NSW LAW REFORM COMMISSION

REPORT 106

Community Justice Centres

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MLC
Attorney General for New South Wales

Dear Attorney

Community Justice Centres

We make this Report pursuant to the reference to this Commission received 2 October 2002.

The Hon Justice Michael Adams
Chairperson

The Hon Justice Michael Adams
Professor Hilary Astor
Ms Andrea Durbach
Master Joanne Harrison
The Hon Justice David Kirby
Professor Michael Tilbury

February 2005

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Terms of reference

In a letter to the Commission received on 2 October 2002, the Attorney General, the Hon R J Debus MP referred the review of the *Community Justice Centres Act 1983* (NSW) including:

> (a) The role of Community Justice Centres as a statewide conflict management and mediation service;
>
> (b) Whether the current structure of Community Justice Centres sufficiently meets the needs of the indigenous community of New South Wales;
>
> (c) The role and entitlements of mediators; and
>
> (d) Any related matter.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon Justice Michael Adams

Professor Hilary Astor

Ms Andrea Durbach

Master Joanne Harrison

The Hon Justice David Kirby

Professor Michael Tilbury (Commissioner-in-Charge)

Officers of the Commission

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RECOMMENDATIONS

Refer to the pages listed below for a full discussion of the Recommendations.

RECOMMENDATION 1 - See Page 23

The CJCs Act should include an objects clause that states that the purpose of CJCs is to provide dispute resolution and conflict management services including the mediation of disputes and matters incidental to the provision of such services, such as:

- the training of mediators;
- the promotion of alternative dispute resolution; and
- contributing to the development of alternative dispute resolution in NSW by the establishment of connections and partnerships with the legal profession, courts and tribunals, the academic sector and other providers of alternative dispute resolution services.

CJCs Act s 14 should be amended to take account of the insertion of a separate objects clause.

RECOMMENDATION 2 - See Page 31

Community Justice Centres should be renamed.

RECOMMENDATION 3 - See Page 41

The CJCs Council's role should be to:

- develop the strategic direction of CJCs;
- endorse policies for CJCs, including standards and codes of practice;
- promote the role of CJCs in the wider mediation community; and
- provide advice, where required, to the Director of CJCs and to the Attorney General on the operation of the CJCs Act, dispute resolution generally and the provision of mediation services.

RECOMMENDATION 4 - See Page 43

The CJCs Council should consist of:

- one practising mediator currently accredited with CJCs (appointed by the Attorney General);
- two practising mediators currently accredited with other New South Wales mediation service providers (appointed by the Attorney General after consultation with relevant peak bodies and service providers);
- a magistrate (appointed by the Attorney General after consultation with the Chief Magistrate);
- two academics with a record of interest in alternative dispute resolution (appointed by the Attorney General); and
- the Director of CJCs (ex officio).

In making appointments to the Council, the Attorney General should consider the desirability of appointing Indigenous persons as members of the Council.

The chairperson should be chosen by the Attorney General from among those appointed to the Council.

RECOMMENDATION 5 - See Page 44

Section 10(2), s 11(1), s 16(2), s 20(1) and s 21(1) of the CJCs Act should be amended to remove the power of the Council to make determinations or issue directions to the management of CJCs.

RECOMMENDATION 6 - See Page 45

a) Section 8 of the CJCs Act should be repealed.

b) Section 9 of the CJCs Act should be repealed.

c) Section 31(1) of the CJCs Act should be amended so that the Council shall endorse, rather than prepare, the CJCs annual report.

RECOMMENDATION 7 - See Page 76

The CJCs Act should include a list of the following factors that must be taken into account when considering whether a particular dispute is suitable for mediation:

- the safety of all parties to the mediation;
- any ADVOs or APVOs that may have been granted or that are pending;
- the degree of equality (or otherwise) in the bargaining power of the parties;
- the occurrence of violence and/or the risk of future violence between the parties or between one of the parties and a third party (including children of the relationship);
- the mental, physical and psychological state of the parties;
- the relationship between the parties;
- whether one of the parties may be using the mediation tactically to gain delay or some other improper advantage;
- the extent to which the issues in dispute are related to any violence between the parties;
- whether the party who has committed or threatened violence is a child; and
- any other matter relevant to the proposed mediation and the parties.

1. Introduction

- The reference
- Background
- This report
- CJCs role

THE REFERENCE

Terms of reference

1.1 In a letter to the Commission received on 2 October 2002, the Attorney General, the Hon R J Debus MP asked the Commission to review the *Community Justice Centres Act 1983* (NSW) including:

> *(a) The role of Community Justice Centres as a statewide conflict management and mediation service;*
>
> *(b) Whether the current structure of Community Justice Centres sufficiently meets the needs of the indigenous community of New South Wales;*
>
> *(c) The role and entitlements of mediators; and*
>
> *(d) Any related matter.*

The course of the reference

1.2 On receipt of the reference the Commission called for preliminary submissions which were received in January-May 2003.[1] The Commission published Issues Paper 23[2] in October 2003 and circulated it widely in the mediation community. Submissions were received in response to the Issues Paper in November 2003 - March 2004[3] and the Commission then conducted an extensive round of consultations with community groups, practitioners and mediation service providers in January - June 2004.[4]

1.3 The Commission also conducted a telephone survey to obtain information on the experience and satisfaction of people who had participated in a Community Justice Centre mediation during July and August 2004. The results of this survey, conducted by Ms Cassandra Bourne, a Masters student in Forensic Psychology at the University of New South Wales, are published in Research Report 12.[5]

1. Preliminary submissions are listed in Appendix A to this Report.
2. NSWLRC, *Community Justice Centres* (Issues Paper 23, 2003).
3. Submissions are listed in Appendix B to this Report.
4. Consultations are listed in Appendix C to this Report.
5. C Bourne, *Mediation and Community Justice Centres: An Empirical Study* (NSWLRC Research Report 12, 2004).

BACKGROUND

Establishment of CJCs

1.4 Community Justice Centres ("CJCs") were first established as a pilot program in 1980[6] to provide a means of settling the sort of disputes that conventional court-based procedures are unable to resolve satisfactorily. A relatively narrow range of domestic or neighbourhood disputes was envisaged, where the disputing parties had, or once had, an ongoing relationship.[7] Such disputes could include those between family members, partners, friends, workmates, members of social groups and other community organisations, neighbours, landlords and tenants, flatmates and so on.[8] Three centres were established at Wollongong, Bankstown and Surry Hills (originally proposed to be in Redfern).

1.5 At their establishment CJCs were heralded as "the most promising step taken this century to provide a system for the settlement of a class of dispute which the adversary processes of our courts have never been able to resolve satisfactorily".[9] The project was monitored by the Law Foundation of New South Wales. A favourable report was produced in 1982[10] and the scheme was made permanent in 1983 with the passing of the *Community Justice Centres Act 1983* (NSW) ("CJCs Act").[11] CJCs are now administered in four regions - the northern, southern, western and Sydney regions[12] with offices at Campbelltown, Penrith, Wollongong, Bankstown and Newcastle.

1.6 CJCs assist in settling disputes through mediation.[13] The mediation services that CJCs provide to disputing parties are available free of charge. The mediations are conducted by mediators who provide their services on a sessional basis (receiving small remuneration) and who are, at least in theory, drawn from the communities where the services are provided.

The CJCs Act

1.7 The CJCs Act provides for the administration of the **CJCs Council** covering such matters as:

- the constitution of the Council (s 5);
- the functions of the Council (s 6); and
- the use by the Council of facilities and staff of other organisations (s 8).

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6. *Community Justice Centres (Pilot Project) Act 1980* (NSW).
7. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 19 November 1980 at 3147.
8. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 26 November 1980 at 3696; Legislative Assembly, 19 October 1983 at 1881.
9. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 November 1980 at 3147.
10. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 155, 191.
11. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1881.
12. See CJCs, *Annual Report 2003-2004* at 3-4.
13. For a definition of "mediation", see para 2.2-2.3.

1.8 It makes provision for the **staff of CJCs** by providing for such positions as:

- the Director (s 10);
- mediators (s 11);
- other staff (s 12).

1.9 It makes provision for the **establishment and operation of CJCs**, including:

- the use of premises (s 15, s 16);
- the keeping and disposal of records (s 17); and
- CJCs' operation within the Attorney General's Department (s 18).[14]

1.10 It sets out a framework for the **provision of mediation services** including:

- the conduct of mediation sessions (s 21);
- the types of disputes suitable for mediation (s 22);
- the voluntary nature of any mediation conducted (s 23, s 24); and
- representation of some parties by agents (s 25).

1.11 It provides for other **miscellaneous matters**, including:

- evaluation of the operations and activities of CJCs (s 26);
- exoneration from liability (s 27);
- privilege (evidence) (s 28); and
- secrecy (non-disclosure of information) (s 29).

1.12 The Act has supplied some model provisions for the statutes of various New South Wales courts[15] as well as the Legal Aid Commission.[16] It has also provided a model for the establishment of similar community mediation schemes in other Australian jurisdictions.[17]

The proliferation of mediation services

1.13 Since CJCs were established more than 20 years ago, there has been an explosion in the provision of mediation services in New South Wales. Instead of being one of the few providers of mediation services, CJCs are now one of many. For example, most courts and tribunals in New South Wales now make provision for mediation, having procedures for

14. *Community Justice Centres Act 1983* (NSW) s 18 refers to the Department of Courts Administration. All references to the Department of Courts Administration are to be construed as a reference to the Attorney General's Department: *Administrative Changes (Departments) Order 1995* (NSW) cl 8.
15. *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW). See also NSW, *Parliamentary Debates (Hansard)* Legislative Council, 4 May 1994 at 1858.
16. *Legal Aid Commission Act 1979* (NSW) Part 3A.
17. See *Dispute Resolution Centres Act 1990* (Qld); *Evidence Act 1958* (Vic) s 21K-s 21N; *Mediation Act 1997* (ACT). These are outlined in IP 23 at para 1.26-1.30.

nominating and appointing suitable mediators.[18] Mandatory mediation is provided for in the Supreme Court, District Court and Consumer, Trader and Tenancy Tribunal.[19] Voluntary mediation is provided for in the Land and Environment Court, Local Courts and the Administrative Decisions Tribunal.[20] In the Federal sphere, mediation is available in relation to family law matters as well as in the Federal Court.[21]

1.14 Mediation may also be conducted in relation to a variety of different matters under the auspices of various government instrumentalities, including, for example, the New South Wales Rural Assistance Authority (in relation to farm debts), the Legal Aid Commission, the Department of Agriculture (agricultural tenancies), the Department of Fair Trading (community land management and strata schemes, among other things) and the Legal Services Commissioner (consumer complaints about lawyers).[22]

1.15 While some mediation providers have developed standards (the Law Society of New South Wales has, for example, adopted a charter on mediation practice for accredited solicitors to follow when conducting mediations[23]) a striking characteristic of the mediation industry that has arisen over the past 25 years is that it is largely unregulated and not subject to common standards. There has been a move in recent years towards the establishment of national standards for mediation service providers.[24] The Commission considers that CJCs, as a Government-funded, generalist, State-wide mediation service, should play a leading role in the establishment of standards in the mediation industry.

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18. Lists of suitable mediators are maintained under provisions introduced by the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW). See, for example, *District Court Act 1973* (NSW) s 164G; *Land and Environment Court Act 1979* (NSW) s 61J; and *Local Courts (Civil Claims) Act 1970* (NSW) s 21R. The Supreme Court now makes other arrangements for the nomination and appointment of mediators: See *Supreme Court Act 1970* (NSW) s 110O; and *Practice Note No 125* (2003) 58 NSWLR 94. See also *Legal Aid Commission Act 1979* (NSW) s 60F.
19. *Supreme Court Act 1970* (NSW) Part 7B; *District Court Act 1973* (NSW) Part 3A; *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) Part 5 Div 2.
20. *Land and Environment Court Act 1979* (NSW) Part 5A; *Local Courts (Civil Claims) Act 1970* (NSW) Part 3C; *Administrative Decisions Tribunal Act 1997* (NSW) Chapter 6 Part 4.
21. *Family Law Act 1975* (Cth) Part 2 and Part 3; *Federal Court of Australia Act 1976* (Cth) s 53A.
22. *Farm Debt Mediation Act 1994* (NSW) Part 3; *Legal Aid Commission Act 1979* (NSW) Part 3A; *Agricultural Tenancies Act 1990* (NSW) Part 4 Div 3; *Community Land Management Act 1989* (NSW) Part 4 Div 2; *Legal Profession Act 1987* (NSW) Part 10 Div 4; *Strata Schemes Management Act 1996* (NSW) Chapter 5 Part 2.
23. See Law Society of New South Wales, *Mediation and Evaluation Information Kit* (2003). An earlier version of the Kit (2001) has been reproduced in T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 201-243. See also "Society adopts charter on mediation practice" (1997) 35(11) *Law Society Journal* 68.
24. See National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney General, 2001); National Alternative Dispute Resolution Advisory Council, *ADR Terminology: A Discussion Paper* (2002); National Alternative Dispute Resolution Advisory Council, *Who Says You're a Mediator? Towards a National System for Accrediting Mediators* (2004).

THIS REPORT

1.16 The remainder of **Chapter 1** further considers the role of CJCs as a government-funded, generalist mediation service that provides its services free of charge across the whole of New South Wales.

1.17 **Chapter 2** involves a consideration of the scope of activities that CJCs can undertake. These activities include not only the provision of the usual mediation service but can also involve other dispute resolution and related activities such as conflict management and community development, training mediators and the development and promotion of ADR. The Commission recommends the inclusion in the CJCs Act of an objects clause to reflect these activities, and also considers incidental matters such as the definition of mediation, the setting of organisational objectives and the renaming of Community Justice Centres.

1.18 In **Chapter 3** the Commission considers the structure of CJCs. It proposes a reconstituted CJCs Council to develop the strategic direction of CJCs, endorse policies, promote the role of CJCs and provide advice, when required, to the Director of CJCs and the Attorney General. The remainder of the chapter considers the current management structure of CJCs, including the role of the Director and the CJCs' internal reference groups.

1.19 **Chapter 4** considers what matters should or should not be brought within the scope of mediation offered by CJCs. It also considers what factors ought to be taken into account in deciding whether to exclude particular disputes from mediation at CJCs. The main focus of this chapter is on disputes that involve some form of violence in the background. The Commission recommends a list of factors to be taken into account when deciding whether a particular dispute is suitable for mediation.

1.20 The process of mediation is the subject of **Chapter 5**. The issues raised cover the periods before, during and after the mediation itself. Matters considered include:

- the principle of voluntary participation by the parties;
- intake assessment and the need for appropriately skilled intake officers;
- the presence of others in a mediation, including representatives and agents, support persons and lawyers; and
- the question of the enforceability of any agreement that comes out of a CJC mediation.

1.21 **Chapter 6** considers the protections that have been included in the CJCs Act to safeguard, in appropriate cases, the mediators, the disputing parties and referring agencies. The protections include:

- the exoneration from liability of mediators for actions taken in execution of the CJCs Act;
- guarantees of confidentiality, subject to appropriate exceptions (for example, the protection of children from harm); and
- privileges with respect to defamation, the admissibility of evidence and the concealing of serious indictable offences.

1.22 **Chapter 7** looks at ways of maintaining the high standards set by CJCs in the field of mediation by:

- setting up and enforcing competency standards, codes of practice, guidelines and other similar documents;
- training and educating mediators, conducting co-mediation, strengthening the role of co-ordinators, and providing more opportunities to mediate;
- informing consumer choice so that parties will have sufficient information to decide whether to participate in mediation;
- receiving and managing feedback, conducting research and having complaints handling and grievance procedures in place.

1.23 **Chapter 8** considers matters relating to mediators, including their accreditation and reaccreditation, selection, initial training, status and remuneration and their continuing education.

1.24 In **Chapter 9** the Commission concludes that there is nothing in the CJCs Act to prevent CJCs delivering appropriate services to Indigenous communities in New South Wales. The Commission considers some ways in which CJCs may collaborate with Indigenous communities and introduce or adapt services to meet their needs.

1.25 **Chapter 10** deals with some miscellaneous issues including questions about the use and gazettal of venues for CJCs, and provisions for Deputy Directors, the review of the CJCs Act and the keeping of records of CJCs.

CJCs ROLE

1.26 CJCs are unique in New South Wales as a government funded, free, State-wide, generalist mediation service.[25] Mediation at CJCs is also formally independent of other processes and programs. For example, unlike court-connected mediation schemes, CJCs are not formally linked to another agency (a court, or authority) for work, and the mediation is not linked to a case management regime nor is it a step in another process, such as under the *Farm Debt Mediation Act 1994* (NSW) or in Legal Aid family law mediation.[26]

1.27 Some of the above characteristics give rise to tensions. For example, despite their formal independence, CJCs have a close relationship with Local Courts and rely on Local Courts for a considerable proportion of their workload.[27] As a broadly based provider of a State-wide service, CJCs may sometimes not have the resources or expertise to deal with some specialist areas, for example, mediation of some family law disputes.[28]

25. See D Rollinson, *Submission* at 1; R G Jones, *Submission* at 1; CJCs, *Submission 1* at 2; CJCs, *Consultation*; LEADR, *Consultation*.
26. D Rollinson, *Submission* at 1.
27. For further discussion of this point, see para 10.4-10.12.
28. Law Society of NSW, *Submission* at 2. See also para 4.14-4.17.

State's role in providing mediation services

1.28 The State provides courts and tribunals for the resolution of disputes. There are, however, cases where courts and tribunals are not the most appropriate forums for the resolution of disputes. The State is interested in mediation because, in some of these cases, mediation may be the most appropriate means of dealing with the dispute by being quicker, cheaper or more effective. Such disputes will include:

- those which are otherwise not readily resolvable by adversarial proceedings;
- those which, while able to be determined by traditional legal proceedings, will still be better resolved by mediation; and
- those which, while able to be determined by traditional legal proceedings, will be cheaper for the parties involved and take pressure off the courts.

Examples of such disputes include those between neighbours about fences or noise. Such "difficult" cases can otherwise tie up court resources and lead to outcomes that are satisfactory to neither party.[29] This was one of the chief influences on the development of some community mediation programs in the United States.[30] A number of submissions accepted the proposition that increased use of mediation in the community would relieve the pressure on Local Courts.[31]

1.29 Mediation can be more effective than litigation in a number of ways. For example mediation can provide for a greater range of solutions than those available to the courts, such as:

> *an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so.*[32]

In such situations mediation is not just a means of relieving court lists - a breakwater against a rising tide of litigation - but is in fact a more effective way of resolving some disputes. Indeed, even if ultimately unsuccessful at resolving a dispute, mediation can often help reduce or refine the issues in litigation so that, ultimately, less court time needs to be spent on a dispute.[33]

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29. See, eg, L Street, "Mediation and the Judicial Institution" (1997) 71 *Australian Law Journal* 794 at 794. But see J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 156 for an alternative viewpoint.
30. See D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 7; American Bar Association, *Report of Pound Conference Follow-up Task Force* (1976) at 9-10.
31. Law Society of NSW, *Preliminary Submission* at 1; Confidential 1, *Preliminary Submission* at 2; H Sham-Ho, *Preliminary Submission*.
32. *Halsey v Milton Keynes General NHS Trust* (England and Wales, Court of Appeal, B3/2003/1458, 11 May 2004, unreported) at para 15. See also *Dunnett v Railtrack plc* [2002] 2 All ER 850 at para 14.
33. Registrars, Local Courts of NSW, *Consultation*.

1.30 The matters mentioned above illustrate the interaction between what could be termed as the two broad objectives of mediation, namely the procedural objective of achieving cost-savings and efficiency in processing particular cases and the objective of providing "fair, consensual and appropriate methods of resolving disputes".[34]

1.31 The operation of CJCs is, therefore, part of the State's responsibility to assist in resolving the disputes of the citizens of New South Wales. The State can fulfil its responsibility in three broad ways, by:

- establishing, funding and operating mediation services, either connected with courts and tribunals or operating outside the formal justice system;
- providing funding for private mediation services; or
- providing a legal framework within which mediators operate, for example giving to mediators protections of confidentiality and immunity.[35]

The State can employ a combination of these strategies as, for example, the Commonwealth presently does in relation to family mediation under the *Family Law Act 1975* (Cth).

1.32 New South Wales provides for mediation services in a number of ways, in addition to the services provided by CJCs. For example, most courts and tribunals maintain lists of mediators under their respective statutes;[36] the Government also provides funding for peak bodies (for example, State Government funding of the Australian Commercial Disputes Centre); and for service providers (for example, Federal Government funding of family mediation services). In funding non-government providers the Government can influence the development of policy in relation to mediation.

The "community" aspect

1.33 In addition to being a government provider of mediation services, CJCs also have a "community" role. CJCs mediators are recruited from the communities they serve. One submission described the service offered by CJCs as one composed "of ordinary people…helping other ordinary people" solve their problems.[37] This grounding in the "community" gives CJC mediations a certain legitimacy in the eyes of the users of their services, distinct from that which arises from CJCs being a government service provider.

1.34 CJCs are also said to play a role in the "empowerment" of communities in that they help individuals and communities to develop their own solutions to their own problems without the need for the imposition of an external solution. The use of community mediation to empower members of communities to resolve their own disputes was also one of the driving forces in the

34. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 259.
35. See para 6.2-6.6, 6.14-6.17.
36. Such provisions were introduced by the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW). See, for example, *District Court Act 1973* (NSW) s 164G; *Land and Environment Court Act 1979* (NSW) s 61J; and *Local Courts (Civil Claims) Act 1970* (NSW) s 21R.
37. R G Jones, *Submission* at 1.

early history of the community mediation movement in the United States in the 1960s and 1970s.[38] The empowerment of individuals and communities through such means is still recognised in some of the formal documentation emanating from CJCs.[39]

1.35 At a more pragmatic level it can also be said that CJCs are well placed to deal with neighbourhood and community disputes[40] and especially provide a "valuable outlet for the tensions which sometimes occur in" such disputes.[41]

1.36 However, it appears to be the case that community mediation has generally not realised this objective. Community mediation's close connection with the communities it serves, its responsiveness to local needs and demands, has diminished in many cases in favour of greater institutionalisation and attachment to the formal justice system and the State. For example, many cases in Australia are referred from the formal justice system. Increasingly, in both Australia and the United States, community mediation programs are tied to the State.[42]

Geographic coverage

1.37 A key characteristic of CJCs is that they offer mediation services to all parts of the State. CJCs are currently administered in four regions - the northern, southern, western and Sydney regions[43] so that CJCs effectively offer mediation services to all parts of the State of New South Wales.

1.38 Some submissions have raised questions of the need for improved access to CJC services for country and regional areas,[44] while other submissions have argued that regionalisation has adversely affected service provision in the major population areas of the State, in particular, the Sydney region.[45]

1.39 The extent of geographic coverage by CJCs is a question of management policy, subject to available resources. The question of whether the geographic distribution of services offered by

38. D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 7. W Faulkes and R Claremont, "Community Mediation: Myth and Reality" (1997) 8 *Australian Dispute Resolution Journal* 177 at 178.
39. For example, promoting the "empowerment of individuals and communities" is an objective of the *Memorandum of Understanding Between NSW Local Courts and the Community Justice Centres, NSW* (28 January 2000).
40. Law Society of NSW, *Submission* at 2.
41. G McIlwaine, *Submission* at 1.
42. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 14-15, 33-37.
43. See CJCs, *Annual Report 2003-2004* at 3-4.
44. Law Society of NSW, *Preliminary Submission* at 1; Severn Shire Council, *Preliminary Submission*; Law Society of NSW, *Submission* at 12; Subregional Group of Local Government Authorities (NE NSW), *Preliminary Submission*.
45. J Courcier, *Submission* at 2; C Courcier-Jones, *Submission* at 1; R G Jones, *Submission* at 5.

CJCs is strategically optimum is one that should be considered by the CJCs Council[46] bearing in mind such resource constraints as apply.[47]

Payment for services

1.40 Another important characteristic of CJCs is that they offer their services to the New South Wales community free of charge. However, nothing in the Act currently prevents CJCs from levying charges for the services they provide.

Charging individuals

1.41 CJCs are strongly supportive of their current policy not to charge individuals for access to CJCs' mediation services. No fee mediation is seen to be an important component of CJCs' principle of accessibility.[48] Accessibility is important if mediation is to be promoted as a desirable alternative to other more traditional forms of dispute resolution.

1.42 Submissions have identified some additional arguments against levying fees for mediations on individuals:

- if parties are asked to pay according to means, some parties might attempt to exploit their position by drawing out a dispute to put the other parties to expense;[49]
- charging for mediation might deter people from mediation even if they could afford it;[50]
- any services requiring charges might require additional policies and procedures in order to ensure appropriate levels of accountability and reporting.[51]

1.43 While it can be argued that disputing parties who obtain the benefit of mediation should be required to bear some of the costs where they are able, the imposition of charges may discriminate against people who cannot afford them and could have the effect of sending some disputes back to the traditional court system. Cost/benefit analyses will ultimately depend on answers to questions such as whether mediation actually does divert matters from the overburdened traditional court system and whether mediation offers other benefits to the community.[52]

Charging institutions

1.44 The situation may be different where the principal client is a large institution. It is possible for CJCs to enter commercial agreements with institutions that require mediation services. There are a number of services offered by CJCs for which payment could be requested. For example, in recent years CJCs have entered into agreements whereby specific institutions undertake to

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46. On the proposed functions of the CJCs Council, see para 3.18-3.26 below.
47. The Act requires the Council, in the exercise of its functions, to have regard to the "financial resources available for the establishment and operation of Community Justice Centres": *Community Justice Centres Act 1983* (NSW) s 6(2).
48. CJCs, *Submission*; CJCs, *Consultation*.
49. See Law Society of NSW, *Submission*.
50. Confidential, *Consultation*.
51. CJCs, *Submission*.
52. See NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991) at para 6.36.

pay for the provision of certain mediation services.[53] It has also been suggested that charges could be imposed on employers for CJCs handling internal corporate workplace disputes.[54]

1.45 While keen to keep the mediation services offered to individuals free of charge, CJCs have reported that where participants are obviously able to pay CJCs sometimes seek contributions in other ways, for example, some large organisations may be asked to provide a venue or security at a facilitated meeting.[55]

1.46 In relation to other institutions paying for the provision of some mediation services, one preliminary submission has observed:

> *This process has not been consistent nor transparent and should be a matter for resolution to ensure that all members of the community have equal access to the services of the CJC.*[56]

Another preliminary submission has also expressed concerns about the transparency of these arrangements.[57] The Commission has received no further submissions on the transparency of such arrangements and understands that they are rarely entered into.[58]

The Commission's view

1.47 The Commission supports the current policy of not charging individuals for access to CJCs' mediation services as an important part of CJCs policy of offering mediation services to members of the community across the State. There is nothing to suggest that the present arrangements are not appropriate. However, the Commission is concerned that there is some perception of a lack of transparency in these arrangements. The Commission is of the view that it is important that there should be consistency and transparency in the charging of institutions for the services provided by CJCs. This is a matter on which the management of CJCs ought to develop a policy for consideration by the CJCs Council.

53. For example, a formal tender relationship was entered with Warringah Council: CJCs, *Annual Report 2000-2001* at 4.
54. R G Jones, *Submission* at 6.
55. CJCs, *Consultation.*
56. City of Newcastle, *Preliminary Submission* at 1.
57. Confidential 1, *Preliminary Submission* at 10.
58. CJCs, *Consultations.*

2. Functions

- Scope of CJCs activities
- Objects clause
- Incidental issues

SCOPE OF CJCs ACTIVITIES

2.1 The CJCs Act currently contains no formal objects clause, setting out the scope of its activities, but it does contain a provision which states that "Community Justice Centres shall be established and operated in accordance with this Act for the purpose of providing mediation services".[1]

Provision of mediation services

2.2 In order to understand what is meant by "mediation services" reference must be had to the definition of mediation in the Act. "Mediation" is broadly defined as including:

> *(a) the undertaking of any activity for the purpose of promoting the discussion and settlement of disputes,*
>
> *(b) the bringing together of the parties to any dispute for that purpose, either at the request of one of the parties to the dispute or on the initiative of the Director, and*
>
> *(c) the follow-up of any matter the subject of any such discussion or settlement.*[2]

The principal purpose of the definition is to identify the activities for which the protections under the Act are offered.[3] However, it may also have the effect, when combined with the current "objects" clause, of appearing to limit the services which CJCs provide.

2.3 In the narrow, technical sense in which it is usually defined, mediation is only one option for the management of disputes. That technical sense is encapsulated in the NADRAC definition of the term as:

> *a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.*
>
> *An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.*[4]

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1. *Community Justice Centres Act 1983* (NSW) s 14.
2. *Community Justice Centres Act 1983* (NSW) s 4(1).
3. The protections are discussed in Chapter 6.

Other alternative dispute resolution activities

2.4 CJCs activities are broader than mediation in this narrow sense. In addition to the core activity of conducting mediation sessions, CJCs currently also provide pre-mediation, conflict resolution services, and stage facilitated meetings,[5] as well as carrying out functions associated with the provision of these services, training, promotion and so on.[6] There are many specific examples of CJCs having provided services other than the conduct of mediation sessions. For example, CJCs have provided input/assistance into the development of mediation schemes established in other contexts:

- A program of **peer mediation in High Schools** was developed by the Department of School Education in partnership with CJCs in 1995.[7]
- A **pre-release mediation program for inmates** of correctional centres and their families was developed in conjunction with the Department of Corrective Services in 1994.[8]
- CJCs initially administered the **Community Youth Conferencing Program** (involving mediation between victims, offenders, families and other community members) in 1993/1994 and conducted training programs for mediators (including police) to take part in the Program.[9]
- In 1998/1999 CJC mediators were contracted to undertake conciliation with parties prior to formal hearings before the Residential Tenancies Tribunal.

2.5 In the United States there has been a similar experience with community mediation programs expanding the types of services that they provide. Many of the developments have been the result of requests by local courts, prosecutors, bar associations and local government. For example, family courts have sought assistance with custody disputes and local governments have sought assistance with resolving disputes between street gangs. Some programs have broadened the services they provide to disputing parties at least partly with a view to diversifying their funding bases. For example, some programs have provided assistance and training to organisations that want to establish in-house mediation schemes. Programs have also moved

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4. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) at 9.
5. For example, in relation to planning disputes or disputes surrounding the changing of government policy: See T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 119.
6. CJCs, *Submission 1* at 4.
7. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 30 October 1995 at 2581. School-based mediation schemes have spread rapidly across the US: D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 27-28.
8. See CJCs, *Annual Report 1993/1994* at 5; NSW, *Parliamentary Debates (Hansard)* Legislative Council, 30 October 1995 at 2581.
9. See CJCs, *Annual Report 1993/1994* at 5; NSW, *Parliamentary Debates (Hansard)* Joint Estimates Committee (Attorney General and Justice), 20 October 1994 at 4302.

into areas such as dispute prevention initiatives, public policy disputes (for example, planning and environment matters) and victim-offender mediation.[10]

Conflict management and community development

2.6 Providing services in the area of conflict management and community development is potentially an important function for CJCs.[11]

2.7 Some submissions to the Commission envisaged a more proactive role for CJCs in conflict management within particular communities.[12] This is consistent with the use of community mediation to empower individuals and communities. As already noted,[13] this was one of the driving forces in the early history of the community mediation movement in the United States in the 1960s and 1970s[14] and is still recognised in some of the formal documentation emanating from CJCs.[15] Some submissions suggested that CJCs should be more active in identifying and dealing with community-based issues such as ethnicity, prejudice and juvenile offending in particular communities and then offering their services in promoting dialogue within the community on these issues.[16]

2.8 An example of such an approach can be found in the active attempts in the 1970s to promote community relations in Aboriginal communities as part of the conciliation function of the Commissioner for Community Relations under the *Racial Discrimination Act 1975* (Cth).[17] It was noted that multiple conciliation conferences could have an impact in smaller provincial centres:

> *Thus, when in one centre, five compulsory conferences involving discrimination against Aboriginals in housing were held in one week - two in respect of estate agents and three in respect of landlords - there was quite a profound impact on the community. The local Aboriginal people were stimulated into greater activity in asserting their rights and the local non-Aboriginal people became more appreciative of their obligations...*[18]

2.9 As already noted, there is a view that community mediation has generally not realised this community development objective. Community mediation's close connection with the

10. D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 25-30.
11. See T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 118.
12. C Courcier-Jones, *Submission* at 1;
13. Para 1.34.
14. D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 7. W Faulkes and R Claremont, "Community Mediation: Myth and Reality" (1997) 8 *Australian Dispute Resolution Journal* 177 at 178.
15. For example, promoting the "empowerment of individuals and communities" is an objective of the *Memorandum of Understanding Between NSW Local Courts and the Community Justice Centres, NSW* (28 January 2000).
16. LEADR, *Consultation*; ACDC, *Consultation.*
17. M Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733 at 738.
18. P Pentony, *Conciliation Under the Racial Discrimination Act 1975: A study in theory and practice* (Australia, Human Rights Commission, Occasional Paper No 15, 1986) at 147.

communities it serves, its responsiveness to local needs and demands, has diminished in many cases in favour of greater institutionalisation and attachment to the formal justice system and the State.[19] CJCs have reported that they continually review their services to ensure that they remain accessible. A recent review has identified possible strategies for promotion to young people and ethnic communities.[20] One submission observed that the offering of CJCs services to a greater geographic area may have resulted in "a lessening of visibility of the CJC in some of the most troubled inner city communities".[21]

Training of mediators

2.10 The training of mediators is an important function of CJCs. The CJCs' initial mediator training program is seen by the mediation industry as being of good quality.[22] Indeed, one submission expressed concern about the quality of training offered by the for-profit sector and saw CJCs as offering a good training ground for those seeking to enter the mediation market.[23] It was estimated that some 10-20% of mediators in private practice had received training from CJCs.[24] Specific issues relating to training are discussed in detail in Chapter 8.[25]

Development of ADR

2.11 It is important that CJCs play a leading role in the mediation industry as the State-wide, not-for-profit, general mediation service provider. The mediation industry, if such a term can be applied to so broad a range of service providers, covers the not-for-profit, government, industry funded, and commercial sectors.[26] It has been suggested that CJCs' position within government allows them to contribute to whole of government approaches and makes them pivotal because of their links to government, other ADR services and mediators.[27]

2.12 The mediation industry is currently characterised by an absence of common standards and codes of practice.[28] In such a context it is important that an organisation like CJCs operates above industry standards so that it can influence the development of better standards within the industry. CJCs can also influence the mediation industry as a provider of training,[29] as a community educator, as a standards or policy setter,[30] or as a participant in forums concerned

19. D Spencer, "Exploding the Empowerment Myth of ADR" (1996) 3 *Commercial Dispute Resolution Journal* 13 at 19. See also H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 14-15, 33-37.
20. CJCs, *Submission 1* at 10.
21. C Courcier-Jones, *Submission* at 1.
22. LEADR, *Consultation*; ACDC, *Consultation.*
23. ACDC, *Consultation.*
24. LEADR, *Consultation.*
25. See para 8.18-8.20 and para 8.38-8.54.
26. ACDC, *Consultation*.
27. CJCs, *Submission 1* at 2.
28. ACDC, *Consultation*.
29. The CJCs' initial mediator training program is seen by the mediation industry as being of good quality: LEADR, *Consultation*; ACDC, *Consultation.* See para 8.18-8.20 below.
30. ACDC, *Consultation*.

with mediation and the development of standards. Such details should be included in management and organisational objectives.[31]

Promotion of ADR

2.13 Another important role for CJCs is the promotion of ADR. This role can be seen as supporting CJCs' role in the development of ADR. Promoting ADR can operate at many levels. It can involve promoting mediation and other ADR approaches generally as alternatives to traditional methods for dealing with disputes. CJCs, as a government mediation service provider, may be well placed to perform this role. For example, one view expressed in consultations was that there is currently no identifiable part of government that promotes alternative forms of dispute management and that CJCs could take on this role.[32]

2.14 The promotion of ADR can involve raising the profile of community mediation. Public awareness of community mediation services is generally low. The same situation would appear to apply in the United States. Three reasons have been suggested for this:

- the media have paid little attention to them;
- program caseloads have been relatively small so few members of the public get the opportunity to experience community mediation;
- extensive public education campaigns have been rare.[33]

2.15 At a more specific level, the promotion of ADR can also involve the promotion of the work of CJCs.[34] However, even raising the profile of CJCs may prove to be a difficult and costly task. CJCs have reported that at present "work to raise the profile of CJCs is a priority, is ongoing and requires continual resourcing".[35] For example, CJCs will make presentations promoting their services to all of the key referring agencies in a region. However, one presentation will often be insufficient and additional problems can occur in regional agencies where there is a high turnover of key staff, for example, in the Police Service.[36] Raising the profile of CJCs within the mediation industry itself will be part of the work of the reconstituted CJCs Council that is recommended in Chapter 3. [37]

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31. See para 2.34-2.36.
32. ACDC, *Consultation*.
33. D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 86-87.
34. A number of submissions and preliminary submissions noted that CJCs do not have a very high profile and suggested that something should be done about this: See especially: Law Society of NSW, *Preliminary Submission* at 1; NSW Department of Housing, *Preliminary Submission* at 2-4; G Barclay, *Preliminary Submission* at 1; Wyong Shire Council, *Preliminary Submission*; Blacktown City Council, *Preliminary Submission* at 1; Orange City Council, *Preliminary Submission*; Cessnock City Council, *Preliminary Submission*; Subregional Group of Local Government Authorities (NE NSW), *Preliminary Submission*; Severn Shire Council, *Preliminary Submission*; Confidential 2, *Submission* at 4; Law Society of NSW, *Submission* at 13; R G Jones, *Submission* at 5; Confidential, *Consultation.*
35. CJCs, *Submission 1* at 21.
36. CJCs, *Consultation*.
37. See para 3.18, 3.19, 3.24.

2.16 Adequate promotion of ADR and the work of CJCs will ultimately depend on the availability of resources. In this context, the question also needs to be asked whether CJCs would have the resources to cope with increased demand caused by effective publicity.[38] So while, the lack of awareness (and acceptance) of ADR alternatives may affect the take up rate of mediations at CJCs,[39] it is also possible that successful promotion might place too great a strain on resources if it were to lead to more people seeking to resolve disputes through CJC mediations. However, it is important that the promotion of ADR and CJCs' services is not lost sight of and this role should be included in an objects clause.

OBJECTS CLAUSE

2.17 IP 23 asked whether an objects clause should be included in the CJCs Act to reflect the actual and potential activities of CJCs.[40] Few submissions commented on this issue. One supported the inclusion of an objects clause on the grounds that it would allow performance to be measured and provide the basis on which to build consistent operational objectives, business plans and staff performance and planning programs.[41] One submission pointed out that the Act has functioned without an objects clause for 20 years.[42]

2.18 It has become common practice to include objects clauses in legislation that establishes agencies and regulates the provision of services. Examples of such clauses include those relating to the system for dealing with complaints against lawyers, disability services, optometrists, and the Community Relations Commission.[43] By contrast, the CJCs Act gives no indication of the activities undertaken by CJCs apart from "mediation".

2.19 In IP 23 the Commission asked what recognition, if any, needs to be accorded in the CJC Act to services other than mediation.[44] Submissions were generally supportive of CJCs providing dispute resolution services other than the conduct of mediation sessions.[45]

The Commission's conclusion

2.20 An argument can be made that the CJCs Act is only required to regulate and protect the mediation activities of CJCs and that any other activities can be carried out on an administrative level without the need for a formal objects clause in the Act. However, the current arrangement whereby only the provision of "mediation services" is specifically identified as a function of CJCs can be seen as limiting. The training, educational and promotional roles of CJCs are integral and

38. See Ballina Shire Council, *Preliminary Submission*.
39. NSW Department of Housing, *Preliminary Submission* at 4.
40. IP 23 Issue 3.
41. R G Jones, *Submission* at 1.
42. Law Society of NSW, *Submission* at 2.
43. *Legal Profession Act 1987* (NSW) s 123, s 124, s 125; *Disability Services Act 1993* (NSW) s 3; *Optometrists Act 2002* (NSW) s 3; *Community Relations Commission and Principles of Multiculturalism Act 2000* (NSW) s 12.
44. IP 23 Issue 4.
45. Confidential 2, *Submission* at 1; CJCs, *Submission 1* at 4; Law Society of NSW, *Submission* at 2.

should be identified as the sort of activities that a government mediation service ought to be providing. In identifying the functions of CJCs it is essential that any list not be limiting.

2.21 The Act should, therefore, state that the role of CJCs is to provide dispute resolution and conflict management services, including the mediation of disputes and matters incidental to the provision of such services, such as:

- the training of mediators;
- the promotion of alternative dispute resolution; and
- contributing to the development of alternative dispute resolution in New South Wales by co-operating, interacting and liaising with the legal profession, courts and tribunals, the academic sector and other providers of alternative dispute resolution services.

The chief function of s 14 of the Act is to establish CJCs. Consequential amendments will need to be made to s 14 to take account of the insertion of a separate objects clause in the Act.

RECOMMENDATION 1

The CJCs Act should include an objects clause that states that the purpose of CJCs is to provide dispute resolution and conflict management services including the mediation of disputes and matters incidental to the provision of such services, such as:

- the training of mediators;
- the promotion of alternative dispute resolution; and
- contributing to the development of alternative dispute resolution in NSW by the establishment of connections and partnerships with the legal profession, courts and tribunals, the academic sector and other providers of alternative dispute resolution services.

CJCs Act s 14 should be amended to take account of the insertion of a separate objects clause.

Services to minorities and disadvantaged groups

2.22 IP 23 raised the issue of whether specific reference should be made in any objects clause to the provision of mediation services to minorities or disadvantaged groups.[46] If CJCs are expected to provide a service to "the community" this means the community in all its diversity, including ethnic, religious and racial communities as well as other communities of interest (for example, housing tenants and young people). This issue was raised because it was suggested that mediation, by providing an informal alternative to the formal justice system, may be an appropriate means for resolving disputes that involve members of particular groups in society who may, for various reasons, be wary of the traditional justice system. Examples include members of immigrant minorities, gay men and lesbians, people with disabilities and young

46. IP 23 Issue 14.

people.[47] In IP 23 the Commission also asked whether there should be specific reference to the provision of services to Indigenous people.[48]

2.23 Mediation has the advantage of being flexible and able to respond to varying cultural assumptions and needs. It can be adapted to the needs of various communities – for example, by the adoption of special procedures, by the identity and skills of the mediator, by location, and by language. It has been noted that forms of alternative dispute resolution have long been used in "many ethnic, cultural and religious communities".[49] The provision of flexible and culturally appropriate services to minority cultural groups has been seen as an important function of CJCs.[50] The recognition of the special needs of members of such groups might involve, for example:[51]

- the recruitment of mediators who represent the particular communities; and
- the training in relevant cultural issues of CJC mediators who do not come from the particular communities.[52]

The appropriateness of one or other of these approaches will depend on the context of each dispute. These issues are dealt with in more detail in Chapter 8.[53]

2.24 Few submissions considered the issue of whether specific reference should be made in the objects to the provision of mediation services to minorities or disadvantaged groups.[54] One submission stated that specific reference should not be made in the objects to the provision of mediation services to minorities or disadvantaged groups because the absence of such a clause has not stopped CJCs delivering services to such groups.[55] Another submission opposed a list of groups on the grounds that any attempt to enumerate groups will inevitably lead to one worthy group being left out.[56] One submission suggested that "without a legislative imperative the needs of Indigenous people and communities will not be considered a priority issue".[57] CJCs have

47. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 168.
48. IP 23 Issue 53
49. M Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733 at 738.
50. CJCs, *Annual Report 2001-2002* at 5. But see CJCs, *Annual Report 2002-2003* at 1 and CJCs, *Annual Report 2003-2004* at 1 where this has been dropped from the key objectives.
51. See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 168-169. Services to Indigenous people and communities are dealt with below in Chapter 6.
52. See also D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, Sydney, 2005) at 451-454.
53. See para 8.2-8.12.
54. Confidential 2, *Submission* at 1; CJCs, *Submission 1* at 4; Law Society of NSW, *Submission* at 3.
55. CJCs, *Submission 1* at 4.
56. Law Society of NSW, *Submission* at 3.
57. L Kelly, *Submission* at 31

suggested that it may be useful to include a statement in an objects clause that CJCs aim to provide services to all sections of the New South Wales community.[58]

2.25 One way that has been suggested for providing services to particular communities is to have culturally-based community-specific CJCs in addition to the existing geographically based services so that, for example, CJCs could provide specific services to Aboriginal and Torres Strait Islander people as well as ethnic communities and communities of interest (for example, housing tenants and young people).[59] Nothing in the Act would appear to prevent this from occurring. The specific question of CJCs for Aboriginal and Torres Strait Islander people is discussed in Chapter 9.[60]

2.26 While the establishment of community-specific CJCs may be appropriate in some circumstances, some submissions opposed the idea.[61] One submission suggested that community-specific CJCs may:

- create barriers for people belonging to more than one community; and
- lead to confusion about which CJC to use.[62]

Even if the development of community-specific CJCs is not currently appropriate, it can still be argued that the current regionally-based CJCs should be equipped to provide services to particular communities within their regions. While one submission considered that there was no need to make further provision to meet the needs of particular communities,[63] others were supportive of providing resources for the existing regional network of CJCs so that each region can better respond to the needs of particular groups within its community.[64]

2.27 An objects clause does not need to deal with questions of coverage of particular communities. Such issues are subject to government policy and to the availability of resources and are not suitable for inclusion in an objects clause for CJCs. They can be identified as part of CJCs' strategic or organisational objectives from time to time. For example, the answer to the question of whether specific reference to the provision of services to Indigenous people should be made in an objects clause will depend on what is determined as being the best way of providing mediation services for Indigenous people, including issues of Indigenous control of the services.[65] Indigenous communities may be better served by an objects clause that is broad enough to allow the development of services that can be tailored to meet Indigenous needs.[66] The Commission does not, at this stage, favour the introduction of community-specific CJCs.

58. CJCs, *Preliminary Submission* at 6.
59. CJCs, *Annual Report 2001-2002* at 12.
60. See para 9.16-9.20.
61. Confidential 2, *Submission* at 2; CJCs, *Submission 1* at 9.
62. CJCs, *Submission 1* at 9.
63. Confidential 2, *Submission* at 2.
64. Department of Community Services, *Submission* at 1; Law Society of NSW, *Submission* at 6.
65. See para 9.16-9.18 below.
66. See para 9.21-9.41.

INCIDENTAL ISSUES

Definition of mediation

2.28 In IP 23 the Commission asked whether the definition of "mediation" in the CJC Act needed to be changed.[67] Some submissions suggested that the definition does not need to be changed[68] because it is broad enough to encompass the activities of CJCs and can adapt to changing community needs.[69]

2.29 The CJCs' submission suggested that if CJCs' activities were to be stated more broadly in the Act, "mediation" could be defined more precisely along the lines of the NADRAC definition.[70]

2.30 However, a definition of mediation that is more precise than the one currently contained in the Act may be problematic. NADRAC has observed that while consistency is desirable any definitions should recognise the "diversity, flexibility and dynamism in dispute resolution practices and processes".[71] It has to be borne in mind that not all terms have the same meaning to all people and that some terms will have different meanings in different cultures.[72] This could well be the case with CJCs and their broad coverage across the State. Too rigid a definition may have an unnecessarily prescriptive effect and may exclude some forms of mediation from the protections offered by the Act. The question of what mediators may or may not do, for example, in terms of advice, may be better dealt with by regulation or codes of practice.[73] For example, the Act already makes it clear that a mediator may not adjudicate or arbitrate upon a dispute that is undergoing mediation.[74]

2.31 There is a need to identify the purposes for which mediation needs to be defined in the Act. The primary purpose of the current definition is to identify the activities that are protected by the provisions that offer exoneration from liability, confidentiality of proceedings and various privileges. The current definition is sufficient to identify the activities that are protected by the Act and is also broad enough to encompass pre-mediation and intake assessment. The Commission considers that the definition of mediation should not be changed.

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67. NSWLRC IP 23 Issue 2
68. Confidential 2, *Submission* at 1; CJCs, Professional Reference Group, *Submission* at 3; Law Society of NSW, *Submission* at 2.
69. CJCs, Professional Reference Group, *Submission* at 3; CJCs, *Preliminary Submission* at 2; J Hallinan, *Preliminary Submission* at 2.
70. CJCs, *Submission 1* at 3. For the NADRAC definition see para 2.3 above.
71. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) at 1.
72. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) at 1.
73. National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) at 2.
74. *Community Justice Centres Act 1983* (NSW) s 21(4). See also J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 25.

Organisational objectives

2.32 A statement of objects in the CJCs Act will not preclude the identification and development from time to time of organisational objectives and strategies. Organisational objectives are necessary so that outcomes of programs can be measured.

2.33 In Issues Paper 23 the Commission identified lists of objectives that could be adopted in relation to mediation service providers, in particular, court-connected mediation schemes.[75] These objectives dealt with effective case or list management, the provision of cost effective services; the provision of services appropriate to the needs of disputing parties; the provision of services in a way that could bring about a change in community attitudes and approaches to the resolution of disputes; the provision of services that are of good quality; and liaison with other people or organisations interested in the provision of ADR services.[76] Objectives will differ depending on the nature of the service provided.

2.34 Some submissions opposed the placing of objectives in the CJCs Act on the following grounds:

- objectives will change - the Act needs to be flexible, not too restrictive;[77] and
- objectives are already stated in CJCs' business planning processes[78] and in annual reports.[79]

2.35 Organisational objectives are currently provided for in greater detail and in other ways than in the CJCs Act. For example, the 2002-2003 annual report of CJCs listed the following organisational goals:

- To contribute to the safety and harmony of communities by improving individual, group and community responses to, and resolution of, conflict.
- To provide quality mediation and conflict management services for metropolitan and regional NSW.
- To provide services that are confidential, impartial, accessible and voluntary.
- To empower people to take ownership of the dispute and transfer conflict resolution skills and knowledge to the community.[80]

2.36 The most recent annual report lists a number of "key objectives":

- The provision of innovative, accessible and equitable ADR services throughout NSW.
- The provision of culturally appropriate ADR services to Aboriginal and Torres Strait Islander communities throughout NSW.

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75. IP 23 at para 2.8-2.9.
76. See, eg, H Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (Australian Institute of Judicial Administration Inc, 2001) at 5; *New Jersey Court Rules 1969* r 1:40-3(b).
77. Confidential 2, *Submission* at 1.
78. CJCs, Professional Reference Group, *Submission* at 3; CJCs, *Submission 1* at 4.
79. CJCs, *Submission 1* at 4.
80. CJCs, *Annual Report 2002-2003* at 1.

- To establish proactive partnerships with key referrers.
- To provide an environment in which all staff and mediators contribute fully to the values and outcomes of the organisation and are appropriately trained, supported and supervised.
- To provide an administrative structure that meets the needs of the business, that is flexible, innovative, practical and cost effective.[81]

These key objectives will change from time to time when different focuses are required. For example, the current key objectives no longer refer to the provision of services which meet the needs of people from culturally diverse backgrounds or people with disabilities or to "the establishment of partnerships with key stakeholders within the Attorney General's Department and with related government and non-government agencies in order to promote a whole of government approach to the management of conflict in the community".[82]

Renaming Community Justice Centres

2.37 In IP 23 the Commission raised the issue of changing the name of CJCs. This question is related to the question of the functions of CJCs because the name of the organisation can convey some of its functions to the community.

2.38 The name "Community Justice Centres" has a level of currency in the mediation industry and among government bodies who refer matters to CJCs. In these circles in New South Wales the term "community justice centre" has, therefore, come to refer to a service that provides mediation to the community. It is this meaning that has been adopted by the *Macquarie Dictionary* which defines "community justice centre" as "a centre offering a free and confidential mediation service as an alternative to normal legal channels in disputes between parties who have an on-going relationship, as members of a family, neighbours, etc".[83]

2.39 However, this meaning would appear to apply only to New South Wales. Queensland, for example, has Dispute Resolution Centres and Victoria has Dispute Settlement Centres, whereas "community mediation services" would appear to have some currency in other States. In South Australia, for example, the Southern Community Justice Centre offers, in addition to mediation through the Community Mediation Service, legal assistance, advice and referral, legal representation and specialist services in relation to child support issues.[84]

2.40 Elsewhere in the world a "Community Justice Centre" will be a "non-profit, community based, research, educational, and crime prevention organisation" in New York,[85] an institution offering restorative justice conferencing for minor criminal matters in Comox Valley, British Columbia, or, in Liverpool in the UK involve:

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81. CJCs, *Annual Report 2003-2004* at 1.
82. See CJCs, *Annual Report 2001-2002* at 5.
83. *Macquarie Dictionary* (3rd edition rev, 2001) at 396.
84. South Australian Community Legal Centres, "Centre Detail: Southern Community Justice Centre" (as at 18 October 2004) «*http://www.saccls.org.au/publoic/centres/detail/6*».
85. "Community Justice Centre, USA" (as at 8 December 2004) «http://www.iisd.org/50comm/commdb/desc/d20.htm».

> *A multi-purpose community building bringing services and facilities to local people. A court to handle low-level crime where the community is often the victim. Court sentences which combine punishment with support to help offenders kick their crime habit. Community punishments which do the jobs local people want done. Community involvement in helping to steer people away from the crime route.*[86]

2.41 Notwithstanding the clearly established identity of "Community Justice Centres" in the New South Wales mediation community and among government instrumentalities, some problems have been identified with the name in New South Wales, particularly as it relates to potential users of the services provided by CJCs.

2.42 First, "community justice" does not adequately reflect to potential users either the core or generic services currently offered by CJCs.[87] CJCs' documentation now refers to its services as "mediation and conflict management services". This description is intended to cover the full range of mediation services presently offered by CJCs, including "facilitation, pre-mediation, dispute analysis, dispute counselling, mediation and post-mediation".[88]

2.43 Secondly, "community justice" may discourage some potential users from participating either through a misunderstanding of what "community justice" entails or a justified antipathy to the "justice system".[89] For example, it has been suggested that the use of the word "justice" may, in fact, lead some potential users to think of CJCs as part of the criminal justice system.[90] This can cause problems when attempts are made to include groups who have not traditionally had a good experience in the formal criminal justice system, for example, Indigenous people.[91] Further, the use of the term "justice" may lead some people to expect more than CJCs can in fact deliver. In the Commission's view, the use of the term "justice" is probably the most problematic component of the current name.

2.44 Finally, the word "centres" does not reflect the current structure of CJCs. "Centres" are really part of an outmoded structure, when the model was more along the lines of 1970s-style neighbourhood centres. CJCs no longer deliver services from discrete ("neighbourhood") centres and now provide "services" to a range of clients.[92]

2.45 Many suggestions have been made as to possible names, most of them involving combinations of terms such as "community", "mediation", "dispute resolution" or "conflict management" and "service". Some combinations could be seen as presenting problems of being either too cumbersome, too obscure or promising too much. Some submissions that favoured

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86. UK, Department for Constitutional Affairs, "Appointment of Community Justice Judge, Liverpool" (2004) «http://www.dca.gov.uk/judicial/appointments/cjjl04/cjjlvs04.htm»
87. M S Dewdney, *Preliminary Submission* at 1; CJCs, *Preliminary Submission* at 1; CJCs, *Submission 1* at 22; Law Society of NSW, *Submission* at 13.
88. CJCs, *Preliminary Submission* at 1.
89. J Delaney, *Submission*.
90. Cessnock City Council, *Preliminary Submission*; NSW Department of Housing, *Preliminary Submission* at 2.
91. Coalition of Aboriginal Legal Services, *Preliminary Submission* at 1.
92. R G Jones, *Submission* at 7; CJCs, *Submission 1* at 22; CJCs, *Preliminary Submission* at 1.

retaining the current name have pointed to the confusion, expense and inconvenience that are likely to result from changing the name.[93] The Commission considers that the confusion, expense and inconvenience caused by a name change will probably be outweighed by the positive benefits of a name change.

2.46 On balance, the Commission considers that a sufficient case has been made for a name change that will better enable CJCs to promote its activities to the whole New South Wales community. In particular, the use of the term "justice" should be avoided as presenting an unnecessary barrier to some potential participants. While the Commission considers that "Community Mediation Service" is appropriate as adequately reflecting the primary activity of CJCs, it prefers to leave the final decision about a change of name to the organisation itself.

RECOMMENDATION 2

Community Justice Centres should be renamed.

93. D Rollinson, *Submission* at 2; CJCs Professional Reference Group, *Preliminary Submission* at 1-2; N Takacs, *Submission* at 1.

3. Structure

- CJCs Council
- Management

CJCs COUNCIL

3.1 The CJCs Act establishes the CJCs Council and provides for its constitution, procedures and functions.

3.2 The Council had its origins in the original co-ordinating committee which was established under the pilot scheme Act.[1] The membership of the co-ordinating committee emphasised the representation of interested agencies and included a member of the Police Force, persons nominated by the Council of the Law Society of New South Wales and the Ethnic Affairs Commission, as well as members of the Departments of Corrective Services, Youth and Community Services and Technical and Further Education.[2] The co-ordinating committee had responsibility for setting the direction of the newly established CJCs, implementing the pilot program and appointing the first directors.[3] The review of the pilot scheme in 1982 recommended that the Government request the co-ordinating committee to advise it on "future administrative, financial and policy aspects" of the program.[4] The Council was seen as "retaining representation by interested organizations and responsible for the overall co-ordination of the scheme, the development of policy and the provision of advice to the Minister".[5] In recent years the CJCs Council has played less and less of an active role in the affairs of CJCs. In September 2001 the Council itself proposed its own dissolution and the establishment of a community advisory committee to advise the Director.[6] The Council ceased meeting pending the outcome of this review.[7] The terms of all of its members have now expired. While the reasons for the failure of the original Council are not entirely clear, one reason may be that the Act inappropriately gave the Council managerial functions while making it a forum for the representation of diverse interest groups.

Membership

3.3 The Council comprises the Director of CJCs (who is an ex officio member)[8] and the following persons appointed by the Attorney General:[9]

- a magistrate nominated by the Chief Magistrate;
- a person nominated by the Council of Social Service of New South Wales;
- two officers of the Attorney General's Department selected by the Attorney General; and

1. *Community Justice Centres (Pilot Project) Act 1980* (NSW).
2. *Community Justice Centres (Pilot Project) Act 1980* (NSW) Sch 1 cl 1(2).
3. J Schwartzkoff and J Morgan, Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81 (Law Foundation of New South Wales, 1982) at 7-8.
4. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 198.
5. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1881.
6. CJCs Council, "Report to Legislation and Policy review of the Community Justice Centres Act 1983" (2001) at 1.
7. CJCs, *Annual Report 2003-2004* at 2.
8. *Community Justice Centres Act 1983* (NSW) Sch 1 cl 1(3).
9. *Community Justice Centres Act 1983* (NSW) Sch 1 cl 1(2).

- not more than five persons selected "by reason of their having such special interests or experience as the [Attorney General] considers would be of assistance in the administration of [the] Act, at least one of whom is to have expertise in training".

Functions

3.4 The Act states that the functions of the Council include the following:

- (a) to determine policy guidelines for, and give directions with respect to, the operation of Community Justice Centres,
- (b) to make such reports or recommendations to the Minister on any matter relating to Community Justice Centres, or on any other matter to which this Act relates, as the Council considers necessary or appropriate,
- (c) to report on and make recommendations concerning the need for an evaluation under section 26 and to assist with the making of such an evaluation, and
- (d) to do such supplemental, incidental and consequential acts as may be necessary or expedient for the exercise of its functions or the establishment and operation of Community Justice Centres.[10]

Other functions and roles are conferred throughout the Act.

3.5 Activities of the Council as identified in the Act fall into three broad categories:

- determining policy guidelines;
- giving directions; and
- giving advice.

The activities of determining policy guidelines and giving directions are closely related in the statute and give rise to a question about the Council's role in the management of CJCs.

3.6 In addition to the general function of determining policy guidelines for, and giving directions with respect to, the operation of CJCs, the Council has some more specific functions allocated by the Act. The following actions may be taken subject to any policy guidelines or directions the Council may set:

- the recommendation by the Director that the Attorney General accredit certain people as mediators;[11]
- the approval by the Director of venues at which CJCs may conduct their activities;[12]
- the responsibility of the Director for the provision of mediation services and for the operation and management of CJCs;[13] and

10. *Community Justice Centres Act 1983* (NSW) s 6(1).
11. *Community Justice Centres Act 1983* (NSW) s 11(1).
12. *Community Justice Centres Act 1983* (NSW) s 16(2).
13. *Community Justice Centres Act 1983* (NSW) s 20(1).

- the determination by the Director of the procedure for commencing and conducting a mediation session at a CJC.[14]

The Council may also determine that "specified classes of disputes are not to be the subject of mediation sessions, or that specified classes of disputes may be the subject of mediation sessions".[15] Also, the records of a CJC may be disposed of only in accordance with directions of the Council.[16]

3.7 The Council's role in management is further emphasised in the Act by the provision which allows the Council to delegate such of its functions as it thinks fit to a member of the Council, a sub-committee of the Council or the Director of CJCs.[17]

3.8 The Council's independent role is further emphasised by the provisions that allow it to make use of the "facilities, or the services of any officers, employees or other staff, of any Department of the Government or of any local or public authority or other organisation",[18] and grants exoneration from liability for anything done or omitted to be done by the Council, a sub-committee of the Council and "a member of, or a person acting under the direction of or with the authority of, the Council or any such sub-committee".[19]

3.9 The Council's role is, however, limited as the Council is stated to be subject to the "control and direction" of the Attorney General "except in relation to the contents of a report or recommendation made by it" to the Attorney General.[20] The Director is stated to be "subject to the control and direction of the Council".[21] However, CJCs are also stated to "operate within and as parts of" the Attorney General's Department.[22]

3.10 The reality is that the Council has not, in recent years, determined any policy guidelines nor given any directions in the areas of operation outlined above. The organisation is operated as a business centre of the Attorney General's Department and this determines the substantive financial and policy decisions of the organisation.

Advisory role

3.11 While the role of advising the Attorney General is merely one of the general functions allocated to the Council by the Act it appears to have become a common belief that the Council existed only as a ministerial advisory body:

> The reasoning behind the Council's existence was that it would be a body of people who are independent of the direct service providers (the

14. *Community Justice Centres Act 1983* (NSW) s 21(1).
15. *Community Justice Centres Act 1983* (NSW) s 22(1).
16. *Community Justice Centres Act 1983* (NSW) s 17(3).
17. *Community Justice Centres Act 1983* (NSW) s 9(1). Provisions for delegation of functions to the Director would not be necessary if the Council were only intended to perform an advisory function.
18. *Community Justice Centres Act 1983* (NSW) s 8.
19. *Community Justice Centres Act 1983* (NSW) s 27(1)(a) and (b).
20. *Community Justice Centres Act 1983* (NSW) s 7.
21. *Community Justice Centres Act 1983* (NSW) s 10.
22. *Community Justice Centres Act 1983* (NSW) s 18.

> Department, the public servants and the mediators) and, as a representative sample of the wider community, would provide a community voice directly to the Minister.[23]

However, the Council has not actively performed this role on any regular basis. The Council last performed an advisory role at the time when the current CJC regions were established.

Future operation of the Council

Roles

3.12 Many submissions supported the retention of the CJCs Council in some form.[24] A number of these envisaged the Council providing the Attorney General with broad advice on ADR issues[25] with some expressly stating that the Council should have no role in determining CJCs practice.[26] Some, however, recognised that the Council should have some role in identifying new directions that could be taken by CJCs and other government mediation service providers and in providing links between CJCs and other parts of the mediation industry.[27]

3.13 One submission noted that CJCs need "an objective outside body to progressively examine policy and practice issues and to consider making appropriate recommendations to the Minister taking into account available human and financial resources".[28]

3.14 The Queensland Act, which also makes provision for a council, merely states that "the principal function of the council is to provide advice to the Minister on the operation of [the] Act, dispute resolution generally and the provision of mediation services under [the] Act".[29]

Proposed composition

3.15 Submissions also considered the composition of the Council. Some submissions suggested that CJCs or other practising mediators must be represented[30] chiefly on the grounds that they have the necessary practical experience and will ensure that the Council's deliberations are grounded in issues that are relevant to current practice in community mediation.[31] One submission raised the possibility that current CJCs mediators might participate in the Council

23. CJCs, *Annual Report 2001-2002* at 13.
24. C Courcier-Jones, *Submission* at 4; Confidential 2, *Submission* at 3; CJCs, Professional Reference Group, *Submission* at 12; Confidential 4, *Submission 1* at 2-3; Law Society of NSW, *Submission* at 11.
25. C Courcier-Jones, *Submission* at 4; Confidential 2, *Submission* at 3; CJCs, *Submission 1* at 18.
26. CJCs, Professional Reference Group, *Submission* at 12.
27. C Courcier-Jones, *Submission* at 4; CJCs, Professional Reference Group, *Submission* at 12.
28. Law Society of NSW, *Submission* at 11.
29. *Dispute Resolution Centres Act 1990* (Qld) s 3(2).
30. C Courcier-Jones, *Submission* at 4; Law Society of NSW, *Submission* at 11; Confidential 2, *Submission* at 3; Confidential 4, *Submission 1* at 2.
31. Law Society of NSW, *Submission* at 11; C Courcier-Jones, *Submission* at 4.

without voting power.[32] It was also suggested that consideration might be given to inviting a former experienced mediator to serve on the Council.[33]

3.16 One submission suggested that it is important that the membership not be fixed, "to facilitate representation of emerging communities or issues".[34] Another submission, however, emphasised that any methods of appointment ought to be statutorily prescribed.[35] It was also suggested that referring agencies might be represented on the Council.[36] Another submission suggested that "membership ought to include academic and practising dispute resolution professionals. They should be people who have the time, the qualifications, the willingness and generosity to make a contribution."[37]

The Commission's view

3.17 The Commission considers that there should continue to be a CJCs Council.

Role of the Council

3.18 The Commission considers that the CJCs Council should have a role in:

- developing the strategic direction of CJCs;
- endorsing policies for CJCs including standards and codes of practice;
- promoting the role of CJCs in the wider mediation community; and
- providing advice, where required, to the Director of CJCs and to the Attorney General on the operation of the CJCs Act, dispute resolution generally and the provision of mediation services.[38]

3.19 In expanding on the roles that may usefully be performed by the CJCs Council, consideration needs to be given to the current state of the mediation industry as a whole. It has been observed on numerous occasions that, even though debates have advanced and the industry has matured to a certain extent in recent years, the provision of mediation across the spectrum is still in its formative stages and is characterised by a significant diversity in practice.[39] There is also a great diversity in opinions about standards of practice among mediators, service providers and industry and other representative bodies. The Commission has observed this particularly in its consultations and the responses it has received to Issues Paper 23.

32. Law Society of NSW, *Submission* at 11.
33. Law Society of NSW, *Submission* at 11.
34. CJCs, Professional Reference Group, *Submission* at 12.
35. Confidential 4, *Submission 1* at 2
36. Department of Community Services, *Submission* at 2.
37. *Confidential 4*, Submission 1 at 2.
38. Compare these functions with those of the Privacy Advisory Committee: *Privacy and Personal Information Protection Act 1998* (NSW) s 61.
39. T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 16; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 203; NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991).

3.20 In providing strategic and policy advice and endorsing policies there are a number of specific functions that the Council can serve. First, the Council should have a role in setting the strategic direction of CJCs, for example, determining from time to time what areas CJCs should develop or concentrate on, including whether or not strategic alliances should be formed with other bodies in the mediation industry. The Council could identify emerging trends in mediation and help to articulate objectives for CJCs so that they could have a mandate for taking new approaches in the field of mediation. The Council could also advise on the role CJCs should play in the development of national standards for mediators as it is important for the government/community sector to have a say in this process.

3.21 Secondly, the Council should have a role in the determination of policies. For example, what disputes should be mediated by CJCs and under what circumstances.

3.22 Thirdly, the Council should be a forum for the provision of expert advice on the practice of mediation to assist the Director of CJCs with the Director's management responsibilities in providing mediation services to the community of New South Wales. Such advice will be particularly valuable in relation to questions of policy and practice that are developing and/or contentious and will help ensure a thorough examination of all relevant issues.

3.23 Some specific matters that the Council could assist in developing policies and provide advice on are discussed, where relevant, in the course of this Report, including:

- the adequacy of the geographic distribution of CJCs' services;[40]
- the charging of institutions for use of CJCs' services;[41]
- the periodic review of the provisions setting forth what matters need to be considered before a dispute is accepted for mediation at CJCs;[42]
- CJCs' approach to mandatory mediations;[43]
- competencies for pre-mediators;[44]
- pre-mediation at CJCs;[45]
- the exercise of the Director's discretion to allow agents or representatives to take part in a mediation;[46]
- codes of practice,[47] including those that deal with disputes where violence is present;[48]
- handling complaints about CJCs mediators and the CJCs mediation process;[49]
- the content of training programs;[50] and

40. See para 1.37-1.39.
41. See para 1.40-1.47.
42. See para 4.71-4.72; Recommendation 7.
43. See para 5.24.
44. See para 5.45-5.47; Recommendation 8.
45. See para 5.49.
46. See para 5.53-5.63.
47. See para 7.17-7.46.
48. See para 4.72-4.74.
49. See para 7.79-7.93.

- appropriate venues for some mediations.[51]

3.24 Finally, the Council should be able to address problems of isolation of CJCs from the wider industry and help to prevent the drift in standards that may arise from lack of input from or interaction with parts of the industry outside CJCs.

3.25 In discharging its functions, the Council may, of course, act proactively but, in practice, the Commission envisages that the Council will act in response to proposals from the management of CJCs, including initiatives from the CJCs' internal reference groups.[52]

3.26 The Council should be appropriately resourced. Members of the Council should also be appropriately paid.

RECOMMENDATION 3

The CJCs Council's role should be to:

- develop the strategic direction of CJCs;
- endorse policies for CJCs, including standards and codes of practice;
- promote the role of CJCs in the wider mediation community; and
- provide advice, where required, to the Director of CJCs and to the Attorney General on the operation of the CJCs Act, dispute resolution generally and the provision of mediation services.

Composition

3.27 The technical and academic expertise and standing required for the changed role of the Council necessitates a change in its composition. In order to ensure that the Council performs effectively the Commission also considers that only those with demonstrated ability and interest in the policy and practice of mediation should be appointed and that the size of the Council should be kept to a minimum. The Commission also considers that the newly reformed Council should not become a forum for representatives of interest groups, referring organisations or internal groupings within CJCs. This function is more appropriately carried out by internal and external reference groups which may be convened from time to time. Accordingly the Commission recommends that the Council should consist of:

- three practising mediators;
- a magistrate;
- two academics; and
- the Director of CJCs.

All but the Director, whose position will be ex-officio, should be appointed by the Attorney General.

50. See para 8.48-8.54.
51. See para 10.4-10.12.
52. See para 3.43-3.53.

3.28 One of the three practising mediators should hold a current accreditation with CJCs and the other two, whether they are accredited with CJCs or not, should currently be undertaking mediation work with other mediation service providers in New South Wales. In appointing the two other mediators, it is expected that the Attorney General will consult with relevant peak bodies and service providers such as LEADR, the Australian Commercial Disputes Centre, the Institute of Arbitrators and Mediators Australia and Relationships Australia. The organisations that the Attorney General should consult will change from time to time as the mediation industry continues to develop.

3.29 The presence of three practicing mediators will ensure that the advice that the Council offers will be grounded in practical considerations. This will also give the Council credibility in the eyes of the CJCs mediators. The presence of mediators who are currently working with other mediation service providers will ensure that a wider view is taken of the issues facing the mediation industry from a practical perspective.

3.30 The Magistrate should be chosen by the Attorney General in consultation with the Chief Magistrate. A Magistrate has been proposed because the Local Courts are the jurisdiction most closely connected with the work of CJCs.

3.31 The two academic appointments must have a track record of interest in Alternative Dispute Resolution. The presence of two academics will help keep CJCs abreast of developments in the field from a critical perspective. Astor and Chinkin have suggested:

> It is an appropriate role of legal scholars to ask questions about legal institutions. Nor will these questions always be comfortable ones. However, responding to and dealing with the challenges of critical and evaluative scholarship will ultimately strengthen the theory and practice of ADR. A healthy relationship between scholars and practitioners is highly desirable for the strong future development of ADR and needs to be pursued with vigour on both sides.[53]

3.32 The Director, as an ex-officio member of the Council, will be able to inform the Council on the day-to-day operation of CJCs and the wider policy issues to which that gives rise and generally be the link between the Council and the management of CJCs, including the reference groups.

3.33 It is envisaged that the Attorney General, in making appointments to the Council, will consider the desirability of appointing Indigenous people as members of the Council. Such appointments may contribute to the CJCs' task of developing services that will meet the needs of the Indigenous communities of New South Wales.[54] In making this recommendation the Commission acknowledges the shortcomings of appointing Indigenous members to what will be a predominantly non-Indigenous body, that is, Indigenous members cannot represent the diversity of Aboriginal communities in New South Wales and Indigenous members will almost always be in the minority and may become distanced from their own constituency because of

53. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 25.
54. See J Delaney, *Submission*.

their (minority) involvement in a mainstream body.[55] However, such appointments will go some way to ensuring that Indigenous needs and concerns are appropriately dealt with by the Council.

3.34 The chairperson should be appointed by the Attorney General from among those appointed to the Council. The Attorney General in selecting the chairperson should choose someone with:

- an understanding of the context in which CJCs operate and the challenges CJCs face;
- standing in the field of mediation; and
- qualities of energy and leadership.

RECOMMENDATION 4

The CJCs Council should consist of:

- one practising mediator currently accredited with CJCs (appointed by the Attorney General);
- two practising mediators currently accredited with other New South Wales mediation service providers (appointed by the Attorney General after consultation with relevant peak bodies and service providers);
- a magistrate (appointed by the Attorney General after consultation with the Chief Magistrate);
- two academics with a record of interest in alternative dispute resolution (appointed by the Attorney General); and
- the Director of CJCs (ex officio).

In making appointments to the Council, the Attorney General should consider the desirability of appointing Indigenous persons as members of the Council.

The chairperson should be chosen by the Attorney General from among those appointed to the Council.

Consequential amendments

3.35 More than 20 years after the establishment of CJCs, it is now no longer appropriate that the Council issue directions or make determinations concerning the day-to-day operation of CJCs. These functions are now appropriately performed by the Director. All references to the Council issuing directions, or controlling the management of CJCs should, therefore, be removed from the CJCs Act.[56]

RECOMMENDATION 5

Section 10(2), s 11(1), s 16(2), s 20(1) and s 21(1) of the CJCs Act should be amended to remove the power of the Council to make determinations or issue directions to the management of CJCs.

3.36 Some other provisions relating to the Council should be amended or removed from the

55. Redfern Community Centre, *Consultation*.
56. *Community Justice Centres Act 1983* (NSW) s 10(2), s 11(1), s 16(2), s 20(1), s 21(1).

CJCs Act as being now irrelevant to the operation of CJCs and the Council. These provisions are:

- the provision allowing the Council to make arrangements with other government departments and authorities concerning the use of facilities and staff;[57]
- the provisions allowing the Council to establish sub-committees;[58] and
- the provision requiring the Council to prepare the annual report of CJCs.[59]

The Commission is of the view that the first listed provision ought to be repealed; the second listed provision ought also to be repealed as it confuses the roles of the Council and the Director; and the provision requiring the Council to prepare the annual report ought merely to require the Council to endorse the annual report.

RECOMMENDATION 6

a) Section 8 of the CJCs Act should be repealed.

b) Section 9 of the CJCs Act should be repealed.

c) Section 31(1) of the CJCs Act should be amended so that the Council shall endorse, rather than prepare, the CJCs annual report.

MANAGEMENT

3.37 CJCs are managed by the Director of CJCs and are administered in four regions - the northern, southern, western and Sydney regions.[60] Each region has a Regional Co-ordinator who reports to the Director.

The Director

3.38 The Director is responsible for the day-to-day operation of CJCs. When CJCs were first established there was one Director for each of the three Centres.[61] In 1983 it became possible to have one person as a Director of multiple Centres. In 1992, amendments were passed to reflect the reality that there was in fact one Director for all CJCs.[62] The Director is appointed in accordance with Part 2 of the *Public Sector Management Act 1988* (NSW).[63]

57. *Community Justice Centres Act 1983* (NSW) s 8.
58. *Community Justice Centres Act 1983* (NSW) s 9(1).
59. *Community Justice Centres Act 1983* (NSW) s 31(1).
60. See CJCs, *Annual Report 2001-2002* at 8.
61. *Community Justice Centres (Pilot Project) Act 1980* (NSW) s 9. See also NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1881.
62. *Statute Law (Miscellaneous Provisions) Act (No 3) 1992* (NSW) Sch 1.
63. *Community Justice Centres Act 1983* (NSW) s 12(1).

3.39 The Act provides that the Director is, "in the exercise of his or her functions, subject to the control and direction of the Council".[64] This does not reflect the reality that CJCs are part of the departmental structure of the Attorney General's Department and, as such, the Director of CJCs reports directly to the Assistant Director-General and the Director-General of the Department.[65] However, the Act also provides that CJCs "operate within and as parts of" the Attorney General's Department.[66] The question of the role of the Council *vis-a-vis* the Director in the exercise of his or her functions has been dealt with above.[67]

3.40 The Act allocates numerous functions to the Director of CJCs. The Director is responsible for:

- "the provision of mediation services and for the operation and management of Community Justice Centres";[68]
- assigning mediators to conduct each mediation session;[69]
- ensuring that certain records relating to the activities of CJCs are retained;[70] and
- consenting to the acceptance of disputes for mediation.[71]

3.41 The Director may also:[72]

- recommend that the Attorney General accredit a person as a mediator;[73]
- approve places at which the activities of CJCs may be conducted;[74]
- determine the procedure for commencing and conducting a mediation session;[75]
- decline to accept a dispute for mediation;[76]
- terminate a mediation at any time;[77] and
- approve the representation by an agent of a party to a mediation;[78]

3.42 The powers and responsibilities of the Director may be delegated to any member of staff of CJCs.[79]

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64. *Community Justice Centres Act 1983* (NSW) s 10(2).
65. CJCs, *Preliminary Submission* at 3.
66. *Community Justice Centres Act 1983* (NSW) s 18.
67. See para 3.6, 3.9, 3.22, 3.32, 3.35.
68. *Community Justice Centres Act 1983* (NSW) s 20(1).
69. *Community Justice Centres Act 1983* (NSW) s 20(2).
70. *Community Justice Centres Act 1983* (NSW) s 17(1).
71. *Community Justice Centres Act 1983* (NSW) s 20(3).
72. Many of these functions are exercised by the Director, subject to the determinations and directions of the Council. See para 3.6 above.
73. *Community Justice Centres Act 1983* (NSW) s 11(1).
74. *Community Justice Centres Act 1983* (NSW) s 16(2).
75. *Community Justice Centres Act 1983* (NSW) s 21(1).
76. *Community Justice Centres Act 1983* (NSW) s 24(1).
77. *Community Justice Centres Act 1983* (NSW) s 24(2).
78. *Community Justice Centres Act 1983* (NSW) s 25.
79. *Community Justice Centres Act 1983* (NSW) s 13.

Reference Groups

3.43 CJCs make use of two reference groups which were formed in 2001/2002:

- **Professional Reference Group** which comprises managers, staff and mediators and has the aim of looking at "quality issues regarding the theory and practice of alternative dispute resolution";[80]
- **Training Group** which comprises managers and mediators and was formed "to provide trainers to conduct the statewide training program".[81]

CJCs have also established an Aboriginal and Torres Strait Islander Network.[82] This is discussed in Chapter 9.[83]

3.44 These groups have no legislative base and their members are recruited from within the organisation. Their main function is to provide internal forums for dealing with practical matters relating to the operation of CJCs. While they perform this function well, they are not intended to cover the policy advice and standard setting roles of the CJCs Council.

Professional reference group

3.45 The Professional Reference Group's functions are governed by a charter which states that the Group is subject to the direction of the Director of CJCs "in consultation with the CJCs management team".[84]

3.46 The Professional Reference Group's charter states that its purpose is:

> to provide support and advice to the CJCs to ensure a mediation and conflict management service to regional New South Wales which conforms with best practice principles and which is the recognised industry leader in mediation and related conflict management process.[85]

To achieve this, the Group will aim to strengthen links between the management of the CJCs, mediators, staff and the community, develop links with other dispute resolution providers, research mediation and conflict management practices and develop frameworks and principles for the provision of mediation and conflict management services.[86]

3.47 The Group's Charter further states that its members shall do the following with respect to mediation and conflict management theory and practice:

> * ensure best practice standards are met

80. CJCs, *Annual Report 2001-2002* at 4.
81. CJCs, *Annual Report 2001-2002* at 4.
82. See CJCs, *Annual Report 2001-2002* at 9.
83. Para 9.10-9.11.
84. CJCs, *Professional Reference Group Charter*.
85. CJCs, *Professional Reference Group Charter*. See also CJCs Profession Reference Group, *Preliminary Submission* at 1; CJCs, *Annual Report 2001-2002* at 8.
86. CJCs, *Professional Reference Group Charter*.

* inform CJC mediators and staff about current issues
* respond to requests for advice from staff and mediators
* identify training opportunities and advise the Training Group
* conduct and/or [oversee] research
* write and present papers for conferences, seminars, etc
* write papers to be published in industry journals
* assist the Director and the Business Development and Training Manager as required. [87]

Some of these functions could usefully inform the work of the CJCs Council.[88]

3.48 Provision is currently made for 21 members to be appointed to the Professional Reference Group. Three officers of the CJCs are ex-officio, namely the Director, the Business Development and Training Manager and the Executive Officer. The following are appointed by endorsement by their peers:

- two CJCs Co-ordinators;
- two CJCs interviewing officers;
- one member of the CJCs Directorate's administrative staff;
- one Aboriginal and Torres Strait Islander CJCs mediator; and
- one representative of the CJCs Training Group.

3.49 Eight mediators (not being CJCs employees) are selected on application, two from each CJCs region. Three mediator specialists are selected by invitation of the Director of CJCs. Members of the Group who do not receive a salary are paid the current hourly rate for mediation for their attendance. Travel and accommodation expenses are also met where necessary.[89]

Training group

3.50 The Training Group is an informal group that currently consists of about 20 people including the CJCs Business Development and Training Manager, the Regional Co-ordinators and accredited mediators who have completed "train the trainer training".[90]

3.51 Objectives of the Training Group include:

- participation in writing, designing, identifying and evaluating courses;
- offering best practice training in order to provide consistency and uniformity across the State; and
- meeting accreditation and re-accreditation requirements.[91]

3.52 Mediators from the Training Group are now conducting the CJC's training program.[92]

87. CJCs, *Professional Reference Group Charter*.
88. See para 3.18-3.26, above.
89. CJCs, *Professional Reference Group Charter*.
90. Information supplied by D Sharp, Director, CJCs (29 August 2003).
91. CJCs Training Group, *Minutes of Meeting* (3 June 2002).

The Commission's view

3.53 The Commission considers that the Professional Reference Group and Training Group both perform useful functions within the current management structure of CJCs. The Commission encourages the continued use of these and other internal reference groups to assist in the day-to-day operation of CJCs.

92. CJCs, *Annual Report 2001-2002* at 9.

4. Scope of mediation

- Commercial matters
- Family law matters
- Factors requiring exclusion of some disputes
- Matters involving violence
- The need for regulation

4.1 The mediation service provided by CJCs is a generalist service. CJCs can potentially deal with all types of disputes anywhere in the State subject to some restrictions.[1] For example, the CJCs Act currently provides that the CJC Council can determine what classes of disputes may or may not be the subject of mediation sessions.[2] The Director may also refuse to allow a particular dispute to be mediated at a Community Justice Centre.[3] However, accessibility is an important feature of mediations conducted by CJCs and in practice few limitations have been imposed.

4.2 CJCs were established to provide a means of settling the sort of disputes that conventional court-based procedures are unable to resolve satisfactorily. The kind of disputes that the CJCs' services aimed to resolve basically fell within a relatively narrow range of domestic or neighbourhood disputes where the disputing parties had, or once had, an ongoing relationship.[4] Such disputes could include disputes between family members, partners, friends, workmates, members of an organisation, neighbours, landlords and tenants.[5] This is borne out to an extent by CJCs' statistics. In 2003-2004, of the 6,824 files opened by CJCs, 44% involved neighbour disputes, 28% were family disputes (65% of which involved separated or separating spouses and 14% involved children or young people and their parents). Twelve percent of all dispute files opened related to fences.[6] However, in practice, CJCs deal with a wider range of matters, even if some matters are dealt with infrequently; and it is arguably feasible for CJCs to expand their services into some specialist areas. For example, mediators have been trained in handling Development Application and Building Application disputes for Newcastle Council.

4.3 This Chapter considers whether there are particular types of disputes for which CJCs should or should not offer mediation before going on to consider whether there are particular aspects to some disputes that should preclude mediation in some or all cases. A particular focus is on mediations where violence is an element in the relationship between the parties.

COMMERCIAL MATTERS

4.4 Disputes about commercial matters exist along a spectrum. They include disputes involving small sums of money, disputes involving small or family businesses, disputes between ordinary consumers or traders and large corporations, franchise disputes and disputes between large corporations.

4.5 When Community Justice Centres were first established it was not intended for them to cover disputes arising from the dealings of business organisations with individuals or other businesses. These commercial disputes were seen as better dealt with by consumer protection agencies and legislation.[7] For example, the current Act governing the Consumer, Trader and

1. CJCs, *Consultation*.
2. *Community Justice Centres Act 1983* (NSW) s 22(1).
3. *Community Justice Centres Act 1983* (NSW) s 24(1).
4. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 19 November 1980 at 3147.
5. NSW *Parliamentary Debates (Hansard)* Legislative Council, 26 November 1980 at 3696; Legislative Assembly, 19 October 1983 at 1881.
6. CJCs, *Annual Report 2003-2004* at 7.
7. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 26 November 1980 at 3696.

Tenancy Tribunal includes sections that promote conciliation, provide for the appointment of mediators and for the payment of the costs of mediations.[8] The CJCs Memorandum of Understanding with the Local Courts observes that there are certain categories of disputes that are less amenable to alternative dispute resolution processes, giving as an example "purely commercial disputes, particularly those involving insurance companies or financial institutions".[9] For example, it has been noted that small claims relating to motor accidents are problematic because insurance companies often have a policy of not settling.[10] However, some disputes with a commercial aspect are being dealt with by CJCs.

4.6 In IP 23 the Commission asked what provision, if any, should be made to prevent certain types of commercial disputes being brought before CJCs for mediation.[11]

4.7 Submissions noted that commercial matters are often amenable to mediation at CJCs, because:

- they can involve persons with on-going relationships, whether business or personal;[12]
- experience with pre-trial hearings in the Small Claims Division of the Local Court has shown that they are;[13] and
- most have underlying issues appropriate for CJC mediation skills and experience.[14]

4.8 Small commercial matters were seen as being particularly amenable to mediation since legal representation is often not feasible for small matters because there are caps on professional fees and in some cases the fees might even be more than the disputed amount. In such cases lawyers do not see mediation as taking business away from them.[15]

4.9 On the other hand some commercial matters present a particular problem for the type of mediation conducted by CJCs in that, for a mediation to achieve an effective outcome, a business would need to be represented by someone authorised to make decisions on its behalf.[16]

4.10 While it can be argued that "small" commercial disputes should be accepted,[17] others have argued that matters should continue to be assessed on a case by case basis since amenability of certain disputes to mediation may change over time.[18]

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8. *Consumer, Trader and Tenancy Tribunal Act 2001* (NSW) Part 5.
9. *Memorandum of Understanding Between NSW Local Courts and the Community Justice Centres, NSW* (28 January 2000).
10. Registrars, Local Courts, *Consultation*.
11. IP 23 Issue 8
12. D Rollinson, *Submission* at 1.
13. R G Jones, *Submission* at 2.
14. Confidential 2, *Submission* at 1.
15. Registrars, Local Courts, *Consultation*.
16. CJCs, *Consultation*.
17. Law Society of NSW, *Submission* at 4.
18. CJCs, *Submission 1* at 7.

4.11 Other arguments relating to the provision of mediation services in commercial matters centre largely on the question of whether CJCs should be able to charge for some of the services they offer. On the one hand some have suggested that, as a matter of equity, it is unfair that CJCs, as a free service, can compete against commercial mediation services[19] and that this could lead to an undervaluing of mediation in the commercial market.[20] However, it was also suggested that free CJC mediations were unlikely to draw small matters away from the commercial sector since the costs involved in commercial mediation (or, indeed, in litigation) were unlikely to make such disputes financially viable - the matters would not have gone to commercial mediation in the first place.[21] Another suggestion was that parties should be means tested if commercial disputes are to be dealt with and parties that fail the test be asked to contribute at a market rate or the matter be outsourced to another agency.[22]

4.12 On the other hand, it was argued that disputes of a commercial nature are seldom presented to CJCs because the parties believed that free services offered no value.[23]

4.13 The Commission considers that at present no change in current arrangements is warranted since:

- there are clearly some commercial matters that will be amenable to mediation at CJCs;
- there is no evidence that the services are being misused;
- there is no simple way of imposing a means test on participants; and
- the Director has the discretion to exclude particular cases.[24]

FAMILY LAW MATTERS

4.14 Twenty eight per cent of disputes handled by CJCs are classified as family disputes and 65% of family disputes are between separating or separated couples.[25] It is not clear how many of these can be classed as disputes under the *Family Law Act 1975* (Cth).

4.15 It could be argued that family law disputes are more appropriately dealt with by mediation service providers who meet the requirements of the *Family Law Act 1975* (Cth) and regulations. For example, the Victorian Dispute Resolution Project Committee, which recommended the establishment of a neighbourhood mediation pilot project in 1985, stated that "disputes of a family law nature which are covered by the jurisdiction of the *Family Law Act*" were not suitable for community mediation.[26]

19. ACDC, *Consultation*; LEADR, *Consultation*.
20. ACDC, *Consultation*.
21. Registrars, Local Courts of NSW, *Consultation*.
22. Law Society of NSW, *Submission* at 4.
23. CJCs, *Consultation.*
24. *Community Justice Centres Act 1983* (NSW) s 24(1).
25. CJCs, *Annual Report 2003-2004* at 6.
26. "Neighbourhood mediation service pilot" (1985) 59 *Law Institute Journal* 153.

4.16 One submission suggested that CJCs should only be allowed to mediate in the area of family law if:[27]

- the mediators assigned to family law disputes meet the qualifications, training (including ongoing training) and experience described in the *Family Law Regulations 1984* (Cth);
- the mediators assigned to family law disputes receive the type of supervision articulated in the *Family Law Regulations*;
- the mediators assigned to family law disputes are trained in and receive ongoing training in areas such as domestic violence, child development and child protection;
- the intake officer or mediator undertakes the assessments as to the appropriateness of disputes for mediation that are stipulated by the *Family Law Regulations*;[28] and
- the intake officer or mediator provides the parties with a written statement outlining the mediation process, the role of the mediators and the rights of the parties.[29]

Another submission suggested that those who are mediating *Property (Relationships) Act 1984* (NSW), *Family Provision Act 1982* (NSW) and *Family Law Act 1975* (Cth) matters need special training and/or must meet specified criteria.[30]

4.17 To the extent that mediation of family law matters also involves questions of violence, these are dealt with later in this chapter.[31] Whether the mediation services offered by CJCs meet the necessary requirements under the *Family Law Act 1975* (Cth) and other relevant regulations is a question for the Family Court and/or Commonwealth Government regulation and cannot be dealt with in the context of the CJCs Act.

FACTORS REQUIRING EXCLUSION OF SOME DISPUTES

4.18 An important question is whether any particular characteristics of the parties or circumstances surrounding the dispute itself should exclude mediation in some cases. The appropriateness of a particular dispute for mediation can be determined at two stages:

- before the mediation commences, in which case the decision will usually be taken by an intake officer; or
- during the mediation when relevant circumstances become known, in which case the decision to terminate will be made by either one of the mediators or one of the parties.

4.19 Following are some factors that may be taken into account in determining whether to proceed with, or continue, the mediation of a particular dispute. The factors can be used in a number of ways to exclude such matters entirely, or they can merely be taken into account in deciding whether the mediation of a particular dispute is appropriate.

27. Greater Sydney Families in Transition Network, *Submission* at 5.
28. *Family Law Regulations 1984* (Cth) reg 62.
29. *Family Law Regulations 1984* (Cth) reg 63.
30. Law Society of NSW, *Submission* at 2.
31. See para 4.26-4.74.

Violence and other reportable behaviours

4.20 One of the most important factors to be taken into account in determining whether to proceed with a mediation is the presence of violence of some sort, either actual or threatened. This includes disputes that have involved:

- serious injury;[32]
- repeated acts of violence;[33]
- domestic or family violence;[34]
- child abuse;[35]
- threats of violence;[36] or
- a history of racial or homosexual vilification or sexual harassment.

4.21 The presence of violence or other abusive or reportable behaviours is particularly of concern where the physical safety of clients or staff is at risk.[37] Issues surrounding violence and mediation, in particular domestic violence, are discussed in more detail below.[38]

Mental and physical condition of the parties

4.22 Another range of factors to be taken into account in determining if mediation is appropriate lies in the mental and physical condition of the parties in so far as they may impact on the effectiveness of the mediation. This range of factors includes:

- the emotional and psychological state of any of the parties;[39]
- the physical health of any of the parties;[40]
- a psychiatric or psychological disability in any of the parties;[41]
- the parties' age, maturity or intellectual capacity;[42] and

32. *New Jersey Court Rules 1969* r 1:40-8(a)(1).
33. *New Jersey Court Rules 1969* r 1:40-8(a)(2).
34. *New Jersey Court Rules 1969* r 1:40-8(a)(5); "Neighbourhood mediation service pilot" (1985) 59 *Law Institute Journal* 153; *Family Law Rules 1984* (Cth) O 25A r 5(c) (repealed); *Family Law Regulations 1984* (Cth) reg 62(2)(a); WDVCAS, *Submission* at 9; Redfern Legal Centre, *Submission* at 16
35. "Neighbourhood mediation service pilot" (1985) 59 *Law Institute Journal* 153; *Family Law Rules 1984* (Cth) O 25A r 5(b) (repealed); *Family Law Regulations 1984* (Cth) reg 62(2)(d).
36. Law Society of NSW, *Submission* at 3.
37. Greater Sydney Families in Transition Network, *Submission* at 6.
38. See para 4.26-4.66.
39. *Family Law Rules 1984* (Cth) O 25A r 5(d) (repealed); *Family Law Regulations 1984* (Cth) reg 62(2)(e).
40. *Family Law Regulations 1984* (Cth) reg 62(2)(e).
41. Law Society of NSW, *Submission* at 3; "Neighbourhood mediation service pilot" (1985) 59 *Law Institute Journal* 153; *New Jersey Court Rules 1969* r 1:40-8(a)(3).

- an alcohol or drug dependency in any of the parties.[43]

Power imbalance

4.23 A power imbalance which results in the disadvantage of one of the parties is also an important factor to be considered.[44] When the Act was introduced in 1983 it was noted that mediation sessions were, in fact, being terminated in instances:

> *where the respective bargaining positions of the parties to a dispute are manifestly unequal. It is well recognized that such cases are not amenable to the mediation process, and the parties are rightly left to pursue their legal remedies.*[45]

The inequality can be in a number of areas, including economic and linguistic disadvantage.[46] This is discussed further in the context of violence below.[47]

Lack of good faith

4.24 Mediation may also be inappropriate in circumstances where one of the parties is not approaching the mediation in good faith.[48] Examples include situations where it becomes clear that one of the parties is using the mediation for the purposes of delaying legal proceedings or to gain some other inappropriate advantage,[49] or where one of the parties has a history of breaking promises.[50] Or it may simply be the case that there is no possibility of the parties reaching agreement on any issues, and that time is being wasted.[51]

Other relevant factors

4.25 It is clearly not possible to list all the possible factors that might make a mediation inappropriate. The list of factors identified above is not exhaustive and any list of factors,

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42. United Nations, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (2000) Annex, article 9.
43. Law Society of NSW, *Submission* at 3.
44. CJCs, Professional Reference Group, *Submission* at 5; CJCs, *Submission 1* at 8; Greater Sydney Families in Transition Network, *Submission* at 6; "Neighbourhood mediation service pilot" (1985) 59 *Law Institute Journal* 153. See also *New Jersey Court Rules 1969* r 1:40-4(f); *Family Law Rules 1984* (Cth) O 25A r 5(a) (repealed); *Family Law Regulations 1984* (Cth) reg 62(2)(c).
45. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1882.
46. See, eg, *Family Law Regulations 1984* (Cth) reg 62(2)(c).
47. See para 4.42-4.46.
48. CJCs, Professional Reference Group, *Submission* at 5; CJCs, *Submission 1* at 8; CJCs, *Consultation.*
49. *Family Law Rules 1984* (Cth) O 25A r 5(e) (repealed).
50. Law Society of NSW, *Submission* at 3.
51. CJCs, Professional Reference Group, *Submission* at 5; CJCs, *Submission 1* at 8; Law Society of NSW, *Submission* at 5.

whether in legislation, regulations or policies, should not close off any of the categories and should state clearly that it is not exhaustive.[52]

MATTERS INVOLVING VIOLENCE

4.26 There are two circumstances to consider:

- mediation of violence itself; and
- mediation of other issues where violence is present in the relationship between the parties.

Much of the discussion is in the context of domestic violence and Apprehended Violence Orders ("AVOs").

ADVOs and APVOs

4.27 AVOs, which are provided for under Part 15A of the *Crimes Act 1900* (NSW), are the primary legal means by which people may seek protection against actual or threatened acts of personal violence, stalking, intimidation and harassment in New South Wales. While an AVO is a civil order obtained from a Local Court on the balance of probabilities,[53] that is according to the less stringent civil, rather than criminal standard of proof, it may be based on actions which in themselves constitute criminal offences. Contravention of the terms of an AVO is a criminal offence.[54] If there is an AVO in place the terms of which preclude face to face mediation, CJCs' current practice is to refuse mediation unless the terms of the AVO are altered.[55]

4.28 There are two types of AVOs, Apprehended Domestic Violence Orders (ADVOs) and Apprehended Personal Violence Orders (APVOs). Their application depends on the relationship between the person applying for the AVO and the person against whom protection is sought. ADVOs are granted where the parties are or have been in a "domestic relationship".[56] APVOs and ADVOs were introduced as distinct categories in 1999 in order to separate matters involving domestic violence from other "personal" violence from which protection might be sought. This distinction recognised the "difference in the nature and level of violence in domestic and non-domestic matters".[57] At the time it was noted that the Government had been "most conscious of concern regarding the conflation of domestic violence matters with non-domestic or 'personal' violence matters under the AVO scheme" which had arguably "done a disservice to people experiencing domestic violence".[58] There are therefore significant legislative distinctions in the ways that applications for ADVOs are dealt with which emphasise the serious view taken of domestic violence.

52. See, eg, *Family Law Rules 1984* (Cth) O 25A r 5(f) (repealed). See also *Family Law Regulations 1984* (Cth) reg 62(2)(f); *New Jersey Court Rules 1969* r 1:40-4(f)(1) and (2).
53. *Crimes Act 1900* (NSW) s 562AE and s 562AI.
54. *Crimes Act 1900* (NSW) s 562I.
55. Information supplied by D Sharp, Director, CJCs (30 September 2004).
56. *Crimes Act 1900* (NSW) s 562A(3).
57. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.
58. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 25 November 1999 at 3674.

Domestic violence

4.29 Domestic violence is a complex issue and needs to be defined in a complex way. Domestic violence involves more than physical violence - it may involve economic duress or control, power imbalance and fear.[59] In defining domestic violence in its recent report on Apprehended Violence Orders, the Commission defined violence to include the actual or threatened commission of personal violence offences, psychological abuse or damage to property. The Commission emphasised that psychological and emotional harm or abuse is a common form of domestic violence and that an imbalance of power which is exploited by the stronger partner is also often a characteristic of domestic violence.[60]

Violence and CJCs mediations

4.30 It is not clear from the statistics how many disputes mediated by CJCs involve violence. Some records are kept of matters involving APVOs. In the period 1 July 2003 - 30 June 2004, of the 6,824 files opened by CJCs, 1,040 cases (15%) involved Apprehended Personal Violence Orders.[61] (Although it should be noted that only 2,768 of the 6,824 files actually proceeded to mediation.[62]) No statistics are published of matters involving domestic violence. It is possible that matters involving domestic violence have been recorded as disputes involving "family - contact" and "division of property" disputes since CJCs' published data does not take account of domestic violence as a category. Of the 76 participants interviewed for the Commission's empirical study, 31.6% reported that an APVO was involved in their mediation and 7.9% reported that an ADVO was involved.[63]

Mediation of violence itself

4.31 When we refer to "mediation of violence" we are referring to the negotiation of a return to a violent relationship or negotiations concerning the level of violence, its incidence, its intensity and its frequency. Mediation of such matters will always be inappropriate. However, mediation of violence itself must be distinguished from mediation that takes place in relation to other issues but within the context of a relationship that involves violence or threatened violence. In some such cases mediation may take place where proper precautions have been taken.[64]

4.32 The commission of violence is a criminal offence. Therefore, violence itself is not a negotiable issue and can never be the subject of mediation. From an ethical standpoint mediators will not condone the negotiation of illegal and violent acts. The fact that violence itself cannot be mediated has been emphasised in relation to domestic violence. This has always been recognised by CJCs which hold the view that "domestic violence is not in itself the subject

59. Redfern Legal Centre, *Community consultation*; WDVCAS, *Submission* at 4-5.
60. NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at para 4.14-4.22.
61. CJCs, *Annual Report 2003-2004* at 6. This number could be significantly increased if recommendations in the Law Reform Commission's Report on Apprehended Violence Orders are adopted: see NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at chapter 5.
62. CJCs, *Annual Report 2003-2004* at 5.
63. C Bourne, *Mediation and Community Justice Centres: An Empirical Study* (NSWLRC Research Report 12, 2004) at para 3.5.
64. See para 4.52-4.53, 4.57, 4.66.

of mediation, nor a negotiable issue".[65] The CJCs policy for dealing with disputes involving domestic violence states:

> *If the parties are separated at the time of mediation, the CJC will not mediate on the victim returning to violent circumstances or the level of violence.*[66]

4.33 Other reasons why the mediation of violence, particularly domestic violence, is not appropriate, include:

- Victims of domestic violence ought not to be made to take responsibility for negotiating an end to the violence they are suffering. This is not required of any other victims of violence in the criminal justice system.[67]
- It would undermine the objects of Part 15A of the *Crimes Act 1900* (NSW) that refer to protecting people from domestic violence.[68]
- Victims of domestic violence need advocates. Mediators do not take sides in a mediation and so cannot tell perpetrators or victims that domestic violence is unacceptable.[69]
- Mediation cannot offer protection from domestic violence. Protection from domestic violence is offered by the ADVO procedures.[70]

4.34 Safety of participants is the chief concern of CJCs' policy. CJCs' current procedures for mediations involving violence are:

> *to ensure the safety of mediators, staff and clients, CJC Interviewing Officers carefully screen all clients for mediation through the pre-mediation process. If a possibility of violence is identified, further pre-mediation is arranged. Where there is an indication that violence will occur at mediation the Interviewing Officers, in consultation with the Co-ordinator, will deem the matter unsuitable for mediation and will not proceed with its organisation.*[71]

Other submissions have raised concerns that the safety of the parties and mediators cannot always be guaranteed, especially where domestic violence is involved.[72]

Mediation of other issues where violence is present

4.35 While violence itself, or the protection offered by ADVOs or APVOs should never be mediated, there will be matters that come to CJCs for mediation where there is violence present in the relationship, or an AVO is in place or an application pending. Provided any existing AVO

65. CJCs, *Annual Report 1998/1999* at 6.
66. CJCs, *Submission 1* at 5.
67. Redfern Legal Centre, *Community consultation.*
68. See *Crimes Act 1900* (NSW) s 562AC.
69. Redfern Legal Centre, *Community consultation*.
70. Redfern Legal Centre, *Community consultation*.
71. CJCs, *Submission 1* at 5.
72. WDVCAS, *Submission* at 5; Redfern Legal Centre, *Submission* at 11, 15.

does not preclude mediation between the parties[73] the question is then whether, and in what circumstances, CJCs should offer mediation of issues where violence is present in the relationship between the parties.

4.36 There are extreme views in this area - ranging from those who think that there is no issue that cannot be mediated, to those who believe, at least in the context of domestic relationships where women are the victims of violence, that no mediation should ever take place:

> *[V]irtually all relationships involve some sort of inequality of power and/or harm inflicted by one party on the other (most commonly by the male partner on the female partner), mediation is not only inappropriate but serves to perpetuate the conflict and harm it purports to reduce. On such an analysis, mediation should never be pursued in family law matters.*[74]

Others take the view that such a course is neither desirable nor practical.[75]

4.37 It can be argued that there is an element of paternalism in excluding victims of domestic violence completely from mediations at CJCs - why should mediation be available to the whole world but not to victims of domestic violence?[76] Likewise in the field of restorative justice, some advocates promote the extension of restorative justice programs, involving, for example, victim offender mediation, to victims of domestic violence and sexual assault on the basis that "to do otherwise would deny a benefit to victims and offenders because restorative justice is superior to conventional criminal justice practices".[77]

4.38 Astor and Chinkin suggest that the important issue is "capacity to mediate" and that:

> *If the target of violence makes a free and informed consent to use mediation she (or he) should be able to do so.*[78]

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73. The standard orders allow that "the defendant must not approach, contact or telephone the protected person(s) except as agreed in writing or for any purpose permitted by an order or directions under the *Family Law Act 1975* as to counselling, conciliation or mediation": NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at Appendix B.
74. R Alexander, "Mediation, Violence and the Family" (1992) 17 *Alternative Law Journal* 271 at 271.
75. See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 353.
76. The Trillium Group, *Consultation*.
77. J Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004) at 1. Such views, however, fail to take adequate account of the differences between one-off criminal acts which are typically the subject of restorative justice programs and domestic violence which involves recurrent activity and a continuing exercise of power and control over the victim: Stubbs at 6-7.
78. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 353.

4.39 Some submissions argued that mediation is inappropriate in any matter where domestic violence is present regardless of whatever other issues can be mediated. The focus of these submissions was on ADVOs and they took the view that mediation should never take place when an ADVO is in place or being applied for, on the basis that the presence of an ADVO is sufficient indication of there being violence that would render it undesirable that mediation take place.[79] By the same token these submissions recognised that mediation in some APVO matters was appropriate where the disputes involved little or no physical violence,[80] for example, when the APVO applications arise in the context of neighbourhood disputes.[81] This is because neighbourhood disputes are usually between people who need to maintain an ongoing relationship, whereas in ADVO matters the victim may no longer want to live with the perpetrator of the domestic violence.[82] This view is consistent with the provisions relating to AVOs since Part 15A of the *Crimes Act 1900* (NSW) mentions the possibility of mediation only in the context of APVOs.[83] In its recent report on AVOs the Commission recommended that an authorised justice be empowered to refuse to issue an APVO if satisfied that the "matters referred to in the complaint may more appropriately be dealt with by mediation or other alternative dispute resolution".[84]

4.40 The Commission puts no premium on the distinction between ADVOs and APVOs in this context. The distinction between ADVOs and APVOs may, in some cases, be an inadequate way of identifying appropriate matters for mediation and more information will usually be required before a properly trained person can make a decision about whether or not to proceed. Some APVO matters may be similar in many respects to some ADVO matters but the relationship between the parties may not be "domestic" under the terms of the law. The dynamics of violence, harassment and controlling behaviours can be present in many relationships besides those that fall within the current definition of "domestic", for example, where elderly people and people with a disability are abused by their carers, where people in public housing are abused by neighbours in the same apartment complex or where the perpetrator is the partner of a former partner or where the perpetrator is a natural parent of a child and the victim is a foster carer.[85] ADVOs may be used inappropriately (although such cases may be rare) in much the same way that APVOs are often said to be used inappropriately.[86] It will also be the case that domestic violence and other violence does not only take place in the context of ADVOs and APVOs. So even if policies regarding mediation of ADVOs and APVOs are dealt with in the context of AVO legislation, some matters involving violence will still come to CJCs by other means. CJCs, therefore, need to deal with domestic violence and other violence when it presents itself as part of a dispute and, while paying due regard to the presence of an AVO (and any restrictions contained in it) or an application for one, should not use the type of AVO as a sole guide to the appropriateness, or otherwise, of a dispute for mediation.

79. WDVCAS, *Submission* at 7; Redfern Legal Centre, *Submission* at 13.
80. Redfern Legal Centre, *Submission* at 15.
81. Redfern Legal Centre, *Community consultation*.
82. Redfern Legal Centre, *Community consultation*.
83. See *Crimes Act 1900* (NSW) s 562AK(5).
84. NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at para 5.24.
85. See NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at para 4.27, 4.31, 4.32.
86. See NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at para 3.64-3.82.

4.41 The Commission, however, remains concerned about mediation taking place where violence is a factor, particularly in situations involving domestic violence.

The power differential

4.42 The principal reason why mediation is inappropriate in any matter where domestic violence is a factor is that the concept of mediation being voluntary and between equals does not fit the domestic violence context. This is because the power differential between the parties in a domestic violence situation means that the possibility of a voluntary, uncoerced agreement is compromised regardless of the subject of the mediation.[87] Mediation where there is such a power imbalance can be seen as undermining the legislative intention of the CJCs Act that participation in mediations should be voluntary, with each party free to leave at any time.[88] It is argued that the power imbalance in the domestic violence context is quite different to the power imbalance that might exist in the case of a regular assault because the gendered power imbalance is entrenched in domestic situations.[89]

4.43 One particular aspect of the power differential is the fear that one party has of the other. This fear is unlikely to be substantially altered by the presence of two mediators and will prevent the former party from being able to make a voluntary agreement as a solution to the "dispute".[90] Fear of repercussions following the mediation may also be a factor that vitiates the voluntary nature of any agreement. Such concerns are so great that some mediation providers will not offer mediation in circumstances where the parties continue to live together or have some other form of regular contact.[91]

4.44 Furthermore the power differential does not go away during mediation, so the mediation itself becomes a vehicle for further abusing, harassing, intimidating or controlling the victim.[92] Some parties, for example, may use subtle physical messages to intimidate their victims during mediation proceedings and these subtleties may not be evident to others in the room at the same time.[93]

4.45 In domestic violence situations where the power imbalance exists the use of a "neutral" mediator as the only other participant in the process arguably reinforces the *status quo*.[94] On the other hand, it has also been suggested that, in some cases, mediators will balance power relationships and in this context terms such as "non-judgmentalism" or "appropriate treatment" are to be preferred to "neutrality".[95] However, it can also be argued that any attempts to balance

87. Redfern Legal Centre, *Community consultation*; WDVCAS, *Submission* at 4; Redfern Legal Centre, *Submission* at 4.
88. *Community Justice Centres Act 1983* (NSW) s 23. See WDVCAS, *Submission* at 5. See also para 5.14.
89. Redfern Legal Centre, *Community consultation*.
90. Redfern Legal Centre, *Community consultation.*
91. Relationships Australia (NSW), *Consultation*.
92. Redfern Legal Centre, *Community consultation*; WDVCAS, *Submission* at 9
93. Redfern Legal Centre, *Community consultation*.
94. Redfern Legal Centre, *Community consultation*; Redfern Legal Centre, *Submission* at 5.
95. Relationships Australia (NSW), *Consultation*.

the bargaining power between the parties cannot re-establish genuine equality and may only provide an illusion of safety for victims of domestic violence.[96]

4.46 While the power differential is particularly relevant in the case of domestic violence, there are other situations where the power differential is equally relevant, for example, in situations where older people are living next door to violent people in public housing, or in some workplace situations.[97]

Other reasons

4.47 Other reasons for opposing mediation in the context of domestic violence include:

- It is difficult to separate from a situation involving domestic violence the issues that do not involve domestic violence so that they can be mediated.[98]
- In the court context parties are too easily manipulated by procedures into accepting mediation in ADVO matters, especially when mediation is suggested by a magistrate.[99] The pressure to take part in mediation may be particularly strong because the victim often does not want the matter to end up in court in the first place.[100] The involvement of a court also places greater pressure on the parties to reach an agreement regardless of its appropriateness in the circumstances.[101]
- The use of mediation may contribute to the revictimisation of victims of domestic violence,[102] even in circumstances where, for example, the violence is directed at a mediator or other person in the mediation rather than the victim.[103]
- The use of mediation (and its attendant confidentiality) returns the issue of domestic violence to the private sphere and effectively "decriminalises" the conduct of the perpetrator.[104] It has been argued that the Government's "policy of ensuring that all domestic violence offences are taken before the courts" is reflected in the part of the CJCs Act that provides that the exoneration from liability for police officers for failure to bring a matter to the courts is excluded in the case of domestic violence offences.[105]

96. WDVCAS, *Submission* at 10. See S Hooper and R Busch, "Domestic Violence and Restorative Justice Initiatives: The Risks of a New Panacea" (1996) 4 *Waikato Law Review* 3.
97. Redfern Legal Centre, *Community consultation*.
98. WDVCAS, *Submission* at 4.
99. Registrars, Local Courts of NSW, *Consultation*; Redfern Legal Centre, *Community consultation*; Redfern Legal Centre, *Submission* at 19.
100. Redfern Legal Centre, *Community consultation*.
101. Redfern Legal Centre, *Submission* at 21.
102. WDVCAS, *Submission* at 7.
103. Redfern Legal Centre, *Submission* at 12.
104. WDVCAS, *Submission* at 8, 11; Redfern Legal Centre, *Submission* at 20, 21.
105. *Community Justice Centres Act 1983* (NSW) s 27(5). NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, Hon F Walker, second reading speech, 19 October 1983 at 1882. See also Redfern Legal Centre, *Submission* at 5-6.

- CJCs mediators may not be as well trained to deal with domestic violence matters as some other mediation service providers, for example, those who operate under the *Family Law Act*.[106]

Mediating with children who commit violence

4.48 Mediation of disputes where one of the parties is a child who has committed or threatened violence, presents some different considerations to disputes involving an adult who has committed or threatened violence. These different considerations may make it appropriate to mediate where violence is present in a dispute, where it might otherwise be inappropriate in the case of adults. This different approach in relation to children is consistent with the general approach of the legal system to treat children differently with a greater emphasis on rehabilitation, by, for example, the use of specialist Children's Courts, the varying of AVOs to allow for youth conferencing and so on.

4.49 It is currently CJCs practice to mediate when APVOs and ADVOs are sought against children.[107] Solicitors from the Children's Legal Service report that matters involving violence committed by young people appear to be resolved in as far as the clients do not come back to them either by way of further offences or by another application for an AVO.[108]

4.50 It has been suggested that the mediation of disputes where a child has committed violence is different[109] because:

- violence by children is often a response to parental behaviour, which also needs to be modified;[110]
- it is a question of establishing an appropriate hierarchy between parents and children which can be achieved by mediation;[111]
- parents often use ADVOs in an attempt to control the behaviour of their children;[112]
- there are no other services for dealing with young AVO defendants without issuing an AVO or proceeding to conviction;[113] and
- unlike adult domestic violence, most young people "grow out of" the offending behaviour.[114]

These matters ought to be considered in determining whether it is appropriate to go ahead with a mediation where one of the parties is a child who has committed or threatened violence.[115] If

106. Redfern Legal Centre, *Community consultation.*
107. Children's Legal Service, *Consultation*; R Dive, *Submission.*
108. Children's Legal Service, *Consultation*.
109. See R Dive, *Submission*.
110. Relationships Australia (NSW), *Consultation.*
111. Relationships Australia (NSW), *Consultation*.
112. Children's Legal Service, *Consultation*.
113. Children's Legal Service, *Consultation*. For example, counselling is only available under a bond supervised by the Department of Juvenile Justice, and conferencing is excluded in matters where young people breach AVOs.
114. Children's Legal Service, *Consultation.*
115. See para 4.72.

mediation does go ahead in such circumstances, it has been suggested that mediators must make it clear to both the child and the parents that violence is always inappropriate.[116]

Dealing with violence

4.51 Dealing with violence in the context of mediation is a serious issue and requires proper consideration. A blanket rule is unlikely to deal with all potential situations appropriately and may result in harm to some participants.

4.52 Some submissions supported mediation of some matters in which violence was a factor but this support is conditional, requiring, in some instances, modification of current CJCs mediation practice. For example, it was suggested that mediation about issues other than violence (where violence is present) could be beneficial so long as the mediation is properly conducted,[117] for example, by use of shuttle mediation (that is, where each party is in a different room and the mediator moves between them as an intermediary),[118] and the mediators are sufficiently skilled, properly trained and sufficiently informed of alternative pathways for disputants.[119] However, there will be situations where procedures, such as shuttle mediation, will still be inappropriate, for example, where one of the parties has a significant fear of retaliation after the mediation has concluded.[120] It has also been noted that in some relationships, power and control does not necessarily end with the physical separation of the parties.[121]

4.53 A safe environment for mediators and disputants was also considered necessary if such matters were to be mediated.[122]

Industry practice

4.54 Some mediation agencies have developed careful protocols to identify disputes involving violence, to assess whether they are suitable for mediation, and to decide what provisions and protections should be put in place in cases where the parties opt to proceed. In the case of family mediation schemes some requirements, including the qualifications and experience of mediators, are tied to funding.

4.55 The Commonwealth's *Family Law Regulations 1984* include a list of considerations that an intake officer must have regard to in deciding whether a dispute is suitable for mediation:

116. Relationships Australia (NSW), *Consultation*.
117. ACDC, *Consultation*; The Trillium Group, *Consultation*; Greater Sydney Families in Transition Network, *Submission* at 6; Confidential 2, *Submission* at 1; Registrars, Local Courts, *Consultation*.
118. Registrars, Local Courts of NSW, *Consultation.*
119. LEADR, *Consultation.* See also WDVCAS, *Submission* at 11; Redfern Legal Centre, *Submission* at 9. These submissions considered that mediation under the *Family Law Act* was better equipped to deal with such mediations.
120. Relationships Australia (NSW), *Consultation.*
121. NSWLRC, *Apprehended Violence Orders* (Report 103, 2003) at para 4.10.
122. LEADR, *Consultation*; CJCs, *Consultation*; Registrars, Local Courts of NSW, *Consultation.*

(a) a history of family violence (if any) within the meaning of subsection 60D(1) of the Act, among the parties;

(b) the likely safety of the parties;

(c) the equality of bargaining power among the parties (for example, whether a party is economically or linguistically disadvantaged in comparison with another party);

(d) the risk that a child may suffer abuse;

(e) the emotional, psychological and physical health of the parties;

(f) any other matter that the mediator considers relevant to the proposed mediation.[123]

4.56 Victorian Legal Aid has recently produced a Family Violence Policy for Roundtable Dispute Management ("RDM"). This policy first makes it clear that the dispute management service does not provide "an alternative to the justice system to resolve issues of violence".[124] The program employs a two-stage screening process, involving the Commonwealth Guidelines and their own case management approach to ensure that only appropriate cases proceed to a conference. The policy provides as follows:

In situations of family violence RDM will perform a comprehensive assessment as to the safety of the client and their family. RDM also acknowledges the potential inter-relationship between family violence and child abuse. RDM's Case Management Team will make inquiries with clients as to both family violence and child abuse including:

The nature and extent of the violence, including mutual violence between the parties and/or other family members.

The impact on the survivor and their family.

The current level of risk to the survivor and their family.

The survivor's willingness to attend an RDM Conference.

The suitability for an RDM Conference.

Measures taken to protect the survivor and their family, including Intervention Orders and Undertakings.

123. *Family Law Regulations 1984* (Cth) reg 62(2). See also the list in the now repealed *Family Law Rules 1984* (Cth) O 25A r 5.
124. Victoria Legal Aid, "Roundtable Dispute Management: Family Violence Policy" (2004) §3.1.

Whether particular safety interventions are required to protect the survivor and their family.[125]

4.57 The safety mechanisms employed by Victorian Legal Aid to ensure the safety of participants include:

- Individual lockable "security rooms" for survivors and their lawyers to access throughout the day of the RDM Conference.
- Separate waiting areas at reception, with a receptionist in attendance at all times.
- The availability of staggered arrival and departure times for survivors and alleged perpetrators.
- Security doors and separate entrance and exit points within the building.
- Duress buttons, video monitors and security personnel.
- Facilities to conduct an RDM Conference without clients being in the same room including "shuttle conferencing", "video conferencing" and "telephone conferencing".
- Prior to scheduling an RDM Conference to take place at a venue other than RDM {338 La Trobe Street, Melbourne}, an assessment will be made as to the suitability of that proposed venue.[126]

4.58 The Western Australian Legal Aid's alternative dispute resolution program includes a comprehensive screening process conducted by trained co-ordinators which is aimed at identifying domestic violence and other issues that may impact on the suitability of a dispute for the program. The co-ordinators are supported by debriefing and "a fortnightly case conference with a senior family lawyer to identify the issues of concern and to put in place practical solutions for intake to the program".[127]

4.59 Local Courts and CJCs have been working on a standardised protocol for referrals from Local Courts in relation to civil claims and Apprehended Personal Violence Orders to ensure that mediation at a CJC is considered early in the process. A kit was finalised in December 2004.[128]

Submissions

4.60 Regardless of their position on the question of mediation where violence is present, some submissions highlighted deficiencies in current CJCs practice in dealing with such matters. There was a strong view in some submissions that CJCs need to revise their practices, particularly in light of those adopted by other organisations offering mediation in cases where violence is present.

4.61 ***Need for more stringent intake assessment.*** Many submissions highlighted the need for improved intake procedures to identify issues of violence.[129]

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125. Victoria Legal Aid, "Roundtable Dispute Management: Family Violence Policy" (2004) §5.4.
126. Victoria Legal Aid, "Roundtable Dispute Management: Family Violence Policy" (2004) §7.1.
127. C Brown, "A new breed of mediation - the 'labradoodle'" (2004) 31(10) *Brief (The Law Society of Western Australia)* 6 at 7.
128. Registrars, Local Courts of NSW, *Consultation*; Information supplied by D Sharp, Director, CJCs (10 January 2005).

4.62 One submission suggested that CJCs should only be allowed to provide mediation in ADVO proceedings if:

> *the intake officer or mediator undertakes an assessment which, amongst other things, explores the type of violence that occurred in the relationship (as it can take many forms such as psychological, financial, social, sexual and physical), the frequency and context of the violence, whether there are any ADVOs in place, the parties' perceptions of the violence, whether a party's safety or ability to negotiate freely is affected by the violence and the impact of any violence on any children of the relationship.*[130]

4.63 ***The need for adequate training in violence issues.*** Submissions highlighted the need for proper training in issues relating to domestic violence.[131] This need applies to both mediators and those responsible for pre-mediation assessments. The training needs to be comprehensive and include, for example, such issues as the forms of violence that do not involve physical contact.[132] One submission suggested:

> *a more comprehensive ongoing training program needs to be developed by the CJC for mediators undertaking mediations that not only involve AVOs but any sort of aggressive behaviour. This should include issues such as masculinity, violence and mental health, adolescent aggression and the difference between male and female aggression.*[133]

4.64 Another submission suggested that CJCs should only be allowed to provide mediation in ADVO proceedings if the mediators assigned have specific and ongoing training to understand issues such as the nature of family violence and its impact on a party's ability to negotiate freely.[134]

4.65 The Women's Domestic Violence Court Assistance Program, which is administered by the Legal Aid Commission, was identified as providing support schemes whose workers were appropriately trained and had considerable skills and experience in relation to domestic violence issues.[135]

4.66 ***Need for better security.*** Some submissions considered that if matters involving physical violence are accepted for mediation there is insufficient security even at the larger court facilities to guarantee the physical safety of the parties and mediators either during the mediation

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129. G Eggleton, *Submission* at 14; Greater Sydney Families in Transition Network, *Submission* at 5-6. On intake procedures more generally, see para 5.25-5.49.
130. Greater Sydney Families in Transition Network, *Submission* at 5-6.
131. Redfern Legal Centre, *Community consultation*; WDVCAS, *Submission* at 11; Redfern Legal Centre, *Submission* at 9.
132. WDVCAS, *Submission* at 4-5.
133. G Eggleton, *Submission* at 14.
134. Greater Sydney Families in Transition Network, *Submission* at 5-6.
135. Redfern Legal Centre, *Community consultation*.

or at its conclusion. This concern is greater in rural areas where there is likely to be even less access to protective services.[136]

THE NEED FOR REGULATION

4.67 The chief questions that the Commission has considered are:

- whether there are any factors that ought to exclude mediation entirely in particular cases;
- whether, in addition to, or instead of these, there should be a non-exhaustive list of factors to be considered in deciding whether or not to exclude mediation in particular cases; and
- how any such regulations should be imposed, whether by legislation, regulation or policy guidelines.

4.68 Some submissions considered there should not be specific exclusions, preferring to rely on the judgment of intake officers and mediators to identify inappropriate cases[137] and it was suggested that such questions should be dealt with on a case by case basis by properly trained persons rather than by relying on a list of exclusions.[138]

4.69 While submissions were generally content to leave the matter to the discretion of the mediators, the question does arise as to whether a non-exhaustive list might provide a level of guidance to mediators and participants and bring some issues, particularly those of violence and power imbalance, to the forefront of considerations. Even if a general list is produced it must still remain a matter for judgment of intake officers or mediators as to whether mediation is appropriate in the particular circumstances of the case. The factors outlined above may indicate that it is inappropriate for mediation to continue in some circumstances but not in others. In some cases the presence of one of the factors may exclude mediation entirely but in others the presence of one of the factors may be of little concern in the particular context or may be ameliorated by various strategies that are available to appropriately skilled mediators.

4.70 The Commission considers that violence is such a serious issue in the context of mediation that the policy concerns should be dealt with expressly. In reaching its conclusions, the Commission has had regard to the following considerations:

- violence itself, whether domestic or otherwise, that is, its occurrence and intensity, can never be mediated;
- the safety of all participants is paramount;
- mediation will usually not be voluntary when domestic violence is present; and
- in appropriate cases special procedures may need to be adopted to ensure the safety of all parties and ensure that any agreements reached are voluntary.

4.71 The Commission is of the view that these considerations should be enshrined in a non-exhaustive list in the CJCs Act. This will achieve a number of objectives:

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136. WDVCAS, *Submission* at 5; Redfern Legal Centre, *Submission* at 15.
137. D Rollinson, *Submission* at 1; CJCs, *Consultation*.
138. CJCs, *Consultation*; CJCs, Professional Reference Group, *Submission* at 4; CJCs, *Submission 1* at 5; Law Society of NSW, *Submission* at 3.

- it will highlight the unacceptability of mediating violence for all participants; for example, one submission suggested that the requirements of the *Family Law Act* and regulations keep domestic violence high on the agenda and, therefore, make mediators more aware of the issue;[139] and
- it will serve a more general educative function.

Any risk that a legislative statement will become unnecessarily restrictive over time will be ameliorated by the review requirements that are recommended in Chapter 10.[140]

4.72 Following are the factors the Commission considers that intake officers and mediators should take into account when considering whether a particular dispute is suitable for mediation:

- the safety of all parties to the mediation;
- any ADVOs or APVOs that may have been granted or that are pending;
- the degree of equality (or otherwise) in the bargaining power of the parties;
- the occurrence of violence and/or the risk of future violence between the parties or between one of the parties and a third party (including children of the relationship);
- the mental, physical and psychological state of the parties;
- the relationship between the parties;
- whether one of the parties may be using the mediation tactically to gain delay or some other improper advantage;
- the extent to which the issues in dispute are related to any violence between the parties;
- whether the party who has committed or threatened violence is a child; and
- any other matter relevant to the proposed mediation and the parties.

Such a list of factors will provide a framework for determining what matters are appropriate for mediation but this framework will remain to be filled out and augmented by appropriately trained intake officers and mediators exercising their discretion, subject to instructions issued by the Director of CJCs and policies endorsed by the CJCs Council from time to time.[141] An example of the sort of policy document that can supplement or augment the list of factors can be seen in the Family Violence Policy developed by Victorian Legal Aid for its Roundtable Dispute Management Program.[142]

4.73 A more specific example of the sort of area where policy determinations and directions will be needed can be seen in the issue of the presence of mediators at Local Courts when AVO matters are being dealt with. The Commission has received some evidence of CJCs mediators actively recruiting matters involving violence and being present in Local Courts on AVO list days.[143] While on-the-spot mediation to reduce court lists is desirable in some circumstances, for

139. Redfern Legal Centre, *Community Consultation*.
140. See para 10.17-10.20; Recommendation 13.
141. See *Community Justice Centres Act 1983* (NSW) s 20(3) and s 22(1).
142. See para 4.56-4.57.
143. NSW Women's Domestic Violence Court Assistance Scheme Network, *Submission* at 5, 7, 11-14; Redfern Legal Centre, *Community Consultation*; Redfern Legal Centre, *Submission* at 8, 13, 18, 19.

example, small civil claims, there are risks involved in promoting mediation to victims of domestic violence. The presence of CJCs mediators at Local Courts promoting the services of CJCs on AVO list days runs the risk of blurring the distinction between the formal court procedures that will offer protection to victims and the mediation offered by CJCs.[144]

4.74 The Commission considers that while the current practice of having mediators present at Local Courts to conduct mediation in relation to small civil claims is appropriate, it is not appropriate for them to be actively promoting mediation in the context of AVO applications which will require careful assessment before mediation can take place, if it takes place at all. CJCs should clearly articulate the need for proper assessment of matters involving violence (in accordance with the requirements set out above) in relation to the promotion of CJCs' services in the Local Courts.

RECOMMENDATION 7

The CJCs Act should include a list of the following factors that must be taken into account when considering whether a particular dispute is suitable for mediation:

- the safety of all parties to the mediation;
- any ADVOs or APVOs that may have been granted or that are pending;
- the degree of equality (or otherwise) in the bargaining power of the parties;
- the occurrence of violence and/or the risk of future violence between the parties or between one of the parties and a third party (including children of the relationship);
- the mental, physical and psychological state of the parties;
- the relationship between the parties;
- whether one of the parties may be using the mediation tactically to gain delay or some other improper advantage;
- the extent to which the issues in dispute are related to any violence between the parties;
- whether the party who has committed or threatened violence is a child; and
- any other matter relevant to the proposed mediation and the parties.

144. Redfern Legal Centre, *Submission* at 18.

5. Process of mediation

- Voluntary participation
- Intake assessment
- Presence of other persons in the mediation
- Enforceability of outcomes

5.1 This chapter deals with various aspects of a CJCs mediation, covering processes before, during and after the mediation itself.

VOLUNTARY PARTICIPATION

5.2 The question whether parties can be compelled (or mandated) to participate in a mediation has excited considerable debate. The debate is, however, largely theoretical. The practical difference between mandated and non-mandated mediations may be minimal. This question is separate from, although related to, the question of the extent to which the parties need to be willing participants in the mediation process, regardless of whether their initial participation is voluntary or not. While a distinction is often drawn between the question of the consent of the parties to attend the mediation and the consensual nature of the process once the mediation gets underway, these two issues are not necessarily so easily separated. On a purely practical level, for example, a court's encouragement of mediation may be "robust", even though that court may have no formal power to order the parties to mediation.[1] It has been observed:

> *The degree of coercion to mediate is not simply a product of a statutory provision allowing the courts to compel the parties to mediate. It is also a function of the social and political circumstances in which the parties must make decisions associated with their dispute.*[2]

5.3 In the Commission's survey of participants in CJCs mediations, the majority of participants reported they felt they had a choice in attending the mediation. However, 7.9% responded that they felt they did not have a choice and 6.6% reported they were "unsure". Of those who felt they did not have a choice in attending the mediation at CJCs 3 were referred by magistrates, 2 by police officers and one by a chamber magistrate. One party reported that they felt they had no choice because the mediation related to the workplace and another reported the mediation involved tenancy issues.[3]

Mandatory mediation

5.4 Mandatory mediation may arise in a number of ways. For example, parties may be compelled to attempt mediation by order of a court, by the provisions of a statute (for example, in order to be able to commence litigation) or by their own prior agreement in a contract.[4]

5.5 The issue of compelling parties to attend a CJC mediation has arisen from time to time.[5] For example, it was canvassed in the review of the pilot scheme in 1982. Some commentators

1. See the comments of the English Court of Appeal in *Halsey v Milton Keynes General NHS Trust* (England and Wales, Court of Appeal, B3/2003/1458, 11 May 2004, unreported) at para 9-11. See also R Dive, *Submission*.
2. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 274.
3. C Bourne, *Mediation at Community Justice Centres: An Empirical Study* (NSWLRC Research Report 12, 2004) at para 3.12-3.14.
4. See, eg, National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (2003) at 9.

believed that compulsion might make the system more effective. It was also suggested that compulsion would reduce the administrative costs involved in CJCs attempting to arrange mediations that do not go ahead because one party refuses to attend. In 2003-2004, for example, 3,180 matters (46% of files opened by CJCs) resulted in a mediation.[6] The review, however, concluded that the purely voluntary nature of the scheme was fundamental to its operation.[7]

5.6 It has also been suggested that in the case of particular types of dispute parties should be compelled to mediate. For example, some Department of Housing local client service teams have suggested that there are problems arising from the fact that tenants cannot be forced to attend a mediation session. They suggested that CJC mediation should be compulsory where a public housing tenancy is at risk.[8] Some local Councils have also suggested that CJC mediation should be compulsory in some cases, for example, in relation to dividing fences.[9] Some Local Courts Registrars while noting the need to be careful about the sort of matters that should be mandatory, suggested that "classic" neighbourhood disputes involving, for example, fences, trees or noise, could be made mandatory.[10] The Law Reform Commission's 1988 report on dividing fences considered that compulsory mediation might be of "practical advantage in getting parties to attend a mediation session" but declined to deal with the issue only in relation to dividing fences because of the general "jurisprudential and practical issues" raised.[11]

5.7 Compulsory mediation is not uncommon. In New South Wales it is available in varying degrees, for example, in the Supreme Court, the District Court and in relation to farm debts.[12] Compulsory mediation, however, cannot be ordered by the Local Courts which continue to be a significant source of CJCs mediations.[13] Queensland's Dispute Resolution Centres can deal with court-ordered mediations (required by what are called "referring orders")[14] which have been referred by the Supreme Court, District Court and Magistrates Court.[15] The Queensland Act retains the Centres' discretion to refuse to mediate particular disputes[16] and also retains the

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5. See, eg, H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 271-272. See also E Laginha, *Preliminary Submission*.
6. Of those that did not proceed to mediation, 246 were resolved to the satisfaction of the parties: CJCs, *Annual Report 2003-2004* at 5.
7. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 194-195.
8. NSW Department of Housing, *Preliminary Submission* at 3.
9. Blacktown City Council, *Preliminary Submission* at 2; Penrith City Council, *Preliminary Submission*.
10. Registrars, Local Courts, *Consultation*.
11. NSWLRC, *Community Law Reform Program: Dividing Fences* (Report 59, 1988) at para 3.31.
12. *Supreme Court Act 1970* (NSW) s 110K, s 110L; *District Court Act 1973* (NSW) s 164A, s 164B; *Farm Debt Mediation Act 1994* (NSW) s 8, s 9B, s 11.
13. *Local Courts (Civil Claims) Act 1970* (NSW) s 21L, s 21M.
14. Amendments allowing this were introduced by *Courts Reform Amendment Act 1997* (Qld) Part 5. See also Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 30 April 1997 at 1176.
15. *Dispute Resolution Centres Act 1990* (Qld) s 2(1).
16. *Dispute Resolution Centres Act 1990* (Qld) s 28(5).

voluntariness principle, including the right of any of the parties to terminate a mediation.[17] The Queensland Act allows questions of privilege, evidence and secrecy to be governed by the statutes under which the order for mandatory mediation has been made.[18]

5.8 In IP 23 the Commission asked whether CJCs should be required to deal with mandatory mediations.[19]

Arguments against mandatory mediation

5.9 There are many arguments against mandatory mediation. Potential problems with making mediation mandatory include:

- the view that participation in mediation must be voluntary to be effective (even though the consensual nature of the process remains unchanged);[20]
- voluntariness "ensures that parties mediate in good faith and have "ownership" of the outcomes of the mediation and conflict management process";[21]
- the possibility that compulsory mediation at CJCs might appear to be forcing people into "second class justice" (in comparison with formal court adjudication);[22]
- the need for CJCs to regulate the types of cases it accepts for mediation, for example, so it can exclude some matters involving violence;[23]
- the possibility that courts dealing with heavy work loads could be tempted to refer cases to CJCs that might not necessarily be appropriate for mediation;[24] and
- the possible impact on CJC performance of cases of a type that have not previously been dealt with by CJCs.

5.10 The English Court of Appeal recently took the view that:

> *if the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process.*[25]

17. *Dispute Resolution Centres Act 1990* (Qld) s 31, s 32.
18. *Dispute Resolution Centres Act 1990* (Qld) s 36(7), (8), s 37(7), (8).
19. IP 23 Issue 9(a).
20. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 273; J Pearson, "Evaluation of Alternatives to Court Adjudication" (1982) 7 *Justice System Journal* 420 at 440.
21. CJCs, Professional Reference Group, *Submission* at 4.
22. See J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 195.
23. See para 4.18-4.74.
24. Refern Legal Centre, *Community consultation*. See also Local Courts Registrars, *Consultation*.
25. *Halsey v Milton Keynes General NHS Trust* (England and Wales, Court of Appeal, B3/2003/1458, 11 May 2004, unreported) at para 10.

The Court also took the view that "to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court".[26] This, of course, is not the case in New South Wales where many courts have the express power to order parties to attend mediation.

Arguments in favour of mandatory mediation

5.11 Some submissions supported mandatory mediation.[27] On a practical level one submission noted that all superior courts were now moving towards mandatory mediation in certain cases and that mandatory mediation could be useful in Local Courts where it is currently not available.[28] Benefits of mandatory mediation include:

- it is good for getting issues aired - it helps parties to focus on issues and perhaps realise that legal action is pointless and it may put some disputes off the legal course;[29]
- in disputes where parties have come to firmly entrenched positions, the parties sometimes welcome being forced into mediation.[30]

5.12 Some of the benefits of mandatory mediation could be achieved by the referring agencies strongly encouraging the parties to undertake mediation. This could be done without strictly compromising the self-determination of the parties. Strong encouragement happens in practice.[31] The English Court of Appeal recently recognised this reality:

> *Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far... [W]e reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust.*[32]

5.13 The objections listed above[33] may be of little weight so far as the outcomes of mandatory mediations go. Some studies in the United States have suggested that voluntary participation does not appear to be determinative of a successful outcome,[34] leading one commentator to suggest that one way for community mediation to have an effective impact on court caseloads

26. *Halsey v Milton Keynes General NHS Trust* (England and Wales, Court of Appeal, B3/2003/1458, 11 May 2004, unreported) at para 9.
27. Confidential 2, *Submission* at 1; Law Society of NSW, *Submission* at 4.
28. Law Society of NSW, *Submission* at 4.
29. Confidential, *Consultation*.
30. Local Courts Registrars, *Consultation*.
31. C Bourne, *Mediation at Community Justice Centres: An Empirical Study* (NSWLRC Research Report 12, 2004) at para 3.12-3.14; Redfern Community Centre, *Consultation*. See also R Dive, *Submission*.
32. *Halsey v Milton Keynes General NHS Trust* (England and Wales, Court of Appeal, B3/2003/1458, 11 May 2004, unreported) at para 11.
33. Para 5.9-5.10.
34. J Pearson, "Evaluation of Alternatives to Court Adjudication" (1982) 7 *Justice System Journal* 420 at 429.

and court costs is for mediation to be made mandatory as a precondition to litigation.[35] Such an approach presumes that mediation will produce faster and higher quality dispute resolution.[36] A review of a mandatory court-connected mediation program in Ontario recently found a high level of positive response from participants about their experience of mandatory mediation.[37] The study also found that civil cases that were part of the mandatory mediation program settled earlier[38] and saved litigants substantial amounts of money.[39] However, one submission suggested that even if compulsion has no effect on the outcomes of mediation, the parties' self-determination, choice and perceptions are more important than outcomes and case management.[40]

Continuing participation

5.14 While the arguments favouring and opposing mandatory mediation outlined above may be equivocal, it is widely accepted that the continued participation of parties in a mediation should be voluntary. This accords with the US *Model Standards of Conduct for Mediators* which states:

> *Self-determination [by the parties] is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.*[41]

The CJC Act currently ensures that such principles are adhered to by stating that a party may withdraw from a mediation session at any time.[42] This is also recognised, for example, in family law matters where a mediator providing family and child mediation services under the *Family Law Act 1975* (Cth) must terminate the mediation if "requested to do so by a party".[43] Even in cases where mediation is a precondition for further proceedings, for example, under the *Strata Schemes Management Act 1996* (NSW), the mediators or any of the parties may terminate the

35. J Pearson, "Evaluation of Alternatives to Court Adjudication" (1982) 7 *Justice System Journal* 420 at 439-441.
36. D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 64.
37. R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Robert Hann and Associates Ltd, 2001) at 96-101.
38. R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Robert Hann and Associates Ltd, 2001) at chapter 3
39. R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Robert Hann and Associates Ltd, 2001) at chapter 4.
40. D Rollinson, *Submission* at 1.
41. US *Model Standards of Conduct for Mediators* item I.
42. *Community Justice Centres Act 1983* (NSW) s 23(2).
43. *Family Law Regulations 1984* (Cth) reg 64.

mediation at anytime.[44] The right of any of the parties to terminate a mediation is dealt with elsewhere.[45]

Making provision for mandatory mediation at CJCs

5.15 In IP 23 the Commission considered that the possibility that mandatory mediations could be referred to CJCs might necessitate:

- the inclusion of provisions similar to those in Queensland in relation to court-ordered mediations;
- a consideration of the resources needed to take on more mediation work in addition to the current non-compulsory workload;[46]
- the inclusion of mechanisms to ensure the quality of mandatory mediation for disputing parties,[47] including, for example, provisions for enforcement of standards and accountability (including complaints mechanisms).[48]

The final point was considered necessary because weaker parties may lose the procedural protections offered by the formal justice system.[49]

5.16 In IP 23, the Commission asked whether special provision should be made to deal with the possibility that mandatory mediations may be referred to CJCs.[50] In response, some submissions stressed the need for CJCs to be involved in discussions concerning the introduction of compulsory mediation from some referring agencies.[51]

The good faith requirement

5.17 In cases where parties are compelled to take part in mediation they may also be required to participate in the mediation in a particular way, usually "in good faith". A good faith requirement may be imposed, for example, either contractually - by way of an agreement to mediate, or by the courts - supported by statutory good faith provisions such as those found in the *Supreme Court Act 1970* (NSW).[52] There has been considerable debate in recent years about good faith requirements in the context of mediation, including their meaning, their

44. *Strata Schemes Management Regulation 1997* (NSW) cl 22.
45. See para 7.64.
46. See Law Society of NSW, *Submission* at 4.
47. See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 275.
48. See para 7.47-7.48 and para 7.79-7.93 below.
49. Australian Law Reform Commission, *Review of the Federal Civil Justice System* (DP 62, 1999) at para 9.36.
50. IP 23 Issue 9(b).
51. CJCs, Professional Reference Group, *Submission* at 4; CJCs, *Submission 1* at 7.
52. *Supreme Court Act 1970* (NSW) s 110L.

enforceability, and also whether good faith can in fact exist when the parties to a dispute necessarily act in their own interests.[53]

5.18 Whatever meaning can be given to the good faith requirement will depend on the circumstances of each case. However, if statutory schemes are established mandating participation in good faith, determinations may need to be made as to whether the parties have in fact participated in good faith. Given the availability of provisions protecting against disclosure of what occurs in mediations,[54] the courts will generally be unable to investigate or review the issue and will instead be compelled to rely on the determination of the mediators in the matter.[55] If CJCs were to deal with compulsory mediations that are also subject to good faith requirements, a number of questions arise, including whether CJCs mediators would be required to make a determination as to whether the parties in fact participated in the mediation in good faith. It has been noted that in some parts of the United States mediators have been required to report to courts on the nature of the parties' participation, notwithstanding the breach of confidentiality involved.[56] Another question that arises is whether the concept of mediation in good faith will be readily understood by parties in the types of matters that are likely to be referred to CJCs. Negotiation in good faith is a concept that is better understood in the commercial context.

5.19 In IP 23 the Commission asked what implications a requirement to mediate in good faith would have for CJCs mediators when dealing with compulsory mediations.[57] Some submissions raised questions about the difficulty involved in judging whether parties have participated in good faith[58] as well as the undesirability of requiring mediators to report on such matters.[59]

The Commission's view

5.20 It is desirable, so far as possible, to distinguish between the ordering of mandatory mediation on the one hand and the voluntary participation of parties once a dispute has been accepted for mediation by CJCs on the other.

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53. See *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at para 79-159; T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 130-132; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 193-202; D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, Sydney, 2005) at 485-496.
54. See para 6.14-6.30 and para 6.33-6.40 below.
55. See *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 256 (Gleeson CJ), 262-263 (Cole JA) and 266 (Sheppard AJA); *State Bank of New South Wales v Freeman* (NSW SC, No 12670/1995, Badgery-Parker J, 31 January 1996, unreported) at 17; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 202.
56. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 273-274.
57. IP 23 Issue 10.
58. D Rollinson, *Submission* at 1.
59. D Rollinson, *Submission* at 1; Law Society of NSW, *Submission* at 4.

5.21 The Commission considers that we may be witnessing a trend that enables courts to require parties to attempt mediation as a prerequisite to litigation or to obtaining a hearing date, at least in certain disputes,[60] if not generally.[61] The Commission supports this trend. The circumstances in which mediation should be mandatory require an independent investigation that focuses on the jurisdiction and power of the relevant courts or tribunals. These questions are best dealt with in the context of the statutes of the referring bodies, for example, the *Local Courts (Civil Claims) Act 1970* (NSW), rather than in the context of a review of the CJCs Act.

5.22 Current practice is satisfactory in that it allows, for example, magistrates to make robust suggestions without impinging on the ability of CJCs to decide what disputes they may or may not accept and without impairing the principle of voluntary participation once the mediation gets under way. The protections under the CJCs Act will continue in place even if mediations are made mandatory under the statutes of various courts and tribunals.

5.23 Even though there would appear to be limited scope for bad faith participation in the context of CJCs mediations, mediators will still be able to terminate a mediation if they consider one of the parties is mediating in bad faith. Bad faith participation is more likely in matters involving substantial sums of money, usually commercial matters before the District or Supreme Courts, for example, where one of the parties might use the opportunity to mediate as a way of testing the strength of their opponent's case.

5.24 The CJCs approach to mandatory mediation, whether imposed by statute as a pre-condition to litigation or ordered by a court, requires a balancing of various policy considerations and practical questions. These are ultimately questions for the Director to deal with as they present themselves. The input of the reconstituted Council and of the CJCs' reference groups will be valuable in this area.

INTAKE ASSESSMENT

5.25 Intake assessment has been identified in submissions and consultations as an important feature of the work of mediation service providers and as crucial to the effective operation of some mediation services.[62] Intake assessment, which involves a person assessing the suitability for mediation of each dispute that presents itself, is referred to by CJCs as "pre-mediation".

Pre-mediation at CJCs

5.26 CJCs define pre-mediation as "a process in which a third party (the pre-mediator) investigates the dispute and provides the parties or a party to the dispute with advice regarding the issues which should be considered, possible, probable and desirable outcomes and the means whereby these may be achieved".[63] This is similar to the definition of "case appraisal"

60. For example, in the Supreme Court and District Court in NSW.
61. For example, in Ontario.
62. See, eg, ACDC, *Consultation*. There are some services to which intake assessment is not crucial, for example, services that deal with contractually mandated mediations, for example, building construction contracts: ACDC, *Consultation*.
63. CJCs, *Annual Report 2003-2004* at 8.

which is identified by NADRAC as being "a process in which a third party (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved".[64] While there are some broad similarities between pre-mediation and case appraisal, case appraisal (sometimes referred to also as "expert appraisal") is ultimately quite a different process in that it involves the engagement of a third party expert who will conduct an independent investigation of some factual aspects of the dispute before reporting his or her findings to the parties, sometimes with advice as to the "possible, probable and desirable outcomes". The role of the appraiser is essentially that of a fact finder and, in some cases, the parties may agree to be bound by the appraiser's findings.[65] Pre-mediation, on the other hand, is a process by which a third party assesses the suitability of a dispute for mediation and may make recommendations as to the best method for the parties to proceed with the dispute whether by mediation or some other process.

5.27 Pre-mediation at CJCs is carried out initially by regional staff, referred to as "interviewing officers". Every matter is pre-mediated before proceeding to mediation. However, the level of pre-mediation will vary depending on the circumstances. For example, additional assessments will be made if a party has an intellectual or psychiatric disability, is under 16, if the dispute is a workplace dispute, or if there is violence present in the relationship.[66] The 2001-2002 Annual Report observed "face-to-face pre-mediation continues to help prepare clients involved in more complex matters and matters involving potentially disadvantaged and disempowered clients".[67]

5.28 In the Western region of CJCs, mediators have received training in pre-mediation so that they can assess disputes that present in the Small Claims Division at Local Courts in Western Sydney on list days.[68] The Small Claims Division deals only with civil claims where the amount claimed is not more than $10,000.[69]

Functions of pre-mediation

5.29 There are a variety of functions that can be usefully performed by pre-mediators. Ultimately the number of functions that are performed and the level at which they are performed will depend on the resources that are made available in terms of staff, time and training. At its most basic pre-mediation is concerned with:

- the filtering of inappropriate cases by identifying the real issues in dispute and the circumstances and positions of the parties; and
- the preparation of the parties for mediation.

If these functions are not performed at pre-mediation, the mediators themselves will have to decide how to deal with such issues as they arise in the course of the mediation. Being able to

64. National Alternative Dispute Resolution Advisory Council, *ADR Terminology: A Discussion Paper* (2002) at 30.
65. See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 89.
66. CJCs, *Consultation.*
67. CJCs, *Annual Report 2001-2002* at 15.
68. CJCs, *Annual Report 2002-2003* at 5.
69. *Local Courts (Civil Claims) Act 1970* (NSW) s 12(3) and s 12(4).

deal with such matters early in proceedings can lead to savings in time and resources, better safety for all participants (including mediators) and may provide an opportunity for a better outcome for the disputing parties whether mediation is pursued or not.

Identifying persons at risk

5.30 One function of pre-mediation is to identify whether one of the parties (or certain third parties, for example, children) is not in a position to negotiate freely or will be at risk. Pre-mediators in such circumstances will need to have awareness of such matters as family/domestic violence issues, protection of children, and disability.[70]

Filtering out inappropriate cases

5.31 The types of cases that may not be suitable for mediation by CJCs can be identified at intake by pre-mediators. These are discussed elsewhere in this Report.[71]

Referral to other services

5.32 Mediation may not always be the best approach to every dispute that presents itself to CJCs. In some cases one or more of the parties may be unaware of other options that may be available to assist with aspects of their dispute. These other more appropriate options could include legal advice, counselling, medical assistance, financial advice, disability support or dispute resolution by a specialist service.[72]

5.33 Relationships Australia reported that their mediators consider they have a duty to refer parties to appropriate services and will, for example, refer parties to counselling or legal advice for both individuals and families. In some cases men have been directed to services that help them address their violence.[73]

5.34 It has been put to the Commission that the need to match problems with appropriate processes, whether involving alternative dispute resolution or not, is an issue that needs to be addressed by the whole mediation industry.[74]

Preparing participants for mediation

5.35 Pre-mediation can be used to prepare the participants for mediation, for example, by:[75]

- educating the parties about the mediation process;[76]
- educating the parties about alternative ways of dealing with aspects of the dispute;
- identifying and correcting informational disparities between the parties; and

70. On general training in these matters, see para 8.41-8.44.
71. See para 4.18-4.74 above.
72. See, eg, LEADR, *Consultation*.
73. Relationships Australia, *Consultation*.
74. LEADR, *Consultation.*
75. Relationships Australia (NSW), *Consultation*.
76. See para 7.62-7.66.

- (if pre-mediation is conducted by one of the mediators) allowing one of the mediators to build rapport with the parties in advance of the mediation thereby making the participants less apprehensive about the mediation.

Assignment to appropriate mediators

5.36 Pre-mediation also provides the opportunity to match particular disputes with mediators who have appropriate skills or characteristics.

5.37 At CJCs mediators are assigned to disputes by an interviewing officer on behalf of the relevant Centre Co-ordinator. The responsibility for assigning the mediators rests with the relevant Centre Co-ordinator on delegation from the CJCs Director. The Co-ordinators attempt to assign the most appropriate mediators to each session, with a view to equal distribution of the workload but also bearing in mind such variables as client comfort and needs, the type of dispute, the mediators' abilities, availability and any requirements for specialised mediators.[77]

5.38 One submission highlighted the desirability of taking account of other life experience in allocating mediators to particular disputes.[78]

5.39 ***Cultural issues.*** The question of allocating mediators when disputants from different cultures are involved in a mediation is an important one, the more so in the context of a community mediation service. There are two ways of dealing with cultural issues at the pre-mediation stage. One is to allocate one or more mediators who come from the same cultural background as one or more of the parties to the dispute. The other is to allocate mediators who have training in cross-cultural issues.

5.40 In some cases it will be appropriate to have a mediator from the same cultural or ethnic background as one of the parties. For example, it has been suggested that some Indigenous people would feel more comfortable with an Indigenous mediator present in the mediation.[79] It was also suggested that if there was a dispute between an Indigenous person and a non-Indigenous person the non-Indigenous person might feel threatened by having two Indigenous mediators.[80]

5.41 However, there will also be circumstances in which the parties may prefer that the mediators not come from their community because they are worried about their private business becoming known in their community. In other cases parties from other cultures may simply be looking for a respectful attitude in a mediator rather than for someone from their own culture.[81] The assessment of such matters is a question for the intake officer.

77. CJCs, "Assigning Mediators" (unpublished paper, 10 January 1996); CJCs, *Consultation*.
78. J Courcier, *Submission* at 2.
79. Redfern Community Centre, *Consultation.*
80. Redfern Community Centre, *Consultation.* On co-mediation, see para 7.51-7.56.
81. Relationships Australia, *Consultation*. See also para 2.22-2.27 and para 9.32.

Pre-mediators

5.42 Some submissions suggested that pre-mediators required special training and skills.[82] Ideally pre-mediators would have the depth of experience or knowledge to be aware of several approaches to the resolution of a dispute.[83] They would also have the independence to say when mediation is not the answer to a particular dispute[84] and be able to identify when specialist assistance is needed.[85]

5.43 There were a number of suggestions as to who could carry out pre-mediation. One suggestion was that an appropriately trained chamber magistrate could do a good job.[86] It was also suggested that other agencies could provide pre-mediation, for example, the Housing Department.[87] It was also noted that in the United States intake officers are usually highly skilled and embedded in their organisation (for example, in-house lawyers or human resources specialists).[88] It was suggested that lawyers might be useful since they can understand the legal options available to the parties.[89]

5.44 It was also suggested that mediators themselves could undertake pre-mediation, one suggestion being that higher level mediators could act as intake assessors at a higher remuneration.[90] At Relationships Australia, for example, after an initial contact with an intake officer, the parties are referred to a mediator for a detailed pre-mediation assessment. The mediator who conducts the pre-mediation sessions then goes on to conduct the mediation, usually with another mediator. The whole assessment process at Relationships Australia usually takes about 3 hours.[91]

Need for competency standards

5.45 While CJCs have a set of competencies for mediators that requires a degree of familiarity with some aspects of pre-mediation, there is no specific set of competencies that relate to the work of those who must conduct pre-mediations.[92] However, the training currently offered by CJCs in pre-mediation aims to equip pre-mediators with certain competencies in three broad areas:

- assessment of the suitability of the dispute for mediation or other conflict management process;
- preparation of the parties for the process they are about to undertake; and
- administration.

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82. ACDC, *Consultation*; LEADR, *Consultation*.
83. LEADR, *Consultation*; ACDC, *Consultation*.
84. LEADR, *Consultation.*
85. ACDC, *Consultation*.
86. ACDC, *Consultation*.
87. ACDC, *Consultation.*
88. LEADR, *Consultation*.
89. LEADR, *Consultation*.
90. LEADR, *Consultation.*
91. Relationships Australia (NSW), *Consultation*.
92. See para 7.10.

The assessment process includes providing the parties with sufficient information to make an informed choice about participating, referring the parties to other sources of assistance where appropriate and generally assessing the suitability of the dispute for mediation at CJCs.[93]

5.46 NADRAC has identified "a variety of analytical and interpersonal skills used to conduct a sound assessment of a dispute for any particular ADR process or processes". These skills can be demonstrated by:

- *accurately and concisely analysing the issues presented to assess the most suitable process*
- *accurately and effectively referring parties to other services which may be more appropriate*
- *assessing parties' capacity to negotiate*
- *understanding the emotions and expectations of parties*
- *determining the parties' readiness to consider and commit to ADR processes, rather than continue the fight*
- *preparing and counselling parties in preparation for an ADR process*
- *assessing power differentials between parties, including the timely and effective exclusion of ADR where appropriate*
- *providing accurate, timely and relevant information about the ADR processes available, and other resources*
- *evaluation of factors such as apprehension of violence, security issues, age of the parties, issues affecting a party from a non-English speaking background, the need to seek advice, the legal or factual complexity of the matter, the precedential value of a formal resolution of an issue and the need for public sanctioning of particular conduct*
- *reassessing when necessary during the process in the light of new information.*[94]

5.47 Given the key role of pre-mediation in the effective operation of a mediation service, the Commission considers that it is important that CJCs develop, for endorsement by the CJCs Council, a set of competencies to be met by those who conduct pre-mediation at CJCs .

93. Information supplied by D Sharp, Director, CJCs (21 October 2004).
94. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney General, 2001) at 105.

RECOMMENDATION 8

CJCs should develop a set of competencies to be met by those who conduct pre-mediation at CJCs.

The need for training?

5.48 Some pre-mediation training is being offered by CJCs.[95] CJCs pre-mediation training looks at the process and the issues that pre-mediators need to consider.[96] Currently, beyond what CJCs have to offer, there is no training available for intake assessors.[97] The current pre-mediation training[98] would appear not to deal specifically with issues of violence and power imbalance. While this is the case, there is a danger that neither interviewing officers nor mediators may be sufficiently trained in dealing with issues that go to the heart of the question whether a particular dispute is suitable for mediation.

The Commission's view

5.49 The Commission is of the view that CJCs should investigate the desirability of diverting further resources into pre-mediation, including pre-mediation training, with a view to the overall improvement of their mediation service. A variety of issues need to be considered including:

- whether CJCs staff, higher level mediators or a combination of both, could undertake pre-mediation;
- what training should be required and in particular whether pre-mediators should be trained to identify and deal with such matters as, for example, intellectual disability, age and violence; and
- what guidelines and policies should be in place to regulate the operation of pre-mediation at CJCs.

Some of these matters, as the subject of policies and guidelines, could benefit from the input and endorsement of the CJCs Council.

PRESENCE OF OTHER PERSONS IN THE MEDIATION

5.50 On some occasions the question has arisen of persons other than the parties to the dispute being present at a mediation. Such people may perform a number of roles including that of a representative or agent of one of the parties to the dispute, a support person or advisor, or an interpreter. Agents and representatives are people who stand in the place of a party to the dispute and take a direct role, either for all or part of the mediation instead of that party. Support persons and advisors, however, do not represent parties to a mediation but merely assist those who are already participating in the mediation on their own account. In some cases each of these roles is important for assisting parties to participate effectively in a mediation. For example, it is recognised that some persons, particularly those with a disability, may require an

95. See, eg, para 5.28.
96. CJCs, *Consultation.*
97. LEADR, *Consultation*.
98. Information supplied by D Sharp, Director CJCs (21 October 2004).

agent to represent their interests effectively in mediation. In practical terms such a person's role may vary depending on the needs of the person with the disability and could range from being a support person who can assist the person with the disability to understand what is going on or to present their own views, to being an advocate who represents the perceived interests of the person with the disability.[99]

5.51 The Act makes specific provision in relation to the situations when agents may represent parties to a dispute.[100] However, the Act does not make any specific provision for the presence of persons other than agents, such as support persons, advisors or interpreters but merely states that "persons who are not parties to a mediation session may be present at or participate in a mediation session with the permission of the Director".[101]

5.52 The question of the presence of lawyers, whether as agents/representatives or as support persons, has been the subject of some debate in the mediation community and is dealt with separately, below.[102]

Representatives and agents

5.53 The Act restricts the use of agents to represent the parties in a mediation. It essentially does two things in this regard. First, it identifies the circumstances in which an agent may be used without the need to seek approval from the Director of CJCs and, secondly, it identifies situations where an agent may be used subject to the approval of the Director of CJCs.[103]

5.54 Agents may be used where one of the parties to the dispute is a corporate entity.[104] In the case of a corporation under the *Corporations Act 2001* (Cth) the agent must be an officer of the corporation; in the case of an owners corporation under the *Strata Schemes Management Act 1996* (NSW) the agent must be one of the proprietors or leaseholders under the scheme; and in the case of any other corporation (including, presumably, an incorporated association under the *Associations Incorporation Act 1984* (NSW)), the agent may simply be somebody appointed by that organisation.

5.55 In all other cases a party to a mediation is not entitled to be represented by an agent unless the Director considers that, in the dispute in question:

> *(i) an agent should be permitted to facilitate mediation, and*

99. J Simpson, "Guarded Participation: Alternative Dispute Resolution and People with Disabilities" (unpublished report on a research project carried out with funding from the Law and Justice Foundation of NSW, 2002) at 10-11.
100. *Community Justice Centres Act 1983* (NSW) s 25.
101. *Community Justice Centres Act 1983* (NSW) s 21(5).
102. See para 5.73-5.83.
103. *Community Justice Centres Act 1983* (NSW) s 25. The required assessment and approval can be delegated to other CJCs staff, for example, Co-ordinators or intake officers, but apparently not to mediators: *Community Justice Centres Act 1983* (NSW) s 13.
104. *Community Justice Centres Act 1983* (NSW) s 25(2).

> *(ii) the agent proposed to be appointed has sufficient knowledge of the matter in dispute to enable the agent to represent the party effectively.*[105]

5.56 In approving the use of an agent, the Director may impose such conditions as the Director considers necessary to ensure that any other party to the mediation "is not substantially disadvantaged" by the use of the agent.[106]

5.57 One reason for restricting the situations where parties to a dispute can be represented by an agent (whether a lawyer or not) is that it is sometimes thought that such representation is only really effective where the issues in dispute have been narrowly confined. Such confinement of the issues restricts the processes of "explanation, exploration and negotiation" which are said to be necessary to successful mediation.[107]

5.58 The position of CJCs would appear not to have changed since 1985 when it was observed that:

> *There have been few occasions where the Director has approved representation by an agent. In almost every case, representation has restricted the scope of the mediation to a narrow range of issues, has severely limited the effectiveness of the mediation and reduced the satisfaction of all parties. In a comparatively few cases, an agent has effectively represented a disputant at a mediation session. Without exception these were disputes involving a single issue with little or no emotional component.*[108]

However, the carefully considered use of such agents has the potential to protect the interests of people with disabilities. It has been suggested that the agent in such cases should be somebody with knowledge of the person-their needs and interests-and the dispute, for example, a guardian, family member or friend.[109] This accords with the requirement in the Act that the Director must be satisfied that the agent "has sufficient knowledge of the matter in dispute to enable the agent to represent the party effectively".[110] There is also a question of conflicts of interest with some agents, for example, where there is a coercive relationship or where there may be a financial interest in certain outcomes.[111]

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105. *Community Justice Centres Act 1983* (NSW) s 25(1).
106. *Community Justice Centres Act 1983* (NSW) s 25(3).
107. W Faulkes, "Pursuing the Best Ends by the Best Means" (1985) 59 *Australian Law Journal* 457 at 458.
108. W Faulkes, "Pursuing the Best Ends by the Best Means" (1985) 59 *Australian Law Journal* 457 at 458-459.
109. J Simpson, "Guarded Participation: Alternative Dispute Resolution and People with Disabilities" (unpublished report on a research project carried out with funding from the Law and Justice Foundation of NSW, 2002) at 10.
110. *Community Justice Centres Act 1983* (NSW) s 25.
111. J Simpson, "Guarded Participation: Alternative Dispute Resolution and People with Disabilities" (unpublished report on a research project carried out with funding from the Law and Justice Foundation of NSW, 2002) at 10.

5.59 In IP 23 the Commission asked what provision should be made for parties who are not able to take part in CJC mediations effectively on their own account, in particular in relation to the representation of their own interests in the mediation.[112]

5.60 Some submissions stated that no change was required because the Act currently provides an adequate framework for dealing with such issues.[113] One submission stated that there needed to be a clear delineation of roles between representatives and agents on the one hand and support persons or advisors on the other.[114] Another submission suggested that the consent of all parties to the mediation should be required before a person could act as a representative or agent of one of the parties to a dispute.[115]

The Commission's view

5.61 The current legislative provision is adequate to deal with the question of the participation of agents and representatives at a mediation. The use of agents or representatives will be appropriate in some circumstances, but these need to be assessed on a case by case basis. There has been nothing in our submissions or consultations to suggest that this should be otherwise. Also no additional provision would appear to be required. In particular there is no need for an express provision requiring the consent of the parties to the presence of others in the mediation since the absence of consent from one party will mean the mediation will not go ahead in any case. Consent from all parties should be just one factor the Director takes into consideration in deciding whether to allow agents or representatives to take part in a mediation.

5.62 An important protection for parties who are being represented by an agent is the ability of the mediators to terminate the mediation if the mediators believe that the agent or representative has "subsequently lost the confidence or authority" of the party they are representing.[116] Nothing would appear to prevent a mediator from exercising their discretion in this regard.

5.63 If circumstances alter in the future it may be necessary for the Council to develop a policy to guide the Director in the exercise of the discretion. However, there is no evidence to suggest that such a policy is required.

Support persons

5.64 Support persons are those who are present not in a representative capacity, but rather to provide some form of assistance or advice to parties who are already participating in the mediation to some extent. Support persons and advisors are not covered by the provisions in the Act that cover agents who act as representatives. Yet some of the concerns about the imbalance that agents may cause in a mediation would apply equally to support persons and advisors. CJCs' current practice is to advise potential parties to a mediation that support people may attend if required, but they may not participate in the session.

112. IP 23 Issue 13.
113. CJCs, Professional Reference Group, *Submission* at 6; CJCs, *Submission 1* at 9.
114. D Rollinson, *Submission* at 1.
115. D Rollinson, *Submission* at 1; Law Society of NSW, *Submission* at 5.
116. Compare *Anti-Discrimination Act 1977* (NSW) s 88.

5.65 In IP 23 the Commission asked what provision should be made for parties who are not able to take part in CJC mediations effectively on their own account, in particular in relation to the presence of support persons in the mediation.[117]

5.66 Some submissions considered that no further provision needed to be made to deal with the use of support persons, since the Act currently provides adequate framework for dealing with such issues.[118]

5.67 One submission called for a clear delineation of roles in respect of support persons.[119] Another submission suggested that the consent of all parties to the mediation ought to be required before a support person could be used.[120]

5.68 One submission suggested it should be possible to have a support person "such as an advocate, guardian or family member" for people with disabilities.[121] One submission particularly raised the issue of the presence of Department of Community Service workers.[122] The CJC Professional Reference Group has suggested that the Act could authorise a "representative agent to be present under any Memorandum of Understanding or Agreement made between any Department or Authority with the CJCs".[123]

The Commission's view

5.69 The presence of support persons in a mediation is an issue of a different order to that of the presence of representatives and agents. While it is possible that the presence of support persons or advisors could advantage particular parties to a mediation in much the same way as the presence of an agent could, the Commission nevertheless considers that a different response ought to be adopted. This is because there is a difference between an agent or advocate, who essentially acts in place of a party, and a support person who helps a party to participate in the mediation. The presence of a support person is often very important to deal with issues of power relationships in mediations. The presence of a support person may make the difference between a person being able to negotiate effectively having regard to their own needs and interests and the mediation not proceeding. Support persons can be common in some types of disputes, and mediators should be able to negotiate the participation of support persons with the disputing parties and handle the dynamics once the mediation gets under way.

5.70 Making the presence of agents or representatives subject to approval by the Director is essentially a means of managing a situation that could impact negatively on a mediation.[124] The presence of support persons, on the other hand, is more likely to have a positive effect on a mediation, so the participation of support persons is best managed by the mediators at the time the issues present themselves. The ability of the parties to the mediation to terminate the mediation at any time is also an important protection in this context.

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117. IP 23 Issue 13(a)
118. CJCs, Professional Reference Group, *Submission* at 6; CJCs, *Submission 1* at 9.
119. D Rollinson, *Submission* at 1.
120. D Rollinson, *Submission* at 1; Law Society of NSW, *Submission* at 5.
121. J Mann, *Submission* at 2.
122. CJCs, *Preliminary Submission* at 5.
123. CJCs Professional Reference Group, *Preliminary Submission* at 7.
124. See para 5.57-5.58, 5.61-5.62.

5.71 Particular care ought to be exercised, however, to ensure that some mediation outcomes are not subject to challenge on natural justice grounds, for example, on the basis that one party in the mediation was allowed a support person and one party was denied it. Such challenges might conceivably occur in situations where the mediation is a precondition to proceedings in a court or tribunal.[125] Mediators will also need to ensure that the use of support persons and advisors is not a back-door means of getting around the restrictions on the use of agents and representatives.

5.72 Nothing in the CJCs Act currently prevents the presence of support persons in a mediation being dealt with as discussed above. No change is, therefore, necessary.

Lawyers

5.73 Lawyers have been singled out as a group because of their connection with more traditional means of resolving disputes and the impediments their presence may place on a successful resolution of a dispute by mediation. Lawyers may be present in a mediation as agents or representatives, support people and/or advisors. The arguments above about the general undesirability of the use of agents to represent some parties apply equally to the use of lawyers as such agents. Much of the discussion that follows assumes that the attendance of a lawyer will be in a supportive or advisory capacity rather than as a representative or agent.

5.74 Despite there being no express provision prohibiting the participation of lawyers in CJCs mediations, it was intended from the beginning that lawyers not be involved in the mediations conducted at CJCs.[126] However, there would appear no bar to legal practitioners attending the mediation session (presumably in a non-representative capacity) so long as the Director, mediators and parties have consented. In practice, however, legal practitioners do not attend mediation sessions.[127] It is the practice in CJCs to advise the parties to a dispute to seek legal advice before they mediate.[128] In consultations with the Commission CJCs emphasised the importance of lawyers in supporting the mediation process and in helping clients to understand their legal rights and obligations.[129]

5.75 In IP 23 the Commission asked whether lawyers who are not parties to the mediation should have any role in mediations conducted by CJCs.[130] Most responses to this issue either

125. See, eg, M Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733 at 754-755. See also *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.
126. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 26 November 1980 at 3589, 3591.
127. C McRobert, "Mediation in Local Courts: An Alternative to Contested Hearings" (1990) 28(11) *Law Society Journal* 50 at 51.
128. See W Faulkes, "Runs on the Mediation Scoreboard" (1985) 59 *Law Institute Journal* 206 at 207; J Williams, "Community Justice Centres: Marking 10 Years of Service" (1990) 28(11) *Law Society Journal* 48 at 50.
129. CJCs, *Consultation*.
130. IP 23 Issue 12.

supported the current position of not having any formal provision[131] or made comments about the desirability or undesirability of having lawyers present in a mediation.

Benefits

5.76 The presence of lawyers in a mediation may be beneficial in some cases. There can be practical reasons for lawyers to be involved in a mediation process. For example, lawyers may be useful in clarifying facts or assisting with inarticulate or stressed persons who are parties to a mediation.[132] They can also help the parties in drafting the terms of an agreement.[133] It has also been suggested that lawyers have proved useful where a party has, for example, a cognitive disability.[134]

5.77 Lawyers may also provide disputants with assessments of the likely outcome, or range of outcomes, if a matter is litigated, thus giving parties information they need in order to assess offers to settle in mediation.[135] In some cases they may also go beyond the provision of information and actually recommend compromise.[136] There is some evidence to suggest, at least in relation to family law matters, that the presence of lawyers in the process (to provide, among other things, advice and support) can often be beneficial, being more likely to result in consensual agreements.[137]

5.78 Another point in favour of lawyers as support persons is that they are "rational and unemotionally attached to the conflict".[138] They may also assist in redressing some power imbalance situations[139] and help the parties to negotiate from a position of knowledge.[140]

5.79 Some submissions suggested that if all parties are adequately informed and freely consent to the presence of lawyers, there should be no reason why lawyers should not be able to participate in a mediation.[141] Another submission suggested that lawyers must be "willing to act as support to parties, prepared to help their client negotiate a compromise agreement which both parties can live with and follow the direction of the mediators".[142]

Disadvantages

5.80 However, the presence of lawyers may:

131. D Rollinson, *Submission* at 1; CJCs, Professional Reference Group, *Submission* at 6; CJCs, *Submission 1* at 9.
132. M Thornton, "Equivocations of Conciliation: the Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733 at 754.
133. Law Society of NSW, *Submission* at 5.
134. J Courcier, *Submission* at 2.
135. R Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 *Journal of Law and Society* 156 at 158-161, 176.
136. Law Society of NSW, *Submission* at 5.
137. R Hunter "Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law" (2003) 30 *Journal of Law and Society* 156 at 158-161, 176.
138. Confidential 2, *Submission* at 2.
139. Law Society of NSW, *Submission* at 5.
140. Law Society of NSW, *Submission* at 5.
141. R G Jones, *Submission* at 2; Law Society of NSW, *Submission* at 5.
142. J Courcier, *Submission* at 2.

- inhibit the open discussions that may take place during mediation;[143]
- disempower individuals and prevent them from resolving their own issues;[144]
- create a power imbalance if one party does not have or cannot afford a lawyer;[145]
- lead, in some cases, to the lawyer dominating the proceedings;[146]
- impede the reaching of settlement in civil claims because of the adversarial approach of lawyers;[147] and
- impact adversely on the informality that is considered a positive feature of mediation proceedings.[148]

One submission suggested that if legal advice is required during a mediation this can be obtained outside the mediation context.[149]

The Commission's view

5.81 There are good arguments for and against the presence of lawyers in a mediation. There are clearly circumstances in which the presence of lawyers may be beneficial. No problem would appear to have arisen from the absence of an express ban on the attendance of legal practitioners.

5.82 The presence of legal practitioners might become more of an issue if, for example, more matters from Local Courts, where lawyers might already have been engaged by some parties, were referred to CJCs for compulsory mediation.

5.83 Clearly a case by case assessment is required as to whether it is appropriate for a lawyer (who is not a party to the mediation) to be present in a mediation.

Interpreters

5.84 There is currently no provision governing the use of interpreters in a mediation session. The provision of interpreters is a necessary component of a mediation service if CJCs are to provide services to culturally and linguistically diverse communities.

5.85 The question is probably not so much whether a provision is required to regulate the use of interpreters but rather to protect an important right for some members of the community to access public facilities on an equal footing with the general community. Clearly each party who needs one ought to have an interpreter as of right. And the use of an interpreter ought not to require consent by the other parties to the mediation.

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143. J Mann, *Submission* at 1.
144. J Mann, *Submission* at 1.
145. CJCs, Professional Reference Group, *Submission* at 6; J Mann, *Submission* at 2; CJCs, *Consultation*.
146. CJCs, *Consultation*.
147. J Mann, *Submission* at 2.
148. M Thornton, "Equivocations of Conciliation: The Resolution of Discrimination Complaints in Australia" (1989) 52 *Modern Law Review* 733 at 754, 756.
149. J Mann, *Submission* at 2.

5.86 However, the use of one interpreter for both parties in some mediations was called into question. It has been suggested that a single interpreter may take sides against one party, especially in some ethnic communities where there may be traditional views about the role of women, for example. The use of one interpreter for each party was considered to be better practice.[150] The Commission agrees that each party ought to be entitled to their own interpreter to ensure that their individual interests are adequately represented in the mediation.

5.87 The Commission considers that no provision need be made for interpreters in the Act. The Director, in managing the conduct of mediations, will be subject to government policies that require the provision of interpreters in the delivery of Government services. It is currently government policy that interpreter assistance is provided to clients who require assistance to ensure equality of access to all government services.[151] No regulation is, therefore, necessary at present.

ENFORCEABILITY OF OUTCOMES

5.88 The Act provides that any agreement reached at a mediation session "is not enforceable in any court, tribunal or body".[152] This provision was included because court enforcement of such resolutions would not be "consonant with the basic concept" that resorting to a CJC is a "real alternative to the court system".[153] However, there is nothing to prevent the parties, if they wish, from concluding an enforceable legal agreement at a later date.[154] Such outcomes are common in other areas, for example, agreements incorporated into consent orders in family law cases.

5.89 Concerns have been raised about the non-enforceability of mediated agreements at CJCs. Some commentators consider that making agreements enforceable would make CJCs more effective.[155] The problem has also been raised of some parties acting in reliance upon unenforceable agreements and incurring expenditure as a result. For example, one party to a fence dispute could incur expenses under a mediated outcome and the other party could simply refuse to pay.[156]

5.90 However, there are a number of problems with allowing for enforceable agreements. For example, the question arises as to how such agreements are to be enforced, presumably by legal proceedings of some sort. There are also issues surrounding the need for legal advice:

150. Redfern Legal Centre, *Community consultation*.
151. See NSW, *Premier's Memorandum* 98-22.
152. *Community Justice Centres Act 1983* (NSW) s 23(3).
153. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 November 1980 at 3149.
154. See W Faulkes, "Runs on the Mediation Scoreboard" (1985) 59 *Law Institute Journal* 206 at 207.
155. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 194; W Harris, "Consumer Disputes and Alternative Dispute Resolution" (1993) 4(3) *Australian Dispute Resolution Journal* 238 at 242.
156. Registrars, Local Courts, *Consultation*.

- some parties might be reluctant to sign agreements without getting them checked by lawyers first;[157]
- there may be risks involved in some parties entering a binding agreement without the opportunity to obtain legal advice;[158] and
- it is possible that such agreements may be unconscionable if the parties have not been able to refer to legal advisors.[159]

Some submissions supported a more flexible arrangement whereby parties could agree to the binding nature of any agreement resulting from a CJCs mediation.[160]

5.91 Queensland adopted the New South Wales provision verbatim in 1990. However, in 1997, the following proviso was added to the non-enforceability of any agreement reached at a mediation session:

> *unless the parties agree in writing that the agreement is to be enforceable.*[161]

This may have been necessitated by the move towards court-referred mediations which were formalised in the Queensland Act in 1997.[162] In some of these cases the parties will already have legal practitioners to advise them.

5.92 The Commission does not consider that change to the current provisions is warranted given:

- the possibility of harm arising from an enforceable agreement entered into without legal advice; and
- the difficulty involved in actually enforcing any agreement so made.

5.93 There are also practical ways of dealing with some of the problems arising from the unenforceability of mediated agreements at CJCs. For example, where one of the parties is likely to incur liability as a result of an agreement, the mediators might advise the parties to seek an enforceable agreement outside the CJCs process.[163]

157. CJCs, *Submission 1* at 17.
158. Law Society of NSW, *Submission* at 11.
159. See R P Meagher, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th edition, Butterworths, 2002) at 16-035.
160. Confidential 2, *Submission* at 3; Law Society of NSW, *Submission* at 11.
161. *Dispute Resolution Centres Act 1990* (Qld) s 31(3) as amended by *Courts Reform Amendment Act 1997* (Qld) s 34.
162. *Courts Reform Amendment Act 1997* (Qld) Part 5.
163. Registrars, Local Courts, *Consultation*.

6. Protections

- Exoneration from liability
- Confidentiality
- Privileges

6.1 The CJCs Act has put in place a number of protections for those involved in the mediation process, including mediators, the parties to the mediation and referring agencies. These protections have been enacted with the general aim of ensuring that people can take part freely in the mediation process, or encourage others to take part in it, without fear of any legal or other consequences that may arise. When Neighbourhood Mediation Centres were introduced in Victoria in 1987 it was suggested that experience in New South Wales and New Zealand showed that:

> *mediation will be … less likely to succeed if parties fear that what they say in a mediation session may be used against them in later proceedings or if mediators are free to disclose statements a party may make to a third party.*[1]

Experience in New South Wales and New Zealand was also said to have shown that:

> *mediators may feel and, in fact, may be compromised if they believe that their activities as mediators may expose them to civil or criminal prosecution.*[2]

The provisions outlined below aim to overcome some of these concerns. The provisions also have implications for the accountability of mediators for their conduct in the course of a mediation. The question of mediator accountability is dealt with in Chapter 7 of this Report.[3]

EXONERATION FROM LIABILITY

Mediators and other officers and staff of CJCs

6.2 The Act exonerates a number of people from "any action, liability, claim or demand" arising from its execution, so long as they act in good faith. These people include members of the Council, mediators and the Director and staff of CJCs.[4] Similar provisions with respect to exoneration were added to the statutes of various courts in 1994 and apply in relation to mediators and neutral evaluators where the courts have referred matters for mediation or neutral evaluation under their respective statutes.[5] Queensland has enacted a provision that is, in all essential respects, the same as that in New South Wales.[6] Victoria has enacted a broadly similar provision.[7]

6.3 The appropriateness of the immunity for mediators is the subject of some debate. Arguments in favour of a general immunity include:[8]

- it allows mediators to act impartially without fear of legal action from either side;
- it ensures finality in mediation in so far as it prevents litigation arising from the process of mediation.

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1. Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 April 1987 at 1536.
2. Victoria, *Parliamentary Debates (Hansard)* Legislative Assembly, 29 April 1987 at 1536.
3. See para 7.47-7.48, 7.79-7.93.
4. *Community Justice Centres Act 1983* (NSW) s 27(1).
5. See, for example, District Court Act 1973 (NSW) s 164H; Land and Environment Court Act 1979 (NSW) s 61K; Local Courts (Civil Claims) Act 1970 (NSW) s 21S; Supreme Court Act 1970 (NSW) s 110R.
6. *Dispute Resolution Centres Act 1990* (Qld) s 35(1).
7. *Evidence Act 1958* (Vic) s 21N.
8. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 190-191. See also R Carroll, "Mediator Immunity in Australia" (2001) 23 *Sydney Law Review* 185 at 205-219.

Extent of the protection

6.4 One issue to be considered is the extent of the protection offered. At present the protection exonerates a person from "any action, liability, claim or demand" arising from the execution of the Act so long as they act in good faith. Different coverage is offered in the Australian Capital Territory Act which gives a mediator, acting in good faith, "the same protection and immunity as a judge of the Supreme Court".[9] In some Commonwealth statutes mediators are granted more extensive immunity,[10] having "the same protection and immunity as a Judge has in performing the functions of a Judge" but without the "good faith" requirement.[11]

6.5 However, the interests of participants also need to be taken into account. While it has been noted that the parties are essentially responsible for any outcomes and that mediators should, therefore, not be liable for any mediated agreement or its consequences, it has been suggested that some provision should be made to guard against bad practice:

> *should there be liability for gross misconduct by a mediator during the mediation process, for procedural aspects of the mediation, or for a breach of ethical obligations, for example failure to deal effectively with power relationships between parties, or even for sexual harassment?*[12]

6.6 NADRAC has proposed that the protections offered by immunity provisions be reduced in favour of increased consumer protection. It has suggested that the immunity provisions should only be available to providers with an appropriate code of practice in place. Such a code of practice would include a mechanism for consumer redress.[13] One submission suggested that mediators should be liable for breach of contract (for example, where the contract is not to give advice or to breach confidentiality) or bad faith.[14] However, the Commission has received no evidence to suggest the need to change the current provisions. The question of consumer input and redress is dealt with in Chapter 7 of this Report.[15]

Extension to others

6.7 Another question is whether similar protections ought to be extended to the "officers, employees or other staff, of any Department of the Government or of any local or public authority or other organisation" who may be engaged by the Council for the purposes of the Act.[16] It is possible that the exoneration already applies to such people since the current protection extends to "a person acting under the direction of or with the authority of, the Council".[17]

6.8 One submission suggested a further extension of coverage for people involved with CJCs in a professional capacity but who are not mediators or staff or engaged by the Council, for

9. *Mediation Act 1997* (ACT) s 12.
10. See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 189.
11. *Federal Court of Australia Act 1976* (Cth) s 53C. See also *Family Law Act 1975* (Cth) s 19M.
12. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 191.
13. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.28, 4.36.
14. Law Society of NSW, *Submission* at 10.
15. Para 7.67-7.93.
16. Under *Community Justice Centres Act 1983* (NSW) s 8. See NSW, *Parliamentary Debates (Hansard)* Legislative Council, 26 November 1980 at 3587.
17. *Community Justice Centres Act 1983* (NSW) s 27(1)(b).

example Police. This submission also suggested that the "current scope is important because it enables community members to act as mediators without fear of legal action".[18]

6.9 Again, the Commission has no basis for suggesting any change to the current provisions in this regard.

Members of the Police Service

6.10 The Act also exonerates members of the Police Service from any liability arising in respect of the referral of a matter to mediation rather than proceeding with charge or prosecution.[19]

6.11 The provision was inserted at the request of the police authorities who were concerned about laws making it an offence for police officers not to charge persons in certain circumstances.[20] The concern would appear to have been in relation to the common law misdemeanours of misprision of felony and compounding a felony (that is, preventing the prosecution of a crime) which have since been replaced in New South Wales by statutory offences of concealing serious indictable offences.[21] It has also been said that police were concerned about being charged with false imprisonment if they arrested someone and took them to a CJC instead of to a Justice as was required by law.[22] The provision is therefore aimed at encouraging "officers to refer all appropriate cases to mediation rather than using criminal proceedings where they are not appropriate", for example cases of minor assault where a criminal sanction is "unlikely to resolve a continuing dispute".[23] Queensland has enacted a similar provision.[24]

Domestic violence offences

6.12 Exoneration of police officers from liability does not extend to domestic violence offences within the meaning of the *Crimes Act 1900* (NSW).[25] This reflects the policy of the government at the time the Act was passed that all domestic violence offences ought to be brought before the courts.[26] Queensland has enacted a similar provision.[27]

6.13 No submissions were received in respect of the above matters and the Commission can find no basis for suggesting any change to these provisions.

CONFIDENTIALITY

6.14 It has been said that mediation is essentially a private process and that "confidentiality lies at the heart of the mediation process and is one of its defining characteristics".[28] On a more practical level, the personal nature of many disputes brought to CJCs requires the existence of some guarantees of confidentiality for the parties. Such guarantees of confidentiality help to build

18. CJCs, Professional Reference Group, *Submission* at 10; See also CJCs, *Submission 1* at 16.
19. *Community Justice Centres Act 1983* (NSW) s 27(2).
20. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 26 November 1980 at 3700.
21. *Crimes Act 1900* (NSW) s 316. See NSWLRC, *Review of Section 316 of the Crimes Act 1900 (NSW)* (Report 93, 1999) at para 2.2.
22. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 26 November 1980 at 3701.
23. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1882.
24. *Dispute Resolution Centres Act 1990* (Qld) s 35(2).
25. *Crimes Act 1900* (NSW) s 4.
26. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1882.
27. *Dispute Resolution Centres Act 1990* (Qld) s 35(3).
28. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 178.

the community's trust in CJCs.[29] Confidentiality of proceedings was also seen as a positive selling point for CJCs mediations. One submission suggested that confidentiality might be an incentive if parties realised that once a dispute goes to court it enters the public arena.[30]

6.15 Confidentiality may be provided for in a number of ways, including by way of a confidentiality clause to an agreement to mediate, by codes of conduct for mediators and by legislation.[31] The US *Model Standards of Conduct for Mediators* suggest that a mediator "shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy".[32] These principles appear to be adequately provided for by the CJCs Act which requires mediators maintain the secrecy of disclosures related to a mediation session.[33]

6.16 The New Jersey Court Rules make similar provision with respect to confidentiality but add:

> *No mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter.*[34]

Such a protection could have the effect of allowing the parties to be completely open in their dealings with mediators, particularly in any pre-mediation sessions conducted by the mediator where each party is allowed to put their position to the mediator in a private session.

6.17 No problem was identified with the CJC confidentiality provisions when they were introduced into other New South Wales legislation in 1994.[35]

Exceptions to confidentiality

6.18 There are some necessary exceptions to the confidentiality provisions. For example, a mediator or other officer may disclose information "where there are reasonable grounds to believe that disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property" or where the disclosure is "in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth".[36] This would appear to anticipate the availability of other statutes that encourage disclosure, for example, s 316 of the *Crimes Act 1900* (NSW) which places penalties on people who fail to disclose the commission of serious indictable offences by others.[37] Disclosure is also permitted with the consent of the party from whom the information was obtained.[38]

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29. NSW *Parliamentary Debates (Hansard)* 19 November 1980 at 3149.
30. Registrars, Local Courts, *Consultation*. It has also been suggested that confidentiality is a reason for commercial disputants sometimes preferring to have matters dealt with by mediation rather than in open court, especially in relation to sensitive areas of their operation: D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, Sydney, 2005) at para 8.10.
31. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 178; T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 129-130.
32. US *Model Standards of Conduct for Mediators* item V.
33. *Community Justice Centres Act 1983* (NSW) s 29(1).
34. *New Jersey Court Rules 1969* r 1:40-4(c).
35. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 10 May 1994 at 2144.
36. *Community Justice Centres Act 1983* (NSW) s 29(2)(c), s 29(2)(f).
37. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 10 May 1994 at 2144.
38. *Community Justice Centres Act 1983* (NSW) s 29(2)(a).

6.19 Similar confidentiality provisions have now been introduced for other mediation schemes in various New South Wales courts.[39] Queensland and Victoria have enacted provisions similar to those in New South Wales.[40] The Australian Capital Territory Act also contains a comparable provision.[41] However, it goes further than the New South Wales Act in that it not only allows disclosure when injury or property damage is threatened but also when it is necessary to report the commission or threat of such offences to the appropriate authorities.[42]

6.20 No significant general concerns were identified in relation to the current provisions.

Consent to disclosure

6.21 In 1994, when the CJC confidentiality provisions were introduced into other New South Wales legislation, the Law Society proposed that disclosure should be permitted with the consent of all parties - not just the party who supplied the information being disclosed. The Law Society in its response to IP 23 again suggested that consent to disclosure must be provided by "every participant in the mediation (including the mediator) and any third party whose interest may be adversely affected by such a disclosure".[43] The proposal was rejected in 1994 for the following reason:

> *To require ... that all parties must agree to the disclosure would provide a third party who may have no substantive interest in the information with a right to confidentiality that he would not have in the ordinary course of events. That could have the effect of undermining the process of mediation.*[44]

The Commission agrees with this assessment.

Protection of children

6.22 One additional issue is whether any specific acknowledgement should be made of the need to protect children from harm. Some of this will no doubt be covered by the permission to disclose where it is "necessary to prevent or minimise the danger of injury to any person". However, the special vulnerability of children may necessitate the inclusion of mandatory reporting requirements such as those contained in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). If certain people who have professional dealings with children have, in the course of their work, reasonable grounds to suspect that a child is at risk of harm, the Act requires that they report these suspicions to the Director General of the Department of Community Services as soon as practicable.[45] Such matters might especially come to the attention of mediators during the mediation of disputes between family members.

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39. By the *Courts Legislation (Mediation and Evaluation) Amendment Act 1994* (NSW). See, for example, *District Court Act 1973* (NSW) s 164G; *Land and Environment Court Act 1979* (NSW) s 61J; *Local Courts (Civil Claims) Act 1970* (NSW) s 21R; *Supreme Court Act 1970* (NSW) s 110Q. See also *Legal Aid Commission Act 1979* (NSW) s 60F.
40. *Evidence Act 1958* (Vic) s 21M; *Dispute Resolution Centres Act 1990* (Qld) s 37 (this section even includes reference to the disclosure of information for evaluation purposes even though that provision is no longer contained in the Queensland Act: *Dispute Resolution Centres Act 1990* (Qld) s 34 was repealed by *Courts Reform Amendment Act 1997* (Qld) s 35).
41. *Mediation Act 1997* (ACT) s 10.
42. *Mediation Act 1997* (ACT) s 10(2)(d)(ii).
43. Law Society of NSW, *Submission* at 10.
44. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 10 May 1994 at 2144.
45. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27.

6.23 In family law matters the protection of children is specifically covered so that a mediator is required[46] to swear or affirm that they will not disclose any communication to them in their capacity as a family and child mediator unless they believe it is reasonably necessary in order:

> *(a) to protect a child; or*
> *(b) to prevent or lessen a serious and imminent threat to:*
> *(i) the life or health of a person; or*
> *(ii) the property of a person; or*
> *(c) to report the commission, or prevent the likely commission, of an offence involving:*
> *(i) violence or a threat of violence to a person; or*
> *(ii) intentional damage to property of a person or a threat of damage to property; …*[47]

The *Family Law Act 1975* (Cth) also exempts admissions or disclosures about child abuse from the general provisions making inadmissible disclosures made in the context of mediation.[48]

6.24 In IP 23 the Commission asked whether any list of exceptions to confidentiality should specifically include the protection of children.[49] Some submissions supported this suggestion.[50]

6.25 CJCs opposed any change to the current provisions in s 29(2) of the CJCs Act. One reason for not including any specific reference to the protection of children is that an agreement to mediate in Department of Community Services ("DoCS") matters includes a specific waiver of confidentiality provisions in relation to information which indicates there is a risk of harm or actual harm to a child or young person.[51] DoCS noted that, as a DoCS approved ADR provider, CJC mediators are required to report instances of abuse of children and young people at risk of harm in accordance with *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23 and s 24.[52] This would come within the exception in the CJCs Act that allows for disclosure "in accordance with a requirement imposed by or under a law of the State... or the Commonwealth".[53] However, the Commission notes that circumstances giving rise to the need to protect children and young people may come up in the course of mediations other than those referred by DoCS.

6.26 The Commission considers that the protection of children and young people is a sufficiently serious issue that reliance ought not be placed on the application of other pieces of legislation or agreements which are only entered into in the context of particular mediations. Specific reference to the protection of children and young people ought to be made in the CJCs Act.

RECOMMENDATION 9

Section 29(2) of the CJCs Act should be amended so that a mediator must disclose information obtained in the course of a mediation where there are reasonable grounds to suspect that a child may be at risk of harm.

46. By *Family Law Act 1975* (Cth) s 19K.
47. *Family Law Regulations 1984* (Cth) reg 66, reg 67.
48. *Family Law Act 1975* (Cth) s 19N. See para 6.33-6.35 below.
49. IP 23 Issue 30(b)
50. Greater Sydney Families in Transition Network, *Submission* at 8-9; Law Society of NSW, *Submission* at 10.
51. Department of Community Services, *Submission* at 2.
52. Department of Community Services, *Submission* at 1.
53. *Community Justice Centres Act 1983* (NSW) s 29(2)(f).

The confidentiality oath or affirmation

6.27 The Act provides that mediators must swear an oath or make an affirmation of secrecy in relation to disclosures related to a mediation session.[54] The confidentiality provisions in other New South Wales statutes dealing with mediation and in some other Australian jurisdictions do not include the requirement of an oath.

6.28 The Commission's provisional view was that the additional oath provisions in the CJCs Act appeared to be unnecessary to the enforcement of confidentiality and as such, should be removed from the Act. This position was opposed in a number of submissions.[55] Reasons for this opposition included that the ceremony of swearing an oath, which usually takes place at a public accreditation ceremony, would:

- reinforce the confidentiality provisions by reminding mediators of their legal and moral responsibility;[56] and
- help to make communities, especially smaller regional communities, aware of the confidentiality that attaches to CJC mediation sessions and the importance that it is accorded.[57]

6.29 Mediators who conduct mediations under the *Family Law Act 1975* (Cth) are also required to swear or affirm that they will not disclose any communication to them in their capacity as a family and child mediator, except in specified circumstances.[58]

6.30 On balance, the Commission can see the value in maintaining the requirement that CJC mediators swear an oath or make an affirmation of secrecy in relation to disclosures related to a mediation session.

PRIVILEGES

6.31 The Act provides that mediation, and any related activities before and after a mediation, are the subject of certain privileges or immunities.

Defamation

6.32 The same privilege with respect to defamation that exists with respect to judicial proceedings also applies to mediations.[59] This means that participants in a mediation conducted by a CJC enjoy the protections of absolute privilege.[60] Similar provisions were added to the statutes of various courts in 1994 and apply in relation to mediations and neutral evaluations where the matters have been referred by the courts under their respective statutes.[61] The Australian Capital Territory Act contains a comparable provision.[62]

54. *Community Justice Centres Act 1983* (NSW) s 29(1).
55. Confidential 2, *Submission* at 3; CJCs, *Submission 1* at 16; Law Society of NSW, *Submission* at 10.
56. Law Society of NSW, *Submission* at 10.
57. CJCs, *Submission 1* at 16; CJCs, *Consultation*.
58. *Family Law Act 1975* (Cth) s 19K.
59. *Community Justice Centres Act 1983* (NSW) s 28(2).
60. NSWLRC, *Defamation* (Report 75, 1995) at para 11.28-11.29.
61. *Supreme Court Act 1970* (NSW) s 110P(1)-(3); *Local Courts (Civil Claims) Act 1970* (NSW) s 21Q(1)-(3); *Land and Environment Court Act 1979* (NSW) s 61I(1)-(3); *District Court Act 1973* (NSW) s 164F(1)-(3).
62. *Mediation Act 1997* (ACT) s 11.

Admissibility of evidence

6.33 Documents prepared in relation to a mediation session, and evidence of anything said or any admission made in a mediation session are "not admissible in any proceedings before any court, tribunal or body".[63] Evidence is, however, admissible, "where the persons in attendance at, or named during, the mediation session and, in the case of a document, all persons named in the document, consent to admission of the evidence or document".[64] Evidence is also inadmissible where there are proceedings arising from a situation where a mediator has disclosed information to "prevent or minimise the danger of injury to any person or damage to any property".[65] These protections are important from a public policy perspective in that they promote and safeguard the processes of mediation undertaken by the CJCs[66] and promote a sense of trust and credibility among the Centres' clients.[67] Similar provisions were added to the statutes of various New South Wales courts in 1994 and apply where the courts have referred matters to mediations and neutral evaluations under their respective statutes.[68] The *Farm Debt Mediation Act 1994* (NSW) also provides that evidence of what was said in a mediation session or in documents prepared for the mediation of a dispute that comes under its jurisdiction is not admissible.[69]

6.34 A number of issues were raised in IP 23 and in submissions regarding this provision. The issues are somewhat different to those raised in respect of the waiver of confidentiality discussed above, because admissibility in legal proceedings may affect the rights of parties in litigation.

6.35 The threshold question is whether the current provision should be retained, making evidence of anything said or any admission made in a mediation session "not admissible in any proceedings before any court, tribunal or body" but with the current exceptions allowing the admission of evidence in appropriate circumstances. One submission opposed the current provisions in the Act, stating that there should be no circumstances in which it should be possible to allow evidence raised in or in relation to a CJC mediation to be admitted in legal proceedings. The ground for this contention was that mediation is a confidential process.[70] Some Commonwealth statutes make no provision for the admissibility of evidence with the consent of any parties.[71] This position is, however, unsustainable in a general context, since a blanket ban on the use of such evidence could, in some cases, offend the principle of self-determination of the parties to a mediation if it were contrary to their collective wishes that the evidence could be used.

Exceptions to non-admissibility

6.36 The next series of issues to consider is whether any changes need to be made to the current exceptions to the non-admissibility of evidence. There are two sorts of exception to be considered here: first, those that allow various interested parties to consent to the admissibility of such evidence; and secondly, those that relate to proceedings arising from a situation where a

63. *Community Justice Centres Act 1983* (NSW) s 28(4), s 28(5).
64. *Community Justice Centres Act 1983* (NSW) s 28(6)(a).
65. *Community Justice Centres Act 1983* (NSW) s 28(6)(b).
66. See *AWA Ltd v Daniels* (1992) 7 ACSR 463 at 469; *Lukies v Ripley (No 2)* (1994) 35 NSWLR 283 at 289.
67. NSW *Parliamentary Debates (Hansard)* Legislative Assembly, 19 November 1980 at 3149.
68. *District Court Act 1973* (NSW) s 164F(4)-(6); *Land and Environment Court Act 1979* (NSW) s 61I(4)-(6); *Local Courts (Civil Claims) Act 1970* (NSW) s 21Q(4)-(6); *Supreme Court Act 1970* (NSW) s 110P(4)-(6).
69. *Farm Debt Mediation Act 1994* (NSW) s 15(1).
70. Confidential 2, *Submission* at 3.
71. See *Family Law Act 1975* (Cth) s 19N; *Federal Court of Australia Act 1976* (Cth) s 53B.

mediator has disclosed information to "prevent or minimise the danger of injury to any person or damage to any property".[72]

6.37 ***Consent to admissibility.*** One option is to make the requirements for the current exceptions more onerous. One submission suggested that the consent of the mediators should also be required before evidence of what went on in a mediation can be admitted in other proceedings.[73] Requiring the consent of the mediators to the admission of evidence may involve an overriding of the will of the parties who may all consent to the admission. Such an overriding can only really be warranted on the grounds of protecting the interests of the parties to the mediation. It is difficult to see why the mediators should have such a continuing protective role once a mediation has concluded. The Commission considers that so long as the mediators adhere to their oath of confidentiality they should have no further role in protecting the interests of the parties to the mediation once the mediation has finished.

6.38 Another possibility is to make some of the requirements for the current exceptions less onerous. For example compared with the provisions in Victoria[74] and the Australian Capital Territory,[75] the CJCs Act makes it more difficult to get evidence admitted where all the parties to the mediation consent, as it also requires the consent of all persons named in a document to be obtained before the evidence can be admitted.[76] No submissions addressed this issue. There is no reason why this additional requirement, involving parties outside the mediation, is necessary in the CJCs Act. The use of such evidence relating to parties other than those who took part in the mediation is a question for the court or tribunal when it considers the relevance of the evidence that is sought to be admitted. This is best left to the discretion of the court.

RECOMMENDATION 10

Section 28(6)(a) should be amended to remove the requirement of consent from persons named during mediation or named in documents used during the mediation so that only persons in attendance at the mediation session need consent to the admission of evidence or a document in subsequent court proceedings.

6.39 Finally, the possibility has also been raised that evidence of mediation proceedings may be admissible in cases where the mediator or one of the parties has engaged in fraud, where there has been a "substantial failure" by the mediator to discharge his or her functions, or where there is an allegation of "very serious misconduct" or that there was effectively no mediation at all.[77] There is currently no definite statement of law to support this position. But again there is no demonstrated need for such a provision in the CJC Act. The Commission prefers to leave such matters to the developing common law in the field of mediation.

6.40 ***Prevention of harm.*** The CJCs Act currently allows for the admissibility of evidence that relates to proceedings arising from a situation where a mediator has disclosed information in circumstances where the confidentiality provisions have been waived, that is, to "prevent or minimise the danger of injury to any person or damage to any property".[78] These provisions, as

72. *Community Justice Centres Act 1983* (NSW) s 28(6)(b).
73. Law Society of NSW, *Submission* at 11.
74. *Evidence Act 1958* (Vic) s 21L. See also *Supreme Court (General Civil Procedure) Rules 1996* (Vic) r 50.07(6).
75. *Mediation Act 1997* (ACT) s 9.
76. *Community Justice Centres Act 1983* (NSW) s 28(6)(a).
77. *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 266; *Commonwealth Development Bank of Australia Ltd v Cassegrain* [2002] NSWSC 940 at para 12 and 13.
78. *Community Justice Centres Act 1983* (NSW) s 29(2)(c), s 28(6)(b).

currently drafted, will also incorporate the amendments recommended above that will allow for the waiver of confidentiality to ensure the protection of children.[79]

Concealing a serious indictable offence

6.41 Finally, the Act provides that officers of CJCs are "not liable to be proceeded against for *concealing a serious indictable offence without reasonable cause* in respect of any information obtained in connection with the administration or execution of [the] Act".[80] It has been suggested that this provision was inserted in the CJC Act to allow serving police officers and justice agency staff to become accredited mediators "without jeopardising their responsibilities under other statutes".[81] There does not appear to be any equivalent provision in other New South Wales statutes.

6.42 Two submissions did not support the provision,[82] one of them suggesting that "no one in any organisation that holds public trust and confidence should have such immunity".[83] However, there has been no demonstrated problem with the provision which was inserted for an apparently practical reason. No change is recommended.

79. See para 6.22-6.26 above. See also *Family Law Act 1975* (Cth) s 19N which exempts admissions or disclosures about child abuse from the general provisions making inadmissible disclosures made in the context of mediation.
80. *Community Justice Centres Act 1983* (NSW) s 28(7).
81. CJCs, Professional Reference Group, *Submission* at 10.
82. CJCs, *Submission 1* at 17; Law Society of NSW, *Submission* at 11.
83. CJCs, *Submission 1* at 17.

7. Ensuring quality of mediation services

- Prescriptive approaches
- Practical approaches
- Informing consumer choice
- Responsiveness to feedback

7.1 CJCs are unique in New South Wales in providing a free, generalist mediation service that is available to all parts of the State and as such have succeeded in delivering a service that is generally recognised for its quality. Submissions have been generally favourable in their view of the work of CJCs and the Commission's survey of participants in CJCs mediations has found a high level of consumer satisfaction.[1] This high level of consumer satisfaction is also evident in other mediation schemes.[2]

7.2 Since the establishment of CJCs in 1980, other mediation service providers have also been established, making for a more competitive environment in some areas. In such an environment CJCs need to be able to maintain and enhance the quality of the service they provide.

7.3 Quality of mediation services can be achieved in a number of ways, none of which is mutually exclusive:

- by prescriptive approaches - setting up and enforcing competency standards, codes of practice, guidelines and other similar documents;
- by practical approaches - aimed at improving mediator practice by way of, for example, training and education, co-mediation, strengthening the role of Co-ordinators, and providing more opportunities to mediate;
- by informing consumer choices - by giving people sufficient information to inform their choice to participate in mediation and to terminate when things go wrong; and
- by responsiveness to feedback - including research and development, receiving feedback and complaints-handling and grievance procedures.

PRESCRIPTIVE APPROACHES

7.4 Quality of mediation services can be ensured to an extent by setting up and enforcing competency standards, codes of practice, guidelines and so on. These instruments can be in legislation, regulations, documents produced by peak bodies, or policy documents produced internally by the mediation service provider itself either with or without external input.

7.5 Mediation is increasingly governed by various policies, guidelines, codes of practice and standards. This is the result of the increasing professionalisation of the industry.

1. C Bourne, Mediation and Community Justice Centres: An Empirical Study (NSWLRC Research Report 12, 2004) at ch 3.
2. S Prince, *Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court* (A Report prepared for the Civil Justice Council, 2004) at 48-55; R G Hann and C Baar, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report - The First 23 Months* (Robert Hann and Associates Ltd, 2001) at 96-107.

Competency standards

7.6 Standards are desirable to ensure appropriate levels of mediator competency.[3] Standards provide a means of assessing the competency of individual mediators and can cover a wide range of knowledge, skills and abilities. Competency standards can interact with many aspects of a mediation service's operations and activities. The attainment of competency standards can be a requirement for the accreditation or continuing accreditation of mediators and also a means of encouraging adherence to codes of practice and guidelines. For example, mediators could be expected to show competency in their knowledge of and ability to adhere to codes of practice and ethical guidelines.[4]

7.7 Because competency standards can be based on demonstrated skills and knowledge and do not have to rely on formal qualifications such as tertiary degrees or diplomas (as is the case with mediators under the *Family Law Act 1975* (Cth)[5]) they are better suited to assessing the competency of mediators, like those at CJCs, who undertake community mediation and who have been selected, in part, because they represent the communities from which they are drawn.[6] However, even though competency standards may be more inclusive of mediators from different backgrounds, care must still be taken to ensure that they "do not import inappropriate cultural bias" when applied to members of minority or disadvantaged groups.[7]

CJCs' Competencies for Mediators

7.8 In October 1999 CJCs management adopted "Competencies for Mediators" which have been adapted from the Australian Capital Territory's "Competency Standards for Mediators".[8] The ACT standards are said to "define the core competencies required of mediators in a wide range of settings and contexts". These competencies are contained in detailed lists of functions under seven major unit headings:

1. plan and prepare mediation ("functions involved in preparing to conduct a mediation");

3. See D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, Sydney, 2005) at para 13.05, 13.15; 13.125; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 214.
4. On codes of practice, see para 7.17-7.46 below.
5. *Family Law Regulations 1984* (Cth) reg 60.
6. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 216. On the question of formal qualifications in community mediation, see para 8.14-8.15.
7. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 216. See also J Kalowski, "In a manner of speaking: A cross-cultural view of mediation" (1996) 2 *Commercial Dispute Resolution Journal* 200 at 200-204.
8. ACT Community Services and Health Industry Training Advisory Board, *ACT Competency Standards for Mediators* (1995).

2. establish climate for mediation ("functions related to the introductory phases of the mediation process, which establishes atmosphere to maintain neutral, impartial, non-judgemental relationship with parties");

3. create a framework for discussion ("functions required to manage information exchange in order to identify, isolate and clarify issues");

4. facilitate exploration of issues ("functions required to explore issues to develop options and ensure contributions to discussions are balanced between the parties");

5. promote negotiation ("functions involved in negotiation and problem solving");

6. identify and establish outcomes ("functions involved in identifying and recording outcomes and closing mediation");

7. maintain professional standards ("process of maintenance and review of professional standards").[9]

Each unit contains a detailed list of "performance criteria" to aid in assessment. The standards are also accompanied by a detailed list of evidence that assessors must look to for each of the categories.

7.9 In the ACT these standards have been declared to be "standards of competency" required for the registration of mediators under the *Mediation Act 1997* (ACT).[10] In New South Wales the "Competencies for Mediators" have been adopted by CJCs for the purposes of internal assessment.

7.10 The competencies adopted by CJCs, however, do not specifically address competencies required for pre-mediation. The unit entitled "plan and prepare mediation" assumes that pre-mediation has already occurred and the performance criteria require mediators to confirm the "adequacy of intake procedures". While competency in some aspects of pre-mediation is required, for example, mediators should be able to make an assessment of "the relevance and limitations of the mediation process to the dispute" and make provision for "party and mediator safety needs", no competencies have been set out for those conducting the pre-mediation process. This deficiency has been addressed in Chapter 5.[11]

Other schemes

7.11 In IP 23 the Commission looked at some other systems for establishing and enforcing standards of competency.

9. Compare National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 105-109.
10. *Mediation Act 1997* (ACT) s 4; *Declaration of Standards of Competency*, Instrument No 65 of 2000 (ACT).
11. Para 5.48-5.49.

7.12 The UK College of Family Mediators has established a procedure for assessing mediator competence whereby mediators are assessed against standards and performance criteria. There are four units, each containing a number of elements for which evidence of competence is required. Each element is assessed against a set of performance criteria. The units look at each mediator's ability to:

1. prepare and set up a mediation;

2. stage the mediation process;

3. manage the process of mediation; and

4. evaluate and develop their own work.[12]

Applicants must demonstrate by written evidence, including case studies, how their knowledge has been applied in practice. Successful completion of this procedure allows candidates to apply for full membership of the College. The Legal Services Commission also recognises the results of these assessments when deciding whether mediators should undertake publicly funded family mediation work in England and Wales.[13]

7.13 NADRAC has adopted a framework for standards which groups standards into three broad categories. For the purposes of this Report these categories relate to mediation practices, the mediators themselves and mediation organisations.[14] There will obviously be some overlap between the categories, especially those relating to mediation practices and those relating to the mediators themselves.[15] The following areas have been included within the category relating to mediators themselves: education, training, assessment, selection, supervision, professional development and discipline.[16]

7.14 In proposing a framework for the development of standards in alternative dispute resolution, NADRAC has proposed the treatment of the "development of standards as an evolutionary process requiring long term commitment, not a one-off solution".[17] NADRAC also

12. UK College of Family Mediators, *Competence assessment for family mediators: portfolio guidelines, specification and template* (effective from 1 January 2003) at 6.
13. UK College of Family Mediators, *Competence assessment for family mediators: portfolio guidelines, specification and template* (effective from 1 January 2003) at 2.
14. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 51-52.
15. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 1.44-1.52.
16. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 55.
17. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 70.

noted the need to develop standards continuously "to improve the quality of ADR practice, and the credibility and capacity of the ADR field".[18]

Submissions

7.15 Few submissions considered what competency standards should be applied to mediators. Some submissions supported "current practice",[19] while another considered that the current competency standards lack specificity and stand in need of review.[20]

7.16 One submission specifically opposed the imposition of standards by legislation, noting that they need to be continually reviewed in order to ensure they meet changing needs.[21]

Codes of practice

7.17 For the purpose of this Report "codes of practice" in relation to mediation refer to instruments and guidelines that govern the way that mediators conduct mediations (sometimes also referred to as "codes of conduct"). The competencies that mediators need to have to conduct mediations have already been dealt with above.[22]

7.18 The CJCs Act itself provides for the setting of policies and guidelines. For example, the functions of the CJCs Council include the determination of "policy guidelines for … the operation of Community Justice Centres".[23] More specifically, the Act provides that the CJC Council can determine policy guidelines for the "provision of mediation services and for the operation and management of Community Justice Centres" and for "commencing and conducting" a CJC mediation session.[24] However, for the most part CJCs' policies, guidelines and codes are determined by CJCs, as a business centre of the Attorney General's Department, in the normal course of business. CJCs have adopted a "Code of Professional Conduct for CJC Mediators".

The role of codes of practice

7.19 A number of roles can be performed by codes of practice.[25] Codes of practice can:

- serve as a guide for the conduct of mediators before, during and after mediations;
- educate the parties (and potential parties) to a mediation;

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18. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 70.
19. Confidential 2, *Submission* at 3; CJCs, Professional Reference Group, *Submission* at 8.
20. Confidential 4, *Submission 1* at 3.
21. CJCs, *Submission 1* at 13.
22. Para 7.6-7.16.
23. *Community Justice Centres Act 1983* (NSW) s 6(1)(a).
24. *Community Justice Centres Act 1983* (NSW) s 20(1), s 21(1).
25. American Arbitration Association, American Bar Association and Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators*; National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 70; Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR-Its Role in Federal Dispute Resolution* (Issues Paper 25, 1998) at para 8.6.

- build confidence in mediation;
- help to develop professionalism in the mediation industry; and
- protect mediating parties.

What codes of practice should address

7.20 Mediation codes of practice can cover a wide range of activities and encompass a mixture of ethical matters and practical standards. Numerous bodies have produced codes of practice to govern the conduct of mediations, the content varying with context.[26]

7.21 At CJCs, some of the areas that could be, or are already covered by various codes and guidelines, are also covered at a general level by provisions of the CJC Act, for example, those regarding confidentiality of information disclosed at a mediation.[27] The CJCs Code of Professional Conduct for CJC Mediators supplements provisions in the Act and also complements protocols contained in the Code of Conduct and Ethics of the New South Wales Attorney General's Department.

7.22 The CJCs Code of Professional Conduct is arranged under three broad headings:

- **Responsibility of mediators to the parties**: which includes ensuring the voluntary participation of the parties and that mediators act honestly and impartially;
- **Responsibility of mediators towards the mediation process**: which includes ensuring that the parties are informed and understand the mediation process, that the dispute is appropriate to the process and that the appropriate process is followed, and that mediators maintain impartiality and neutrality, observe confidentiality and terminate sessions where appropriate;
- **Responsibility of mediators towards CJCs and the profession**: which includes commitment to learning and development and observance of proper conduct towards other mediators.[28]

7.23 The matters listed above are substantially in line with the issues which it is generally considered ought to be addressed in codes of practice.[29] Submissions which considered the question of what should be covered by a code of practice generally considered that CJCs'

26. See T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 144-146; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 220-221. A list of Australian practice standards may be found at National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 43.
27. *Community Justice Centres Act 1983* (NSW) s 29.
28. CJCs, *Code of Professional Conduct for CJC Mediators*.
29. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 98-99; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 224-225.

current arrangements were adequate.[30] It was also agreed that future reviews should take account of NADRAC and other industry codes where necessary and appropriate.[31]

Some other specific issues

7.24 In IP 23 the Commission raised a number of discrete issues in the context of what codes of practice should address. They have been included here as examples of the sorts of problems that arise in considering what should be included in codes of practice. Codes of practice for dealing with disputes where violence is present have been discussed elsewhere in this Report.[32]

7.25 ***Duty to third parties***. Consideration has been given to the extent that mediators have a duty to third parties to a mediation. This is a particular concern in relation to vulnerable third parties who may be affected by the outcome of the mediation, for example, children and other people under a disability, either in family relationship or financial disputes.[33] Examples include where separating parents come to an agreement that threatens the welfare of their children or where claimants to a deceased estate reach an agreement that does not take into account other parties who may also be entitled to provision under the *Family Provision Act 1982* (NSW). NADRAC has recognised the potential risks to third parties that may arise from the way that some mediations are conducted, in particular the possibility of violence, the escalation of the dispute, and failure to meet legitimate needs.[34] In the United States ADR practitioners have an obligation to ensure that parties consider the interests of others where necessary.[35]

7.26 One submission questioned the basis on which mediators could assess the impact on third parties.[36]

7.27 ***Impartiality of mediators.*** It is essential that mediators be able to conduct mediations in an impartial manner. If a mediator is partial or appears to be partial, the confidence of the disputing parties in the process can be undermined.[37] Failure to be impartial can arise from personal relationships and interests or from prejudices and biases (that may also amount to unlawful discrimination).

7.28 The CJCs' *Code of Professional Conduct* currently deals with impartiality by requiring that mediators must, at all times:

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30. D Rollinson, *Submission* at 1; CJCs, Professional Reference Group, *Submission* at 9; CJCs, *Submission 1* at 14.
31. D Rollinson, *Submission* at 1; Law Society of NSW, *Submission* at 9.
32. Para 4.51-4.66.
33. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 229-230. On arguments for a particular duty to children in family mediations see D Spencer and T Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials* (Lawbook Co, Sydney, 2005) at para 13.210; and B Menin, "The Party of the Law Part: Ethical and Process Implications for Children in Divorce Mediation?" (2000) 17 *Mediation Quarterly* 281 at 285-286.
34. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 31-33.
35. T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 151.
36. D Rollinson, *Submission* at 2.
37. See US *Model Standards of Conduct for Mediators* item II.

- *identify and declare all monetary, psychological, emotional, associational or authoritative affiliations they have with any parties to a dispute which could cause a conflict of interest or affect their perceived or actual neutrality in the performance of their duties;*

- *identify any potential for a conflict of interest and if a conflict of interest arises mediators should disqualify themselves from mediating.*

7.29 There are numerous considerations to be taken into account when considering the question of mediator impartiality. For example, conflicts of interest and other factors impinging on a mediator's impartiality and neutrality are rather more likely to arise in small rural communities where there may only be a limited panel of mediators available to choose from. Resource implications may also come up in such circumstances, for example, where the cost or inconvenience of getting an "impartial" mediator from another locality may be great.

7.30 It should also be noted that impartiality may not be desirable to some groups, particularly where the culture of that group demands it. For example, in some cultures the use of a neutral "stranger" may not be considered appropriate,[38] or may not even be practically possible.[39] Strategies may have to be developed, for example in Indigenous communities, that acknowledge the close community ties that parties to a mediation may share with their mediators.[40] In some cases it can be said that "neutrality and confidentiality are non-issues", for example, in some Indigenous communities.[41] Strategies and policies need to be developed to address such situations.[42]

7.31 In general there are a number of strategies that may be employed to help deal with the possibility of mediator partiality. A basic mechanism to avoid some conflicts is a provision that allows a mediator to terminate the mediation session at any time. Such a mechanism is provided for in the CJCs Act.[43] The provision, however, relies on the mediator identifying potential conflicts and biases and acting appropriately.

7.32 A further option is to allow the parties to challenge the impartiality of the mediator. An example of a specific provision can be found in the New Jersey Court Rules which stipulate that a mediator or either one of the parties may terminate a mediation session if "a party challenges the impartiality of the mediator".[44] The parties must, however, be aware of their right to do this. Greater Sydney Families in Transition, for example, requires that mediators inform the parties

38. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 154.
39. S Young, "Cross-cultural negotiation in Australia: Power, perspectives and comparative lessons" (1998) 9 *Australian Dispute Resolution Journal* 41 at 48.
40. L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 63.
41. See M Sauvé, "Mediation: towards an Aboriginal conceptualisation" (1996) 3(80) *Aboriginal Law Bulletin* 10 at 10. See also para 6.5 below.
42. Greater Sydney Families in Transition Network, *Submission* at 8.
43. *Community Justice Centres Act 1983* (NSW) s 24(2).
44. *New Jersey Court Rules 1969* r 1:40-4(f)(1)(B).

prior to mediation that if at any time they feel that one or both mediators are being biased, they may raise this with the mediators[45] The issue of informing consumer choice is dealt with below.[46]

7.33 In order to preserve the self-determination of the parties to the mediation, a code of practice could allow for the conflict to be fully declared and then for it to be left to the parties to consent to the continuation of the mediation having taken into account all of the circumstances.[47] Such an arrangement is also provided for in the *Family Law Regulations 1984* (Cth).[48]

7.34 Co-mediation is a useful strategy to help ensure that mediators do not side with one of the parties.[49] Co-mediation at CJCs is discussed in more detailed below.[50]

7.35 Appropriate education and training may also assist, for example, by helping mediators overcome biases that are more subtle and less easy to identify but which nonetheless give rise to partial treatment of particular parties to a mediation.[51] For example the Greater Sydney Families in Transition Network ensures that its mediators undergo specific training to identify the partiality that may unintentionally arise due to a person's personal values, beliefs or background.[52]

7.36 While some adjustment may need to be made to current policies from time to time to take into account new understandings and developments elsewhere in the mediation industry, CJCs' current approach of dealing with impartiality through their Code of Professional Conduct appears to be working satisfactorily. At present no change is warranted in this regard.

7.37 ***Preventing undesirable outcomes.*** Another discrete issue that could be included in the matters dealt with by codes of practice is whether mediators should be able to prevent mediation outcomes that may be discriminatory, unethical, illegal or otherwise against public policy.[53]

7.38 CJCs were originally intended to "assist parties to a dispute to find their own solution, thereby ensuring that the result is acceptable to the parties".[54] This approach may prove problematic when the parties agree to an outcome that could be seen as involving prejudice, discrimination or being in some other way contrary to public policy. Indeed, it has been suggested that the informal nature of mediation, particularly community mediation, may make it

45. Greater Sydney Families in Transition Network, *Submission* at 7.
46. Para 7.62-7.66.
47. See, eg, US, *Model Standards of Conduct for Mediators* item III.; Law Society of NSW, *Revised Guidelines for Solicitors who act as Mediators* item 5.
48. *Family Law Regulations 1984* (Cth) reg 65.
49. Greater Sydney Families in Transition Network, *Submission* at 8.
50. Para 7.51-7.56.
51. On continuing education, see para 8.38-8.54.
52. Greater Sydney Families in Transition Network, *Submission* at 7.
53. Anti-Discrimination Board, *Preliminary Submission* at 7.
54. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1882.

easier for some parties to express prejudices which they might refrain from expressing in more formal environments.[55]

7.39 Problems exist along a continuum ranging from the outcome of a mediation implying support of, for example, the entrenchment of traditional gender roles, to agreements amounting to the continuation of an abusive relationship or unlawful activity.[56]

7.40 The CJCs Code of Professional Conduct currently states that:

> *Mediators must ensure that agreements reached between parties are fair and equitable.*
>
> *In the event that mediators believe that an agreement reached is either/or*
>
> - *illegal;*
> - *grossly inequitable to one or more of the parties;*
> - *the result of false information;*
> - *the result of bad faith bargaining;*
> - *impossible to carry out;*
>
> *the mediators may pursue either or both of the following alternatives:-*
>
> - *inform the parties of the difficulties which the mediators see in the agreement;*
> - *withdraw as a mediator and reveal the general reason for taking such action (bad faith bargaining, unreasonable settlement, illegality etc)*

7.41 In Issues Paper 23 the Commission asked what provision, if any, should be made to prevent mediation outcomes that are discriminatory, unethical, illegal or otherwise against public policy.[57] Submissions that considered this issue were generally unwilling to support giving the mediator any role other than that of guiding the process by which the parties determine the substance of their agreement.[58] One submission noted, on the question of preventing certain outcomes, "it is not the mediator's role to make such judgments".[59]

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55. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 40-41.
56. Mediation of violence has been dealt with above, para 4.26-4.74.
57. IP 23 Issue 27.
58. D Rollinson, *Submission* at 2; Confidential 2, *Submission* at 3; CJCs, Professional Reference Group, *Submission* at 9; CJCs, *Submission 1* at 15.
59. Confidential 2, *Submission* at 3.

7.42 A practical approach to these situations, and one already encouraged at CJCs in some circumstances, is for mediators to withdraw from the mediation if they find the outcome of the mediation ethically unacceptable.[60] Such matters are clear when the agreement involves illegal action. However, matters are less clear when the outcomes are unfair or unethical.[61] One submission suggested that mediators should be educated to recognise this so that they can withdraw from mediations where appropriate.[62]

Establishing codes of practice

7.43 Codes of practice can be imposed in various ways, for example, by statute, by regulation or by codes and guidelines developed at an administrative level. The requirement to develop codes and guidelines can also be imposed by legislation or regulation. Such provisions can also dictate the way in which the codes and guidelines are further developed.

7.44 There is considerable debate on the question of who should be responsible for mediation standards.[63] There is support for both government regulation and industry self-regulation. One argument in favour of at least some government regulation is the need to ensure that particular standards are met in cases where mediation is mandatory.[64] Proposals have also been mooted for a national peak body to determine ADR standards. However, it has been noted that there is "presently no body with a mandate and the necessary independence to establish a peak body".[65] Without a national body to determine standards, some provision needs to be made to set standards of practice and conduct for CJCs.

7.45 One approach is to make specific reference in legislation allowing for the development of codes of practice.[66] Legislative provisions could, for example, entrench a role for the CJCs Council in the development of codes of practice as is sometimes done in New South Wales with professional regulatory bodies in relation to their professions.[67]

7.46 Few submissions addressed the question of the provision that should be made for the development of codes of practice for CJCs mediations. Those that did stressed that practicing mediators ought to have a role in developing any further codes of practice for CJCs.[68] The

60. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 230-231; D Rollinson, *Submission* at 2.
61. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 229-230.
62. Law Society of NSW, *Submission* at 9.
63. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 222-224. See also T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 144-146.
64. See para 5.15.
65. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 223.
66. Anti-Discrimination Board, *Preliminary Submission* at 6.
67. See, eg, the Osteopaths Registration Board which "may establish a code of professional conduct setting out guidelines that should be observed by registered osteopaths in their professional practice": *Osteopaths Act 2001* (NSW) s 19.
68. C Courcier-Jones, *Submission* at 3; Confidential 2, *Submission* at 3; CJCs, *Submission 1* at 14.

Commission is of the view that interaction with other parts of the mediation industry should also be important to the development of codes of practice for CJCs. Mediators will have a role in the development of further codes of practice for CJCs through representation on the CJCs Council and also through internal consultative bodies, such as the CJCs current Professional Reference Group. Other parts of the mediation industry will also be represented on the CJCs Council and these mediators will also be able to facilitate the necessary interaction between CJCs and the other parts of the mediation industry.

Enforcement of standards, codes and guidelines

7.47 It has been observed, in relation to mediation in Australia generally, that "existing standards are educational, for the most part, rather than enforceable".[69] Is it desirable to move to an enforceable, rather than an educational model? For example, should codes of practice include mechanisms for dealing with complaints, or for assessing the performance of mediators? This is a major question for the ADR profession generally. Currently there is no one body responsible for enforcing standards. There are some mechanisms in place, for example, the Law Society could conceivably discipline solicitors who breach their mediation guidelines,[70] and the courts will have a supervisory role in relation to mediators who have been included on their lists. For example, the Chief Judge of the District Court may amend the District Court's list of mediators "for any reason that the Chief Judge considers appropriate".[71]

7.48 Any provisions aimed at enforcing standards of practice and conduct will have to take into account the issues of admissibility and confidentiality of information disclosed during the course of a mediation. It is possible that the admissibility and confidentiality provisions may prevent review of the conduct of a mediation.[72] Review by the Ombudsman of the conduct of mediators during mediation is already expressly excluded by the CJC Act.[73]

PRACTICAL APPROACHES

7.49 There are some practical approaches that can be taken to maintain and enhance the skills of CJCs mediators. These can be implemented as part of the day-to-day operation of CJCs, with guidance from the CJCs Council where appropriate, and, as such, require no legislative alteration.

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69. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 224.
70. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 224.
71. *District Court Act 1973* (NSW) s 164E(5); See also *Local Courts (Civil Claims) Act 1970* (NSW) s 21P(5). A provision to similar effect in *Supreme Court Act 1970* (NSW) s 110O(5) has been repealed: See *Courts Legislation Amendment Act 2003* (NSW) Sch 8[9]. A number of "nominating entities" now provide panels of mediators suitable for the mediation of matters before the Supreme Court: *Practice Note No 125* (2003) 58 NSWLR 94 at 96.
72. On the provisions relating to admissibility and confidentiality, see para 6.14-6.30 and para 6.33-6.40 above.
73. See para 7.87-7.90.

Opportunities to mediate

7.50 Some submissions have drawn attention to the need to give mediators the opportunity to mediate regularly.[74] The chief reason for this is that regular activity will help mediators to maintain and build skills.[75] It was suggested that 12-15 mediations per year would be a minimal requirement.[76] This would amount to at least one mediation every four weeks if spread over a whole year. One submission noted that expectations of opportunities for mediators in country regions have not been met and also suggested that fewer mediators might be more desirable if it meant more opportunities for each to mediate.[77]

The co-mediator model

7.51 As a matter of general practice CJCs mediation sessions are conducted by two mediators. While not mandated in the CJCs Act, this practice of co-mediation received considerable and wide-ranging support in submissions and consultations. Relationships Australia also employs a co-mediation model.

7.52 Co-mediation is feasible for CJCs where it would not be for many other mediation providers because of the costs that would normally be involved for parties in employing two mediators at market rates.[78] Co-mediation might not be viable if CJCs' pay rates for mediators were to be substantially increased.[79]

7.53 There are a number of benefits in having a second mediator, including:

- It can be useful during the course of mediation.[80] For example having a second mediator can provide a convenient means of changing focus or direction during the course of a mediation that might not be achieved so easily by a single mediator;[81] can assist in long and complex mediations which may be too daunting a prospect for a single mediator;[82] and may also be more efficient in complex matters.[83]
- It allows for a mix of skills, gender, race, age and so on, that is appropriate to the type of dispute and the disputants in a particular case;[84] for example, it can achieve gender balance in family mediation. Gender balance is desirable in family mediation not just because it helps prevent some parties from feeling isolated because of their gender, but

74. C Courcier-Jones, *Submission* at 2; J Courcier, *Submission* at 1.
75. J Courcier, *Submission* at 1.
76. C Courcier-Jones, *Submission* at 2; J Courcier, *Submission* at 1.
77. J Courcier, *Submission* at 2.
78. LEADR, *Consultation.*
79. Confidential, *Consultation.* The remuneration of CJCs mediators is discussed below, para 8.26-8.36.
80. ACDC, *Consultation*; LEADR, *Consultation*.
81. LEADR, *Consultation.*
82. R G Jones, *Submission* at 2.
83. Relationships Australia (NSW), *Consultation.*
84. LEADR, *Consultation*; Redfern Community Centre, *Consultation.*

also because sometimes it is better for particular inappropriate behaviours of one party to be challenged by both male and female mediators.[85]

- It provides opportunities for mentoring and training. For example, it allows each mediator to enhance their own skills by learning from their co-mediator, either during the course of the mediation or by means of debriefing at the conclusion of the mediation.[86]
- It ensures greater consistency in service.[87]
- It ameliorates potential or perceived bias and protects against false allegations of partiality, harassment and other inappropriate behaviour.[88]
- It ensures checks and balances.[89]

7.54 One submission suggested that co-mediation is particularly helpful when mediating APVO matters because:

- it allows a second perspective and insight on issues;
- it may prevent bias caused by the personality and experiences of individual mediators; and
- two mediators may be better than one if physical safety is at any time compromised.90

7.55 However, co-mediation may not be as effective a tool for achieving professional development as regular clinical supervision.[91] Co-mediation can also be a problem if there is a hierarchy among mediators, which leads to one mediator dominating the proceedings - for example a less experienced mediator combined with a more experienced mediator.[92]

7.56 While co-mediation is generally a desirable practice and there are many benefits associated with it, its continued use by CJCs will ultimately be a question of available resources. The Director's ability to allocate resources should not be constrained by legislation in this area.

Professional supervision and support

7.57 Another means of assisting mediators to maintain and update their skills is to provide opportunities for professional supervision and support. At CJCs this has been achieved to an extent by "continuing and sometimes frequent conversations between co-ordinator and mediator over the conduct of individual cases".[93] One submission has suggested that this informal arrangement has become more difficult at least in the Sydney region since CJCs were regionalised.[94]

85. Relationships Australia (NSW), *Consultation.*
86. LEADR, *Consultation*; J Courcier, *Submission* at 1; N Takacs, *Submission* at 1; R G Jones, *Submission* at 2; C Courcier-Jones, *Submission* at 2.
87. J Courcier, *Submission* at 1.
88. J Courcier, *Submission* at 1; R G Jones, *Submission* at 2.
89. N Takacs, *Submission* at 1.
90. G Eggleton, *Submission* at 9.
91. Relationships Australia (NSW), *Consultation*.
92. Relationships Australia (NSW), *Consultation.*
93. R G Jones, *Submission* at 3.
94. R G Jones, *Submission* at 3.

7.58 It is possible to establish more formalised structures. For example, Relationships Australia has a system of "clinical supervision" carried out in groups. The groups consist of one mediator as supervisor and four other mediators. The groups provide a forum for discussing practice issues and for receiving feedback from client evaluation forms. Supervisors are also available to discuss matters with mediators individually.[95]

7.59 Another example of professional supervision and support can be found in the policy and procedures relating to Youth Justice Conferences. The procedures manual for Youth Justice Conferences includes policy and procedures relating to the supervision and development of convenors of Youth Justice Conferences. (In considering the policy and procedures surrounding Youth Justices Conferences it needs to be borne in mind that, while conferencing may be similar to mediation in some superficial senses, the issues at stake may be quite different, namely the rehabilitation of young offenders and the meeting of the needs of victims and the community.) The policy states that:

> *Supervision of convenors is an important responsibility of administrators and will be vital in periodically addressing issues, supporting convenors, providing objective feedback, renewing certificates of competency and maintaining consistent standards.*[96]

7.60 The procedures set down for achieving this policy include:

- contact between administrators and convenors for the purpose of discussing and clarifying issues in preparation for a conference;
- administrators attending conferences in order to evaluate, supervise and monitor the conduct of a conference;
- a supervision or debriefing session following a conference, with up to two hours being made available, the time spent depending upon the complexity of the conference and the experience of the convenor;
- regular meetings for all convenors in a geographic area, providing a forum for peer supervision and an "opportunity for all convenors to share experiences and raise concerns";
- periodic attendance at Directorate conferences;
- completion and review of post-conference diaries; and
- participation in specified training courses.[97]

Peer assessment

7.61 Peer assessment has also been identified as a useful means of assisting mediators to comply with competency standards and codes of practice and to ensure relevance and quality.[98]

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95. Relationships Australia (NSW), *Consultation*.
96. NSW, Department of Juvenile Justice, *Procedure Manual: Youth Justice Conferences* (updated November 2003) at 12.
97. NSW, Department of Juvenile Justice, *Procedure Manual: Youth Justice Conferences* (updated November 2003) at 12-13.

This can be achieved by the use of debrief sessions as part of professional supervision[99] or separately.

INFORMING CONSUMER CHOICE

7.62 One way of encouraging adherence to standards and of making the services provided by CJCs accountable and responsive to the needs of consumers, is to provide the parties with information about what they are entitled to expect from the process and from the mediators. Such information will help them to decide whether the service they are receiving is adequate or satisfactory and whether to complain or not.[100] This can be characterised as a question of consumer choice, either to participate in a mediation at all or to cease participating where appropriate.

7.63 Parties to a dispute are currently provided with a fact sheet that outlines the process they are about to undertake and advising that the process is confidential and voluntary, that all parties must agree to who can attend the mediation and that any resulting agreements are not legally binding. Parties are also advised to seek legal advice before the mediation if necessary.[101]

The right to terminate a mediation

7.64 We have already considered situations where it is appropriate for mediators to decide not to proceed with a mediation or to terminate one that is already underway. Mediators are in a position to do this because they have been trained to identify and deal with such issues. Parties to a mediation could also choose to terminate a mediation for any of those reasons, if they were aware of a problem. There are also other grounds for termination which would be more the preserve of the parties themselves, for example, those relating to mediator behaviour[102] such as inability to maintain neutrality, implication in a conflict of interest, or inability to behave in a culturally appropriate manner. The parties to a CJCs mediation, however, are unlikely to be skilled in identifying whether the service they are receiving is adequate or measures up to realistic expectations and may not even be aware that they are able to choose to terminate a mediation at any time. It is, therefore, important for the parties to be able to make an informed choice.

Providing information

7.65 In some cases mediation service providers have been required to provide certain types of information to the parties before they can commence a mediation. For example, the *Family Law Regulations 1984* (Cth) include a set of provisions that prevent family law mediators from

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98. Law Society of NSW, *Submission* at 9; J Courcier, *Submission* at 1-2.
99. See para 7.57-7.60.
100. See para 7.79-7.84, below. See also National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.11.
101. Information supplied by D Sharp, Director, CJCs (21 October 2004).
102. See Law Society of NSW, *Submission* at 5.

commencing a mediation until they have provided, at least one day in advance of the mediation, certain information about the process of mediation that they are about to undertake and also to advise the parties of, amongst other things:

- the mediator's role, which involves not telling them what to agree to and not providing legal advice;
- their right to obtain legal advice at any stage;
- their right to terminate the mediation at any time;
- the mediator's immunity from civil liability for anything said or done in their role as mediator;
- the inadmissibility in evidence of anything disclosed in the course of the mediation;
- the mediator's confidentiality and disclosure obligations; and
- the qualifications of the mediator to conduct the mediation.[103]

Such an approach may be overly prescriptive in the context of some CJCs mediations, for example, mediation of small claims presented at Local Courts.

7.66 There are some further matters that need to be taken into account when considering the question of consumer choice. In IP 23 the Commission considered that one means of encouraging the use of suitably qualified mediators would be to allow the parties to make their own assessment of the mediator's qualifications and abilities before consenting to enter the process. The commentary to the US *Model Standards of Conduct for Mediators* suggests that "mediators should have available for parties information relevant to training, education and experience" and that "the requirements for appearing on a list of mediators must be made public and available to interested persons".[104] For most parties, however, the assessment of a mediator's qualifications may not be an informed one. Many members of the community do not have a high awareness of mediation and may be subject to various external pressures (institutional and personal) to participate.[105] The qualifications of mediators may mean little to them and they may not be able to differentiate between good and poor qualifications. It may also be administratively difficult to make available a pool of mediators to meet the requirements of some parties. It must also be remembered that CJC mediators provide their services on a sessional basis, are not remunerated at market rates and their services are provided free of charge to most clients.

RESPONSIVENESS TO FEEDBACK

7.67 Gathering, assessing and responding to feedback is another means of improving the services provided by CJCs. Three ways of finding the information required to improve the services offered by CJCs are by way of:

- general feedback;
- empirical research; and

103. *Family Law Regulations 1984* (Cth) reg 63.
104. US *Model Standards of Conduct for Mediators* item IV.
105. See H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 158, 203, 207, 222.

- complaints-handling.

While each of these provides a way of receiving feedback about the services provided by CJCs, they require separate treatment. For example, complaints-handling raises particular questions of fairness to the individuals concerned.

General feedback

CJCs current practice

7.68 CJCs have reported that their client feedback and complaints policy is in accordance with the policies of the Attorney General's Department.[106] CJCs regularly seek feedback about their services in a number of ways. One way is to provide each participant in a mediation with a "Have your say" form. Another way is to seek feedback from regular referrers who may receive comments from people they have referred to CJCs. CJCs monitor referrals and seek reasons from referrers when they detect declines in referral rates.[107]

Other industry practice

7.69 Other mediation service providers also have systems for encouraging and dealing with feedback from participants in mediations.

7.70 The New South Wales Law Society's *Charter on Mediation Practice* provides an opportunity for participants to provide feedback on the mediation process under the Law Society Mediation Program. The Charter states:

> *Your positive, constructive and informed feedback will help us to maintain the standard of mediation service provided by the Law Society Program at the highest possible level.*[108]

7.71 Relationships Australia reports that clients of its mediations are given evaluation forms. The data from these is recorded on a database and also fed to the mediator supervisors who give feedback to the individual mediators. Relationships Australia also conducts internal presentations on the feedback received.[109]

Views expressed in submissions

7.72 In IP 23 the Commission asked whether provision should be made for participants to provide feedback concerning the conduct of CJC mediations.[110] While one submission was not in favour of making provision for feedback on the conduct of CJCs mediation sessions,[111] others

106. CJCs, *Submission 1* at 14.
107. CJCs, *Consultation*.
108. "The Law Society of NSW Charter on mediation practice: A guide to the rights and responsibilities of participants" (1997) 35(11) *Law Society Journal* 68 at 69.
109. Relationships Australia (NSW), *Consultation*.
110. IP 23 Issue 25.
111. Confidential 2, *Submission* at 3.

were.[112] The Law Society was in favour of an evaluation or feedback form being provided to each participant at the end of each mediation.[113]

7.73 Benefits of allowing feedback include:

- mediations carried out in the area of family law will meet the Family Relationship Service Program standards of the Commonwealth Department of Family and Community Services;[114]
- providing a mechanism to "maintain a high quality service, improve services and adapt services to cater for different people's needs";[115] and
- assisting in assessing CJCs mediators' compliance with competency standards and codes of practice.[116]

The Commission's view

7.74 Receiving feedback of a general nature is a desirable practice and ought to be carried out as a matter of course. However, as this is carried out at an administrative level, there would appear to be no need to impose any legislative requirements.

Research

7.75 Research into mediations conducted by CJCs is also a means of ensuring the services offered by CJCs remain relevant and are of good quality.[117]

7.76 The Act currently provides for research into mediations conducted by CJCs by allowing for disclosure of information obtained in connection with the administration or execution of the CJC Act so long as the disclosure is "reasonably required for the purposes of research carried out by, or with the approval of, the Council" and does not reveal the identity of a person without that person's consent.[118]

112. Greater Sydney Families in Transition Network, *Submission* at 7; Law Society of NSW, *Submission* at 9.
113. Law Society of NSW, *Submission* at 9.
114. Greater Sydney Families in Transition Network, *Submission* at 7.
115. Greater Sydney Families in Transition Network, *Submission* at 7.
116. Law Society of NSW, *Submission* at 9.
117. See J Courcier, *Submission* at 1.
118. *Community Justice Centres Act 1983* (NSW) s 29(2)(e).

7.77 Several submissions suggested there is a need for "follow up" research, involving the questioning of parties to mediations, to ascertain:

- the longevity of any agreements reached at mediation;
- the effectiveness of any agreements;
- what benefits, if any, the parties felt they gained as a result of the mediation.[119]

One submission suggested that such follow up enquiries should be undertaken 3 and 6 months after a mediation.[120] Another submission suggested the follow up should be 6 months after the mediation.[121]

7.78 Research is a matter to be pursued by the management of CJCs and does not require further legislative support than that which is already in place.

Complaints-handling

7.79 Sometimes feedback will go beyond being feedback of a general nature about the quality of the mediation service provided by CJCs and will become a complaint about the inadequate performance or behaviour of a particular mediator or mediators. For example, a mediator might fail to identify a power imbalance so that a party suffers as a result, or may bully the parties into a resolution, or have a conflict of interest, or not be impartial, or be racist or sexist in their dealings with the parties. There can be a number of responses to such a complaint. One response, at a general level, is to set systems in place to help ensure that the performance or behaviour complained of does not happen again, for example, by additional training for all mediators or by introducing new guidelines for the determination of which cases are appropriate for mediation at CJCs. Another response is to deal individually with the mediator in question by, for example, retraining, or in egregious cases, dismissal. In terms of the second type of response, certain procedural protections may need to be put in place to protect the interests of all parties to the mediation, both disputants and mediators.

7.80 The handling of complaints is an issue that needs to be addressed by the whole mediation industry.[122] NADRAC, for example, considers "improved complaints handling as a priority for the future development of ADR standards".[123]

7.81 The eliciting of complaints is an important aspect of a complaints-handling policy. NADRAC has noted the importance of taking a "pro-active and strategic approach" to complaints so that, for example, "parties could be advised of a service's quality requirements and code of

119. Law Society of NSW, *Submission* at 13; C Courcier-Jones, *Submission* at 3.
120. J Courcier, *Submission* at 1.
121. Law Society of NSW, *Submission* at 13.
122. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.10-4.15; 4.68-4.72; Victoria, Attorney General's Working Party on Alternative Dispute Resolution, *Report* (1990) para 4.26-4.27; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd ed, LexisNexis Butterworths, Australia, 2002) at 222-224.
123. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.10.

practice, and encouraged to complain where those requirements are not met".[124] CJCs currently provide information of this sort on their "Have your say" form that is distributed to all mediation participants. The form states:

> *Our commitment to client service is to provide mediation and conflict management services that are:*
>
> - *professional,*
> - *delivered in a respectful manner;*
> - *non-discriminatory; and*
> - *confidential*
>
> *We have a responsibility to inform our clients:*
>
> - *that mediation is voluntary;*
> - *they have a right to decline mediation;*
> - *what information is recorded and why; and*
> - *that they can give feedback about and/or make a complaint about CJCs service.*

7.82 Once a complaint is made about a mediator, CJCs make use of the grievance handling procedure that has been established by the Attorney General's Department for dealing with complaints about the quality of their services and the conduct of members of staff.[125] Having such a procedure in place is good in the context of an issue that is yet to be dealt with adequately by the mediation industry. The policy and procedures will be appropriate for dealing with some aspects of the quality of service provided by CJCs and their staff. However, there is still a need for a policy that is tailored to the mediation context that deals with issues such as confidentiality and the fact that mediators are ministerial appointees rather than staff of the Attorney General's Department.

7.83 The fact that they are ministerial appointees raises particular issues regarding mediators who are alleged not to have performed in accordance with the standards required of them. Staff of the Attorney General's Department in such situations will have certain rights in accordance with their employment conditions. However, there is currently little in the way of legislatively supported procedures and no statement of rights for mediators or disputants when complaints are made. The Act currently provides that a decision of the Minister revoking the accreditation of a mediator can be reviewed by the Administrative Decisions Tribunal.[126] However, this provision is of limited application since mediators could effectively be prevented from conducting further mediations by CJCs not allocating mediations to them or not reaccrediting them on the expiry of their current accreditation. The Act does not provide for review in these circumstances.

7.84 An example of a policy dealing with termination of services may be found in the procedures manual for Youth Justice Conferences. Where concerns are raised about the conduct of a conference convenor, the relevant policy does not require a formal investigation. However, if the convenor's employment is terminated or they are offered no further work, they

124. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.11.
125. CJCs, *Consultation*.
126. *Community Justice Centres Act 1983* (NSW) s 11(3)(b).

must be provided with a reason. In the case of "serious" allegations, the convenor ought to be given an opportunity to provide an explanation.[127]

Who will handle the complaints?

7.85 At present complaints are dealt with internally by CJCs in accordance with the Attorney General's Department grievance handling procedure. The Commission is not aware of any specific cases in which this procedure has proved inadequate. However, there have been some generally expressed doubts about the ability of existing mediation service providers to deal with complaints about ADR services. Responses to a NADRAC discussion paper released in 2000 emphasised the "need for a complaints body separate from the actual service provider".[128] One submission to IP 23 considered that there should be an independent complaints panel, convened from time to time by the CJCs Council.[129] "This 'separation of powers' is necessary in the public interest and to maintain the confidence of the public".[130]

7.86 NADRAC has recognised that the primary responsibility for managing complaints should rest with the mediation service provider. However, it has also suggested that the impediments that prevent parties taking a complaint direct to the provider, necessitate, in an ideal world, a second tier, independent complaints process.[131] While NADRAC doubted that such a body would be viable, it has encouraged further examination of the possibility of a national ADR complaints body.[132]

7.87 ***Review by the Ombudsman.*** The New South Wales Ombudsman may not investigate "conduct of a mediator at a mediation session under the *Community Justice Centres Act 1983*".[133] This would appear to be part of the confidentiality regime that applies to CJC mediations. Similar protections are in place in Queensland where the Ombudsman may not investigate administrative actions taken by "a mediator at a mediation session under the *Dispute Resolution Centres Act 1990*".[134]

7.88 In Victoria in 1990, an Attorney-General's working party on alternative dispute resolution considered the question of complaints against mediators. The working party proposed an "ADR services ombudsman" to provide quality and accountability controls and to "provide the public with a quick and cheap means of having any complaints (well founded or otherwise) properly addressed".[135] The proposal was subject to the maintenance of principles of confidentiality and it

127. NSW, Department of Juvenile Justice, *Procedure Manual: Youth Justice Conferences* (updated November 2003) at 13.
128. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.69.
129. Confidential 4, *Submission 2* at 1.
130. Confidential 4, *Submission 2* at 1.
131. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.12.
132. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.14, 4.72.
133. *Ombudsman Act 1974* (NSW) Sch 1 cl 18 and s 12.
134. *Ombudsman Act 2001* (Qld) s 16(2)(f).
135. Victoria, Attorney-General's Working Party on Alternative Dispute Resolution, *Report* (1990) at para 4.27.

was suggested that the role could be carried out by the State Ombudsman. However, no such scheme was implemented in Victoria. More recently NADRAC has called for the continued consideration of the establishment of an ADR Ombudsman.[136]

7.89 An argument against oversight of the mediation process by the Ombudsman is that it might lead to mediators acting in a more legalistic manner.[137]

7.90 In IP 23 the Commission asked whether the Ombudsman should be able to investigate the conduct of CJC mediators during mediations.[138] Several submissions opposed the idea, chiefly on the basis of confidentiality of the mediation proceedings.[139]

Dealing with confidentiality

7.91 One of the barriers to dealing effectively with a complaint about a mediator is the confidentiality of mediation proceedings and the inadmissibility of evidence of such proceedings in courts and tribunals.[140] This is necessary, among other things, to gain the confidence of the parties to the mediation process.

7.92 The possibility has been raised that evidence of mediation proceedings may be admissible in cases where the mediator or one of the parties has engaged in fraud, where there has been a "substantial failure" by the mediator to discharge his or her functions, or where there is an allegation of "very serious misconduct" or that there was effectively no mediation at all.[141] One submission suggested that mediators should lose their immunity where they are in breach of contract (for example, where the mediator has contracted with the parties not to give advice or to breach confidentiality) or have acted in bad faith.[142] Another possible approach could be to place the complaints-handlers under an obligation to preserve the confidentiality of information obtained for the purposes of dealing with a complaint about a mediator or the mediation process.[143]

136. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 73.
137. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 22 November 1983 at 3024.
138. IP 23, Issue 31.
139. Law Society of NSW, *Submission* at 10; Confidential 2, *Submission* at 3; CJCs, *Submission 1* at 17.
140. See para 6.14-6.30, 6.33-6.40.
141. *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 266; *Commonwealth Development Bank of Australia Ltd v Cassegrain* [2002] NSWSC 940 at para 12 and 13.
142. Law Society of NSW, *Submission* at 10. See also para 6.6.
143. Compare the recommendations relating to the handling of complaints against lawyers in NSWLRC, *Complaints Against Lawyers: An Interim Report* (Report 99, 2001) at para 4.56.

The Commission's view

7.93 An effective complaints-handling process is an important part of the systems that should be in place to ensure the quality of services provided by CJCs. A complaints-handling process should be clearly explained and provide rights and protections for all parties concerned. CJCs are to be commended for the system they currently have in place which aims to achieve these objects. However, the Commission is of the view that there is value in now reviewing, and keeping under constant review, the current policy and procedures to ensure that they are appropriate to the mediation context and represent best practice in the field. A review could consider such questions as how to deal with the confidentiality of the mediation process, the immunity of mediators from liability and with the rights of mediators against whom complaints have been made. The input of the reconstituted CJCs Council would be useful in this review and the formulation of any subsequent policies and guidelines.

8. Mediators

- Accreditation and reaccreditation
- Selection of mediators
- Initial training
- Status and remuneration of mediators
- Continuing education

8.1 This chapter considers issues relating to mediators including their accreditation, training and development, and status and remuneration. The handling of complaints about mediators has been dealt with in Chapter 7.[1]

ACCREDITATION AND REACCREDITATION

8.2 A person cannot be a mediator at a CJC unless they have been accredited.[2] The Attorney General accredits mediators on the recommendation of the Director subject to any policy guidelines and directions of the Council. A mediator can be accredited for a term not exceeding three years and accreditation may be renewed upon expiry. Decisions refusing to grant or revoking accreditation can be challenged in the Administrative Decisions Tribunal.[3] The current practice is that a potential mediator must undertake initial training before they can be considered for accreditation. After successful completion of the initial training, they are accredited for a period of 12 months and, following mentoring and assessment, may be accredited for a further period of three years. The relevant CJC regional co-ordinator is responsible for the supervision and assessment of mediators during the initial period of accreditation.[4] For the purposes of reaccreditation the performance of mediators is assessed on their compliance with a set of mediator competencies that have been adopted by CJCs.[5]

8.3 Guidelines for the accreditation of mediators have been adopted by CJCs.[6] CJCs are currently developing new policies and processes for accreditation, reaccreditation, supervision, grievances and non-accreditation of mediators.

SELECTION OF MEDIATORS

8.4 CJCs aim to appoint as mediators people from all walks of life, who are recruited from the communities which they intend to serve. No special occupational or educational qualifications are required of mediators.

8.5 The selection process for CJC mediators involves a number of discrete stages. The initial stages are aimed at assessing the suitability of applicants to take part in the basic mediator training program. Prospective mediators must first submit an application addressing matters such as future availability, geographic location and ability to travel. An information session on CJCs and mediation is then held for applicants followed by a group discussion which allows applicants to be observed interacting in a group. These activities are followed by a half-hour written exercise aimed at further testing the suitability of applicants. Following an assessment of applicants based on the above, together with relevant demographic criteria, applicants may be invited to attend a personal interview if one is considered necessary. Successful applicants are

1. Para 7.79-7.93.
2. *Community Justice Centres Act 1983* (NSW) s 4(1).
3. *Community Justice Centres Act 1983* (NSW) s 11.
4. CJCs, Policy and Procedures on Mediator Accreditation (November 2001).
5. See para 7.8-7.10.
6. CJCs, *Submission 1* at 11.

then invited to attend a 72-hour basic mediator training course.[7] Successful completion of the course makes a trainee eligible for accreditation by the Attorney General.

Desirable characteristics in CJCs mediators

Representativeness

8.6 When first established, the panels of mediators were intended to reflect the composition of the communities in which they operated:

> *Mediators are selected to reflect the ethnic origins of members of the community, their primary or basic language, their educational and socio-economic backgrounds, their religious beliefs and cultural tradition.*[8]

8.7 In some circumstances it can be important to achieve cultural matching between disputants and mediators within the existing service delivery model.[9] A representative group of mediators may improve access for marginal groups who might otherwise be discouraged from taking part in mediations.[10] For example, Indigenous people might feel more comfortable with an Indigenous mediator present, especially if the other disputant was not from an Indigenous background.[11] CJCs currently aim to engage mediators who will represent a wide cross-section of the community taking into account "age, gender, availability, ethnic and cultural background or specific program needs".[12]

8.8 Although it is sometimes regarded as important to match the culture of the mediator with that of the participants, there may be cases where this is undesirable – for example where the parties and the mediator come from the same small community and have social links which might provoke fears about confidentiality or bias. It is sometimes the case that it is more desirable for mediators to be highly skilled at mediating cross-cultural issues rather than for them to belong to the same community as the parties. This is an issue of training, rather than selection.[13]

8.9 Few submissions considered the question whether CJCs mediators are sufficiently representative of the communities in which they operate. One considered that they were,[14] one

7. CJCs, *Interim Policy - Recruitment and Selection of Mediator Trainees* (December 2001).
8. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 22 November 1983 at 3025.
9. Confidential, *Consultation.*
10. Anti-Discrimination Board, *Preliminary Submission* at 5.
11. Redfern Community Centre, *Consultation.* See para 9.29-9.33 below.
12. CJCs, "Becoming an accredited mediator with the Community Justice Centres" «http://www.lawlink.nsw.gov.au/cjc.nsf/pages/training4» (as at 1 September 2003).
13. The training of CJC mediators is dealt with at para 8.18-8.20 and para 8.38-8.57 below.
14. Confidential 2, *Submission* at 2.

was uncertain[15] while another considered that more needed to be done to recruit young people and representatives from "emerging communities".[16]

8.10 Some questions have been raised about the interaction between any program of positive recruitment of mediators from disadvantaged groups and the provisions of the *Anti-Discrimination Act 1977* (NSW). There are two ways of dealing with any inconsistency. One way is for CJCs to seek exemptions from the *Anti-Discrimination Act*.[17] Such exemptions are available under the *Anti-Discrimination Act* for special needs programs and activities.[18] Another way would be to include a special measures provision in the CJCs Act.[19] The Commission does not consider that a special measures provision is warranted. The Commission has no evidence to suggest that there has been a problem with recruitment of particular groups.

8.11 In IP 23 the Commission asked the further question of whether the aim of recruiting mediators who reflect the community in which they operate should be included in legislation.[20] While at least one submission acknowledged the wisdom of recruiting mediators who are representative of their communities,[21] submissions that considered this issue opposed the inclusion of such an aim in legislation.[22] One submission suggested that including this aim would be too restrictive and suggested that it might be more desirable that mediators be highly skilled in dealing with cross-cultural issues.[23]

8.12 The Commission considers that ultimately such matters cannot be legislated for. The representativeness of mediators is a matter to be covered by policies and guidelines and for the Director to bear in mind when he or she makes decisions about the recruitment and appointment of mediators.

Suitability to act as mediators

8.13 One submission suggested that potential mediators should "undergo a 'self-awareness' assessment to ensure that they are temperamentally suited to becoming mediators before they start their training".[24] The current selection procedure described above would appear to be adequate. No change is warranted at this stage.

15. Law Society of NSW, *Submission* at 6.
16. CJCs, *Submission 1* at 10-11. See also Anti-Discrimination Board, *Preliminary Submission* at 8.
17. CJCs, *Submission 1* at 11.
18. *Anti-Discrimination Act 1977* (NSW) s 126A.
19. Anti-Discrimination Board, *Preliminary Submission* at 8. One model can be found in the *Local Government Act 1993* (NSW) which provides that, in the event of any inconsistency between the *Anti-Discrimination Act 1977* (NSW) and the provisions of an equal employment opportunity management plan, the provisions of the management plan prevail: *Local Government Act 1993* (NSW) s 346.
20. IP 23 Issue 16(b).
21. Law Society of NSW, *Submission* at 6.
22. Confidential 2, *Submission* at 2; Law Society of NSW, *Submission* at 6.
23. Confidential 2, *Submission* at 2.
24. Law Society of NSW, *Submission* at 7.

Prior qualifications

8.14 Particular qualifications, such as tertiary degrees or diplomas, are not required for people to become CJCs mediators. One reason for this is that requiring particular qualifications for mediators may make it difficult to appoint mediators who reflect the diversity of the local community, particularly members of minority groups.[25] This would especially be the case if tertiary qualifications were to be required.[26] It has also been observed that:

> *[Formal] qualifications can be cumbersome and complex to develop and maintain. Such a requirement may also make ADR more of a 'profession' and create greater exclusivity.*[27]

8.15 The Commission considers that there should be no change to the current practice whereby mediators are not required to hold tertiary degrees, diplomas or other qualifications for the generalist mediation services provided by CJCs.

Recognition of previous training and experience

8.16 Some people who seek to be CJCs mediators may already be mediating for other mediation service providers which will also have accreditation and training requirements. Presently there is no provision for the recognition of previous training and mediation experience.

8.17 One submission suggested that any candidate who had received training elsewhere should have to "demonstrate their suitability to join the CJC panel using supervised co-mediation with an experienced mediator".[28] This approach is not possible with CJCs, since the Act does not allow for any probationary period. People cannot act as mediators for CJCs, and be eligible for the protections offered under the Act, unless they have already been accredited. The Commission is of the view that CJCs should investigate matters and develop a protocol if thought necessary for the recognition of previous training and experience.

INITIAL TRAINING

8.18 The training referred to in this section is that which takes place before mediators are accredited. Issues of continuing education, training and development of CJCs mediators are dealt with later in this chapter.[29]

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25. See D McGillis, *Community Mediation Programs: Developments and Challenges* (US National Institute of Justice, 1997) at 70.
26. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 212. See also 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) at para 4.20-4.23.
27. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 57.
28. Law Society of NSW, *Submission* at 7.
29. Para 8.38-8.57.

8.19 The training of mediators is essential for all providers of mediation services. In 1991 the New South Wales Law Reform Commission concluded that training of mediators was necessary:

> *Failure to undergo training in the process increases the risk that a mediator's behaviour will be incompetent and unethical, and of harm to clients.*[30]

However, it did not recommend that such training be made mandatory in legislation. There were two reasons for this position. First, the need for mandatory requirements had not been demonstrated. Secondly, it was premature to prescribe the training required by mediators at what was then seen as an early stage of the development of the field.[31] The Commission preferred to leave the question of qualifications and training to the administering agencies.[32] As with most mediation services, this is still the case with CJCs which provide their own initial training program.

8.20 The CJCs' initial training course is widely acknowledged in the mediation industry as being of the highest quality and as meeting the needs of the organisation.[33] It has been noted that most other mediation providers were unable to provide initial training of the same duration or quality as CJCs.[34]

STATUS AND REMUNERATION OF MEDIATORS

Status of CJC mediators

8.21 CJCs mediators are accredited by the Attorney General on the recommendation of the Director of CJCs.[35] Mediators are specifically not included within the category of "staff of Community Justice Centres" and are therefore not appointed or employed under the *Public Sector Management Act 1988* (NSW).[36] As ministerial appointees they are not subject to an award. However, they are expected to comply with the Attorney General's Department's Code of Conduct and the CJCs' Mediators' Code of Professional Conduct.

8.22 In IP 23 the Commission asked whether CJCs mediators should be employed under the *Public Sector Management Act 1988* (NSW) or whether they should continue to be ministerial appointees.[37]

8.23 Submissions were generally supportive of mediators continuing to be ministerial appointees. The main reason for this support was the independence ministerial appointment is

30. NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991) at para 3.6.
31. NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991) at para 3.7-3.8.
32. NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991) at para 3.9.
33. LEADR, *Consultation*; Confidential 2, *Submission* at 2; CJCs, Professional Reference Group, *Submission* at 7; Law Society of NSW, *Submission* at 8.
34. LEADR, *Consultation*; ACDC, *Consultation*.
35. *Community Justice Centres Act 1983* (NSW) s 11(1).
36. *Community Justice Centres Act 1983* (NSW) s 12.
37. IP 23 Issue 20.

seen to give mediators.[38] Independence is important because it reassures clients and allows mediators to carry out their work without fear or favour.[39] It was also suggested that ministerial appointment helps to ensure that CJCs mediators are representative of the community.[40]

8.24 CJCs submitted that mediators should continue to be ministerial appointees and observed that their pay and conditions can be determined by administrative action without the need for them to be under the *Public Sector Management Act 1988* (NSW).[41]

8.25 The Commission agrees that, in light of the independence afforded by ministerial appointment, CJCs mediators ought to continue to be accredited by the Attorney General on the recommendation of the Director of CJCs.

Remuneration and conditions

8.26 The Act provides that a mediator is "entitled to be paid such remuneration as is determined in respect of the mediator by the Minister".[42] When CJCs were originally established it was felt that, while mediators' efforts should receive some financial recognition, "there should be no encouragement to mediators to think of their CJC activities as a conventional job or as a major source of income".[43]

8.27 In IP 23 the Commission asked how the remuneration of CJCs mediators should be structured.[44] The responses received come under a number of headings.

How should remuneration and conditions be governed?

8.28 Despite not being covered by the *Public Sector Management Act 1988* (NSW), mediators receive some of the benefits that would otherwise be available to public sector employees. In addition to an hourly rate, mediators receive one-twelfth of annual gross earnings as a leave loading and also an employer contribution to superannuation based on gross earnings and payment of expenses. They are also provided with training and professional development opportunities.

8.29 There are a variety of options for the engagement of CJC mediators apart from bringing them under the *Public Sector Management Act 1988* (NSW), such as making them casual employees of the Attorney General's Department. It has also been suggested that CJC mediators should have an award to govern their remuneration and other employment conditions,

38. Confidential 1, *Preliminary Submission* at 4; R G Jones, *Submission* at 1; CJCs, Professional Reference Group, *Submission* at 8; Confidential 4, *Submission 1* at 3.
39. Confidential 1, *Preliminary Submission* at 4.
40. CJCs, Professional Reference Group, *Submission* at 8.
41. CJCs, *Submission 1* at 13.
42. *Community Justice Centres Act 1983* (NSW) s 12(2).
43. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 15.
44 IP 23 Issue 21.

as is the case with some other ministerial appointees, for example, judges' associates.[45] Relationships Australia has an enterprise agreement in place.[46]

8.30 One submission suggested that mediators should be given the opportunity to have their employment conditions governed by an award if they so wish.[47]

Pay rates

8.31 CJCs mediators are currently paid $24.41 per hour.[48] Some submissions have highlighted the fact that this rate is not in line with those offered by other services.[49] For example, the rates for Relationships Australia mediators range from $28 to $33.50 per hour[50] and $150 per hour is the base level for commercial mediation.[51] The Law Society has observed:

> *A review of the remuneration for mediators is timely in the light of the importance of their role in the overall success of the CJC. The remuneration rate for CJC mediators should be increased in line with other statutory mediation programs and be reflective of the effort the mediators have to contribute to maintain their CJC accreditation.*[52]

8.32 The comparatively low rate gives rise to a number of concerns that were raised in some submissions:

- CJCs may be dealing with disputes which should be dealt with in the commercial sector. The low pay of CJCs mediators may give rise to equity and competition concerns in this context.[53]
- It may be difficult to develop an industry of mediation professionals where there are mediators offering their services for so low a rate. If professional development is to be considered the responsibility of the individual, CJCs mediators on their current rates of pay will simply be unable to justify pursuing professional development opportunities such as attending conferences or engaging in additional training or development.[54]
- While CJCs mediators are usually very committed, mediators often stop working for CJCS for financial reasons.[55]

8.33 It has also been suggested that CJCs mediators may be subject to exploitation. While it is true that CJCs mediators, as holders of a statutory office, are not being forced to accept the office they hold,[56] their level of remuneration may, if insufficient, amount to exploitation.

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45. J Hallinan, *Preliminary Submission* at 3.
46. Relationships Australia (NSW), *Consultation.*
47. R G Jones, *Submission* at 4.
48. Information supplied by D Sharp, Director, CJCs (10 January 2005).
49. M S Dewdney, *Preliminary Submission* at 3. LEADR, *Consultation.*
50. Relationships Australia (NSW), *Consultation*.
51. LEADR, *Consultation*.
52. Law Society of NSW, *Submission* at 8.
53. LEADR, *Consultation.*
54. LEADR, *Consultation*.
55. CJCs, *Consultation.*

8.34 Some submissions have suggested remuneration rates be increased to from between $30 and $40 per hour[57] to between $60 to $70 per hour.[58]

8.35 One submission suggested that pay rates should be on a scale that reflects the experience and skill levels of individual mediators.[59] For example, Relationships Australia pays its mediators according to a predetermined scale and mediators move up the scale after annual performance reviews.[60]

8.36 The Commission understands that the remuneration of mediators is currently under review by CJCs[61] which is in the best position to determine the rates it can pay based on available resources. However, in deciding on an appropriate rate or scale of rates there are some factors that should be taken into account:

- Co-mediation at CJCs might not be economically viable if mediators were paid commercial rates.[62] However, co-mediation might also be a factor in keeping pay rates lower than they would be for mediators conducting single-mediator mediations, since co-mediation lessens the load of responsibility on the individual.[63]
- The mere fact of experience at CJCs is valuable, making it worthwhile for mediators to seek experience with CJCs notwithstanding the low pay offered. However, it should be noted that those seeking to move into more remunerative areas, for example, commercial work, or family mediation, might still need some additional training or experience that is not offered by CJCs.[64]
- Most CJCs mediators are very committed to the broad objectives of CJCs and offer their services for less tangible reasons than remuneration.[65]
- Substantially increasing rates for CJCs mediators might lead to the need to charge for mediation in some cases. Such charges might deter people from agreeing to mediate even if they could afford it.[66]
- The minimum two hour attendance fee for no-shows and ultra-short mediations may not be adequate compensation for "what is usually a major disruption to the mediator's day".[67]
- That, while the current interim travel policy (effective 1 September 2002)[68] goes some way to addressing the travel allowance issue for mediators operating outside the urban areas of

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56. NSW, *Parliamentary Debates (Hansard)* Legislative Council, 2 June 1998 at 5478.
57. R G Jones, *Submission* at 4.
58. Law Society of NSW, *Submission* at 8. Another submission has provided a detailed salary structure proposal for CJC mediators based on current Public Service grades: J Hallinan, *Preliminary Submission* at 3-4.
59. LEADR, *Consultation.*
60. Relationships Australia (NSW), *Consultation*.
61. CJCs, *Submission 1* at 13.
62. Confidential, *Consultation*.
63. R G Jones, *Submission* at 4.
64. ACDC, *Consultation*.
65. Confidential, *Consultation*; CJCs, *Consultation.*
66. Confidential, *Consultation*.
67. R G Jones, *Submission* at 4.

the State,[69] it is possible that the travel allowance may not sufficiently take into account the distances to be travelled in country New South Wales and that the remuneration may not adequately cover the cost of running the vehicle.[70]

Training and professional development

8.37 While training and development opportunities are provided, the time mediators spend in training is not remunerated. This is a contentious point for mediators who have to sacrifice paid time in other employment to attend training that is mandatory for continuing accreditation.[71] This situation may be exacerbated when mediators feel that the training has not been particularly valuable.[72] Two submissions suggested that mediators should be remunerated for attending training sessions.[73] The Commission is of the view that this is a matter that should be considered by CJCs management.

CONTINUING EDUCATION

8.38 Continuing education and mediation experience is required in order for mediators to be re-accredited with CJCs. CJCs currently provide mediators with opportunities for learning and development with the aim of maintaining mediator competency and standards. The CJC Directorate and regional co-ordinators develop training programs in consultation with the Training Group and Professional Reference Group. Mediators can also seek approval from the regional co-ordinators to attend other programs of education and training in alternative dispute resolution that CJCs will recognise. The CJCs have developed a system whereby a mediator must accrue a certain number of "Continuing Mediation Accreditation points" in order to be considered for re-accreditation as a mediator. The 100 CMA points that mediators must accrue each year represent the completion of activities in the areas of practice, learning and development and organisational context.[74] There is no legislative backing for this system of Continuing Mediation Accreditation.

8.39 In IP 23 the Commission noted the strong views in favour of continuing education for mediators as being essential for the practice of mediation[75] and noted a number of legislatively based continuing education requirements for mediation and other professional groups.[76] These requirements were aimed at ensuring that relevant skills are reinforced and enhanced and that ethical and other relevant matters are addressed.

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68. CJCs, *Policy: Interim Travel Policy* (effective 1 September 2002).
69. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 September 2001 at 16873.
70. Confidential 1, *Submission*.
71. R G Jones, *Submission* at 4.
72. R G Jones, *Submission* at 4.
73. C Courcier-Jones, *Submission* at 2; R G Jones, *Submission* at 4.
74. CJCs, *Policy and Procedures on Mediator Accreditation* (November 2001). For example, the conduct of 6 mediations amounts to 60 points, completion of one core compulsory training course (of 6 hours) amounts to 10 points.
75. NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991) at para 3.35; US *Model Standards of Conduct for Mediators* item IX.
76. See *New Jersey Court Rules 1969* r 1:40-12(b)(3); *Legal Profession Act 1987* (NSW) s 57N and *Legal Profession Regulation 2002* (NSW) cl 142.

8.40 Most submissions considered that some form of continuing education/training should be required for CJC mediators.[77] Some concerns were raised about the content, quality, rigour and value of the training and continuing education programs offered to mediators for the purposes of continued accreditation.[78] One submission has also suggested that reliance on train-the-trainer sessions has proved problematic.[79] The question of convenience has also been raised with one submission suggesting that distance education models could be adopted to obviate the need for personal attendance at courses.[80]

Need for specialised training

8.41 Several submissions dealt with the need to provide training in specialised areas. Specialised training can be divided into two broad categories - the sort of specialised training that is generally necessary to the practice of mediation in a community-based service like CJCs and the sort that is required for dealing with particular types of disputes.

8.42 The former category includes such matters as anti-discrimination issues,[81] techniques for working with young people,[82] disability awareness (including psychiatric disability),[83] and cultural awareness/sensitivity in relation to the communities in which CJCs provide services.[84] Issues involving violence are also included in this category.[85]

8.43 A focus on issues relevant to the mediation of disputes in the communities served by CJCs might be particularly appropriate,[86] especially issues of cultural responses to disputes. One submission stressed the importance of the need for mediators to receive training in cross-cultural awareness.[87] Training in cross-cultural mediation is important because parties sometimes prefer mediators not to come from their community for fear that their private business might be spread around. It has been suggested that parties from other cultures are sometimes simply looking for a respectful attitude of the mediator, not necessarily someone from their own culture.[88] The coverage of such issues also aims to overcome systemic discrimination; to identify inequalities and power imbalances in existing relationships; and to improve access to disadvantaged groups.[89] One submission encouraged CJCs:

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77. D Rollinson, *Submission* at 1; Confidential 2, *Submission* at 2; CJCs, Professional Reference Group, *Submission* at 7; Law Society of NSW, *Submission* at 7.
78. Confidential 1, *Preliminary Submission* at 3; G Barclay, *Preliminary Submission* at 1; Confidential 4, *Submission 1* at 2; R G Jones, *Submission* at 3.
79. C Courcier-Jones, *Submission* at 2.
80. C Courcier-Jones, *Submission* at 2.
81. Anti-Discrimination Board, *Preliminary Submission* at 7.
82. R G Jones, *Submission* at 3.
83. R G Jones, *Submission* at 3; Anti-Discrimination Board, *Preliminary Submission* at 7.
84. Anti-Discrimination Board, *Preliminary Submission* at 7; Coalition of Aboriginal Legal Services, *Preliminary Submission* at 2.
85. Training in relation to issues of violence has been considered at para 4.63-4.65.
86. Law Society of NSW, *Submission* at 7.
87. Confidential, *Consultation.*
88. Relationships Australia (NSW), *Consultation.*
89. Anti-Discrimination Board, *Preliminary Submission* at 4, 5.

> *to provide cultural training to non-Indigenous mediators to enable sufficient understanding about the issues facing Indigenous participants in mediation. This ensures that all Indigenous contact with Community Justice Centres will be dealt with in a culturally appropriate manner.*[90]

8.44 An example of a legislative provision that requires specialised training in such areas may be found in relation to legal practitioners in New South Wales who are required to undertake, at least once every three years, a course that includes:

> *a component relating to the management of the practice of law that deals predominantly with the following issues:*
>
> *(a) the principles of equal employment opportunity,*
>
> *(b) the law relating to discrimination and harassment,*
>
> *(c) occupational health and safety law,*
>
> *(d) employment law...*[91]

This provision was included in the *Legal Profession Regulation 2002* (NSW) in order to promote greater understanding of the significance of these issues to legal practice.[92]

8.45 The second category, specialised training that is required for dealing with particular types of disputes, includes the gaining or updating of legal knowledge, for example in relation to matters that may be mediated under the *Property (Relationships) Act 1984* (NSW), *Family Provision Act 1982* (NSW) and *Family Law Act 1975* (Cth)[93] and local government planning regulations,[94] especially where changes have occurred that are relevant to the areas in which they mediate.[95]

8.46 It has been suggested that particular expertise in the areas under dispute is not necessary because CJCs mediators are facilitators of a process and are, therefore, not required to be experts in the technical details of the particular areas under dispute.[96]

8.47 The extent to which these matters ought to be considered in initial training or continuing education will vary from time to time. These matters are appropriately determined by the Director following consideration by the CJCs Training Group and Professional Reference Group and with advice from the CJCs Council.

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90. Aboriginal and Torres Strait Islander Services, NSW State Office, *Submission* at 3.
91. *Legal Profession Regulation 2002* (NSW) cl 142.
92. NSW Attorney General's Department, *Regulatory Impact Statement: Legal Profession Regulation 2002* (2002) at 64.
93. Law Society of NSW, *Submission* at 2.
94. R G Jones, *Submission* at 3.
95. Law Society of NSW, *Submission* at 7.
96. CJCs, *Consultation.*

The content of courses

Determination of content

8.48 The content of CJCs training courses is currently determined by the CJCs Training Group. The Training Group is an informal group that currently consists of about 20 people including the CJCs Business Development and Training Manager, the regional co-ordinators and accredited mediators who have completed "train the trainer training".[97]

8.49 Objectives of the Training Group include:

- participation in writing, designing, identifying and evaluating courses;
- offering best practice training in order to provide consistency and uniformity across the State; and
- meeting accreditation and re-accreditation requirements.[98]

Mediators from the Training Group are now conducting the CJC's training program.[99]

8.50 Most submissions opposed prescribing the content of continuing education courses in legislation,[100] principally on the grounds that CJCs should have the flexibility to determine training programs according to current needs which will change from time to time.[101]

8.51 One submission highlighted the need for CJCs to co-opt external specialists on the question of training needs in order to avoid being too "inwardly focussed and self-referring".[102]

Evaluating content

8.52 Current arrangements for evaluating the content of training courses are that the CJCs Directorate and Training Group annually evaluates the CJCs training programs.[103] Feedback is received at the end of each training session and is taken into account in the development of the courses in the following year.[104]

8.53 In IP 23 the Commission asked what provision, if any, should be made for the accreditation and evaluation of CJCs mediator training programs.[105] Few submissions considered this issue directly. One suggested that the accreditation and evaluation of CJCs mediator training programs should remain a matter of policy and practice.[106]

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97. Information supplied by D Sharp, Director, CJCs (29 August 2003).
98. CJCs Training Group, *Minutes of Meeting* (3 June 2002).
99. CJCs, *Annual Report 2001-2002* at 9.
100. Confidential 2, *Submission* at 2; Law Society of NSW, *Submission* at 7; CJCs, *Submission 1* at 12; Professional Reference Group, *Submission* at 7; D Rollinson, *Submission* at 1.
101. Confidential 2, *Submission* at 2; CJCs, Professional Reference Group, *Submission* at 7.
102. R G Jones, *Submission* at 3.
103. CJCs, Professional Reference Group, *Submission* at 7; CJCs, *Submission 1* at 13.
104. CJCs, Professional Reference Group, *Submission* at 7; CJCs, *Submission 1* at 13.
105. IP 23 Issue 19.
106. CJCs, Professional Reference Group, *Submission* at

The Commission's view

8.54 Determining the training needs of CJCs and assessing current training programs is clearly a responsibility of the Director. At present the Director makes use of the Training Group to discharge this responsibility. The Commission considers this appropriate. The Commission also believes that, in future, the Director will benefit from the advice of the reconstituted CJCs Council.

Recognition of other training and experience

8.55 It has been suggested there is a need to recognise training and experience gained in mediation beyond that conducted by CJCs. There are a number of reasons for this. First recognition of external training will encourage mediators to seek professional development that will complement in-house training programs.[107] Secondly, there are practical reasons arising from the fact that some CJC mediators mediate for other panels which also have accreditation and training requirements.[108] The Law Society has also observed that there are a significant number of CJC mediators on other panels:

> *Most panels require a minimum number of mediations per annum for re-accreditation as well as attendance at training and education sessions. There is an urgent need for inter-agency liaison to formulate a mutual agreement to allow for 'recognition of prior learning' also referred to as 'advanced standing' to avoid undue duplication.*[109]

NADRAC has, therefore, suggested that "it is desirable for accrediting bodies to develop a degree of mutual recognition... so that wastage of time and resources is avoided".[110] However, the widely varying standards and criteria for accreditation will be problematic if some form of mutual recognition is to be provided for.[111] NADRAC has noted that the limited scope for mutual recognition within the ADR sector is consistent with the diversity of services offered.[112]

8.56 The Law Reform Commission has also previously noted that:

> *There are serious difficulties in establishing comparability among courses. It is likely to introduce an undesirable rigidity and inflexibility for courses which are in a constant state of change as theory and practice develop.*[113]

107. C Courcier-Jones, *Submission* at 2.
108. M S Dewdney, *Preliminary Submission* at 4.
109. Law Society of NSW, *Submission* at 8.
110. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at 83.
111. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 232-233.
112. National Alternative Dispute Resolution Advisory Council, *A Framework for ADR Standards* (Report to the Commonwealth Attorney-General, 2001) at para 4.48.
113. NSWLRC, *Training and Accreditation of Mediators* (Report 67, 1991) at para 5.22.

8.57 CJCs have reported that they are currently investigating the establishment of a system to recognise training provided by other organisations.[114] It is appropriate that the matter should be dealt with in this way.

114. CJCs, *Submission 1* at 11.

9. CJCs and the Indigenous community

- Current provision
- The structure for providing services
- Types of services
- The Commission's view

9.1 The terms of reference for this review include the requirement that the Commission considers:

> *Whether the current structure of Community Justice Centres sufficiently meets the needs of the indigenous community of New South Wales.*

9.2 The particular history of dispossession of Indigenous people and inappropriate treatment by the justice system[1] requires, in many cases, a response that is different to that which needs to be adopted for immigrant cultural, ethnic and other groups. There are many Indigenous communities in New South Wales, including rural, urban, traditional and historical communities.[2] Each will have different needs to be considered.

9.3 The diversity of Indigenous communities in New South Wales and the need to involve Indigenous people fully in decisions that concern them are recognised in the four principles contained in the New South Wales Attorney General's Aboriginal Justice Agreement:

> *1. Accepting that Aboriginal people know their own problems and issues and that Aboriginal people are best situated to solve those problems.*
>
> *2. Actively encouraging and supporting local Aboriginal community innovation which aims to address justice problems and concerns.*
>
> *3. Recognising and respecting the significant cultural diversity in the NSW Aboriginal community and that each Aboriginal community has its own distinct problems and needs.*
>
> *4. Acknowledging that crime in Aboriginal communities has a deep set of underlying causes and that we share responsibility in addressing these causes.*[3]

9.4 The four overall aims of the Aboriginal Justice Agreement are:

> *1. To improve Aboriginal access to justice.*
>
> *2. To improve the quality and relevance of justice that Aboriginal people receive.*
>
> *3. To provide a framework for ongoing partnership between the Aboriginal Justice Advisory Council and the Attorney General in addressing justice issues.*
>
> *4. To allow Aboriginal people to take a leadership role and make key decisions in solving their own justice concerns.*[4]

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1. See, for example, L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 41-50. See also NSWLRC, *Sentencing: Aboriginal Offenders* (Report 96, 2000) at para 1.6-1.17; J Lock, *The Aboriginal Child Placement Principle* (NSWLRC RR 7, 1997) at para 2.2-2.32.
2. CJCs, *Submission 2* at 2.
3. Aboriginal Justice Advisory Council, *Aboriginal Justice Agreement* (2002).

9.5 In light of the dispossession and oppression of Indigenous people, the provision of mediation services to Indigenous communities is important because it may help Indigenous communities to achieve the resolution of disputes without recourse to the formal justice system.[5] There is the potential, within community mediation, for Indigenous people to develop methods of resolving disputes that are appropriate to Indigenous culture and needs.[6] However, this is not to say that community mediation currently does, or will, deal adequately with Indigenous culture and needs.[7]

9.6 However, there is a danger that recent Western models of dispute resolution could be imposed on Indigenous communities in ways that are inappropriate. Commentators have highlighted the problems associated with imposing the forms of mediation developed for the general community as a "solution" for Indigenous people:

> *A reading of anthropological and related literature in regard to Australian Aboriginal studies leaves little doubt that the traditional Aboriginal world views are ... ontologically and epistemologically different; Aboriginal culture and non-Aboriginal Australian culture in their conceptualisation of how people relate to each other and how people relate to the universe are fundamentally different. It may therefore follow that a transplanted mainstream dispute resolution process will not necessarily strike.*[8]

Put simply, it is possible, that Indigenous conceptions of "mediation" may be vastly different to those accepted more generally.[9]

9.7 Two broad considerations arise from the responses to IP 23. One is the question of the appropriate model for delivery of services to Indigenous people and communities. Another is the question of what services ought to be delivered. Both considerations require consultation with Aboriginal communities across the State at many levels with views being sought from representatives of communities, focus groups and individuals.[10] Such consultations are

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4. Aboriginal Justice Advisory Council, *Aboriginal Justice Agreement* (2002).
5. L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 51-72; H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 170.
6. See H Astor, "Mediation initiatives and the needs of Aboriginal women" paper delivered at *Second International Mediation Conference: Mediation and Cultural Diversity* (Adelaide, South Australia, 18-20 January 1996) at 3-4.
7. See, eg, P R Grose, "Towards a better tomorrow: A perspective on dispute resolution in Aboriginal communities in Queensland" (1994) 5 *Australian Dispute Resolution Journal* 28 at 38; M Dodson, "Power and cultural difference in Native Title mediation" paper delivered at *Second International Mediation Conference: Mediation and Cultural Diversity* (Adelaide, South Australia, 18-20 January 1996).
8. P R Grose, "Towards a better tomorrow: A perspective on dispute resolution in Aboriginal communities in Queensland" (1994) 5 *Australian Dispute Resolution Journal* 28 at 30.
9. See also, for example, M Sauvé, "Mediation: towards an Aboriginal conceptualisation" (1996) 3(80) *Aboriginal Law Bulletin* 10.
10. See Confidential 3, *Submission* at 7.

consistent with government policy that recognises the right of Indigenous people "to negotiate and participate in decisions that affect them".[11] External input is important in this process. The current CJCs Aboriginal and Torres Strait Islander Network,[12] while important as a forum for Indigenous mediators, cannot provide external input as it is a body internal to CJCs and cannot represent the diversity of Indigenous communities in New South Wales.[13]

CURRENT PROVISION

9.8 CJCs currently make some provision for the needs of Indigenous people and communities, principally through their mediation and training program and the Aboriginal and Torres Strait Islander network. This is consistent with one of CJCs' "key objectives" which is to provide:

> *culturally appropriate ADR services to Aboriginal and Torres Strait Islander communities throughout NSW.*[14]

Mediation and training program

9.9 As part of this approach CJCs have recently recruited and trained 15 Indigenous mediators in the CJCs' northern region.[15] The training program was based on the CJCs' basic mediation training[16] and was adapted for Indigenous people, the aim being to meet the needs of participants and provide culturally appropriate mediation. The Indigenous mediators were accredited in May 2003 and are now mediating through the northern region CJCs office.[17] These were in addition to 18 Indigenous mediators across all regions who were already mediating with CJCs by 2002.[18] A project officer position has been created at CJCs to evaluate the program in the northern region and to plan the implementation of the CJCs Indigenous program across the State.[19]

Aboriginal and Torres Strait Islander Network

9.10 The Aboriginal and Torres Strait Islander Network was established to advise the CJCs Directorate on matters concerning Indigenous communities and mediation. The Network has no formal status within the Attorney General's Department. Network members have a primary

11. NSW, *The NSW Government Statement of Commitment to Aboriginal People* (1997) at 5.
12. See para 9.10-9.11 below.
13. CJCs, *Submission 2* at 8-9.
14. CJCs, *Annual Report 2003-2004* at 1.
15. Information supplied by D Sharp, Director, CJCs (25 August 2003).
16. See para 8.2 and para 8.5 above.
17. Information supplied by D Sharp, Director, CJCs (4 September 2003).
18. CJCs, *Submission 2* at 1.
19. NSW, *Public Sector Notices* (28 January 2004) at 12.

obligation to the self-determination and well-being of Aboriginal and Torres Strait Islander communities and to the Network.[20]

9.11 The Network has undertaken a number of tasks, including:

- "work on the design of the most appropriate model of service delivery to Aboriginal and Torres Strait Islander communities";[21] and
- involvement in training programs for Indigenous staff of the Attorney General's Department.[22]

THE STRUCTURE FOR PROVIDING SERVICES

9.12 The following paragraphs consider two models for providing CJCs services to Indigenous people. One is to establish separate Indigenous CJCs and the other is to follow the current CJCs approach to the provision of mediation services to Aboriginal communities, namely to integrate the administration of those services into CJCs' usual administrative framework.[23] One of the main questions that arises in the context of such proposals is the extent to which an Indigenous CJC should be carried on under the umbrella of a government department and the extent to which it should be directed by Indigenous people themselves. When circumstances are favourable Indigenous communities can develop and use their own methods of managing disputes.[24] Such dispute resolution methods, where they have been developed by communities, ought to be preserved.[25] By the same token, arguments for community generated schemes ought not to be taken as excluding all government involvement. For example, Government can still have a role in supporting and co-ordinating local Indigenous initiatives.[26]

9.13 One commentator has observed that for Indigenous mediation projects to work:

> *it is vital that an approach other than a bureaucratic and impersonal one be adopted. The literature is strewn with dismal failures of impositions upon Aboriginal communities essentially telling them what has been good for them. The*

20. CJCs, *Charter of the Aboriginal and Torres Strait Islander Network*.
21. CJCs, *Annual Report 2001-2002* at 9.
22. CJCs, *Annual Report 2001-2002* at 9.
23. CJCs, *Submission 1* at 24.
24. L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 74; A Ackfun, "Aboriginal Mediation: A Personal Perspective" [1993] *Queensland ADR Review* (April) 2 at 3.
25. M O'Donnell, "Mediation within Aboriginal Communities: Issues and Challenges" in S McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference held 23-25 June 1992* (Australian Institute of Criminology Conference Proceedings No 21, 1992) at 35.
26. See P Memmott, "Community-based strategies for combating Indigenous violence" (2002) 25 *University of New South Wales Law Journal* 220 at 225-226.

present mode is to adopt an extensive consultative approach requiring high levels of physical endurance, patience and the ability to listen.[27]

Integrated service delivery

9.14 It can be argued that the current CJCs, organised as they are in geographic regions, should be equipped to provide services to, and meet the needs of, Indigenous communities in their regions. This is the current approach of CJCs and has seen the recruitment and training of 15 Aboriginal mediators in the CJCs' northern region.

9.15 One submission suggested that equipping CJCs to provide services to, and meet the needs of, Indigenous communities in their regions was best practice and preferred the present situation whereby meeting the needs of Indigenous people is part of the core business of CJCs.[28]

Indigenous CJCs

9.16 The possibility of culturally-based community-specific CJCs has been raised in recent years. In particular it has been suggested that an Aboriginal and Torres Strait Islander CJC be established to meet better the needs of Indigenous people.[29] One commentator has suggested that "the Aboriginal community needs more than to have programs of mediation... which exist within the dominant legal structures merely transferred into the Aboriginal community with mediators who have had cultural training so that they are sensitive to Aboriginal concerns".[30] One submission strongly supported a service that operates "from the premise of Aboriginal self-determination" and that has a majority of staff who are Indigenous.[31]

9.17 A separate CJC that specifically provides services to Indigenous people and communities might, by providing a space for any special adaptations that may need to be made to the general model of CJCs, better meet the needs of Indigenous people and communities. One submission, however, suggested that a separate Indigenous service would have the effect of marginalizing Indigenous community in the delivery of mediation services.[32]

9.18 CJCs have reported that since the establishment of the northern region's Aboriginal mediation scheme Indigenous people have been involved in 7% of the total referrals received by CJCs. This figure is considerably larger than the proportion of Indigenous people in the New South Wales population which currently stands at 1.9%. CJCs have suggested that these figures justify a further examination of the expansion of the service that is currently being offered and an examination of appropriate structures for the delivery of CJCs services, including an autonomous

27. P R Grose, "Towards a better tomorrow: A perspective on dispute resolution in Aboriginal communities in Queensland" (1994) 5 *Australian Dispute Resolution Journal* 28 at 28-29.
28. Confidential 3, *Submission* at 4.
29. CJCs, *Annual Report 2001-2002* at 12.
30. L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 6.
31. L Kelly, *Submission* at 15-16.
32. Confidential 3, *Submission* at 4, 9.

or semi-autonomous service to Indigenous people. The evaluation of the northern region's scheme is considering alternatives to the current approach bearing in mind, however, the budgetary constraints that may apply.[33]

The Commission's view

9.19 At present, future directions with regards to Indigenous CJCs will depend, in part, on an assessment of the current program being operated by CJCs in the northern region.[34]

9.20 The Commission is of the view that this will be a matter for the CJCs Council and management to consider once the assessment of the northern region scheme has been completed and appropriate consultations have been held with the Indigenous communities across the State.

TYPES OF SERVICES

9.21 Whatever model is chosen for delivery, the questions remain as to what services are required and whether they involve the use of pre-existing services, the adaptation of pre-existing services or the introduction of different services to meet the needs of Indigenous people and communities. Needs will vary and can be either general or specific. These can be determined through appropriate consultations with the various Indigenous communities in New South Wales.

9.22 There are two broad approaches to the question of the type of services that ought to be delivered to Indigenous people and communities. One is to adapt existing mediation services to meet Indigenous needs and the other is to introduce different services to meet specific needs.

9.23 Whatever approaches are adopted by CJCs, they need to be the result of creative, responsive engagement with the relevant Indigenous communities.

Pre-existing services

9.24 The core work of CJCs is to deliver a community mediation service. There would appear to be sufficient work in this general area in the Indigenous communities of New South Wales. For example one submission drew attention to the fact that the Aboriginal and Torres Strait Islander Legal Services provide priority assistance to clients who potentially face custodial sentences. This means that 89% of matters handled by the Services are in relation to criminal matters. It was suggested that CJCs could assist in civil and family law matters where Indigenous people are often unrepresented in the formal justice system:[35]

> *Community Justice Centres have the potential to alleviate unmet need emanating from the under-resourcing of Aboriginal and Torres Strait Islander Legal Services*

33. CJCs, *Submission 2* at 6.
34. See para 9.9 above.
35. Aboriginal and Torres Strait Islander Services, NSW State Office, *Submission* at 1-2.

> *(ATSILS), by ensuring that the mediation provided by CJCs is effective, culturally appropriate and that Indigenous mediators are available where requested.*[36]

There are two issues considered here: first, so far as pre-existing services are relevant to Indigenous people, what adaptations need to be made; and, secondly, whether more provision needs to be made for suitable mediators for disputes that may involve one or more Indigenous people.

9.25 In dealing with both these questions, a number of different types of disputes should be considered, namely disputes between Indigenous people from the same community, disputes between Indigenous people from different communities and disputes between Indigenous people and non-Indigenous people.

Necessary adjustments

9.26 Some questions arise as to whether any of the requirements in the Act or general standards or codes stand in the way of adapting CJCs' services to meet Aboriginal needs. Areas where adaptations may be required in appropriate cases include:[37]

- ***Voluntary participation*** may need to be reassessed in light of the needs of the welfare of a particular community as well as to those of particular individuals within it. In some communities, for example, elders may exert strong pressure on parties to mediate.[38]
- ***Confidentiality*** of disputes may prove difficult to achieve or may be undesirable in some cases, for example, where Indigenous communities "do not resemble the same dispersed and private living arrangements as those found particularly in urbanised Australian society",[39] especially when it becomes a multi-party dispute, involving family, friends and other community members.[40] While mediators are bound by an oath of confidentiality, the extent to which any of the parties is bound to maintain confidentiality may depend on particular cultural contexts but will generally be a matter for agreement between the parties.[41]

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36. Aboriginal and Torres Strait Islander Services, NSW State Office, *Submission* at 1.
37. P R Grose, "Towards a better tomorrow: A perspective on dispute resolution in Aboriginal communities in Queensland" (1994) 5 *Australian Dispute Resolution Journal* 28 at 31-32.
38. M O'Donnell, "Mediation within Aboriginal Communities: Issues and Challenges" in S McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference held 23-25 June 1992* (Australian Institute of Criminology Conference Proceedings No 21, 1992) at 41-42; L Kelly, *Submission* at 3-4. Pressure to mediate in the context of Indigenous communities may present no more problem for voluntary participation than court ordered mediation or strong pressure from judicial officers: see para 5.2-5.24 above.
39. M O'Donnell, "Mediation within Aboriginal Communities: Issues and Challenges" in S McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference held 23-25 June 1992* (Australian Institute of Criminology Conference Proceedings No 21, 1992) at 42.
40. On the multi-party nature of Aboriginal dispute management, see M Sauvé, "Mediation: towards an Aboriginal conceptualisation" (1996) 3(80) *Aboriginal Law Bulletin* 10 at 10-11.
41. L Kelly, *Submission* at 5-6.

- ***Neutrality*** of mediators may be difficult to achieve if the mediators come from the same community as the disputants.[42] However, "neutrality" may not be appropriate since Indigenous disputants may look to the mediator to carry "moral authority" and be known and respected within the relevant community.[43]
- ***The scope of matters appropriate for mediation*** may need to be revised. For example, in some communities, issues of domestic violence may be suitable for mediation, especially given the close-knit nature of some Indigenous communities and also the unwillingness of some victims to seek protection from the formal justice system, in light of the historical experience of Indigenous people in the justice system.[44]

9.27 Concerns have also been raised about the appropriateness of current pre-mediation procedures to Indigenous people, for example the reliance on telephone and letters to communicate with disputants.[45] CJCs have reported that while the basic process of CJC mediation is highly flexible further research and study needs to be carried out to address these and other issues.[46]

9.28 The Commission is of the view that nothing currently prevents appropriate adaptation of the services that CJCs provide to Indigenous people. The adaptations that are required are appropriately a matter for the management and Council of CJCs after appropriate research and consultation with Indigenous communities.

Provision of appropriate mediators

9.29 In addition to the 15 Indigenous mediators working in the northern region, there are other Indigenous mediators in the other CJC regions. However, more Indigenous mediators are needed in all regions,[47] not only to assist with disputes within Indigenous communities but also in situations where only one of the parties to a dispute is of Aboriginal or Torres Strait Islander background. The presence of Indigenous mediators may help to counter such factors as historical and structural power imbalances when non-Indigenous people are also parties to the

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42. See M Sauvé, "Mediation: towards an Aboriginal conceptualisation" (1996) 3(80) *Aboriginal Law Bulletin* 10 at 10-11; L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 63.
43. M O'Donnell, "Mediation within Aboriginal Communities: Issues and Challenges" in S McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference held 23-25 June 1992* (Australian Institute of Criminology Conference Proceedings No 21, 1992) at 42; L Kelly, *Submission* at 6-7.
44. M Sauvé, "Mediation: towards an Aboriginal conceptualisation" (1996) 3(80) *Aboriginal Law Bulletin* 10 at 11-12; M O'Donnell, "Mediation within Aboriginal Communities: Issues and Challenges" in S McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference held 23-25 June 1992* (Australian Institute of Criminology Conference Proceedings No 21, 1992) at 42. See also L Kelly, *Submission* at 7-11. Compare the attitudes of Indigenous and non-(Indigenous women in relation to restorative justice programs and domestic violence: J Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (Australian Domestic and Family Violence Clearing House, Issues Paper 9, 2004) at 8-9.
45. L Kelly, *Submission* at 14; CJCs, *Submission 2* at 6.
46. CJCs, *Submission 1* at 23, 24.
47. Aboriginal and Torres Strait Islander Services, NSW State Office, *Submission* at 2; CJCs, *Submission 1* at 23.

mediation.[48] The program in the northern region will be evaluated before consideration can be given to expanding the service.

9.30 The need for mediators with Indigenous backgrounds was highlighted by the Department of Housing's submission. Responses from their local client service teams suggested that a mediator with an Indigenous background would be useful so that Indigenous clients would feel "supported".[49] The Coalition of Aboriginal Legal Services also emphasised the need to train mediators who reflect the diversity of Indigenous communities in the State, having regard to age, sex, tribe, language and background.[50]

9.31 There may be particular problems with providing Indigenous mediators in situations where one of the disputants is non-Indigenous. In such circumstances it may not be appropriate to have an Indigenous mediator who is too closely connected to the Indigenous disputant's community since it may give rise to the appearance of bias in the eyes of the non-Indigenous disputant.[51] However, it will be important for some Indigenous disputants to have an Indigenous mediator present so that they feel that their concerns will be listened to and acknowledged.[52] Any concerns about an Indigenous mediator who is not known to the Indigenous disputant can be dealt with in pre-mediation.[53]

9.32 In some cases non-Indigenous mediators with training in Indigenous cultural issues will be all that is required.[54] For example, one submission encouraged:

> *CJCs to provide cultural training to non-Indigenous mediators to enable sufficient understanding about the issues facing Indigenous participants in mediation. This ensures that all Indigenous contact with Community Justice Centres will be dealt with in a culturally appropriate manner.*[55]

9.33 The allocation of mediators appropriate to the dispute and the disputants where at least one Indigenous person is involved is a question that needs to be dealt with at intake assessment. Some concerns have been expressed about the failure to identify some Indigenous parties where they have not been the ones to approach CJCs in the first instance.[56] This problem can be overcome by a more rigorous approach to pre-mediation intake assessment.[57]

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48. See, eg, M Dodson, "Power and cultural difference in Native Title mediation" paper delivered at *Second International Mediation Conference: Mediation and Cultural Diversity* (Adelaide, South Australia, 18-20 January 1996); L Behrendt, *Aboriginal Dispute Resolution: A step towards self-determination and community autonomy* (Federation Press, Sydney, 1995) at 64-65.
49. NSW Department of Housing, *Preliminary Submission* at 3.
50. Coalition of Aboriginal Legal Services, *Preliminary Submission* at 2.
51. L Kelly, *Submission* at 7.
52. Redfern Community Centre, *Consultation*; L Kelly, *Submission* at 13-14.
53. L Kelly, *Submission* at 7.
54. See para 2.23 and para 8.8.
55. Aboriginal and Torres Strait Islander Services, NSW State Office, *Submission* at 3.
56. L Kelly, *Submission* at 13-14; CJCs, *Submission 2* at 6.
57. See para 5.36-5.41.

Different services

9.34 Some submissions suggested that the range of services offered to Indigenous communities ought to be broadened beyond the mediation services currently available.

9.35 Early intervention before disputes escalate ("conflict anticipation")[58] may be a useful role that CJCs can play in Indigenous communities so that CJCs "can assist agencies and communities to predict conflict and put in place strategies that reduce the likelihood of conflict".[59] Such an approach, however, may require the allocation of substantial resources away from the current core work of CJCs.

9.36 One example of such work is the Queensland Attorney-General's Department's Community Justice Program's collaboration in the early 1990s with the people of Doomadgee who were experiencing problems with the management of alcohol and levels of violence in their community:

> *After seeking permission from all major groups (the women, the Council, and so on) within Doomadgee, consultation with the Aboriginal Coordinating Council staff and attending a full Aboriginal Coordinating Council meeting, a team of three mediators (two white, one black) flew to Doomadgee and began a five to six-day process of meeting separately and then in groups together with the wider communities to assist them to identify their major concerns, discuss them fully and establish priorities for the way forward. The role of the mediators was to act as a neutral, third party, willing to preserve the confidentiality of the issues and able to encourage all parties to speak fully and constructively to each other about past concerns and future options and directions.*[60]

9.37 Several submissions noted a need to find new approaches to relationships between Indigenous people and police.[61] Suggestions included the facilitation of meetings between Indigenous communities and the Police[62] and the provision of intermediaries to negotiate between Police and Indigenous young people.[63] In Queensland, dispute resolution services have facilitated dealings between government agencies and Indigenous people.[64] It was also suggested that some Indigenous parents required an intermediary or neutral observer to assist with dealings between them and school principals concerning disciplinary actions against their

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58. See para 2.6-2.9.
59. L Kelly, *Submission* at 26, 30.
60. M O'Donnell, "Mediation within Aboriginal Communities: Issues and Challenges" in S McKillop (ed), *Aboriginal Justice Issues: Proceedings of a Conference held 23-25 June 1992* (Australian Institute of Criminology Conference Proceedings No 21, 1992) at 36-37.
61. Redfern Community Centre, *Consultation*; L Kelly, *Submission* at 30.
62. L Kelly, *Submission* at 30.
63. Redfern Community Centre, *Consultation*.
64. C Nolan, "Alternative Dispute Resolution in Aboriginal and Islander Communities: The Community Justice Program's Experience" in S Egger and C D Egger (ed), *Australian Violence: Contemporary Perspectives 2* (Australian Institute of Criminology, 1995) at 292; A Ackfun, "Aboriginal Mediation: A Personal Perspective" [1993] *Queensland ADR Review* (April) 2 at 2.

children.[65] Another submission suggested that CJCs could consider offering victim-offender mediation and conferencing options in the context of offering services to Indigenous people.[66]

9.38 Even if CJCs do not expand their operation beyond current services, Indigenous people's experience of mediation at CJCs may be taken into other contexts. One submission suggested that CJCs' service "needs to be promoted as a part of a community toolbox that builds the capacity of the community to better deal with their problems" and that the skills obtained through experience in CJCs mediations could be utilised in other processes, for example, Circle Sentencing,[67] Community Aid Panels,[68] and even civil court processes, to name a few.[69] One of the aims of the Community Justice Program in Queensland in the early 1990s was to provide Indigenous community members with conflict management skills.[70]

9.39 Such suggestions would take the work of CJCs beyond the usual range of mediation services currently offered. It is questionable whether some of these activities are appropriate for CJCs. Because CJCs provide a free service, there is sometimes a tendency to expect CJCs to provide beneficial "alternative" services to the community. Some of the support services required are more in the nature of counselling or advocacy services rather than strictly mediation or ADR. Ultimately it may be a matter for Government to provide and resource appropriate support services that go beyond the services currently provided by CJCs.

9.40 CJCs have advised that they are committed, so far as resources allow, to providing the most appropriate services to meet the needs of the Indigenous communities of New South Wales. To this end, the current evaluation of the northern region's Aboriginal mediation scheme will involve undertaking research and consultation to establish the most appropriate models that can fit within existing frameworks or be expanded beyond them.[71]

THE COMMISSION'S VIEW

9.41 As a State-wide organisation offering a generalist mediation service, CJCs is well placed to provide a range of services to the various Indigenous communities throughout New South Wales. There would appear to be nothing in the Act that prevents collaboration with Indigenous communities and the adaptation of the services that CJCs currently provide to meet the needs of Indigenous people. The revised objects clause[72] will help to ensure that there are no impediments in situations where CJCs are called upon to advise on, help to develop or provide a range of services not confined to mediation but including, for example, facilitation, conferencing,

65. Redfern Community Centre, *Consultation.*
66. L Kelly, *Submission* at 27.
67. For an explanation of circle sentencing, see NSWLRC, *Sentencing: Aboriginal Offenders* (Report 96, 2000) at para 4.30-4.34.
68. For an explanation of Community Aid Panels, see NSWLRC, *Sentencing* (DP 33, 1996) at para 9.85-9.87.
69. Confidential 3, *Submission* at 9.
70. A Ackfun, "Aboriginal Mediation: A Personal Perspective" [1993] *Queensland ADR Review* (April) 2 at 2.
71. CJCs, *Submission 2* at 11.
72. See para 2.17-2.21 and Recommendation 1.

circle sentencing and healing ceremonies. No further legislative provision would appear to be necessary to continue CJCs' provision of services to the Indigenous population of New South Wales.

10. Miscellaneous provisions of the Act

- Venues
- Deputy Directors
- Review of the CJCs Act
- Records

VENUES

10.1 The activities of CJCs may be carried on at a number of different venues. The Act currently draws distinctions between these venues. CJCs may be "established at such premises as the Governor may determine by order published in the Gazette".[1] Such a gazetted premises would appear to be a "principal office" of a particular CJC.[2] However, the activities of a CJC may also be carried on at such other places as the Director approves from time to time.[3] Such premises, apparently, do not require gazettal.

Gazettal of centres

10.2 In IP 23 the Commission suggested that the current procedures are cumbersome and probably unnecessary and that CJCs ought to be able to open offices anywhere in the same way that other offices of business centres within the Attorney General's Department are established. In IP 23 the Commission therefore asked whether the requirement for gazettal of Centres should be removed from the Act.[4] Submissions that considered this issue agreed that the gazettal requirement should be removed.[5] CJCs observed that the centre-based approach is no longer operational and that CJCs are now regionally focussed.[6]

10.3 The Commission can think of no reason for the retention of a provision requiring the gazettal of premises for CJCs.

RECOMMENDATION 11

The requirement for gazettal of Centres should be removed from the CJCs Act.

Use of court facilities

10.4 The CJCs Act currently provides that the activities of a CJC may be conducted at such places as the Director may approve from time to time, "subject to the policy guidelines determined by, and any directions of, the Council".[7] One particular aspect of this discretion is the question of whether it is appropriate that CJCs use court facilities for mediation. This question has been the subject of some debate amongst mediation practitioners. The question is an important one because the use of court facilities may have an impact on the effectiveness of

1. *Community Justice Centres Act 1983* (NSW) s 15.
2. *Community Justice Centres Act 1983* (NSW) s 16(1).
3. Community Justice Centres Act 1983 (NSW) s 16(2).
4. IP 23 Issue 38.
5. Confidential 2, *Submission* at 4; CJCs, *Submission 1* at 20; Law Society of NSW, *Submission* at 12.
6. CJCs, *Submission 1* at 20.
7. *Community Justice Centres Act 1983* (NSW) s 16(2). See para 3.35 and Recommendation 5 above, for proposed amendments to s 16(2).

CJCs in such areas as the provision of services to particular communities and community development.

10.5 On a practical level the use of court facilities is convenient and cost effective, since court facilities are already provided by the Attorney General's Department.[8] Courts, because they are staffed and are often close to police stations, also offer greater security for mediators and clients.[9] On the other hand court facilities will not be so convenient for a number of CJCs mediations since they may be unavailable on weekends and after hours.[10] Accommodation is a problem in some courts - few court venues would offer the flexibility that CJCs are looking for.[11]

10.6 It is possible that the use of court facilities by CJCs could suggest too close a connection to the courts to the disadvantage of both CJCs and the courts. Some concerns have been raised that too close a connection with the courts may impact upon the perceived independence of CJCs.[12] Others have identified concerns for the standing of the courts. It has been suggested that close associations with alternative dispute resolution programs may present problems for the standing and integrity of traditional courts which "fill a highly specific role as custodians of the sovereign power of adjudication of disputes through the mechanism of due process and by the application of principles and rules of law". It is considered by some that ADR programs are "additional or complementary to litigation" and should not be seen as "alternative procedures within the services provided by the court system".[13] Others have pointed out that confusion may result where "courts, identified with authoritative third party decision-making, become the locus of dispute resolution services of an entirely different character".[14]

10.7 Such confusion is not seen as a problem by some. One submission noted that CJCs and the courts are "all part of the one justice system under the Attorney General addressing conflict in society for best resolution and outcomes".[15] Another submission stated that mediation is increasingly seen as part of the dispute resolution process and having mediation available at the courts "draws attention to the desirability of trying mediation before getting involved in costly legal proceedings".[16]

10.8 The proximity of CJCs to the courts may have the effect of disempowering[17] or excluding some participants. If mediation is about providing an alternative to traditional methods of dispute

8. Although it has been observed that the use of court facilities is rendered necessary because of the "realities of limited funding": Law Society of NSW, *Submission* at 6.
9. J Courcier, *Submission* at 2; Law Society of NSW, *Submission* at 6
10. J Courcier, *Submission* at 2.
11. Registrars, Local Courts, *Consultation*.
12. J Courcier, *Submission* at 2; R G Jones, *Submission* at 3.
13. L Street, "Mediation and the Judicial Institution" (1997) 71 *Australian Law Journal* 794 at 795.
14. H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 270 referring to S Roberts, "Three Models of Family Mediation" in R Dingwall and J Eekelaar (ed), *Divorce Mediation and the Legal Process* (Clarendon Press, Oxford, 1998) at 148.
15. Confidential 2, *Submission* at 2.
16. Law Society of NSW, *Submission* at 6.
17. J Courcier, *Submission* at 2.

resolution and encouraging the participation of people who may, for various reasons, be wary of the justice system,[18] close proximity to courts may not be a good idea.[19] This could be especially so in the case of groups who have a history of poor relations with the criminal justice system, for example, Indigenous people. It was originally proposed that the Redfern CJC be located at the Redfern Local Court and operate "in a fashion which could be more formal and more obviously allied to the traditional legal system". However, consultations with organisations and individuals in the area at the time revealed that this would be an "unpopular decision and one which might well prejudice the ability of the centre to attract cases and clients".[20]

10.9 On the other hand, it has been suggested that close physical associations with the courts and other "legal" agencies has made little difference to the types of clients who approach CJCs:

> *It was in fact with some reluctance that CJCs initially used court houses or legal aid offices for local mediation sessions. To everyone's surprise, it did not seem to make any difference to the service users or the effectiveness of the process.*[21]

This, however, might suggest little more than that the type of person who would be reluctant to attend a mediation at a court house would not have made use of CJC mediations in any case.

10.10 Physical proximity to court houses has also been seen as an effective way of increasing case loads for CJCs, at least in so far as they deal with cases that have some connection with the formal legal system. Extensions to the Campbelltown Court House in 1989 incorporated accommodation for CJCs designed to "retain its own identity with totally separate access".[22]

10.11 In this context, CJCs mediators have been attending Local Courts to mediate some matters, mostly small claims, on the spot. This practice has attracted varying responses. One submission observed that in the southern region there are four courts that are not covered by CJCs on court days which means that the service is not promoted to the public at a time when they could be most receptive to the services offered.[23] A recent review of a small claims mediation scheme at Exeter County Court in England found that 73% of participants thought that the fact that the mediations took place in the court building helped the mediation process.[24]

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18. For example, Aboriginal and Torres Strait Islander peoples, immigrants, gay men and lesbians, people with disabilities and young people: H Astor and C Chinkin, *Dispute Resolution in Australia* (2nd edition, LexisNexis Butterworths, Australia, 2002) at 168; T Sourdin, *Alternative Dispute Resolution* (Lawbook Co, Sydney, 2002) at 116-117.
19. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 197.
20. J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 16.
21. W Faulkes, "The Modern Development of Alternative Dispute Resolution in Australia" (1990) 1 *Australian Dispute Resolution Journal* 61 at 66.
22. W Faulkes, "The Modern Development of Alternative Dispute Resolution in Australia" (1990) 1 *Australian Dispute Resolution Journal* 61 at 66.
23. Confidential 1, *Submission*.
24. S Prince, *Court-based Mediation: A preliminary analysis of the small claims mediation scheme at Exeter County Court* (A Report prepared for the Civil Justice Council, 2004) at 52.

However, there are other circumstances where such an approach is not appropriate. These are dealt with elsewhere in this report.[25]

The Commission's view

10.12 The arguments for and against CJCs using court facilities for mediations suggest that much will depend on the circumstances of the individual disputes that present themselves. There will clearly be some circumstances where the provision of mediation services in court facilities will be inappropriate and others where holding the mediation in court facilities will be highly desirable, for example, where small claims matters are being mediated. Ideally a range of venues ought to be available and this would appear to be the case at present. The engagement of particular venues is properly the responsibility of the Director of CJCs. There is no demonstrated need at present but it is possible that in future it may be necessary to seek guidance of the CJCs Council to identify the types of disputes that ought not to be mediated in court complexes.

DEPUTY DIRECTORS

10.13 When CJCs were first established there was a Director for each of the three Centres.[26] This was a means of managing the pilot or development phase of CJCs when early plans included the possibility that each Centre might develop along different lines as a form of controlled experiment.[27] In 1983 it became possible to have one person as a Director of multiple Centres. In 1992, amendments were passed to reflect the reality that there was in fact one Director for all CJCs, and also to provide for the appointment of Deputy Directors.[28]

10.14 According to the Act a Deputy Director has no specific role that could not also be allocated to any other member of staff. As such, references to a "Deputy Director" are unnecessary since a Deputy Director need not be appointed for the Director to be able to delegate such functions under the Act to that officer as a "member of staff".

10.15 In IP 23 the Commission therefore asked whether references to the "Deputy Director" should be removed from the Act.[29] Submissions that considered the issue supported the removal of such references from the Act.[30]

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25. See para 4.73-4.74.
26. *Community Justice Centres (Pilot Project) Act 1980* (NSW) s 9. See also NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 October 1983 at 1881.
27. The proposals were never followed through. See W Faulkes, "The Modern Development of Alternative Dispute Resolution in Australia" (1990) 1 *Australian Dispute Resolution Journal* 61 at 63-64; J Schwartzkoff and J Morgan, *Community Justice Centres: A Report on the New South Wales Pilot Project, 1979-81* (Law Foundation of New South Wales, 1982) at 9-10, 13, 31.
28. *Statute Law (Miscellaneous Provisions) Act (No 3) 1992* (NSW) Sch 1.
29. IP 23 Issue 40
30. Law Society of NSW, *Submission* at 12; Community Justice Centres, *Preliminary Submission* at 1; CJCs Reference Group, *Preliminary Submission* at 2.

10.16 The Commission cannot identify any reason for retaining references to the "Deputy Director" in the CJCs Act.

RECOMMENDATION 12

References to the "Deputy Director" should be removed from the CJCs Act.

REVIEW OF THE CJCs ACT

10.17 The Act currently provides that "The Minister may cause or arrange for an evaluation to be made, at such times and in respect of such periods as the Minister thinks fit, of Community Justice Centres and of their operation and activities".[31] Since 1992 all new legislation in New South Wales includes stricter review requirements, specifying dates for commencement of reviews and for the tabling of reports in Parliament. A standard formulation, leaving aside variables such as time limits, is:

> *The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*

Such a review is usually to be undertaken as soon as possible after 5 years has passed since the date of assent to the Act in question.

10.18 In IP 23 the Commission asked whether a clause requiring periodic review should be inserted in the CJCs Act.[32]

10.19 Of the submissions that addressed the issue, one considered that a requirement for periodic review was "not necessary",[33] another noted that periodic reviews are a good thing[34] and another submission felt that there was no need for a specific provision in the CJCs Act because a three-yearly review could probably be carried out as part of the AGD's business development plan.[35] CJCs, however, submitted that the CJCs Act should be subject to review like any other Act.[36]

10.20 The Commission notes that this Report represents the first major review of the operation of the Act since it was passed in 1983 (following a review of the pilot scheme Act of 1980) and agrees that there is merit in having a periodic review of the Act as is now standard practice with most new legislation in New South Wales. The Commission considers that 5 years from assent to any amending Act resulting from this Report will be a sufficient date for the commencement of the next review of the CJCs Act.

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31. *Community Justice Centres Act 1983* (NSW) s 26.
32. IP 23 Issue 44.
33. Confidential 2, *Submission* at 4.
34. D Oldfield, *Preliminary Submission*.
35. Law Society of NSW, *Submission* at 13.
36. CJCs, *Submission 1* at 21.

RECOMMENDATION 13

Section 26 of the CJCs Act should be amended to require regular periodic review of the CJCs Act.

RECORDS

10.21 Section 17 of the CJCs Act currently deals with the records of CJCs, including their retention, access and disposal.

Requirement to keep records for evaluation purposes

10.22 The Act currently requires the Director to ensure that "such records relating to the activities of Community Justice Centres are made and kept as are necessary or appropriate to enable a proper evaluation of Community Justice Centres under section 26 to be made".[37]

10.23 This provision may need to be read in light of CJCs' position in the Attorney General's Department. The *Public Finance and Audit Act 1983* (NSW) places a requirement on the Director-General of the Attorney General's Department to ensure that "proper accounts and records in relation to all the operations of the Department" are kept.[38] "Proper" records would include such records as are necessary to ensure that the Auditor-General can conduct a performance audit of CJCs.[39] However, these other requirements may not cover all that is "necessary or appropriate to enable a proper evaluation of Community Justice Centres under section 26". The provision in the CJCs Act, because it is linked to questions of evaluation of CJCs, involves different considerations to the other provisions in s 17 which deal with access to and disposal of CJCs records.[40] The Commission is of the view that s 17(1) should be retained but relocated to s 26 of the CJCs Act which makes provision for the evaluation of CJCs.

Access and disposal

10.24 In addition to imposing a positive requirement in respect of records that are necessary or appropriate for evaluation purposes, the Act also states that the CJCs Council is entitled to inspect "any records" of a CJC and that the records of any CJC may be "disposed of only in accordance with the directions of the Council".[41]

10.25 The disposal and retention of NSW government records and questions of access to them are currently governed by a number of Acts, including the *Privacy and Personal Information Protection Act 1998* (NSW) and the *State Records Act 1998* (NSW). Conformity with the provisions in these Acts will be the responsibility of the Director of CJCs. The additional

37. *Community Justice Centres Act 1983* (NSW) s 17(1).
38. *Public Finance and Audit Act 1983* (NSW) s 45C.
39. *Public Finance and Audit Act 1983* (NSW) s 38B(1).
40. See para 10.24-10.26.
41. *Community Justice Centres Act 1983* (NSW) s 17(2) and (3).

provisions currently contained in the CJCs Act are, therefore, unnecessary. The Commission recommends that s 17(2) and s 17(3) of the CJCs Act be repealed.

10.26 Various researchers and bodies, including the CJCs Council, may, from time to time, require access to CJCs records for the purposes of evaluation and quality assurance, or even to investigate complaints. The Commission expects that access will be granted in conformity with the requirements of the relevant State legislation.

RECOMMENDATION 14

Section 17(1) of the CJCs Act should be retained, but relocated as a subsection to s 26 of the CJCs Act. Section 17(2) and s 17(3) of the CJCs Act should be repealed.

Appendices

- Appendix A: Preliminary submissions
- Appendix B: Submissions
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Appendix A: Preliminary submissions

Anti-Discrimination Board of NSW, 21 February 2003

Ballina Shire Council, 17 January 2003

Barclay, Gay, 19 March 2003

Bega Valley Shire Council, 10 January 2003

Blacktown City Council, 3 February 2003

Byron Shire Council, 17 February 2003

Cessnock City Council, 10 January 2003

Coalition of Aboriginal Legal Services, 15 January 2003

Community Justice Centres (NSW), 11 April 2003

Confidential 1, 4 April 2003

Coonamble Shire Council, 18 February 2003

Deniliquin Council, 24 January 2003

Department of Ageing, Disability and Home Care (NSW), 11 February 2003

Department of Corrective Services (NSW), 31 January 2003

Department of Fair Trading (NSW), 10 February 2003

Department of Housing (NSW), 17 March 2003

Department of Local Government (NSW), 10 February 2003

Dewdney, Micheline Sarah, 25 March 2003

Fairfield City Council, 3 January 2003

Glachan, Ian, MP, 28 January 2003

Hallinan, Janet, 30 March 2003

Hornsby Shire Council, 12 February 2003

Laginha, Ed, 31 March 2003

Lake Macquarie, City of, 3 March 2003

Law Society of New South Wales, 8 April 2003

Newcastle, City of, 11 February 2003

Oldfield, David, MLC, 21 January 2003

Ombudsman (NSW), 30 January 2003

Orange City Council, 30 January 2003

Penrith City Council, 24 January 2003

Pezzutti, Brian, MP, 22 January 2003

Pittwater Council, 5 February 2003

Police (NSW), 24 March 2003

Price, John C, 28 January 2003

Professional Reference Group, Community Justice Centres, 31 March 2003

Richmond Valley Council, 22 January 2003

Saliba, Marianne MP, 8 May 2003

Seaton, Peta, MP, 23 January 2003

Severn Shire Council, 14 April 2003

Sham-Ho, Helen, MLC, 28 January 2003

Subregional Group of Local Government Authorities (NE NSW), 8 April 2003

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Wollongong City Council, 25 February 2003

Wyong Shire Council, 28 February 2003

Appendix B: Submissions

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Bates, Peter, 24 November 2003
Community Justice Centres (NSW), *Submission 1*, January 2004
Community Justice Centres (NSW), *Submission 2*, 22 July 2004
Community Justice Centres Professional Reference Group, 16 January 2004
Confidential 1, 17 December 2003
Confidential 2, 12 December 2003
Confidential 3, 22 December 2003
Confidential 4, *Submission 1*, 16 February 2004
Confidential 4, *Submission 2*, 17 February 2004
Confidential 4, *Submission 3*, 28 May 2004
Courcier, John, 22 December 2003
Courcier-Jones, Christine, 22 December 2003
Delaney, John, 23 August 2004 (telephone)
Dive, Roger, Chief Children's Magistrate (NSW), 8 July 2004 (telephone)
Eggleton, Glen, February 2004
Greater Sydney Families in Transition Network, 20 January 2004
Jones, R G (Felix), 14 December 2003
Kelly, Loretta, 18 April 2004
Law Society of New South Wales, 27 February 2004
Mann, Joy, 25 January 2004
McIlwaine, Garry, 9 February 2004
Redfern Legal Centre, 13 July 2004
Rollinson, David, 12 December 2003
Takacs, Nefley, 11 December 2003
Women's Domestic Violence Court Assistance Scheme Network, 13 Jul 2004

Appendix C: Consultations

The Trillium Group, 28 January 2004

LEADR, Scott Pettersson, Chief Executive Officer, 18 March 2004

Australian Commercial Disputes Centre Ltd (ACDC), Bernhard Ripperger, 19 March 2004

Community Justice Centres (NSW), Director and Co-ordinators, 24 March 2004

Registrars, Local Courts of New South Wales, 29 March 2004

Redfern Legal Centre, Community consultation on mediation of apprehended domestic violence orders, 4 May 2004

Confidential consultation, 27 May 2004

Children's Legal Service, Teresa O'Sullivan, Senior Solicitor, 1 June 2004

Relationships Australia (NSW), 11 June 2004

Redfern Community Centre, Consultation with members of the Redfern Aboriginal community, 15 June 2004

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