

# Building an evidence-base for the Civil Justice System

## Civil justice system framework and literature review Report

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for the

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## Building an evidence base for the civil justice system

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## ACRONYMS and ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABA	American Bar Association
ABS	Australian Bureau of Statistics
ACCJSI	Australian Centre for Court and Justice System Innovation
ADR	Alternative dispute resolution
AGD	Attorney General’s Department, Australia
AIFS	Australian Institute of Family Studies
AIHW	Australian Institute of Health and Welfare
AIIA	Australasian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
CALD	Culturally and linguistically diverse
CAV	Consumer Affairs Victoria
CCJSI	Centre for Court and Justice System Innovation, Monash University
CCP	Children’s Cases Program of the Family Court of Australia
CDRA	<i>Civil Dispute Resolution Act 2011</i>
CLC	Community Legal Centre
CLRP	Civil Litigation Research Project
CMD	Court mandated diversion
Cth	Commonwealth
DF&D	Department of Finance & Deregulation, Australia
DIISRTE	Department of Industry, Innovation, Science, Research and Tertiary Education
DSCV	Dispute Settlement Centre for Victoria
FaHCSIA	(Department of) Families, Housing, Community Services and Indigenous Affairs
FCA	Family Court of Australia
FDR	Family Dispute Resolution
FICS	Financial Industry Complaints Service
FMC	Federal Magistrates Court

FOS	Financial Ombudsman Service
FRC	Family Relationship Centre
GAOP	Grants to Australian Organisations Program
HERDC	Higher Education Research Data Collection
HILDA	Household, Income and Labour Dynamics in Australia
JPE	Judicial Performance Evaluation, US
LAC	Legal Aid Commission
LAT	Less Adversarial Trial
L&JF	Law and Justice Foundation, NSW
LSAC	Longitudinal Study of Australian Children
LSRC	Legal Services Research Centre
NADRAC	National Alternative Dispute Resolution Advisory Council
NCSC	National Centre for State Courts, US
NJC	Neighbourhood Justice Centre, Victoria
NSU	Norfolk State University
PILCH	Public Interest Law Clearing House
PIP	Parent Information Program, UK
ROGS	Report on Government Services
RRR	rural and remote regions
SBDC	Small Business Development Corporation, Western Australia
SCRGSP	Steering Committee for the Review of Government Services Provision
SRLs	self-represented litigants
SRED	Survey of Research and Experimental Development
UoE	University of Exeter
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission
VSBC	Victorian Small Business Commissioner

### Executive Summary

The aim of this project was to scan research into the civil justice system conducted over the last five years to find empirical research that relates to the draft objectives for the civil justice system. The research has been classified under the relevant objectives through assignment to a classification framework developed in consultation with the Commonwealth Attorney-General's Department (AGD).

Through this process of scanning the literature, the consultants were also asked to make findings in relation to the state of civil justice research in Australia, with a view to informing the planned development of an evidence base for the civil justice system.

The project was conceived as part of the “bottom-up” approach to building an evidence base for the civil justice system - assessing the utility of existing data collections. Completion of the task was greatly assisted by discussions at a Forum on *Building an Evidence Base for the Civil Justice System* on 25 May 2012 and by further consultations with researchers in the field.

One of the challenges associated with the project has been to classify broad-based research, often produced as part of a program evaluation, against the various classifications that flow from the draft objectives. Few research studies fit neatly within the system objectives and a close examination of many studies reveals findings against a number of the classifications. These have been dealt with to the extent possible by cross-referencing.

Detailed findings on the research have been included at the end of each classification. These brief statements encapsulate findings on the research and evidence base for the objective covered under the respective classifications. A full list of these findings are on the following pages.

The final chapter provides a discussion on the state of research and data collection, as evidenced by the literature scan, and contains a number of recommendations for moving forward (see below).

On **data challenges**, it is recommended:

1. that a list of data items/concepts considered essential be developed as a starting point for clarifying what is important to measure in improving the civil justice system;
2. that a high level case be developed and considered by all governments at a high level that demonstrates the benefits to be gained from, and seeks in principle commitment to, national consistency of data in particular areas of the civil justice system;
3. that options for development of infrastructure to facilitate and drive the achievement of nationally consistent data across the civil justice system in Australia be explored and costed; and
4. that the potential for development of a National Information Agreement relating to the civil justice system be explored in the context of the infrastructure options.

On **fostering quality research**, it is recommended:

5. that AGD consider formulating a civil justice research strategy in collaboration with the

states and territories and other key bodies, to focus attention on the highest priority areas of desirable research.

On **barriers that inhibit research**, it is recommended

6. that the AGD further investigate, in collaboration with the Department of Industry, Innovation, Science, Research and Tertiary Education, why the ratings applied to civil justice research in universities do not appear to encourage such research.

On the **availability and visibility of research**, it is recommended:

7. that the AGD initiate discussions with the states and territories and other relevant bodies who may have commissioned confidential evaluations or other research to determine whether the research (or abridged versions of the research) can be made publicly available; and
8. that the AGD discuss with Australian Centre for Court and Justice System Innovation (ACCJSI) ways in which the AGD can encourage and support use of the ACCJSI Clearing House as a means of sharing research on the civil justice evidence base, including writing to states and territories and other relevant bodies inviting their participation.

The final sections of the report deal with research funding, the quality, utility and effectiveness of the scanned research as well as the gaps identified against each classification. Finally, some observations are made in relation to the draft objectives, based on the experience gained from the literature scan.

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3 September 2012

## Detailed findings on the research attributed to each classification

### Classification 1: Social stability and economic growth

- While there are numerous theoretical journal articles and judicial papers on the civil justice system which provide valuable insights into the various aspects of the system, and how it operates, there is very limited empirical research. The only study that was found was an opinion poll on the Constitution. Otherwise, the evidence base must rely on data in publications like the ROGS which are limited in terms of their scope and analysis, but valuable in terms of their national comparability.
- Research relating to demand in the justice market is generally limited to services to socially and economically disadvantaged people. Much reliance is placed by researchers on the NSW Law and Justice Foundation's 2006 *Justice Made to Measure* Report. Comprehensive though it is, this report targets legal needs in disadvantaged areas which leave a significant gap in the identification of legal needs in other demographics and State and Territory jurisdictions. Further, *Justice Made to Measure* covers both the criminal and civil spheres which place some limitations on analysis of the civil justice system in isolation. There is a major gap in the areas of empirical research on the private market and government institutions.
- More research has been undertaken on supply in the justice market although, apart from a Commonwealth survey on Community Legal Centres, most of the work emanates from the NSW Law and Justice Foundation. Though it is broader in scope and includes some research on the supply and retention of solicitors in NSW, there are gaps in areas of empirical research in other aspects of the market in NSW and in all aspects of the private market in other jurisdictions.
- No empirical evidence was discovered about the benefits of justice.
- There is substantial international empirical research with coherent methodologies on civil justice although a review of research on the cost of justice showed there is very little research in that area.

### Classification 2: Community resilience and capacity building

- There is some empirical research available on how information is accessed and the difficulties associated with awareness amongst disadvantaged people of whether they have legal problems. These studies, however, cover both the criminal and civil justice systems.
- While government websites provide substantial information and guidance which aims to increase civic awareness about the justice system and legal processes, there is no research which indicates the extent to which they are accessed or have beneficial effects.
- There is ample research about information and awareness of ADR in Victoria but not it would appear in other jurisdictions.
- There have been a number of surveys taken about industry/small business awareness of dispute resolution mechanisms.
- There is limited research on dispute and conflict resolution skills in the community. The substantial work by NADRAC relates solely to Indigenous people and could usefully be replicated in the wider community.

### **Classification 3: Expeditious resolution of disputes**

- Empirical research over the last five years in relation to timely resolution of disputes has focused on the use of alternative dispute resolution (ADR) and family dispute resolution (FDR). In particular, some robust research has been undertaken into the use of court-related mediation and the way in which it increases the efficiency of court processes.
- Much of the useful research has been undertaken as part of government-commissioned evaluation of programs, aimed at evaluating whether a program met its objectives, for example the KPMG evaluation of FDR in Legal Aid Commissions or the AIFS evaluation of the Family Law Act reforms or the research into mediation in the Victorian courts.
- The introduction of new government legislation has also been a trigger for high quality research in this area. For example, the introduction of a default position of mandatory FDR as part of the 2006 family law reforms has triggered analysis, evaluation and commentary about dispute resolution processes. Similarly, government reforms in relation to the adoption of pre-action protocols have also triggered a desire to understand whether pre-action protocols and guidelines speed up the resolution of cases, or whether they add barriers and costs. While the views of many parties have been put forward and analysed (for example in a Senate Inquiry), the only empirical research in relation to pre-action protocols in Australia is currently still underway. Again, it is commissioned research – this time by the Australasian Institute of Judicial Administration.
- While the ROGS regularly publishes clearance rates in the various courts, there has been no accompanying research that attempts to examine the timeliness issue in more detail, particularly in relation to judicial decisions.

### **Classification 4: Service quality, including just and fair processes**

- Very little reference to therapeutic jurisprudence was found in the literature scanned, although there is considerable work of a theoretical nature.
- There is a significant body of research into the skills of mediation practitioners (with the introduction of the National Mediation Accreditation Standards relevant to this).
- Researchers have called for further empirical research into the alleged tendency of some lawyers to create an adversarial approach and into the ethical infrastructure of large legal firms.
- There would seem to be potential for further research into what constitutes 'expertise' in family law and into the apparent differences between practitioners with a social science and a legal training.
- A limited amount of empirical research was found in relation to measuring how the professional skills of those involved in the civil justice system could be strengthened, or the impact of that up-skilling.
- Findings in relation to service quality are found in almost all evaluations reviewed for this project. The large-scale evaluations commissioned by governments or other bodies use robust methodologies that rely on multi-dimensional approaches to measuring quality, including objective measures as well as measures of perception.
- Levels of satisfaction and perceptions of fairness and their inter-relations with outcomes are concepts which have been the subject of a significant amount of empirical research – through client and practitioner surveys. The extent to which

<p>people accept early resolution outside of the courts, appears to be closely related to their perceptions of fairness and authority and this remains an area where further research is warranted.</p>
<b>Classification 5: Equity of access</b>
<ul style="list-style-type: none"><li>• There are several sources of data on the income levels of clients of government-funded legal assistance services. These data provide a rich source of research material for determining affordability and the impacts of low income on disadvantaged people who are in dispute.</li><li>• One of the impacts of the cost of legal services is the increase in self-represented litigants. There has been considerable research undertaken on self-represented litigants across a range of issues, however, there has been little in recent years.</li><li>• There is substantial research available on the groups in society who experience barriers to accessing legal assistance services; and the predominant factors which impact on equitable access.</li><li>• Research and evaluation on video-conferencing as a response to barriers to access in rural, regional and remote communities is limited. A review of the available research has made recommendations on how video-conferencing could be used more efficaciously.</li><li>• Barriers and access to services to people who are vulnerable or marginalised in society have been the subject of several Australian and international studies. This is an area where non-government organisations play a key part, however, there appears to be limited research or evaluations on their impact in the area of civil justice. A far greater emphasis is placed on the interface by vulnerable people with the criminal justice system.</li><li>• Statistical evidence suggests that Judicial Case Management has been successful in enabling access to justice and improving dispute resolution outcomes pre-court. Statistics aside, there have been no authoritative studies or evaluations undertaken in Australia with review and judicial commentary relying heavily on international studies.</li><li>• Descriptive information aside, some work has been identified on system complexity in the field of ADR. No empirical work on the broader civil justice system in Australia has been located.</li><li>• International research on barriers and access to justice provide sound methodologies which would be useful for undertaking empirical studies in Australia.</li></ul>
<b>Classification 6: Wellbeing</b>
<ul style="list-style-type: none"><li>• Research relating to this classification is dominated by extensive evaluation of the impact on children and families of the civil justice processes for resolving family disputes. The series of changes to the Family Law Act 1975 were intended to bring the views, feelings and experiences of children into sharper focus and considerable high quality empirical research has addressed how well this objective has been achieved.</li><li>• There is also considerable high quality research into the way in which family violence is managed by civil justice services.</li><li>• While there is some high quality research into the way the civil justice system impacts on Indigenous people, there is very little research into the way the system interacts with culturally and linguistically diverse clients or people with disabilities or mental health problems. Some of this research relates to client satisfaction and is covered under Classification 4.</li></ul>

### **Classification 7: The research and evidence base**

- There are many examples in the research literature where the paucity of data and data systems are highlighted, indicating the need for improved comparability of data. A useful analysis of the differences in concept and definition of the term 'mediation' provides a good example of the need for common agreed definitions.
- There are a number of examples in the literature over the last five years where performance measures have been developed within services – some have been useful, others have been found unsatisfactory. All rely on comparable data being available if they are to be useful and reliable.
- The literature provides some examples of innovative approaches to fostering research that may serve as useful models as an evidence base is being developed.



### **Introduction**

The introductory section of this report provides the background to the report and the Attorney-General Department's long term objectives for the evidence-base project. This report provides an early contribution to that project. Included are the draft civil justice objectives from which the authors were asked to devise a research classification framework; and the civil justice framework principles developed by the Access to Justice Taskforce.

The next section of the report sets out the classification framework which comprises seven classifications. In each classification there are a set of sub-classifications. Findings are included at the end of each classification which includes the authors' assessment of the extent and quality of the research in the respective areas.

The final section of the report on major findings includes some recommendations about ways in which the current state of data and research could be built into a more robust foundation for the development of reliable evidence to underpin the future of the system. This section also draws together some of the findings across the project as a whole.

Some areas have virtually no sound empirical research included. That is not to say that there isn't any. The requirement was that, as a general rule, only research from the past five years be included. In some cases earlier research has been referenced, but for the most part the general rule has been applied. Another reason why there is scant or no material is that it wasn't found. There were severe time limitations on this project. While every effort was made to populate the framework, time was against us in the end. For example, very little research emerged on tribunals, and a more intensive search may have produced more.

### **Background**

The Civil Justice Evidence Base project is a long-term endeavour of the Commonwealth Attorney-General's Department and has the support of the Federal Civil Justice System Roundtable. Over time, the Department aims to develop:

- a robust evidence base that will enable important questions to be answered about what the civil justice system delivers to the people who use it, its value to the Australian community, and the extent to which it meets broad public policy objectives;
- reliable information about people's needs and expectations, why and how they choose and move between services, what influences those choices and decisions, what happens to them along the way, and the extent to which their needs and expectations are met and the outcomes they get;
- approaches to analysing information that is gathered to enable understanding of how changes to one part of the system may influence other parts of the system so that better judgements can be made about the system-wide impacts of policy and service delivery (AGD 2012).

### The project requirements

The aim of this project is to develop a framework for classifying civil justice research that will provide an evidence base for future policy formulation and program development. Departing from the historical institutional (or outputs-based) approach, this framework will be underpinned by outcomes-based principles and methodologies with a focus on outcomes both for the Australian community as a whole and for individuals who interact directly or indirectly (for example, children of disputing parties) with the Australian civil justice system. The principal purpose of the literature review is to ascertain how well research and evaluation undertaken over the past five years informs the evidence base in line with the classification framework and what might be needed to improve it. The project's requirements are set out in box 1.

#### Box 1: Civil justice system project requirements

- develop a framework for classifying civil justice research and evaluation work with reference to the draft civil justice system objectives and *Strategic Framework for Access to Justice* (AGD 2009)
- audit research and evaluations conducted in the last five years and reference, as appropriate, other important examples conducted at earlier times which may be instructive in terms of methodology or outcomes or provide useful or best practice models
- review the quality, utility and effectiveness of research and evaluation in the civil justice field, with reference to accepted social science methodological principles for qualitative and quantitative research and analysis
- in accordance with the classification framework identify any gaps, areas of duplication or other issues
- identify any barriers to undertaking quality research and evaluation about the civil justice system including any issues with the way funding is disseminated for civil justice research and evaluation work and recommend any changes that may facilitate future research and evaluation work
- undertake a desktop review of overseas policy and practice with respect to civil justice research and evaluation to identify any models that may be worth consideration here.

### Civil justice objectives

One of the project's requirements is that the classification framework be developed with reference to the draft civil justice system objectives<sup>1</sup> (see box 2).

#### Box 2: Civil justice system draft objectives

##### *Overarching objective*

The Australian civil justice system contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law.

1. People can solve their problems before they become disputes.
2. People can resolve disputes expeditiously and at the earliest opportunity.
3. People are treated fairly and have access to legal processes that are just.
4. People have equitable access to the civil justice system irrespective of their personal, social or economic circumstances or background.

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<sup>1</sup> These may change as a result of on-going consultation with stakeholders and/or the development of the classification framework.

5. People benefit from a civil justice system that values the well-being of those who use it.
6. People can be confident that the civil justice system is built on and continuously informed by a solid evidence base.

### Civil Justice Framework Principles

The Access to Justice Taskforce report recommended a strategic framework for ensuring that new initiatives and reforms to the justice system optimally target available resources to improving access to justice. They represent performance measures for assessing the degree to which the objectives have been achieved. The justice principles for access to justice policy-making are set out in table 1.

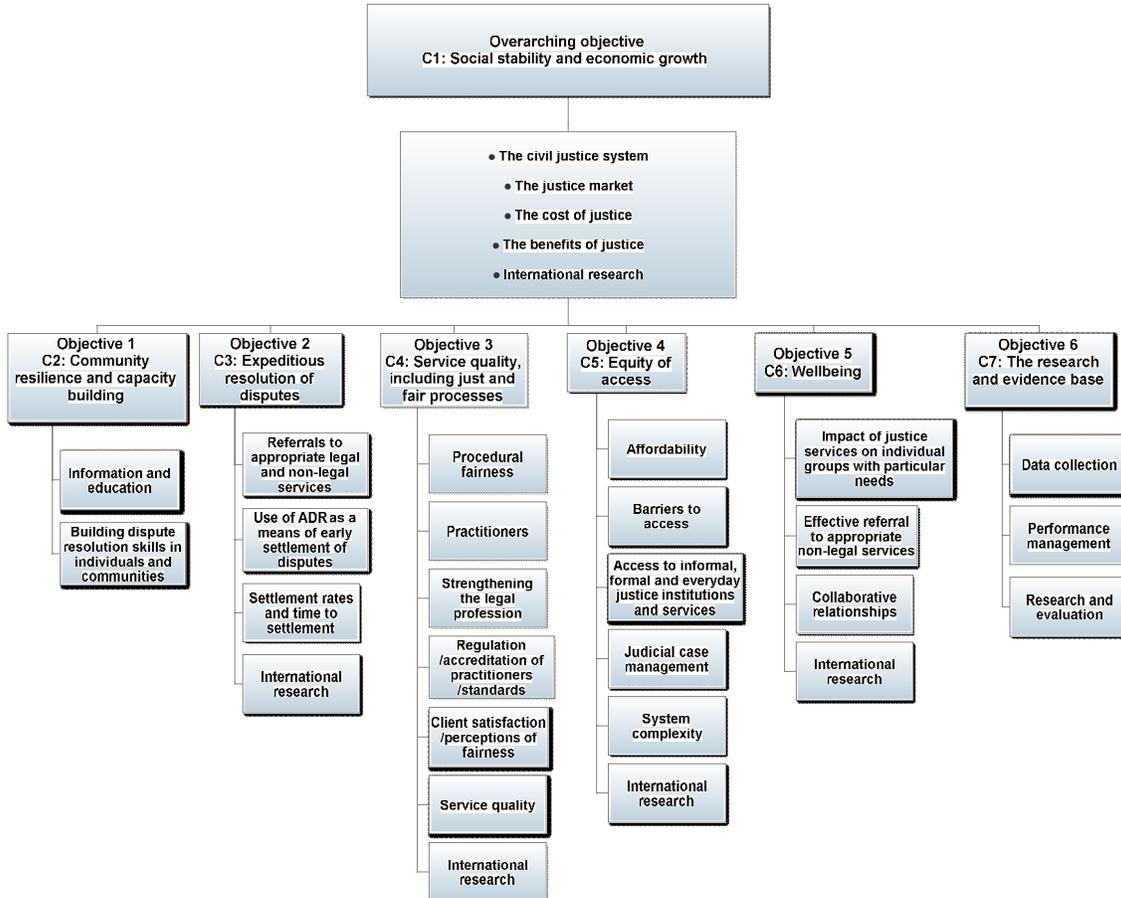
Accessibility	Justice initiatives should reduce the net complexity of the justice system.
Appropriateness	The justice system should be structured to create incentives to encourage people to resolve their disputes at the most appropriate level. Legal issues may be symptomatic of broader non-legal issues. The justice system should have the capacity to direct attention to the real causes of problems that may manifest as legal issues.
Equity	The justice system should be fair and accessible for all, including those facing financial and other disadvantage. Access to the system should not be dependent on the capacity to afford private legal representation.
Efficiency	The justice system should deliver fair outcomes in the most efficient way possible. Greatest efficiency can often be achieved without resort to a formal dispute resolution process, including through preventing disputes. In most cases this will involve early assistance and support to prevent disputes from escalating. The costs of formal dispute resolution and legal assistance mechanisms – to Government and to the user – should be proportionate to the issues in dispute.
Effectiveness	The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes and maintaining and supporting the rule of law.

Source: Cth 2009a, p.8.

## The classification Framework

This framework has been constructed with a dual purpose. First, to reflect a means of consolidating research that relates to the civil justice system objectives (box 1) within a formal classification framework (figure 1). The second is to identify research that has been undertaken over the past five years and position it within the classifications in the framework.

Figure 1: Classification framework and objectives



## The nature of research

Research takes many forms, and for this project the focus is to identify primarily empirical material. Norfolk State University (NSU) defines empirical research is defined as:<sup>2</sup>

Research based on observed and measured phenomena. It reports research based on actual observation or experiments using quantitative research methods and it may generate numerical data between two or more variables (NSU 2010).

<sup>2</sup> There are many sources for defining empirical research. The NSU definition was included because it provides a sense of what is generally accepted.

Possible methodologies used in empirical research include a study, an observation, or analysis involving a number of participants or subjects. Data collection, survey or questionnaire, assessment or measurement, or interviews conducted are all possible methodologies associated with empirical research. Generally, empirical research will contain the following sections:

- Introduction and literature review of related research
- A statement of the research question(s) and method used to gather the data
- Analysis of the results of the data gathered (quantitative or qualitative)
- Discussion of conclusion
- A substantial list of the references consulted throughout the article (NSU 2010).

Identifying empirical research across all of the classifications has produced mixed results with some areas such as ‘expeditious resolution of disputes’ being quite substantial, while others such as ‘social stability and economic growth’ are deficient. In some cases, the authors have extrapolated the findings from a study or evaluation and these have been compiled in Appendix A.

Some non-empirical research has also been referenced in this report. While it might be argued that non-empirical research has no place in an evidence-base, the authors believe that it nevertheless plays a significant role in developing the knowledge base from which important research and evaluation questions are found. There is a substantial body of judicial and academic work which has not been referenced.

Finally, it was not always clear just where a particular piece of research should be located in the framework. As a first step, placement was decided upon the basis of what area the research question focussed upon. Where there was a cross-over to other classifications, the research has been cross-referenced.

### **Classification 1: Social stability and economic growth.**

This classification supports the overarching objective:

**The civil justice system contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law.**

It includes research into how the civil justice system as a whole, factors into the social stability of people and communities, and the economy. This encompasses the institutional arrangements, the market for civil justice services, including demand and supply, and the costs and benefits of justice to society.

While justice, equity and accessibility are the ultimate outcomes that the civil justice system strives to achieve, at the highest strategic level, the system is an important component of stability, security and prosperity (AGD 2012). This is encapsulated in the highest level objective for the civil justice system agreed by all Australian governments:

The civil justice system sustains and fosters social stability and economic growth (SCRGSP 2010).

### **The civil justice system**

There are difference notions about what comprises the civil justice system. The Steering Committee for Government Service Provision includes a justice chapter in its annual Report on Government Services (ROGS) which portrays justice services as comprising police services, civil and criminal courts administration, and adult corrective services. This is a broader concept of the justice system than is envisaged in this framework. Nevertheless, the courts administration section which is presented in both the criminal and civil spheres provides important data on the civil justice system nationally. It also provides information on the various courts jurisdictions in the Commonwealth, states and territories and the types of matters they deal with (SCRGSP 2012, pp.7.3-7.5). The performance indicator framework reports on: equity (with access indicators); effectiveness (with quality and access/timeliness indicators); and efficiency (with clearance and cost indicators) (SCRGSP, p.7.24). Unlike other chapters in the ROGS (which reports on twelve areas of government service delivery), courts administration has been unable to develop thus far, any indicators on ‘outcomes’.<sup>3</sup> See also Classification 7 on performance measurement.

The components of the civil justice system as conceptualised in this report draw upon the description of the federal civil justice system in the Attorney-General’s Access to Justice Taskforce report (see box 3). This translates readily to the way the system operates at a national level.

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<sup>3</sup> The ROGS notes that the activities of court administration lead to broader outcomes within the overall justice system that are not readily addressed in the service-specific chapter. The SCRGSP has identified outcome indicators as an important element for future court administration framework development (SCRGSP 2012, 7.52).

### Box 3: Components of the federal civil justice system

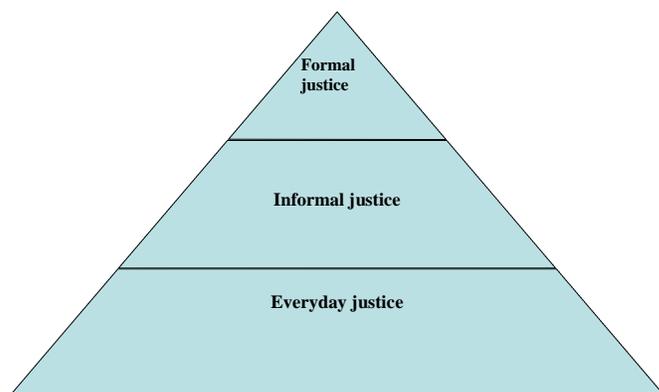
Australian's federal civil justice system encompasses the many institutions and services through which the Commonwealth helps people to resolve civil disputes, and prevent disputes from occurring. It includes:

- the laws and legal frameworks applying in the federal context
- services that provide information and advice in relation to legal problems and events that people might experience, including informing them of their legal rights
- providers of legal and related services, including legal advice, assistance, advocacy, dispute resolution and representation
- primary decision makers/public officials (including ministers) making decisions affecting rights (for example, eligibility for benefits, concessions or licences to carry on a business)
- dispute resolution services that help people negotiate their own solutions such as Family Relationship Services
- complaint handling bodies, including Ombudsmen
- administrative review tribunals; and
- courts

Source: Cth 2009b, p.1.

The taskforce noted how the individual's pathway through the justice system will vary depending upon the entry point, the level of assistance available, and the resources the individual has at their disposal (Cth 2009b, p.68). The objectives which sit above the classifications in this report, and the way the classification framework is structured, reflect this approach which essentially moves away from a purely institutional view of justice towards one that envisages individuals finding the best pathway through the system for them. The optimal entry point and resolution points may be anywhere on the spectrum (figure 2).

**Figure 2: The relationship between justice types and the number of disputes resolved**



#### Formal justice

Courts  
Legal assistance  
External merits review  
Legal services  
Better decision-making

#### Informal justice

Alternative dispute resolution (ADR)  
Legal assistance – ADR  
Legal assistance – early intervention

#### Everyday justice

Access to information  
Resilience  
Handling matters personally

Source: Cth 2009b, p.68

The Victorian Law Reform Commission (VLRC) Civil Justice Review report focused on civil justice reform. It provided a comprehensive overview of the litigation system in Victoria and made a series of recommendations, leading, among other things, to the Victorian proposal to strengthen pre-action obligations. The report considered the aims of the civil justice system and the principles that should guide the rules of civil procedure, summarised factors influencing the justice system and assessed the performance of the civil justice system using empirical data and feedback. It suggested that many litigants in the higher Courts are dissatisfied as a result of delay, inefficiency and disproportionate legal costs (VLRC 2008).

The report made specific recommendations for reform, including increasing the use of alternative dispute resolution. Proposals for the provision of an increased array of alternative dispute resolution (ADR) processes, more effective industry specific ADR schemes and additional provisions for mandatory referral to ADR were a prominent feature of the report. The report also suggested that there is a need for ongoing civil justice review as well as other reform proposals (Sourdin 2012, p 25).

Research on how the justice system is perceived by the community is very limited. The federalism Project at the Griffith Law School commissioned Newspoll to conduct surveys in 2008 and 2010 on the Australian Constitution. Respondents 18 years and over were selected via a stratified random sample process. Interviews were conducted by telephone. Results were post-weighted to reflect population distribution. The results were presented disaggregated into Australian (average), states and territories. Survey questions related to the Constitution and:

- local government;
- an Australian Republic;
- recognition of the history and culture of Indigenous Australians
- levels of government; and
- responsibilities of levels of government (Brown & Levy, 2010).

### **The justice market**

In a study using both qualitative and quantitative research methods, Forell, Cain & Gray (2010) found *inter alia*, that some rural, regional and remote areas of NSW are experiencing economic, social and population decline. Resident services, including legal services, they concluded, are likely to decline accordingly. The study's methodology included:

- a snapshot taken from the NSW Law Society's data on all practising lawyers in NSW;
- a census of all filled and vacant public legal assistance solicitor positions in NSW on 30 June 2009;
- examination of all registered private practitioner legal aid panel members during that time; and

- a survey of self selected solicitors who either were working in or who had left a public legal assistance service in regional, rural, and remote (RRR) areas.

### The demand for legal services

The opening words of the civil jurisdiction section in the 2012 ROGS on ‘social and economic factors affecting demand for services’ are:

Demand for civil justice services are influenced by the types of legal issues people experience, which in turn are influenced by social and economic factors. Demand also varies with the way in which people respond to legal issues – do nothing, deal with the issue independently or seek advice or legal assistance (SCRGSP 2012, p.C11)<sup>4</sup>.

The VLRC review found that legal needs often do not involve one problem, but rather a cluster of problems and increased complexity in matters. In its submission to the review, the National Association of Community Legal Centres (CLCs) cited a number of studies and reports including the Australian Council of Social Services, *Australian Community Sector Survey Report 2007*, the 2006 report on *The Economic Value of Community Legal Centres* by the University of Technology Sydney, the New South Wales Law and Justice Foundation as part of its *Access to Justice and Legal Needs* research program and research in the United Kingdom, *A Trouble Shared – legal problems clusters in solicitors’ and advice agencies*, which all point to the need for a multi-dimensional approach with more holistic service provision and better coordination of responses to clients’ needs.<sup>5</sup>

The New South Wales review of CLCs noted that:

The community legal centres’ value base included a strong emphasis on ‘holistic’ responses to client problems—an awareness that a disadvantaged client’s legal problem was likely to be based in, associated with or the cause of other non legal problems which should also be addressed (AGD 2008. p.33).

Various studies have identified a range of cluster types, for example, family problems, welfare benefits/housing, consumer and employment. In their research on problem clusters, Moorhead found that about a third of clients also had a physical disability, chronic illness or mental problems (Moorehead 2007).

The Access to Justice Taskforce signified the demand for federal civil justice services by compiling a list of accessed services, see Cth 2009b.

In 2006, the NSW Law and Justice Foundation (L&JF) published in its report, *Justice Made to Measure*, the results of an extensive survey on the legal needs of socially and economically disadvantaged people in NSW.<sup>6</sup> The survey was administered during 2003 via telephone interviews in three suburban areas within Sydney, one major provincial centre and two rural/remote areas. In total 2,431 residents aged 15 years or over were

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<sup>4</sup> SCRGSP cite AGD 2009 as the source of this approach.

<sup>5</sup> The National Association of Community Legal Centres *Submission*, p16

<sup>6</sup> The Law & Justice Foundation NSW will be publishing the results of a recent legal needs survey in August 2012.

interviewed with an estimated survey response rate between 24 and 34 per cent (Coumarelos Wei & Zhou 2006).<sup>7</sup>.

The survey examined the randomly drawn sample's experience of a total of 100 different events that have the potential for legal resolution **covering both the criminal and civil law systems**. The survey measured:

- the incidence of legal events during the 12 months prior to the survey;
- participants' responses to legal events, including the use of legal services;
- satisfaction with the assistance received for legal events;
- the resolution of legal events; and
- satisfaction with the outcome of legal events (L&JF 2006, pp. xvii-xviii).

A summary of the survey's major findings is included in Appendix A.

### Supply of legal services

The Commonwealth Government Review of the Commonwealth Community Legal Services Program<sup>8</sup> collected and analysed data from a wide range of sources such as the National Association of Community Legal Centres (CLC) publications, CLC annual reports, Community Legal Services Information System reports, ABS surveys and NSW Law and Justice Foundation reports (AGD 2008, p.15). The review confirmed that the program is providing services to clients who are significantly disadvantaged. It found that 58 per cent of CLC clients receive some form of income support, 82 per cent earn less than \$26,000 per annum and almost 9 per cent have some form of disability (AGD 2008, p.6).

A wide-ranging terms-of-reference provided the basis for Dora Dimos's review of civil law policies (excluding mental health and veteran's law policies) in NSW. The review entailed undertaking a literature review, and analysis of relevant statistics including Legal Aid NSW, LawAccess and selected court and tribunal statistics. Semi structured interviews were held with stakeholders, individuals and agencies that are working in legal environments with disadvantaged clients about civil law matters. The review analysed the information and data qualitatively, however, there is no quantitative analysis in the report. The report covered the breadth of the civil law system in NSW and the supply of legal services (Dimos 2008a). It makes a number of recommendations based on its findings (see Appendix A).

A census was conducted by the Law and Justice Foundation of NSW of all private solicitors and public legal assistance solicitor positions in NSW. Its results indicated that problems in recruiting and retaining solicitors for publicly funded legal assistance work in rural, regional and remote areas were typically location specific and often position specific (Cain & Forell 2010).

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<sup>7</sup> Note earlier caveat that the report covers both criminal and civil justice systems.

<sup>8</sup> Almost 62 per cent of the CLC activities in 2006-07 involved civil law, with a further 31 per cent involving family law (AGD 2008 p18).

Forell, Cain & Gray found that there is at least some evidence to suggest that recruitment and retention problems are more nuanced and vary from region to region. They found that there had been a net loss of solicitors in regional, rural and remote NSW (Forell, Cain & Gray 2010). Major findings and conclusions can be found at Appendix A.

### **The cost of justice**

Based on the research in their literature review, Richardson, Sourdin & Wallace note the perception that there has been an increase in the number of self-represented litigants over the past fifteen years is widespread and is largely attributed in the literature to increased costs and changes to legal aid funding.<sup>9</sup> Although there are studies which provide data and evidence supporting the increase, there is little information on why this is occurring and the impact on courts (Hunter et al 2002, cited by Richardson, Sourdin & Wallace 2012).

The Chief Justice of NSW is currently undertaking a comprehensive review of the Costs Assessment Scheme. The review will examine and report on how effectively the Scheme is achieving the aims of providing a just, quick and cheap resolution of costs disputes. This is not an empirical study and will be based on written submissions. Nevertheless, given the breadth of its terms of reference, its findings will contribute to the research base and may provide the basis for future empirical studies (Chief Justice of NSW 2011).

The Australian Law Reform Report, *Managing Discovery: discovery of document in Federal Courts*, found that “discovery is often the single largest cost in any corporate litigation, giving rise to concern about the scale of costs”. Because of the volume of information available, the Australian Law Reform Commission (ALRC) maintained that the commercial realities of discovery may represent a significant barrier to justice for many litigants as well as amounting to a huge public cost (ALRC 2012, p.14).

### **Cost benefit of family dispute resolution (FDR)**

There is limited quantitative data to support anecdotal reports that alternative dispute resolution (ADR) in the justice setting saves court time.

The KPMG evaluation of FDR services in Legal Aid Commissions (LACs) highlighted a need to collect accurate, complete and reliable data regarding the cost of FDR and the cost of litigation. There are limited quantitative data to support anecdotal reports that ADR in the justice setting saves court time (KPMG 2008, p.18).

At the national level, and in most jurisdictions, the KPMG evaluation found that FDR is ‘cheaper than litigation’. The most cost efficient FDR services in commissions are those that conference a large volume of matters (that is, 80-90 per cent of matters where appropriate).

As KPMG notes, however, there are limitations on the cost benefit analysis – it only uses costs to the Australian Government, and there is no evidence to indicate the number of

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<sup>9</sup> See *inter alia* Senate Legal and Constitutional Affairs References Committee, Access to Justice, 2009; Law Council of Australia, 2004, *Erosion of Legal Representation in the Australian Justice System research Report* which found that there had been a rise in SRLs based on a survey and some statistical data (Richardson, Sourdin & Wallace 2012).

partially resolved matters that subsequently proceeded to court, or the amount of court time that was saved (KPMG 2008, p.84).

The cost was represented by the financial costs of FDR to the Australian Government and the benefits by the value of court event hours that are avoided as a result of successful FDR outcomes (see KPMG 2008, p.18). This analysis excludes intangible benefits associated with successful FDR outcomes such as the avoided stress, anxiety and time for clients.

There are some ambiguities relating to costs. See classification 3 for a discussion of whether research on pre-action protocols or mediation may front-end load the costs.

### **The benefits of justice**

It is difficult to identify in research terms what would constitute the benefits of justice. Broadly, it might be assumed that there are benefits to society in having functional governments and institutions and these in themselves lead to just and beneficial outcomes. More precisely, it may be assumed that having a functional civil justice system that is equitable and accessible to everyone in society is beneficial. That said, it has not been possible to locate any empirical research on this subject although, it is noted that there is a great deal of academic and judicial work on the theory of justice and jurisprudence.

### **International research**

#### **The civil justice system**

Justiciable problems do not always occur in isolation. In lieu of the fact that little empirical research has examined multiple problems in depth, Pleasence et al attempted to identify common clusters of problems, their extent, and those who experience them. They initially conducted a study called ‘The Legal Services Research Centre’s Periodic Survey of Justiciable Problems’ – a large-scale survey undertaken in England and Wales, documenting 5,611 respondents’ experience of 21 discrete problem categories.

Residential addresses were randomly selected from 73 post code sectors, spread throughout England and Wales. The study oversampled in three case study areas to allow regional comparisons.

After assessing the overall incidence and overlap of problem types, the study used a hierarchical cluster analysis, based on each respondent’s experience of these categories, to identify clusters. Social and demographic predictors of each cluster were then established using mixed-effects Poisson regression. Finally each problem type’s likelihood of overlapping with further problems was examined, both within and between identified clusters.

This was the first time that specific clusters of justiciable problems have been detected through a survey and associated susceptible populations identified; however, many of the findings support already existing research and literature (Pleasence et al, 2004).

Verdonschot et al have developed a shortlist of criteria and questionnaire items that could be used to evaluate the quality of outcomes of legal procedures and other paths to justice. For the purposes of creating the shortlist, the authors use the following definitions:

- A path to justice is a commonly applied process that users address in order to cope with a legal problem. Such a path to justice begins when the user first addresses the process and ends at the moment of an outcome.
- An outcome can be a final decision by a neutral person, a joint agreement by the parties, or an end to the process because one of the parties quits the process.

The measurement instrument aims to assess the quality of these outcomes from the perspective of the persons using paths to justice. The authors state that they intend the criteria and items to become part of a methodology for measuring the price and quality of access to justice from a user's perspective. They concluded that there were some methodological challenges: problems associated with neutral evaluations of outcomes; ambiguity of outcomes; and the relative weight of each criterion in different settings (Verdonschot et al, 2008).

### The justice market

Gramitov, Laxminarayan & Barendrecht have explored interrelations between supply and demand perspectives on justice and their implications for choosing units of analysis. They look at the development of a measurement framework for estimation of cost and quality of justice. The central research problem identified by the authors is the attainability of rigorous research methodology through which to collect data on several ingredients of the broader concept of access to justice and namely: cost, quality of outcome and procedural quality (Gramitov, Laxminarayan & Barendrecht 2010). For details on the methodologies, see Appendix A.

A study undertaken by Ab Currie, Principal Researcher from the Department of Justice, Canada, compared the results of legal needs surveys in a range of overseas jurisdictions and found the incidents of legal problems ranged from 26 per cent to 67 per cent of respondents.

... justiciable problems trigger both other justiciable and a range of health and social problems. Access to justice services can therefore play an important role in building an inclusive society, diminishing social disadvantage, dependency and the related cost to public services (Currie 2007).

### Cost of justice

A review by Taylor and Svechnikova of the international research on the cost of justice demonstrated an overwhelming lack of empirical data on the subject. The purpose of the review was to investigate how issues related to the costs of civil justice are reported; and to especially identify any previous empirical research and see how costs are measured. They surmised that, while there is a lack of empirical knowledge concerning the actual

costs of justice, there is substantial Canadian and international research on the social cost of failing to do so (Taylor & Svechnikova 2010).<sup>10</sup>

The review considered Gramitov's work on measuring the cost and quality of access to justice which involved building a measurement framework that includes approaches to the study of litigations (supply vs demand), the choice of units of analysis and measurement, the choice of data and collection methods<sup>11</sup> (Taylor & Svechnikova 2010, p.19). While there are many other aspects of the cost of justice covered in this review, the authors found that:

As it stands, the most comprehensive research we have identified occurred between 1980-1966....The inevitable conclusion is that there is currently no methodological models for systematic measurement of Canadian costs to justice. Such international research as is available offers some help in beginning to develop designs and measurements, but is dated....(Taylor & Svechnikova 2010, p.22).<sup>12</sup>

Research has been conducted in the UK after implementation of the Woolf Reforms that suggests that the reforms may have had unintended consequences in that “overall case costs have increased substantially over pre-2000 costs for cases of comparable value” (Fenn, Rickman and Vancappa cited in ALRC 2010). This research was apparently based on a comprehensive cross-section and time-series data study, however, the authors were not able to access the study (ALRC 2010).

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<sup>10</sup> See Currie. A., 2007, *The legal problems of everyday life: The nature, extent and consequences of justiciable problems experience by Canadians*, Department of Justice, Ottawa; Currie, A., ‘Civil Justice problems and the disability and health status of Canadians’, *Journal of Law and Social Policy*, 21, 31-38; Currie, A., 2009, ‘The legal problems of everyday life’ in R. L. Sandefur (Ed), *Sociology of Crime, Law and Deviance*, Volume 12, 1-41, Emerald, Bingley, UK; Pleasence, P., Balmer, N, J., Buck, A., Smith, M. & Patel, A., 2007, ‘Mounting problems: Further evidence of the social, economic and health consequences of civil justice problems’ in Pleasence, P., Buck, A. & Balmer, N. (Eds), *Transforming lives: Law and social progress*, (pp.67-92), Legal Services Commission, London; Pleasence, P., Balmer, N. & Buck, P., 2008, The health cost of civil-law problems: Further evidence of links between civil-law problems and morbidity, and the consequential use of health services, *Journal of Empirical Legal Studies*, 5, 351-371; Pleasence, P., Balmer, N, J., Tam, T., Buck, A., Smith, M. & Patel, A., 2008, ‘Civil justice in England and Wales: Report of the 2007 English and Welsh civil and social justice survey’, Research paper No. 22, Legal Services Commission, London; Stratton, M. & Anderson, T., 2008, *Social, economic and health problems associated with a lack of access to the courts*, Canadian Forum on Civil Justice, Edmonton.

<sup>11</sup> See Gramitkov, M, 2007, Methodological challenges in measuring cost and quality of access to justice, TISCO Working paper Series on Civil Law and Conflict Resolution Systems No. 002/2008, Social Science Research Network, available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1099392](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1099392);

<sup>12</sup> The review included an extensive discussion on an Australian study which has not been included above due to its age. See Worthington & Baker. 1993

### Findings

#### Classification 1: Social stability and economic growth

- While there are numerous theoretical journal articles and judicial papers on the civil justice system which provide valuable insights into the various aspects of the system, and how it operates, there is very limited empirical research. The only study that was found was an opinion poll on the Constitution. Otherwise, the evidence base must rely on data in publications like the ROGS which are limited in terms of their scope and analysis, but valuable in terms of their national comparability.
- Research relating to demand in the justice market is generally limited to services to socially and economically disadvantaged people. Much reliance is placed by researchers on the NSW Law and Justice Foundation's 2006 *Justice Made to Measure* Report. Comprehensive though it is, this report targets legal needs in disadvantaged areas which leave a significant gap in the identification of legal needs in other demographics and State and Territory jurisdictions. Further, *Justice Made to Measure* covers both the criminal and civil spheres which place some limitations on analysis of the civil justice system in isolation. There is a major gap in the areas of empirical research on the private market and government institutions.
- More research has been undertaken on supply in the justice market although, apart from a Commonwealth survey on Community Legal Centres, most of the work emanates from the NSW Law and Justice Foundation. Though it is broader in scope and includes some research on the supply and retention of solicitors in NSW, there are gaps in areas of empirical research in other aspects of the market in NSW and in all aspects of the private market in other jurisdictions.
- No empirical evidence was discovered about the benefits of justice.
- There is substantial international empirical research with coherent methodologies on civil justice although a review of research on the cost of justice showed there is very little research in that area.

### **Classification 2: Community resilience and capacity building**

This classification supports objective one:

**People can solve their problems before they become disputes.**

Included is research on the extent to which people, including those who are disadvantaged, have access to information and skills that will increase their capacity to manage a range of complex needs. It also looks at whether the necessary information and wherewithal to access legal services is available when disputes cannot be resolved.

#### **Information and education**

##### **Civic education and awareness**

*Justice Made to Measure* reports that individuals experienced a high volume of legal issues for which the legal system was not utilised. Traditional legal advisers were rarely used. In three-quarters of cases where help was sought, only non-legal advisers were consulted. In at least one-quarter of cases where help was sought for issues that had legal implications, only non-legal forms of help was obtained (Coumarelos Wei & Zhou 2006).

In her paper, 'Relieving some of the legal burdens on clients: Legal aid services working alongside psychologists and other health and social service professionals', Liz Curran looked at key research from the United Kingdom and the more limited research undertaken in Australia. This paper explores the difficulties associated with vulnerable and disadvantaged people finding appropriate assistance due to lack of awareness that their problem is legal in nature. The conclusions drawn in this paper are based on a range of research studies most of which are empirical. Curran's study is not systematic, however it is useful in pointing to relevant studies in this area (Curran 2008).

Apart from the service specific information available in different forms from service providers themselves, government websites provide a plethora of information about the legal system. As these do not constitute research they have not been documented, however, examples of the kind of guidance that is available are:

- The Australian Taxation Office (ATO) provides guidance to taxpayers on how to challenge an ATO decision and have it independently considered. This information may benefit the community by clarifying how the tax and superannuation laws operate.
- The New Zealand Government has established a website to provide information about how laws are made by the Government; New Zealand's court system; and the criminal and civil justice system. It also provides teacher ideas and resources; and a guide to legal knowledge (NZ Government).

More recent research in relation to Victorians' awareness of alternative dispute resolution (ADR) services demonstrated that while members of the public may have heard of some

ADR service providers before<sup>13</sup>, the small percentages of Victorians who reported having actually contacted one of them were markedly lower. For example, while 92 per cent of respondents had heard of Consumer Affairs Victoria (CAV) only 11 per cent reported ever contacting CAV; similarly, 79 per cent reported having heard of the Ombudsman Victoria but only 4 per cent had ever contacted the Ombudsman's Office. This low contact rate is particularly concerning given the relatively high incidence of disputes reported (Sourdin 2007).

### Business

Research in relation to visibility of ADR services indicates that for some, ADR services and processes may be neither visible nor accessible. Certainly, research conducted into public awareness of the Financial Industry Complaints Service (FICS) found that, as an ADR body, FICS was not particularly well known. A research project conducted into FICS's processes in 2000 and 2001 found that as the majority of referrals to FICS were from industry members, FICS relies on these referrals to ensure consumers have access to its dispute resolution services. In 2000 FICS commissioned its own research into awareness of its services and found that 8 per cent of industry members were willing to advise telephone complainants that there was no remedy available to them and 45 per cent named the Australian Securities and Investments Commission (ASIC) (or their regulator) as the key body for consumer protection and recourse, instead of naming FICS (Sourdin 2007).

A survey conducted for the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) in May 2011 explored the extent to which small businesses were aware of dispute resolution mechanisms (DIISRTE 2011). The research was based on a survey of over 300 businesses that had experienced a recent dispute with another Australian business. The survey found that:

despite the wide range of mechanisms available, including low cost and free services, small businesses are not generally aware of the existing services, the relative costs or suitability of each mechanism for different types of disputes. The survey also found that small businesses have a low awareness of ADR (DIISRTE 2011).

An opinion poll undertaken by the Western Australia Small Business Development Corporation's (SBDC) Ready Response Network focused on small business attitudes and experiences relating to the resolution of business-to-business disputes. When asked where advice was obtained, 41 per cent indicated from legal practitioners, 15 per cent from business and industry associations and seven per cent from the SBDC. The opinion poll provides data on a wide range of questions relating to how small business interfaces with the civil justice system, including use of dispute resolution (SBDC 2010). There is no information provided on the sample size or method of selection so it is not clear whether the results are robust.

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<sup>13</sup> Consumer awareness was determined by reading interviewees a list of ADR service providers and asking them to indicate 'whether you have heard of any of them as a body that can help with a dispute' (Ispos cited in Sourdin 2007).

### Building dispute and conflict resolution skills in individuals and communities

Sourdin's research points to the need for further empirical research into the reasons why disputants decide to 'give up' on resolving their dispute, or which avenues disputants explore prior to lodging a complaint or dispute for resolution. Sourdin notes that there are few statistics available on how effective or well-received any 'self-help' advice is or whether those that 'give up' do so because they find ADR schemes or services difficult to access or too difficult to understand and engage with (Sourdin 2007).

The National Alternative Dispute Resolution Advisory Council's (NADRAC) report, 'Solid Work You Mob Are Doing' presents the research findings of an in-depth investigation into effective practices for managing conflict involving Indigenous people as part of the Federal Court of Australia's Indigenous Dispute Resolution and Conflict Management Case Study Project (the Project). The findings were informed by three main case studies and a range of shorter 'snapshot' studies (NADRAC 2009b).

The report identifies a number of critical factors for effective practice designed to assist practitioners and others involved in the design and delivery of a dispute management process and a range of strategies for implementing effective practice and advocates for a national Indigenous dispute management service. The report proposes that this service would build on and integrate with existing networks, such as community mediation centres and justice groups, to provide timely, responsive, culturally and physically safe services that Indigenous people can feel they genuinely 'own.' The report argues that this investment would have significant social and economic benefits, by:

- Enhancing the potential for sustainable partnerships with Indigenous peoples
- Avoiding the costs of Indigenous contact with the criminal justice system
- Strengthening governance and social cohesion in Indigenous communities (NADRAC 2009b).

### Findings

#### Classification 2: Community resilience and capacity building

- There is some empirical research available on how information is accessed and the difficulties associated with awareness amongst disadvantaged people of whether they have legal problems. These studies, however, cover both the criminal and civil justice systems.
- While government websites provide substantial information and guidance which aims to increase civic awareness about the justice system and legal processes, there is no research which indicates the extent to which they are accessed or have beneficial effects.
- There is ample research about information and awareness of ADR in Victoria but not it would appear in other jurisdictions.
- There have been a number of surveys taken about industry/small business awareness of dispute resolution mechanisms.
- There is limited research on dispute and conflict resolution skills in the community. The substantial work by NADRAC relates solely to Indigenous people and could usefully be replicated in the wider community.

### **Classification 3: *Expeditious resolution of disputes***

This classification supports objective two:

**People can resolve disputes expeditiously and at the earliest opportunity.**

This classification is about preventing disputes from graduating into the court room through the earliest possible assessment of client needs and referral to the most appropriate and expeditious pathway to justice. It includes the use of alternative dispute resolution services, which are embedded into courts and tribunals as an increasingly prominent and relied upon feature in handling and disposing matters before the court, as well as in resolving disputes prior to commencement of legal proceedings.

The availability of appropriate services; and referral to and availability of alternative dispute resolution (ADR) are also included. ADR is used to describe the processes that may be used within or outside courts and tribunals to resolve or determine disputes where the processes do not involve traditional trial or hearing processes. The term ADR is used also to describe processes that may include conferencing, mediation, evaluation, case appraisal and arbitration. Court settlement rates, the time taken to settle matters and the extent to which they are re-activated are also relevant to this classification.

### **Referrals to appropriate legal and non-legal services**

Civil disputes can be prevented from escalating by ensuring that appropriate referral to other services is explored at the earliest opportunity. There are many different ways in which people can be encouraged or required to attempt to resolve their disputes before entering the litigation system.

Pre-action protocols and obligations aim to encourage disputants to resolve their disputes before commencing court or tribunal proceedings<sup>14</sup>. Stated benefits of this approach include time and cost savings as well as potential achievement of a better outcome: avoiding adversarial court proceedings can prevent the potential destruction of existing business and other relationships. Moreover the polarising of disputant positions can limit the options available to resolve the dispute. However there are also concerns that pre-action or pre-litigation obligations may limit access to justice by increasing costs and time or providing a ‘hurdle’ that prevents people from accessing the court and tribunal system. There is also a concern that people may reach a compromise without adequate legal advice or that, because commencing legal proceedings is too expensive or too difficult, they may be unable to exercise their legal rights. These concerns have been the subject of considerable discussion and some research in the Australian legal environment, particularly as a result of legislation that has been proposed or enacted that extends the application of protocols and obligations to a broader category of disputes.

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<sup>14</sup> Pre-action obligations arise outside court and tribunal settings and are imposed as a result of agreements to enter into ADR processes, legislative arrangements, regulatory schemes as well as through court or non-court protocols and guidelines. Some pre-action protocols require disputants to engage in ADR or consider using ADR as a precondition to commencing legal proceedings. Others require that ‘would-be’ litigants take steps or file a statement about what they have done to resolve their dispute if they are unable to resolve it and then commence court or tribunal proceedings.

The introduction of the Commonwealth *Civil Dispute Resolution Act 2011* (CDRA) which requires disputants to file a ‘genuine steps’ statement setting out the attempts made to resolve differences before commencing litigation in respect of a range of civil disputes was controversial legislation and its passage was preceded by a number of reports and inquiries<sup>15</sup>

The Australian Law Reform Commission (ALRC) Report on Discovery in Federal Courts (November 2010) reviews the issue of front loading of costs, notably in the UK (from paragraph 5.25 in Ch 5. The advantages and disadvantages of pre-action protocols are summarised in the *Discovery Report* (ALRC 2010). Within New South Wales, support for pre-action obligations emerged after a detailed discussion and consultation process that considered various reports and responses in other jurisdictions (NSW Justice and Attorney-Generals 2009).

Legg and Boniface reviewed the use of pre-action protocols in the United Kingdom and the recent recommendations for more wide-spread adoption of protocols in Australia pre-action protocols. They examined some concerns such as ‘satellite’ litigation and the front-loading of costs looking; the potential for front end loading of costs; and suggested conditions for the successful adoption of pre-action protocols in Australia. The article is not based on ‘empirical’ research (Legg and Boniface 2010).

The CDRA legislation was specifically considered by a Senate Subcommittee appointed to comment on the draft legislation. The Sub-Committee took submissions in 2010 and early 2011<sup>16</sup> and developed a view that there was general support in the submissions and evidence provided for the intent of the Bill. (Parliament of Australia 2011). Similar legislation strengthening pre-action obligations was delayed in NSW in 2011 and enacted then repealed in Victoria in 2010-2011, partly because of a lack of empirical evidence about its effectiveness (Sourdin 2012).

Only a limited amount of research into the effectiveness of pre-action protocols and obligations has been conducted within Australia and internationally (Sourdin 2012). To fill this gap, the Australasian Institute of Judicial Administration (AIJA) has commissioned the Australian Centre for Court and Justice System Innovation (ACCJSI) at Monash University to undertake a research project to assess the use and effectiveness of pre-action schemes and obligations that encourage people to resolve their disputes before filing proceedings with a court or tribunal. A background paper has been released (Sourdin 2012).

The key research questions being examined in the project are whether or not pre-filing processes can be:

- effective and efficient and produce lasting outcomes

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<sup>15</sup> NADRAC reports have specifically considered the use of pre-action protocols and have reviewed and considered concerns that, although such protocols would reduce the number of disputes progressing into the litigation system, they could also potentially lead to the front loading of work and legal costs.

<sup>16</sup> Submissions were made by Prof Tania Sourdin, the Federal Court of Australia, the Human Rights Law Resource Centre and PILCH Homeless Persons' Legal Clinic, the Castan Centre for Human Rights Law, the National Legal Aid, the Law Council of Australia, the Federation of Community Legal Centres (Vic), the Insolvency Practitioners Association (IPA), the NSW Department of Justice and Attorney General, the National Alternative Dispute Resolution Advisory Council (NADRAC) and the Attorney-General's Department.

- accessible and timely
- considered by the parties to be just or fair
- efficient in terms of the resources used
- improved, extended or supported more effectively

A range of research methodologies is being used to conduct the research. These include:

- a detailed literature review of issues and past work that has been focused on pre-action obligations and protocols;
- a review of available statistics from schemes that exist in the family and business sectors;
- a quantitative and qualitative analysis of disputes finalised in a NSW scheme and a Victorian scheme directed at Retail Lease Disputes in the pre-action area ('case study analysis'); and
- direct interviews and focus groups held with stakeholders who include disputants, representatives and those involved in schemes or arrangements that exist outside the case study areas.

The effectiveness of referrals to Family Relationships Services has been examined in the extensive evaluation of the 2006 reforms in the family area (Kaspiew et al 2009, see Classification 6 for details). The evaluation found that these reforms had resulted in a significant increase in the use of non-court services, and a decrease in matters filed in the Family Court of Australia and the Federal Magistrates Court (FMC). While the number of applications that were made to the FMC between 2005-06 and 2008-09 increased, this increase was more than offset by the decrease in the total number of such orders that were lodged across the system. The overall number of applications for final orders relating to children's matters declined by 22 per cent from 18,752 in 2005-06 to 14,549 in 2008-09<sup>17</sup>. In addition, the Report found that there was an increase in the number of clients for all Family Relationship Services Program services over the period 2006-07 to 2008-09 (Kaspiew et al 2009, cited in Sourdin 2012, p.29).

Early referrals to other services is not only aimed at speeding up resolution, but is also a way of ensuring that the civil justice system meets the needs of clients more appropriately. Two studies discussed under Classification 6 are relevant here. The Commonwealth Family Relationship Centres/Legal Assistance Partnerships Program (the *Better Partnerships* program) aims to assist separated or separating families by 'providing access to early and targeted legal information and advice when attending Family Relationship Centres (FRCs)'. The program was comprehensively evaluated by the Australian Institute of Family Studies (AIFS) in late 2010 (Moloney et al 2011) and is included in the section on- Collaborative Relationships under Classification 6. The KPMG evaluation of FDR services in LACs collected information in relation to screening

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<sup>17</sup> The number of applications to the FCA declined by 72 per cent from 7,479 to 2,086 over this period and the number to the FMC increased by 17 per cent from 9,405 in 2005-06 to 10,987 in 2008-09 and the number of applications to the FCoWA decreased by 21 per cent from 1,868 to 1,476.57

and intake processes and is discussed in Classification 6: Effective referral to appropriate non-legal services.

### **Use of ADR and other forms of early resolution**

This sub-classification looks at research into the extent to which alternatives to litigation are used to expedite resolution of disputes.

The ATO has analysed trends in Australia's tax and superannuation litigation over recent years. The analysis shows that there is a trend of finalising cases prior to hearing, and indicates that ADR techniques are positively impacting resolution of disputes. The resulting booklet – *Your case matters* – is a 'work in progress'. The ATO is seeking feedback from the community, and also plans to add other aspects of tax and superannuation litigation such as debt recovery and administrative law litigation (ATO 2012).

A research project commissioned by the Victorian Department of Justice and completed by Professor Tania Sourdin in 2008 examined how mediation was used in the Supreme and County Courts of Victoria. The Research Report focused on examining whether mediation processes used in disputes:

- (1) resolved or limited the dispute;
- (2) were accessible;
- (3) were considered by the parties to be just or fair;
- (4) used resources efficiently and promoted lasting outcomes; and
- (5) achieved outcomes that were effective and acceptable.

The methodology combined:

- a detailed literature review;
- a quantitative and qualitative analysis of civil disputes finalised in the Supreme and County Courts of Victoria from February to April 2008 (553 case files were examined and parties in those cases were surveyed with 98 usable disputant surveys returned and 34 mediator surveys returned and analysed); and
- direct interviews and focus groups with litigants, mediators and legal representatives (Sourdin 2008).

The project found that, for the most part, the use of mediation met the objectives listed above. Mediation was the most common process for finalising disputes (43 per cent of survey respondents had their dispute finalised at mediation). The results also showed that dispute age (age of dispute measured from when the cause of action arises) may be more strongly associated with mediation outcomes than case age (age of case from when it is filed in court) and that younger disputes were more likely to be finalised at mediation than older ones. Mediation may also have assisted to narrow issues in matters that were not finalised at mediation. Some matters may be more amenable to resolution by mediation than others (Sourdin and Balvin 2000).

A robust evaluation of a pilot of compulsory mediations between November 2007 and June 2008 at Broadmeadows Magistrates Court (in the civil jurisdiction for matters under \$10) was undertaken by Transformation Management in 2009<sup>18</sup> (Transformation Management 2009). The Evaluation sought to answer the question as to whether the Broadmeadows court-annexed mediation project is a suitable replacement for ‘usual court practice’ or whether it would be simply replacing (and possibly augmenting) a well known process for another that may later be found to fall well short of better practices elsewhere.

Measures used were effectiveness, efficiency, staff and user satisfaction with priority to measures of individual reaction. With a resolution rate well over the target of 75 per cent and major reductions in the need for magistrate’s hearing time, the project was found to deliver speedier turnaround times for civil disputes, with fewer court attendances on the part of litigants and equivalent disposals of cases using less expensive resources. In general, while information on the efficiencies was readily available, information about the effectiveness from the point of view of the clients and individuals was less so. It was agreed that more extensive surveys would need to be conducted if the pilot was expanded to other courts. In the meantime, the views of staff and internal players were relied upon to reflect the experience of clients (Transformation Management 2009).

The Victorian Law Reform Commission (VLRC) undertook an analysis of the Federal Court’s 2008-09 Annual Report in 2008 and concluded that 57 per cent of Federal Court referrals (FCA 2009) and 59 per cent of NSW Supreme Court referrals (SCNSW 2008) were settled at mediation. The VLRC linked this increase in mediation to swifter resolution of cases and time and cost savings. However, given the lack of clear definition of mediation and lack of data on actual time taken, these conclusions would benefit from being subjected to further empirical investigation, based on more clearly defined data (VLRC 2010).

Research by Buth, described fully in Classification 7, demonstrates why such caution is necessary. Buth’s examination of the data concepts and definitions used to report court-connected mediation in the Federal Courts of Australia raises substantial concerns about taking the data at face value.

Industry-based Ombudsman schemes such as the Financial Ombudsman Service (FOS) deal with a significant number of disputes each year. For example, 23,790 new FOS disputes were initiated in the 2009–2010 reporting period (an increase of 6 per cent on the previous year). The overwhelming majority of the 21,543 disputes resolved in 2009–2010 were resolved by consent – only 12 per cent of matters resulted in a determination by FOS (Sourdin 2012).

Research into the impact of judicial case management on the early settlement of disputes is also relevant here, and is discussed in Classification 5: Equity of Access.

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<sup>18</sup> The compulsory mediations were conducted by the Dispute Settlement Centre of Victoria (DSCV)

### Settlement Rates and time to Settlement (including re-activation of cases)

Hunter's evaluation of the Children's Cases Program in the Family Court found that the CCP cases had fewer case events, and involved fewer subpoenas, affidavits and expert reports than the control group cases. They were also finalised in half the time taken by the control group, an outcome Professor Hunter attributed to the nature of the court process rather than any differences in the characteristics of the cases, whilst also recognising that speedier processes were partially a result of the listing priority and resourcing given them (Harrison 2007).

Hunter found that:

- there were no statistical differences between the settlement/determination rates of both CCP and the control group cases;
- there was no greater "stickability" of outcomes (in fact CCP cases were much more likely to return to court, especially for variation and contravention matters);
- there were considerable variations in judges' management of cases between the Sydney and Parramatta registries and by individual judge; and
- judges' workloads (and that of their associates) was unsustainably high. (Harrison 2007).

The KPMG evaluation of FDR in LACs looked at the time taken to finalise cases in the Family Court from filing to finalisation either by settlement or by judicial decision (KPMG 2008).

A 'timeliness' project is planned at Monash University, aiming to develop a literature review of timeliness in court proceedings, focusing on time standards, including from the Productivity Commission, definitions of timeliness and delay, information collected by courts and determining national and international timeliness indicators. An issues paper will be produced, leading to a conference addressing the question: 'Can we improve the timeliness of court proceedings?' (ACCJSI website).

Clearance rates are reported in the *Report on Government Services* (SCRGSP 2012). This is covered in Classification 7: Performance Measurement.

### International Research

A study by Michael Heise used data from 46 large counties to test hypotheses related to questions about whether court-annexed appellate ADR programs stimulate settlement and reduce disposition time. It consisted of 8,038 trials that generated 965 filed appeals, with 166 appeals participating in ADR programs. The study found mixed support for ADR programs (Heise 2010). Conclusions and limitations of the study can be found in Appendix A.

The comprehensive UK Report of Lord Justice Jackson, entitled the *Review of Civil Litigation Costs* (Jackson Report), published in 2009, focused on the increasing cost of civil litigation within the United Kingdom, which was found to act as a significant impediment to access to justice. The Jackson Report examines the use of pre-action

protocols across a range of areas and jurisdictions in England and Wales, which may have led to the ‘front loading’ of costs in some areas. While the UK protocols may have reduced the time taken to resolve disputes, they may have increased the average cost of settlement in some areas.

### Findings

#### Classification 3: Expeditious resolution of disputes

- Empirical research over the last five years in relation to timely resolution of disputes has focused on the use of alternative dispute resolution (ADR) and family dispute resolution (FDR). In particular, some robust research has been undertaken into the use of court-related mediation and the way in which it increases the efficiency of court processes.
- Much of the useful research has been undertaken as part of government-commissioned evaluation of programs, aimed at evaluating whether a program met its objectives, for example the KPMG evaluation of FDR in Legal Aid Commissions or the AIFS evaluation of the Family Law Act reforms or the research into mediation in the Victorian courts.
- The introduction of new government legislation has also been a trigger for high quality research in this area. For example, the introduction of a default position of mandatory FDR as part of the 2006 family law reforms has triggered analysis, evaluation and commentary about dispute resolution processes. Similarly, government reforms in relation to the adoption of pre-action protocols have also triggered a desire to understand whether pre-action protocols and guidelines speed up the resolution of cases, or whether they add barriers and costs. While the views of many parties have been put forward and analysed (for example in a Senate Inquiry), the only empirical research in relation to pre-action protocols in Australia is currently still underway. Again, it is commissioned research – this time by the Australasian Institute of Judicial Administration.
- While the ROGS regularly publishes clearance rates in the various courts, there has been no accompanying research that attempts to examine the timeliness issue in more detail, particularly in relation to judicial decisions.

### **Classification 4: Service quality, including just and fair processes**

This classification supports objective three:

**People are treated fairly and have access to legal processes that are just.**

Users of the civil justice system expect that the services will be of high quality, fair and unbiased, and be administered by appropriately trained professionals. Research in this classification measures these aspects objectively as well as measuring the perceptions of users of the system – that is, satisfaction with the services.

#### **Procedural Fairness**

Therapeutic jurisprudence invites members of the judiciary to reflect on their court procedures to see whether the insights from the behavioural sciences can inform them how to better promote justice.

The 2008 Evaluation Report of Tasmania's Court Mandated Drug Diversion (CMD) Program (which is underpinned by the principles of therapeutic jurisprudence) examines the interplay between the supervision of the court and the motivation for offenders to first of all seek and then maintain their involvement in treatment during the bail period. Ultimately, the Report is an evaluation of the CMD and not therapeutic jurisprudence – however, it may provide some broader evaluation of the success of the implementation of principles of therapeutic jurisprudence.

#### **Practitioners**

There is a significant body of research into the skill level of practitioners, particularly in relation to skills in mediation and related skills that are required in high quality dispute resolution.

Moloney notes that

The importance of the individual characteristics of lawyers (Mnookin 2010) and of mediators (Bowling and Hoffman 2003) in the resolution of disputes has been well recognised. The characteristics of professional counsellors have also been systematically researched and found to account for considerably more of the variation in outcome than any other factor (Wampold 2001 quoted by Moloney et al 2011, p.259).

A research project into how mediation was used in the Supreme and County Courts in Victoria (Sourdin and Balvin 2009 - see Classification 3 for details) found that the quality of mediation services used in court-connected programs could be improved. Focus groups and feedback provided on the mediator surveys suggested that a form of abbreviated conferencing was used mainly in personal injury matters that could not and should not be described as mediation. Less than half of the mediators (considering all case types) appeared to have followed any industry standard mediation model. To enhance the quality of mediations, it was recommended that the courts define and describe the mediation process to be used by external mediators mediating court-connected disputes

and ensure that all mediators are properly trained and accredited. This would require clearer process models and descriptions, improved quality assurance processes (through monitoring and regular evaluations), requiring mediators to comply with the standards set out in the National Mediator Accreditation System and ensuring that only accredited mediators operate in the sector (Sourdin and Balvin 2009).

KPMG measured the level of skill of FDR practitioners in LACs and found they are highly skilled and qualified and have strong experience in chairing conferences – which they assessed was an important factor in assisting parties to reach agreement (KPMG 2008). Their study measured the years of experience of practitioners and compliance with interim accreditation standards. They found, for example, that:

- 90 per cent of clients were satisfied with the way the conference chairperson explained the conference and their role
- 80 per cent of clients were satisfied with the FDR practitioner’s fairness and professionalism.

The KPMG report commented on an apparent difference in approach between FDR practitioners who are social scientists and those who are lawyers, with the former more readily reporting on this aspect and the tools they use to ensure it. An even stronger distinction was found between FDR practitioners and lawyers in relation to understanding what is meant by ‘best interests of the child’, with the latter more often defining a child’s best interest as a 50/50 shared parenting arrangement (KPMG 2008).

In research conducted towards a masters degree thesis, Olivia Rundle has adopted an empirical research method to obtain lawyers’ perspectives towards direct participation of clients in court-connected mediation. Rundle conducted interviews of 42 legal practitioners (out of 142 practitioners approached) who practised in the Supreme Court of Tasmania’s mediation program, with their general characteristics comparable to the broader group. Ten mediations were also observed, to provide an additional source of data, to test the conclusions that were drawn on the basis of the interviews (Rundle 2008). Rundle found evidence of a lack of appreciation within the Tasmanian legal profession of the potential benefits that direct disputant participation can offer (Rundle 2008).

Howieson takes issue with claims that the adversarial behaviour of lawyers in Family law disputes increases animosity between the parties, pointing out that this is based on anecdote and that there is no empirical evidence to show this. Rather she suggests there is ‘strong qualitative evidence’ to suggest that family lawyers are constructive and conciliatory in their approach to resolving family law disputes. As Howieson notes, there is a need for further empirical investigation into the adversarial behaviour of lawyers (Howieson 2007).

The importance of conducting further research into ‘expertise’ in family work – what is it and how to develop it – has been highlighted by Sophie Holmes (Holmes 2006).

The report entitled *Solid Work You Mob Are Doing* identified the attributes and skills of practitioners in the Indigenous dispute management context as one of the critical factors

in determining the effectiveness of outcomes. (See Classification 1 for further information on this report).

The impact of the cultures and organisational structures of large law firms on individual lawyers' ethics was examined by Parker et al. They noted that while the considerable scholarship on illegal, unethical or questionable behaviour by commercial lawyers has been focussed on the United States, there have been well publicised examples in Australia (Parker et al 2008, p.161)<sup>19</sup> Questionable or unethical behaviour falls into two categories:

1. Where lawyers or firms allegedly breach their ethical and legal obligations to their own clients by acting despite conflicts of interest or with dubious attempts at managing conflicts of interest.
2. Situations in which lawyers may have breached legal and ethical obligations to the courts, the fair operation of the legal system and the public by assisting their clients in the commission or cover-up of illegal or unethical behaviour (Parker et al 2008, pp.161-162).<sup>20</sup>

Parker et al examined the (mainly US) research that has been undertaken, and surmised that there has been little reporting or research on the extent to which Australian law firms have implemented ethical infrastructures and what impact they have on ethical behaviour. They noted, however, that there is some preliminary evidence that clients complain less about NSW legal practices than other firms (Parker et al, 2008, p.2008).<sup>21</sup> They concluded that informal collegial controls that may in the past have worked are now being undermined by new, more bureaucratic management structures that lack any ethics focus. They proposed a more ethically supportive firm structure, and what that may involve (Parker et al, 2008).

### Strengthening the legal profession

A limited amount of empirical research was found in relation to measuring how the professional skills of those involved in the civil justice system could be strengthened, or the impact of that up-skilling.

A small research project by Horan & Taylor-Sands investigated the effectiveness of using a simulated dispute on DVD as a teaching and learning tool to integrate theory and practice in civil litigation by use of a feedback survey (Horan & Taylor-Sands 2008). See Appendix A for the findings.

The *Solid work you mob are doing* report (NADRAC 2009, see Classification 1) advocates for a range of training initiatives which recognise prior learning and are

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<sup>19</sup> See Parker C, & Evans A., 2007, *Inside Lawyers' Ethics*; and Law Society of New South Wales in consultation with Law Institute of Victoria, 2006, *Information Barrier Guidelines*.

<sup>20</sup> See: *McCabe v British American Tobacco Australia Ltd* [2002] VSC 73: ALRC, 2007, *Client Legal Privilege and Federal Investigatory Bodies: Discussion Paper 73*, 395-6; for Australian Wheat Board: ALRC, 2008, 'Privilege in Perspective: Client Legal Privilege in Federal Investigations, *Report ALRC 107*, pp.490-1; Mescher, B, R., 2007, 'The Business of Commercial Legal Advice and the Ethical Implications for Lawyers and Their Clients' in *Journal of Business Ethics*.

<sup>21</sup> See Centre for Applied Philosophy and Public Ethics, 2006, *Complaints and Self-Assessment Data Analysis in relation to Incorporated Legal Practices*.

designed and delivered in culturally competent ways; as well as professional support, appropriate remuneration and career opportunities for practitioners working in the Indigenous context.

### **Regulation/Accreditation of practitioners/standards**

The need for standards in various areas of the civil justice system has been noted in the course of various research studies. For example, Moloney has provided references (personal communication) to a series of articles by Sourdin, Fisher and Moloney in 2004 into a quality framework for family dispute facilitation practitioners, including Practitioner approval standards however these have apparently not been released by AGD.

Compliance with standards has been measured in a few studies – see the KPMG study of FDR in LACs (KPMG 2008) discussed above under ‘Practitioners’.

Research into the effectiveness of the Model Litigant Rules (the Rules) in regulating Commonwealth litigant behaviour was conducted by Michelle Taylor-Sands and Camille Cameron. The evaluation explores weaknesses in the processes for monitoring and recording breaches of the Rules, and the methods used to enforce compliance. It makes recommendations on how the monitoring process could be improved – by broadening the role of the Office of Legal Services Coordination (OLSC) – and increasing the transparency of the OLSC by providing a more formal mechanism for investigating complaints and publicly recording breaches (Taylor-Sands & Cameron, 2010, p.202). An annexure is included which provides a table of complaints and breaches of the Rules from 1999-2000 to 2007-08.

Cameron and Taylor-Sands have investigated whether existing professional codes of ethics and civil procedure rules are sufficient (Cameron & Taylor-Sands, 2007). The same authors also explored the role of government as litigant and examined some specific cases where the Commonwealth has been the litigant. The paper provides a critique of government conduct and suggests reforms to the Rules and their enforcement (Cameron & Taylor-Sands, 2007).

### **Service quality**

Findings in relation to service quality are found in almost all evaluations reviewed for this project. The large-scale evaluations commissioned by governments or other bodies use robust methodologies that rely on multi-dimensional approaches to measuring quality, including objective measures as well as measures of perception.

In 2009 the services of the Neighbourhood Justice Centre (NJC) in Victoria which was established in 2007 was evaluated<sup>22</sup>. The evaluation methodology was robust and looked in detail at all aspects of the NJC’s operations: community engagement; Court activity, including therapeutic jurisprudence practices; and client services based on intensive

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<sup>22</sup> The NJC offers a range of justice and social services covering both the criminal and civil jurisdictions. The NJC Court is a venue of the Magistrates’ Court of Victoria, the Children’s Court and the Victims of Crime Assistance Tribunal. As a venue of the Victorian Civil and Administration Tribunal, it deals with residential tenancy, small claims, guardianship and administration matters.

clinical engagement; and user perspectives. As part of the economic evaluation, benefit cost analyses and cost-effectiveness analyses were undertaken (Ross et al, 2009).

In the KPMG study, FDR services in LACs were found to comply with the legal aid requirements for reporting, accreditation and acceptance of matters for FDR, for example provision of regular reports to AGD on service utilisation and settlement rates (KPMG 2008).

### **Client satisfaction/perceptions of fairness**

Perceptions of fairness in mediation were measured by Sourdin in her study of the Supreme and County Courts in Victoria. (see Sourdin and Balvin 2009, described in Classification 3). Sourdin found that perceptions of fairness were generally higher than for the other dispute resolution processes. However, 67 per cent (n=24 out of 36) of disputants who finalised their dispute at mediation considered that they were pressured to settle the dispute. Also, the correlation between perception of fairness and case cost was statistically significant and negative, when examined for all types of resolution processes.

In the same study, parties who had their dispute finalised at mediation reported moderate to high levels of satisfaction with the process.

KPMG collected information on levels of satisfaction with FDR in LACs through surveys and interviews. They found, for example, that:

- 84 per cent of clients very satisfied or satisfied with the information provided to them pre conferencing
- 99 per cent of FDR practitioners agreed that settlements arising out of FDR conferencing are in general workable. There is no mechanism, however, to check on the longevity or sustainability of the agreements. (Queensland has a support service to assist follow-up)
- Client satisfaction with the outcome was lower – only 64 per cent nationally were satisfied with the outcome of their FDR conferencing. (KPMG 2008).

KPMG also measured the level of satisfaction of services for clients from diverse backgrounds and the types of services provided. Clients were generally highly satisfied with the assistance they accessed, such as interpreter services, access to a support person or other assistance. (KPMG 2008). This research is also relevant to Classification 6 Wellbeing.

The Department of Finance and Deregulation (DF&D) conducted research into client satisfaction in the course of its evaluation of the Legal Aid for Indigenous Australians program (relating to both criminal and civil justice) through consultations with stakeholders, including the courts, law enforcement agencies and LACs, concluding that the services were good vehicles with which to provide culturally sensitive and appropriate legal services and were providing good quality legal services, despite the workloads and other pressures (DF&D 2008). (Also relevant to Classification 6). Similarly, see L&JF 2006, (pp.147-156) re client satisfaction of socially and economically disadvantaged people in NSW.

Research conducted into court-based schemes (Sourdin and Matruglio 2004), external dispute resolution schemes (Elix and Sourdin 2002), as well as research into consumers' experience in resolving their credit disputes at Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) (Dispute Resolution Processes for Credit Consumers) has found that disputants were often satisfied with the dispute resolution services offered by each of these schemes.

The 2011 Victorian Small Business Commissioner (VSBC) Annual Report includes a client satisfaction survey across its mediation services.

In her review of the CCP, Hunter found that the parties were significantly more satisfied with both the process and the outcomes of their cases than were those in the control group. The process was also more friendly to self-represented litigants, and the role adopted by the family consultants was described as a 'valuable and effective innovation' (see Harrison 2007).

Recent research for a Ph.D thesis challenges the notion that adverse outcomes do not impact on the perceptions of fairness by the client. (Condliffe 2011). Condliffe conducted a small research experiment simulation that empirically tested 252 participants in a high density housing estate on three levels: (their preferences, their perceptions of justice (fairness) and some elements of efficiency). Each of these three levels was tested in relation to different mediation/arbitration processes. This research is useful in raising questions about the ability of parties to distinguish between procedural and substantive 'satisfaction'. However, as Condliffe argues, there is a need for further research into this area.

The Law Council of Australia's submission to NADRAC's Resolve to Resolve study (See Classification 7) in relation to data on supporting quality ADR noted that additional data needs to be gathered about qualitative measures such as perceptions of fairness by users of court services including ADR (See Buth 2010).

The 2009 study into family violence since the 2006 family law reforms includes research on the way respondents perceived family law services. (See Classification 6 for more information on this study). Most respondents were critical of services, whether or not the respondents were satisfied with the service outcomes. The respondents' encounters with the family law socio-legal services in relation to the violence were disappointing and unhelpful: 'It was of concern that those satisfied with services fell frequently below 50 per cent and those dissatisfied with services rose frequently to above 50 per cent. Services outside the family law socio-legal service system attracted more positive comment than did services within it' (Bagshaw et al 2010). This finding differed from the call-back findings in another study that showed separated people's position improving in the twelve month period after service provision (Brown and Hampson cited in Bagshaw et al 2010).

### **International research**

The American Bar Association Section of Dispute Resolution established a taskforce to examine what factors define high quality mediation practice where parties are represented by counsel, and therefore what aspects of this kind of mediation can be improved. (ABA

2008). The Taskforce focused only on mediation quality in private practice civil cases where the parties are usually represented by counsel in mediation (including commercial, tort, employment, construction, and other kinds of disputes that are typically litigated in civil cases, but not domestic, family law, or community disputes). The taskforce reviewed existing policy documents, reports, and research on mediation quality and investigated how users felt about mediation services through 10 focus groups, surveys (100 respondents), and telephone interviews (13). The Taskforce concluded that there are a number of ways to improve the quality of mediation – for example, training manuals etc. They also recognised the potential to expand their research to other areas of mediation.

In the United States, Gill analysed the use of Judicial performance evaluations (JPEs), which are an important part of the judicial selection process in the states. An analysis of the ‘Judging the Judges’ survey of Nevada attorneys provided empirical analysis which showed that, after controlling for objective measures of judicial performance, gender and race still contribute significantly to the scores on all of the behavior-based measures. The analysis finds evidence of significant unconscious bias, as social cognition theory would predict, and casts serious doubt on the overall validity of these measures of judicial quality. This result raises serious questions about the validity and fairness of JPEs (Gill 2012).

In the United States, a 2008 study by Kiser, Asher, and McShane quantitatively evaluates the incidence and magnitude of errors made by attorneys and their clients in unsuccessful settlement negotiations. The primary study analyses 2,054 contested litigation cases in which the plaintiffs and defendants conducted settlement negotiations, decided to reject the adverse party's settlement proposal, and proceeded to arbitration or trial. The parties' settlement positions were compared with the ultimate award or verdict and revealed a high incidence of decision-making error by both plaintiffs and defendants. This study updated and enhanced three prior studies of attorney/litigant decision making, increasing the number of cases in the primary data sets more than threefold, adding 72 explanatory variables from 19 classes, applying a multivariate analysis, presenting an historical review of error rates during the 1964–2004 period, and comparing the primary study error rates with error rates in cases where the parties are represented by attorney-mediators. Notwithstanding these enhancements, the incidence and relative cost of the decision-making errors in this study were generally consistent with the three prior empirical studies, demonstrating the robustness of the earlier works by Samuel Gross and Kent Syverud, and Jeffrey Rachlinski. The multivariate analysis, moreover, shows that the incidence of decision-making error is more significantly affected by “context” variables (e.g., case type and forum) than by “actor” variables (e.g., attorney gender and experience level) (Kiser, Asher & McShane 2008).

A Taiwanese study by Kuo-Chang Huang attempted to use empirical evidence to answer the question: To what extent does legal representation affect case outcomes? The study showed that:

1. Cases are most unlikely to be settled when both parties are represented, while parties are most likely to settle a case when neither is represented.
2. Legal representation has no significant bearing on the case outcomes when the parties go to trial.

The study reported the results of an independent empirical study of the official data on more than 100,000 civil cases terminated in Taiwan from 2000 to 2006. An important feature of this study was that the cases studied were not merely a sample but included every case nationwide within the above-mentioned parameters. The authors argue that this feature dispels any sampling error or sampling bias possibility. The data came from the official computerised database established by the Judicial Yuan of the Taiwan government. This official database includes information about every case terminated in every district court, including how the case terminated, the amount in controversy, and the dates of filing and termination. Conclusions are shown in Appendix A.

### Findings

#### Classification 4: Service quality, including just and fair processes

- Very little reference to therapeutic jurisprudence was found in the literature scanned, although there is considerable work of a theoretical nature.
- There is a significant body of research into the skills of mediation practitioners (with the introduction of the National Mediation Accreditation Standards relevant to this).
- Researchers have called for further empirical research into the alleged tendency of some lawyers to create an adversarial approach and into the ethical infrastructure of large legal firms.
- There would seem to be potential for further research into what constitutes 'expertise' in family law and into the apparent differences between practitioners with a social science and a legal training.
- A limited amount of empirical research was found in relation to measuring how the professional skills of those involved in the civil justice system could be strengthened, or the impact of that up-skilling.
- Findings in relation to service quality are found in almost all evaluations reviewed for this project. The large-scale evaluations commissioned by governments or other bodies use robust methodologies that rely on multi-dimensional approaches to measuring quality, including objective measures as well as measures of perception.
- Levels of satisfaction and perceptions of fairness and their inter-relations with outcomes are concepts which have been the subject of a significant amount of empirical research – through client and practitioner surveys. The extent to which people accept early resolution outside of the courts, appears to be closely related to their perceptions of fairness and authority and this remains an area where further research is warranted.

### **Classification 5: Equity of access**

This classification supports objective four:

**People have equitable access to the civil justice system irrespective of their personal, social or economic circumstances or background.**

Equity of access means that all people – regardless of their race, religion, cultural or language background, or economic circumstances – have access to the justice system. Barriers to access exist where there are limitations which prevent or make it difficult for certain people or groups within society to access the justice system.

### **Affordability**

#### **Access to affordable services**

Details of statistical information on the income levels and disabilities of people seeking support are included in the ‘supply’ section of Classification 1.

A literature review by Richardson, Sourdin and Wallace provides a comprehensive summary of research on self-represented litigants. The range of desirable data variables arising from the literature falls into three main groups:

1. Individual or demographic characteristics that influence representative status (the term ‘postcode justice’ has been used to describe the variable).
2. Case characteristics which dictate whether representative status will be significant to the processes used, the outcomes and the impact on the court or tribunal.
3. Court and tribunal processes which may be impacted upon which highlight a need for accommodation to different representative statuses (Richardson, Sourdin & Wallace 2012).

As noted in Classification 1 the increase in self-represented litigants (SRLs) has been attributed to increased costs and changes to legal aid funding. Richardson, Sourdin and Wallace have drawn the following characteristics on SRLs from the literature<sup>23</sup>:

- SRL applicants are more likely to be male than female<sup>24</sup> (there is some limited research suggesting that women are more likely to resolve their disputes using ADR);
- SRL respondents are more likely to be male in Family Court matters;
- SRLs are more likely to be young (median age 35 years), unemployed, and to have lower education levels;
- SRLs tend to come from culturally and linguistically diverse backgrounds;

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<sup>23</sup> Although the literature review provides a substantial list of references, there is only one that is recent.

<sup>24</sup> See Woodyatt, T., Thompson, A. and Pendlebury, E., 2011, ‘Queensland’s self-represented services: A model for other courts and tribunals’ in *Journal of Judicial Administration*, 20, p.225.

- The overall demographic characteristics including gender, employment and income status may differ depending on whether the person is fully self represented or partially self represented;
- SRLs that were employed were from a range of professional, trade and sales/personal service occupations;
- some SRLs may have impaired capacity which impacts on their ability to self-represent or may have a disability; and
- some studies suggest that SLRs are more commonly defendants in proceedings; however this finding was not the case in another study (Richardson, Sourdin & Wallace 2012).

### Barriers to access

Tania Sourdin has undertaken research over five years to better understand who uses alternative dispute resolution services and who doesn't – and why (Sourdin 2007). In particular, her research has suggested that many disputants who may have grievances or concerns do not access or use complaints and dispute resolution services. Sourdin concludes that there are a number of factors that impact on use and access to ADR. Her findings indicate that those who use these services do not appear to be representative of the general population (using ABS data). “Vulnerable” consumers – ie those living in typically low socio-economic regions appear to be least likely to access ADR and have been found to experience additional barriers to accessing ADR (Sourdin 2007).

The research identified that complainants and disputants who tend to take action when they have a complaint or a dispute tend to be located in certain geographical areas, have a higher socioeconomic status, and that age and gender can be an important factor in determining whether disputants will access complaints and dispute resolution processes (Sourdin 2007).

People facing significant disadvantage often have multiple interrelated issues, including legal issues. They tend not to approach legal services for assistance, and face particular difficulties in working with lawyers to address their legal problems. Their issues may be at crisis point by the time they access legal assistance, and may not have the documents or capacity to work with a legal adviser (Forell & Gray 2009).<sup>25</sup>

A study by Forell and Gray reviewed a selection of research studies on outreach legal services to people with complex needs with the purpose of informing the evidence base. The review's objectives were to appraise and synthesise the best available research evidence on:

1. the effectiveness of outreach legal services in reaching disadvantaged people with complex needs, and providing the range of legal services they require in a sustainable way; and
2. the features of effective outreach legal services (Forell & Gray 2009, p.2).

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<sup>25</sup> See Grunseit et al, 2008; Coumarelos et al, 2006; and Forell et al, 2005.

The review focussed on people who are marginalised or socially excluded as a result of issues such as homelessness, disability, unresolved mental health issues, Indigenous status, severe financial hardship, unemployment or remote location. Their complex needs may be over and above their legal needs (Forell & Gray 2009).

A summary of the authors, subject areas and locations covered are provided in table 1.

**Table 1: Summary of researchers, subjects and locations**

Subject area	Author	Location
Credit and debt	Buck et al, 2007 Day, Collard & Hay, 2008 Day, Collard & Davies, 2008 Gillespie et al, 2007 Hartlepool New Deals for Communities, 2004 Sherr, 2002 Smith & Patel, 2007	England and Wales England and Wales England and Wales Scotland England  England 3 London Boroughs England and Wales
Civil law – aboriginal legal aid services	Dimos, 2008	NSW, Australia
Civil law - services to homeless people	Goldie, 2003 Kilner, 2007 Westwood Spice, 2005	Victoria, Australia South Australia NSW, Australia

Source: Forell & Gray, 2009, p.6.

The review’s findings are summarised in Appendix A.

A public discussion paper published by the Government’s Expert Panel on Constitutional Recognition of Indigenous Australians suggested that an agreement-making power be considered as one of the reforms.<sup>26</sup> This idea has also been vaunted by the Law Council of Australia.<sup>27</sup> In her paper on agreement-making, Shireen Morris canvasses issues which give rise to discrimination and argues that special measures in legislation are warranted to enable equal enjoyment of rights or effective equality. In arguing for the inclusion of an agreement-making power into the Constitution, she argues that this would need to allow for agreements at State and Commonwealth level to address both state and race-based laws (Morris 2011). This is not an empirical study and has been included because it identifies how a barrier to equal enjoyment of rights might be addressed through Constitutional reform.

### Rural and remote areas

The use of video conferencing to provide legal advice and assistance to disadvantaged clients living in rural and remote areas (RRR) was reviewed by the Law and Justice Foundation of NSW. Interest in video conferencing has increased in the context of:

- The diminishing feasibility and the relatively high cost of maintaining resident legal services in some RRR areas<sup>28</sup>;

<sup>26</sup> See, Expert Panel on Constitutional Recognition of Indigenous Australians, 2011, ‘A National Conversation’ *Discussion paper*, May, p.19. [www.youmeunity.org.au/be-informed/discussion-paper](http://www.youmeunity.org.au/be-informed/discussion-paper).

<sup>27</sup> Law Council of Australia, 2011, *Ibid.* p.16.

<sup>28</sup> See Forell, Cain & Gray, 2010; Wilczynski, Ross & Connell, 2009.

- The technology for providing these services reducing in cost and becoming more accessible over time<sup>29</sup>
- The rollout of the National Broadband Network across Australia and the scope for this to be utilised in the provision of legal services in RRR areas<sup>30</sup> (Forell, Laufer & Digiusto, 2011).

The review undertook a comprehensive and systematic search for, and review of research, evaluation and other relevant documents. The methodology involved four stages: (i) Defining scope and inclusion criteria; (ii) Literature search; (iii) Appraisal; and (iv); and Data extraction and synthesis.

The review was unable to locate virtually any research reports which have specifically evaluated the effectiveness of video conferencing for the provision of legal services. Of the 13 studies included in the review, eleven had only examined the use of video conferencing for legal assistance as part of a broader study. Many of the studies were international. Nevertheless, the review was able to draw some useful insights and make recommendations regarding making use of video conferencing more effective, and monitoring and evaluation (Forell, Laufer & Digiusto, 2011).

### Homelessness

Non-government organisations can play a significant role in providing legal services to disadvantaged people. The Public Interest Law Clearing House (PILCH) is one such organisation which also advocates on behalf of its client groups. For example, PILCH's Homeless Persons' Legal Clinic in concert with the Council to Homeless Persons wrote to the Yarra Ranges Shire Council to object to the introduction of the *General Provisions Local Law 2010*. In support of their objection, they quoted findings from the *Youth Homelessness and Housing in the Shire of Yarra Ranges Report* of June 2005, which produced statistical data on the social and economic impacts of disadvantage and homelessness (PILCH 2011).

### Disabilities

The National Association of Community Legal Centre's submission to the ALRC review, noted that its consultations with community legal centres had revealed an increase in clients with mental or intellectual disabilities which had the attendant outcome of increasing complexity in matters and the time required to assist these clients.<sup>31</sup> The submission also cited the Law and Justice Foundation research, *Justice Made to Measure*, which found that people with a chronic illness or disability are particularly vulnerable to a range of civil, criminal and family legal problems and suggested that meeting the legal needs of people with a chronic illness or disability should be a top priority.<sup>32</sup>

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<sup>29</sup> See Access to Justice Taskforce, 2009.

<sup>30</sup> See McClelland Media Release, May 2010.

<sup>31</sup> The National Association of Community Legal Centres Submission, p15

<sup>32</sup> The National Association of Community Legal Centres Submission, p24.

### Access to formal, informal and everyday justice institutions and services

Louis Schetzer's study into debt-related problems in Victoria aimed to:

- gain a better understanding of the nature of debt-related problems where Magistrates' Court legal proceedings have been issues;
- obtain information as to the advice-seeking behaviour of consumer debtor defendants in the Magistrates' Court; and
- assess whether access to advice or assistance assists debtors with the resolution of consumer debt-related problems.

The project involved four research initiatives which in combination provide a robust basis for analysis. The methodology involved:

- an analysis of Magistrates' Court data for 2005-06;
- analysis of debt recovery practices and procedures from a number of major creditors in relation to small debt matters;
- conduct of 90 structured interviews with the clients of financial counsellors from around Victoria; and
- a telephone survey of 450 Magistrates' Court consumer default judgement debtors (Schetzer 2009, p.vii).

Wilczynski, Ross & Connell's longitudinal evaluation of the effectiveness of the Regional Solicitor Program was undertaken in two separate phases:

- Phase 1: Evaluate the four elements below one year after the inception of the Program:
  - Examination of the underlying rationale of the program
  - Process and structure evaluation
  - Impact analysis
  - Cost-benefit assessment.
- Phase 2: update the findings of phase one with data and stakeholder feedback concerning the Program in its second year, including responses to changes made to Program administration following the phase one research.

Both phases included a series of stakeholder interviews and analysis of administrative data. Those consulted included:

- stakeholders able to comment on the Program generally i.e. Legal Aid NSW, the NSW Law Society, NSW Legal Assistance Forum, Aboriginal Legal Service (NSW/ACT) Ltd, and the Department of Justice and Attorney General (DJAG).
- Program Solicitors and partners of participating private law firms in each location.

- representatives of relevant organisations external to the participating firm e.g. local consumer advocacy groups/referral bodies, representatives of the local court system, regional representatives of CLSD and Community Legal Centres, regional Legal Aid NSW offices and regional Law Society of NSW representatives.
- formerly subsidised individual practitioners who have left the Program, and partners in firms that are no longer participating in the Program.
- firms and individual practitioners that have declined to participate in the Program, where available (Wilczynski, Ross & Connell, 2009).

The evaluation was small-scale with some notable limitations (see Appendix A).

### Aboriginal and Torres Strait Islanders

Research into the legal needs of Indigenous people has been largely focussed on the area of criminal law, due to over-representation of Indigenous people in the criminal justices system.....Improved understanding and servicing of the legal needs of Indigenous communities across a range of civil law spheres – housing, consumer rights, credit and debt, employment law, negligence, corporations law and so on – will assist in the provision of effective access to authorities currently under-utilised by Indigenous communities (Cunneen & Schwartz, p.726)

A study by Cunneen and Schwartz, 2011 into the civil and family law needs of Indigenous people in NSW was premised on the notion that “the identification of the wide range of civil and family law needs of Indigenous people in NSW could serve to eliminate the inequality in access to justice for the Indigenous communities in Australia” (Cunneen & Schwartz, p.724).

The objectives of this research were to:

- analyse the civil and family law needs of Aboriginal people in NSW; and
- arising out of the legal needs analysis, explore how Legal Aid NSW might improve the services that they provide to Aboriginal clients in the areas of civil and family law.

The study involved: examination of Legal Aid NSW data recording the use of civil and family law Legal Aid Services by Indigenous clients over the 2008 year; and consultation with Aboriginal communities and service providers in eight focus sites chosen for geographical spread, and including remote, rural, regional and urban communities. The review’s findings are summarised in Appendix A.

### Older Australians

Statistical data indicates that the Legal Aid means test does not appear to be disadvantaging older persons compared to other applicants; in 2006-07, 81 per cent of applications for legal aid assistance by older people were approved (compared to 77 per cent as the national average for all applicants) (AGD 2008).

A report prepared by the ABS for the AGD analysed the relationship between area level disadvantage and location of community legal centres (CLCs). The analysis found that

CLCs are geographically concentrated in major urban areas, generally in areas of relatively less disadvantage (ABS 2007). The areas identified as the most disadvantaged did not have access to a CLC (AGD 2008).

### Judicial case management

Managerial judging is widely practiced by judges of State Supreme Courts, the Federal and Family Courts, the District and County Courts and some lower Courts. As defined by Justice McClellan, case management involves increased judicial supervision over, and management of, pre-trial procedures. Its objectives are to facilitate settlement of disputes that have the potential to settle, and to ensure that disputes that must proceed to trial do so “efficiently on the real issues of the parties”<sup>33</sup> (McClellan 2010). While this paper is non-empirical, it draws upon a number of evaluations and judicial experience to characterise the effects of judicial case management of civil commercial cases. Justice McClellan’s findings are summarised in Appendix A.

See also ALRC 2012 in ‘The cost of justice’ section in classification 1 on the cost of discovery.

### System complexity

There are significant differences between the states and territories about the matters that come before the various courts. The *Report on Government Services* (ROGS) provides detailed information about the coverage in all courts jurisdictions in the Commonwealth, state and territories, along with diagrams of flows through the civil justice system (SCRGSP 2012, p.C8) and the major relationships of courts in Australia (SCRGSP 2012, p.7.11).

Haphazard system design also impedes access, particularly for vulnerable people. Sourdin argues that ADR schemes and services have not developed in a homogenous fashion, and as a result are arguably more susceptible to systemic design defects. While schemes and services may satisfy large groups of disputants they may be unaware of those disputants who fail to access them (Sourdin 2007).

Most ADR schemes are designed to consider issues relating to access, as access is usually a key requirement in any dispute resolution scheme. For example, the benchmarks for Industry-Based Customer Dispute Resolution in 1997 articulated six benchmarks to consider in assessing system efficacy: accessibility; independence; fairness; accountability; efficiency; and effectiveness. The benchmark relating to accessibility requires that: ‘The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers’ (cited in Sourdin 2007).

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<sup>33</sup> See Bergin, 2008. The Hon Justice PA Bergin, 2008, *Case Management*, paper presented to the National Judicial Orientation Program, Broadbeach, 3-8 August.

### International research

#### Affordability

Drawing on data from seven different countries (the United States, England and Wales, Canada, **Australia**, New Zealand, the Netherlands, and Japan), in this study Herbert Kritzer examined the relationship between income and using a legal professional.

The author does not employ any new data collection; rather, a variety of extant studies are relied upon to examine the relationship between income and lawyer use.

The data for Australia came from a survey conducted by Jeffrey FitzGerald in 1981–1982 in Victoria State (the ‘Australia Study’. This study (designed as a replication of a Civil Litigation Research Project (CLRP) study conducted in the US in 1980) involved 1,019 households and focused on problems of meeting a minimum threshold (AU\$1,000).

The author’s article also included an unpublished report of an analysis of the data from the Australia Study and the CLRP Study (the ‘report’). The report presented the results of a logistic regression analysis of the likelihood that disputants would employ lawyers. The logistic regression model included income as a variable as well as problem type and a variety of other variables. The analysis predicted lawyer use by each of these variables. The report presented the results of the analysis in the form of predicted probabilities, where those probabilities were obtained by varying the value of one variable while the other variables were held at their mean values (Kritzer 2008).

#### Barriers to access

The importance of services targeted at socially excluded young people – those who experience multiple disadvantage and young people not in education, employment or training – have been identified as a group that has specific needs in relation to navigating the justice system and obtaining advice (Balmer, Tam & Pleasence, 2007)

The UK Legal Services Commission’s Civil and Social Justice Survey findings provide data on:

- the vulnerability of young people to civil justice problems and factors which exacerbated risk, for example, being a victim of crime, a long-term illness or disability, and living in high density housing;
- the impact of problems, for example, physical and stress-related ill health, loss of employment and income, loss of home, loss of confidence and violence;
- how problems were dealt with, including doing nothing and failing to obtain advice; and
- the mode of contact with advisers and the role of technology (LSRC 2010).

Barendrecht, Mulder and Giesen have looked at the preliminary issues that arise when trying to measure access to justice in a systematic manner. They discuss the possibilities of a framework in which the costs and quality of access to justice can be determined and where costs are not merely measured in terms of money, but also in terms of time and

emotional costs, for example, stress (Barendrecht, Mulder & Giesen 2006). For details on selection of variables and scale see Appendix A.

Gramitov, Martin and Klaming undertook an empirical study of consumer related disputes in The Netherlands. The primary aim of the study was to assess and predict the role of cost, quality of procedure and quality of outcome as barriers to access to justice for this particular path to justice. The study analysed the perceptions and evaluations of people who referred their legal problem to the Consumer Dispute Commission. A web-based questionnaire was distributed to 152 participants who used the procedure and received an outcome in the past 12 months. This instrument was based on an extensive review of the relevant justice literature. The results of the study demonstrated that the perceptions of the quality of the outcome were strongly influenced by the favourability of the outcome (Gramitov, Martin & Klaming 2009). Details about the survey design and sample can be found in Appendix A.

Research by Sandefur looked at the experiences people have with civil justice events, organisations or institutions. The research reviewed what is known about access to civil justice and race, social class and gender equality. Three classes of mechanisms through which inequality may be reproduced or exacerbated emerged: the unequal distribution of resources and costs; groups' subjective orientations to the law or to their experiences; and differential institutionalisation of group or individual interests (Sandefur 2008).<sup>34</sup>

### Findings

#### Classification 5: Equity of access

- There are several sources of data on the income levels of clients of government-funded legal assistance services. These data provide a rich source of research material for determining affordability and the impacts of low income on disadvantaged people who are in dispute.
- One of the impacts of the cost of legal services is the increase in self-represented litigants. There has been considerable research undertaken on self-represented litigants across a range of issues, however, there has been little in recent years.
- There is substantial research available on the groups in society who experience barriers to accessing legal assistance services; and the predominant factors which impact on equitable access.
- Research and evaluation on video-conferencing as a response to barriers to access in rural, regional and remote communities is limited. A review of the available research has made recommendations on how video-conferencing could be used more efficaciously.
- Barriers and access to services to people who are vulnerable or marginalised in society have been the subject of several Australian and international studies. This is an area where non-government organisations play a key part, however, there appears to be limited research or evaluations on their impact in the area of civil justice. A far greater emphasis is placed on the interface by vulnerable people with the criminal justice system.
- Statistical evidence suggests that Judicial Case Management has been successful in enabling access to justice and improving dispute resolution outcomes pre-court. Statistics aside, there have been no authoritative studies or evaluations undertaken in Australia with review and judicial commentary relying heavily on international studies.

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<sup>34</sup> Abstract only accessed.

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- Descriptive information aside, some work has been identified on system complexity in the field of ADR. No empirical work on the broader civil justice system in Australia has been located.
- International research on barriers and access to justice provide sound methodologies which would be useful for undertaking empirical studies in Australia.

### **Classification 6: Wellbeing**

This classification supports objective five:

**People benefit from a civil justice system that values the wellbeing of those who use it.**

The focus of this classification is on how well services in the system care for the people who use the system. In particular it is concerned with people who are vulnerable or have particular needs that require support during their contact with the civil justice system.

### **Impact of justice services on identified groups with particular needs**

#### **Aboriginal and Torres Strait Islanders**

The report entitled *Solid Work you Mob are Doing* (NADRAC 2009b) identified a number of factors for effective practice for managing conflict involving Indigenous people. The report, which is described in Classification 2, is based on research findings including case studies.

A study by Cunneen and Schwartz into the civil and family law needs of Indigenous people in NSW was premised on the notion that “the identification of the wide range of civil and family law needs of Indigenous people in NSW could serve to eliminate the inequality in access to justice for the Indigenous communities in Australia” (Cunneen & Schwartz 2011))

The objectives of this research were to:

- analyse the civil and family law needs of Aboriginal people in NSW; and
- arising out of the legal needs analysis, explore how Legal Aid NSW might improve the services that they provide to Aboriginal clients in the areas of civil and family law.

The study involved consultation with Aboriginal communities and service providers in eight focus sites chosen for geographical spread, and including remote, rural, regional and urban communities.

Research into the legal needs of Indigenous people has been largely focussed on the area of criminal law, due to over-representation of Indigenous people in the criminal justices system.....Improved understanding and servicing of the legal needs of Indigenous communities across a range of civil law spheres – housing, consumer rights, credit and debt, employment law, negligence, corporations law and so on – will assist in the provision of effective access to authorities currently under-utilised by Indigenous communities (Cunneen & Schwartz 2011, p.726)

#### **Culturally and Linguistically Diverse clients**

An evaluation of the cultural appropriateness of the FDR services offered to culturally and linguistically diverse (CALD) communities (specifically members of the Lebanese, Turkish and Iraqi communities living within the catchment area Family Relationship Centre at Broadmeadows) offers some insights into (and suggestions about managing)

cultural matters in the current practice of family dispute resolution in Australia (Akin Ojelabi et al 2011).

Research into current interpreting practices in Australian courts and tribunals for bilingual or multilingual cases was commissioned by the Australian Institute for Judicial Administration in 2011. This exploratory study aimed to ascertain the strengths and weaknesses and make recommendations for a consistent national protocol on working with interpreters in the justice system. The project included a survey of tribunal members, magistrates and judges using an on-line questionnaire; and a survey of interpreters through another on-line questionnaire. Additional comments from interpreters were also obtained through an existing judicial interpreters' social on-line network (Hale 2011).

### People vulnerable to violence

Many of the parenting cases coming to the family courts raise issues of violence (often combined with other issues, such as the impact of mental illness or substance abuse). There has been considerable research in this area, largely focused on the analysis of procedures that ensure the safety of clients in situations where family violence is a factor.

The KPMG evaluation of FDR services in LACs surveyed clients in relation to their perception of their safety during conferencing, with client survey data indicating that 93 per cent of clients reported feeling very safe or safe during the conference (KPMG 2008, p.46). The KPMG study also surveyed FDR practitioners, with 92 per cent of respondents agreeing that there are appropriate protocols and procedures in place in LACs to allow effective response to clients who are victims of family violence (KPMG 2008, p.47).

The Family Courts Violence review by Richard Chisholm assessed 'the appropriateness of the legislation, practices and procedures' that apply in cases where violence is a factor; and in particular considered:

- whether the practices and procedures of the courts encourage victims to disclose family violence and support 'best practice';
- whether appropriate support is provided for families who have experienced violence; and
- whether information disclosed by litigants is appropriately shared within the courts (Chisholm 2009).

Chisholm's review did not collect new data but provided an analysis of the law and processes in place, as well as drawing on evidence from the 2003 (Australian Institute of Family Studies (AIFS) Violence Study. The AIFS study of 300 cases found that more than half the cases coming before the family courts were found to involve issues of violence. The proportion of cases involving violence was higher among the cases that needed adjudication, and many of the cases involved what the researchers considered allegations of 'severe' violence. The frequency and severity of allegations led the researchers to conclude that for cases litigated in the Family Court "allegations of violence appeared to be "core business". The incidence of violence issues in Federal Magistrates Court cases was somewhat lower (62 - 67 per cent) than in the Family Court (79 per cent), but was still well over half the cases requiring adjudication. Allegations of child abuse frequently accompanied allegations of family violence. The researchers

noted that caution should be applied when drawing inferences across the family law system from a study of 300 cases, but the research indicates that issues of family violence (and often associated child abuse concerns) form a significant part of many parenting cases that come before the courts (Moloney et al 2007, cited by Chisholm 2009).

The Family Law Council provided an advice on family violence and family law in 2009. Its findings were informed by ‘a vast amount of research and a number of reports by social scientists, academics and lawyers on family violence and its impacts; by reference to practice guidelines and wisdom of social scientists and lawyers; by current legislative frameworks; and by case law. In particular, Council has taken account of the consultations it has conducted with community workers, legal practitioners, social scientists, academics, judicial officers and others since mid-2006’ (Family Law Council 2009).

Research into family violence since the 2006 family law reforms was commissioned by the federal AGD in 2009 and conducted by collaboration between University of South Australia and Monash University (including Flinders University) and James Cook University (Bagshaw et al 2010). The study aimed to assess:

- The effect that a history of or existence of violence within the relationship has on the decisions that people make about accessing the courts and dispute resolution services
- The effect that a history of or the existence of violence within the relationship has on the decisions people make while they are at court and at dispute resolution services
- The effect that a history of or the existence of violence within the relationship has on post-separation parenting arrangements.

The research design included a number of different data collection strategies aimed at collecting data firsthand from parents and children who had experienced parental relationship breakdown, with and without family violence. Researchers from the disciplines of criminology, law, education, psychology and social work collected data directly from parents and children. The project surveyed a broad sample of parents and children to examine how family violence has affected their access to courts and dispute resolution services, and post-separation parenting arrangements. The consistency of responses from survey respondents suggests the strong reliability of the data (Bagshaw et al 2010).

### Wellbeing of Children and Families

Harrison provides a record of the Family Court of Australia’s move away from the traditions of the common law adversarial trial to what is now known as the less adversarial trial (LAT). The approach was developed by the Court ‘in response to a long recognition of the need to provide better ways to decide disputes between separating parents when the best interests of children is the paramount concern.’ The Court embarked on the pilot project, known as the Children’s Cases Program (CCP) in 2003 and subsequently decided to apply the less adversarial approach to all Family Court of Australia hearings (Harrison 2007).

Professor Rosemary Hunter was contracted to evaluate whether the Children's Cases Program (CCP) was meeting its objectives and to determine its resource impacts, and identify best practice models. Her report was completed in June 2006. As part of the evaluation process, Dr Jennifer McIntosh was separately contracted to examine the impacts of CCP on families and children, and her report was completed in March 2006.

Professor Hunter's methodology is described in detail in her report, but essentially her analysis included a survey of 168 CCP parenting cases finalised in the Sydney and Parramatta Registries and 168 non-CCP parenting cases which went to trial in the same registries during the same period. She also conducted a number of interviews and several focus groups with those involved professionally in all aspects of the CCP process. Professor Hunter's evaluation is comprehensive and detailed. A limitation of her study is that her research was largely conducted during the early months of the CCP pilot while the process was still evolving. Also, as Hunter and McIntosh were evaluating a pilot in which parental consent was required, factors influencing that consent were obviously significant in the evaluations.

Dr McIntosh used telephone interviews with a small group of parents in the CCP and control groups to assess the impact of CCP on parental capacity and children's well-being, parents' perceptions of the court process and of how the arrangements for the children were working. Interviews took place three months after the completion of their matters and involved 45 parents who had participated in CCP and an additional 34 who she described as mainstream (ie. whose matters had been determined in the traditional way). McIntosh is careful to emphasise the small sample size which hampers the generalisability of her results. However the richness of her qualitative data gives a powerful message of the strengths of the CCP (Harrison 2007).

The impact on children and families of the civil justice processes for resolving family disputes has been the focus of considerable research, particularly associated with the introduction of the changes to the family law system in 2006.<sup>35</sup> The 2006 changes have been evaluated in a number of high quality studies authored by AIFS as well as other researchers, using evaluation methodologies including empirical data to compare the outcomes of different approaches.

The AIFS evaluation of the 2006 family law reforms was published in 2009. The nine key evaluation questions cover the extent to which the various facets of the reforms met the needs of parents and children. The evidence base the evaluation provides about the use and operation of the family law system in Australia is more extensive than has previously been available in Australia and, according to the authors, is arguably more extensive than other studies that exist internationally. The evaluation is based on an extensive range of studies that examine the views and experiences of around 28,000 people involved in the family law system (including parents, grandparents, officials and lawyers). AIFS conducted a wide range of surveys and interviews, analysed administrative data and examined more than 1,700 court files.

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<sup>35</sup> These changes included amendments to the Family Law Act 1975 and increased funding for new and expanded family relationships services.

The voice of the child in family law disputes is examined by Parkinson and Cashmore 2008, which integrates examinations of these issues with empirical data from interviews which explore the views and experiences of children, parents, counselors, mediators, lawyers and judges involved in such disputes in Australia.

McIntosh and Chisholm explored the ‘pluses and minuses of shared care arrangements in circumstances of continuing conflict in which parents are unable and unwilling to protect their children from experiencing that conflict.’ The authors drew on two recent studies of dispute resolution interventions among highly conflicted parents. The first of these is a study based on an intervention in a community mediation setting which compared the outcomes for separated parents who attended two distinct brief forms of therapeutic mediation for post-separation parenting disputes (data collected from 119 families at three points in time). The second study was based on an intervention in a registry of the Family Court of Australia which investigated outcomes for 77 parents and 111 children (aged 4 years and above) involved in the Family Court’s Child Responsive Pilot Program. Comprehensive interviews conducted with parents and children before and 4 months after a litigated settlement was reached about their post-separation parenting arrangements (McIntosh and Chisholm 2008).

While the authors of this study tempered their findings with the caveat that the study involved small, non-probability samples, they noted that the with-in subjects, repeated measures design, and mixed method data from multiple courses contributed to the ‘confidence [they] place in the findings.’

A follow-up research report by Dr McIntosh in April 2009 compared outcomes over four years for two groups of separated parents who attended mediation over parenting disputes using either ‘Child Focused mediation’, or ‘Child Inclusive mediation’. The study was designed to explore the impacts of these two distinct mediation interventions on parent, child and family relationship functioning. Two treatment samples were recruited across three cities using identical criteria, and cases were allotted by calendar allocation to one of two interventions (Child-Focused families in the first half of the year, Child-Inclusive in the second half of the year). The two groups did not differ significantly on demographic, marital history or dispute characteristics variables. Parents in both treatment groups were actively encouraged to base their negotiations about parenting agreements upon their children’s needs and to deal productively with the acrimonious nature of their dispute (McIntosh 2009).

A three year, longitudinal study was undertaken to explore empirical evidence about the relevance of ‘shared care’ arrangements to financial arrangements between separated parents. Fehlberg, Millward and Campo drew upon in-depth interviews with separated parents to explore shared care arrangements post-2006. They focused on 32 in-depth interviews conducted in early 2009 with parents in shared care arrangements, drawn from a qualitative, purposive sample of 60 volunteer parents. Traditional and shared carers were both recruited to allow comparisons to be made, with over-sampling of shared carers. The sample of carers was rich and varied, but not statistically representative of separated parents in Australia (Fehlberg, Millward & Campo 2009).

Key findings from two recent Australian studies of outcomes for infants and older children in different post-separation parenting arrangements, both commissioned by the

Australian Government Attorney-General's Department are documented in McIntosh et al 2010. The first of these was a study of high conflict parents who sought community-based mediation to resolve a parenting dispute. It drew on data from an intervention study that compared outcomes for families who participated in (a) child-focused mediation and (b) child-inclusive mediation. Data were collected from respondents at 4 points-in-time across a 4-year period: (i) at divorce mediation intake, (ii) 3 months post-mediation; (iii) 1 year post-mediation; and (iv) 4 years post-mediation. Methods involved face-to-face interviews with 169 families. The second study used data from national random samples of parents of 5,000 young infants and parents of 5,000 children aged 4–5 years, collected as part of the Longitudinal Study of Australian Children (LSAC). The authors strongly urged the replication and extension of their findings from both studies, by employing sensitive attachment oriented measures including where possible rigorous observational data to further explore links between post-separation care and psycho-emotional development. They noted that longitudinal depth studies covering the span of infancy, with sufficient sample sizes, will be of particular importance.

Cashmore et al carried out research on the implications of the changes to the 2006 Family Law Reforms on Shared Care Parenting, and the circumstances under which shared care arrangements work, and do not work, in the best interests of the child. They employed a range of different datasets, surveys and interviews which together provide a quite comprehensive and well-rounded picture of the experience of shared care in Australia in comparison to other kinds of parenting arrangements. Among the data sets used were the LSAC and the Household, Income and Labour Dynamics in Australia (HILDA) Survey and a survey of more than 1000 parents (both those who had shared care arrangements and those who did not) recruited by various means (Cashmore et al 2010).

In an article that provides a five year retrospective of Australian shared care research, Smyth comments that what stands out is that 'when the samples from the six studies are summed, it appears that our knowledge of shared care in Australia currently hinges on information from no more than 123 mothers, 135 fathers and 85 children' (Smyth 2009).

The awareness of the value of giving children a voice, and the benefits to the decision-making process that can result from listening to and involving children was explored by Cashmore & Parkinson. They provide an overview of the results of a series of qualitative interviews conducted with parents, children, family consultants, mediators, lawyers and judges seeking to explore the issue of children's participation in decision-making in family law disputes (Cashmore & Parkinson 2009).

Other research that has examined the impact on children of family dispute resolution includes the KPMG evaluation of FDR services in LACs (KPMG 2008). The FDR practitioner survey results show that:

- 89 per cent of FDR practitioners agreed (either 'somewhat' or 'strongly') that appropriate systems are in place to ensure the best interests of the child
- 94 per cent agreed that settlements arising out of FDR conferencing are child focused (KPMG 2008 p.38).

A study of adolescents' experiences after the 2006 reforms to the family law system was commissioned by the Australian Government's Attorney-General's Department and the

Department of Families and Housing, Community Services and Indigenous Affairs. It aimed to understand how adolescent children viewed their experience of parental separation in the context of the 2006 family law reforms. This included their input into parenting arrangements; support mechanisms; satisfaction with their living arrangements; relationships with parents and others; and confidence and wellbeing. The study conducted telephone interviews with 623 adolescents, aged 12-18 years, recruited from a longitudinal study of 10,000 separated parents across Australia. The study applied three main forms of analysis: descriptive methods, analysis of variance and qualitative analysis (Lodge & Alexander 2010).

### **Effective referral to appropriate non-legal services**

Some research relating to this sub-classification covers similar ground to Classification 3 (Expedition settlement of claims) as the provision of support and referral to services outside the civil justice system can help speed up settlement, as well as providing appropriate support to clients of the system.

Screening and intake processes in FDR services provide the opportunity to assess the suitability of a dispute for particular pathways. They also collect valuable information on issues such as family violence or mental health issues that would more appropriately be referred to non-legal services for assistance. Empirical research has been carried out to measure the effectiveness of the procedures and protocols in place for assessment and referral. The KPMG evaluation of Family Dispute Resolution services in Legal Aid Commissions (KPMG 2008) measured the level of comfort of FDR practitioners that appropriate protocols and procedures are in place (81 per cent of practitioners agreed they were appropriate). The evaluation concluded that the approach to working with people from diverse backgrounds is *ad hoc* and determined on a case by case basis and would benefit from the development of protocols for working competently with people with special needs including people with mental health or drug and alcohol concerns, Indigenous clients and clients from culturally and linguistically diverse (CALD) backgrounds. The evaluation identified the need for a national risk assessment and management approach to screening and intake for FDR (KPMG 2008).

### **Collaborative relationships**

An evaluation of the ‘Better Partnerships’ program was completed in late 2010 by AIFS (Moloney et al 2011). The Family Relationship Centres/Legal Assistance Partnerships Program (the ‘Better Partnerships’ Program) aimed to assist separated or separating families “by providing access to early and targeted legal information and advice when attending Family Relationship Centres”. The evaluation highlighted some of the challenges and benefits of collaborative partnerships in this area, which links community-based non-legal players with well established publicly-funded legal service providers.

The evaluation was made up of five studies involving quantitative and qualitative approaches that canvassed the perspectives of managers, professionals and clients. Key questions included the effectiveness of the services and whether the outcomes were consistent with the best interests of the children and were non-adversarial.

### International research

A multi-purpose social survey conducted by the UK Office for National Statistics was used as part of a project exploring the nature and extent of contact problems in the general population of separated families and their relationship to contact patterns in the UK (Peacey and Hunt 2008). While related to the outcome of civil justice processes, this study is considered peripheral to the central issue of the impact of civil justice processes on the wellbeing of clients.

Trinder et al undertook an evaluation of the Parent Information Programme (PIP) in England, which is an innovative programme for parents involved in litigation about child contact. It redirects resources from the courts to more creative programmes that seek to improve parental relationships and help them settle contact arrangements independently. Currently one in ten parents who separate or divorce seek the assistance of the courts in making decisions about contact arrangements for their children. Research in this area suggests that courts have limited impact on the key co-parenting factors that make contact arrangements sustainable and work best for children. This robust evaluation was designed to identify the actual and potential of the PIP as an effective and value for money intervention for parents with disputes over parenting arrangements. It aims to understand the court and non-court pathways undertaken by parents attending PIP, and how this compares to the experiences of comparable non-PIP cases. It measures the impact on families of PIPs compared to other court-based pathways and the average cost of providing PIP and its cost-effectiveness in comparison with other court-based pathways. It also aims to understand in more depth why PIP might work better in some circumstances than others, including what parents and professionals perceive to be helpful and unhelpful about PIP and what changes may be required Trinder et al (2011).

The UK Network on Family Regulation and Society has commenced a three year (July 2011- June 2014) ESRC-funded interdisciplinary project that aims to provide critical evidence about the usage, experience and outcomes of the three different forms of Alternative Dispute Resolution in family law currently available in the UK:

- Solicitor Negotiation
- Mediation and
- Collaborative Law (where the parties and their solicitors work together to reach a resolution against a background commitment by all participants not to resort to court proceedings) (UoE 2012).

The project, entitled ‘Mapping paths to family justice’<sup>36</sup> is the first to investigate the relative merits of these alternatives and is particularly relevant as diversion away from the family courts is likely to be further encouraged.

The project will focus on answering the following questions:

1. How widely is each process actually used and how embedded has it become in the public mind as a means of resolving family disputes?

2. How positive or negative have people's experiences of these ADRs been in the short and longer term?
3. What norms of family dispute resolution are embedded in the different alternatives?; and
4. Are particular approaches more or less appropriate for particular kinds of cases and parties? (UoE 2012).

This project is using a mixed methods approach.<sup>37</sup> The major conceptual contribution of the research will be its focus on the norms of family dispute resolution (such as child welfare, equality, rights or fault) that fare best within each dispute resolution process. The normative outcomes of family dispute resolution processes matter because of: their fairness or otherwise to the parties; their impact on the parties' children; and the commitment of public funds to these processes.

In a study funded by the UK Ministry of Justice, Trinder and Kellett explored the longer term outcomes of in-court conciliation, including the fairness, efficiency and effectiveness of dispute resolution schemes in litigated family contact cases. The study was based on follow-up telephone interviews with 117 of the original baseline study parents. The study used a range of outcome measures including contact patterns, durability of agreements, re-litigation, co-parenting, contact problems and adult and child wellbeing. The two to three year period since the original conciliation appointment allowed sufficient time for arrangements (and relationships) to have settled down, or, alternatively, for further litigation and conflict. The study consisted of a second follow-up telephone interview with parents who had attended in-court conciliation approximately two years previously and who had been interviewed in both the baseline and the first (six to nine month) follow-up studies (see Introduction for the full methodology) (Trinder and Kellett 2007).

The findings challenge the notion that alternative dispute resolution mechanisms are less likely to fuel parental conflict, more likely to result in an outcome tailored to individual circumstances and to be accepted by the parties as well as reducing delay and costs. Previous research has raised questions about whether rapid negotiations in a highly pressurised court environment can produce a fair, safe or sustainable solution. Trinder and Kellett raise concerns about some of the limitations of in-court conciliation and argue for the development of a more facilitative or educational-therapeutic approach to litigated contact cases.

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<sup>37</sup> A set of questions on a nationally representative survey with 3,000 participants, interviews with lawyers, mediators and parties with experience of different styles of ADR, recordings and analysis of a selection of mediations, collaborative law sessions and lawyer-client interviews).

### Findings

#### Classification 6: Wellbeing

- Research relating to this classification is dominated by extensive evaluation of the impact on children and families of the civil justice processes for resolving family disputes. The series of changes to the Family Law Act 1975 were intended to bring the views, feelings and experiences of children into sharper focus and considerable high quality empirical research has addressed how well this objective has been achieved.
- There is also considerable high quality research into the way in which family violence is managed by civil justice services.
- While there is some high quality research into the way the civil justice system impacts on Indigenous people, there is very little research into the way the system interacts with culturally and linguistically diverse clients or people with disabilities or mental health problems. Some of this research relates to client satisfaction and is covered under Classification 4.

### **Classification 7: The research and evidence base**

This classification supports objective six:

**People can be confident that the civil justice system is built on and continuously informed by a solid evidence base.**

Included in this classification is research that investigates those elements which contribute towards a robust research and evidence base:

- comparable and useful data collections
- the development of performance indicators or outcome measures
- commentary on the extent of civil justice research or resourcing

Broader discussion of the state of research on the civil justice system, including research funding and other barriers to building the evidence base, is included in the Major Findings section on ‘The State of Research and Evaluation’.

#### **Data collection**

The Steering Committee for the Review of Government Service Provision (SCRGSP) produces the annual *Report on Government Services (ROGS)* which include a chapter on the Justice System<sup>38</sup>. The Justice section of the report includes separate sections on Police, Courts administration and Correction Services. The Courts Administration data includes civil expenditure data disaggregated by jurisdiction, for example:

Real recurrent expenditure (less revenue from own sources) on justice services (by government and per person) (SCRGSP, 2012)<sup>39</sup>.

The National Alternative Dispute Resolution Advisory Council (NADRAC) report *Resolve to Resolve* noted that, like the rest of the civil justice system, there is very little comparable empirical data concerning the provision and use of ADR (with the exception of the family law arena). Accordingly the report noted that, at a systemic level, there is little data from which conclusions can be drawn about:

- the use of and the demand for ADR
- the profile of ADR practitioners and organisations
- the appropriateness of alternative forms of ADR for different disputes, and
- the effectiveness of different ADR processes (NADRAC 2009a).

The Report requested submissions relating to the importance of research and evaluation into ADR processes. The submissions noted in the report are summarised at Appendix B and indicate the widespread support for growing the research and evidence base in the field of ADR.

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<sup>38</sup> The SCRGSP comprises representatives from the Commonwealth and all State and Territory governments. It is chaired by the Chairman of the Productivity Commission which provides the Secretariat.

<sup>39</sup> See tables C.1 and C.2, pp.C.9-10.

Legal Aid representation statistics (extracted from latest annual reports for each state) detail the number of applications received and approved in each jurisdiction in the categories of criminal, family and civil law. The statistics for each jurisdiction are not presented in a uniformly consistent manner and without a context which translates the statistics into useful performance information, (ie targets or thresholds) the data is of little use as an evidence base. The percentage of applications for civil law matters that result in grants of assistance ranges from 41 per cent in Western Australia to 87 per cent in Tasmania (2010-11 Annual Reports). The WA report notes that applications for State civil law matters in WA increased by 25 per cent from the previous financial year, arguing that this reflects “a greater awareness among practitioners of Legal Aid WA’s commitment to increasing its level of service delivery in this important area of law.” The evidence for this claim cannot be found in the data alone.

The Department of Finance and Deregulation evaluation of the Legal Aid for Indigenous Australians program commented on the need for AGD to review the nature of data it collects, the operational and strategic reasons for requiring the data, and the use to which it will be put (Department of Finance and Deregulation 2008). They also looked at reporting using the Indicator Reporting Information System database. The database has only recently been consolidated and 2006/07 appears to be the first year of reliable data on a nationally consistent basis. However, they noted there appear to remain inconsistencies amongst Providers in the interpretation and reporting of some key items. (Note that these services include criminal justice and it is not possible to isolate the civil justice-related issues).

Statistical information about the Family Court of Australia (FCA) has been produced by the National Support Office of the FCA. In the second report of its kind the FCA provides data on orders made in cases relating to how children ‘spend time with’ their parents in both litigated and early agreement cases. The data are based on 1013 litigated cases and 2788 early agreement cases finalised during the 2008/2009 financial year in the Family Court of Australia. It does not contain any data in relation to orders made in the Federal Magistrates Court or the Family Court of Western Australia and does not attempt to compare the data or draw conclusions regarding trends (FCA 2010).

Community Legal Centres (CLCs) are required under their service agreements to collect and maintain data on client demographics and service activities. The purpose-built Community Legal Services Information System was rolled out between 2003 and 2006 and allows electronic transmission of accountability information as well as being an internal management and case management tool. The National Association of CLCs considers it “a robust and useful information system...well accepted by centres” (AGD 2008, p.84). There remains room for improvement in data validation.

In a useful contribution to the development of an evidence-base, Rhain Buth has investigated the quality of the administrative data relating to court-connected mediation in the Federal Court of Australia. These data are often used to support claims that court-connected mediation is on the increase – yet Buth’s investigation of the quality of the data suggests that the data have flaws that “cloud researchers’ abilities to analyse the efficacy and utility of mediation in Australia’ (Rhain Buth 2009).

Buth examined data in annual reports of the Federal Court, together with State and Territory court reports. Her analysis revealed that problems with the data include blurred reporting terms, contradictory definitions, irregularities in the settlement rates, and the absence of registry-specific and case-specific data. Her broader aim was to draw attention to the need for discussion about improving the quality and national consistency of data and to examine alternative measures that might better answer questions about court-connected mediation.

Buth examined three aspects of court-connected mediation:

- (a) the reporting of mediation;
- (b) the activity measure of court-connected mediation, which is its referral; and
- (c) the outcome measures, which are demonstrated in the recorded settlement rates.

For each of these aspects she identified problems with the data, including:

- mediation is not given an operational definition in the Federal Court’s annual reports, yet is treated as a uniformly reportable ADR service. Many different activities occur under the reported label of ‘mediation’; and
- mediations that have a more oblique connection to the court –including tribunals, commissions, workers compensation schemes, health care complaint schemes, community mediation services and those associated with government ombudsman – are not uniformly included in reporting of the handling and disposing of matters that may not technically be filed in court (Buth 2009).

While the annual report data suggest that there is not an overwhelming increase in court-connected mediation in the Federal Court, anecdotal wisdom suggests a growing reliance on it. Buth concluded that the disparity may be due to the narrow reporting of only those mediations that met criteria to be court-annexed, or that court-connected mediations are increasingly being taken up in private settings without adequate reporting to a court, court authority or relevant government body, or even that the increased use of mediation is taking place in non-court but court-related settings such as tribunals, administrative bodies, compensations schemes and the like. Buth’s contribution highlights the importance of addressing conceptual/definitional issues in order to draw relevant, cogent conclusions from the data (Buth 2009).

### **Performance Measurement**

In the last ten years there has been global interest in the development of indicators to provide evidence about the operation of justice systems and components within those systems. These developments have had a range of themes and purposes including:

- To provide international comparisons about the strength of the justice system in various countries.
- To provide evidence about the performance of the formal justice systems, particularly in developed economies.
- To provide evidence about the effectiveness of justice system reforms.

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- The Worldwide Governance Indicators and Rule of Law Index are very high-level perception based indicators that apply to the totality of the criminal and civil justice systems in Australia.
- Measuring Access to Justice and the Framework for Court Excellence both provide frameworks and resources that can inform the development of indicators. The Framework for Court Excellence is already endorsed by the Australian Institute of Judicial Administration, and therefore the values and concepts in that framework reflect those of the formal justice system
- The Court Administration section of the *Report on Government Services* has established a framework for reporting output data for much of the formal justice system, although no specific outcome indicators have yet been identified (SCRSP 2012, p.7.23).
- Legal needs surveys provide a description of the incidence of legal problems and the actions taken by people to resolve them.

Elizabeth Shearer has summarised the most relevant initiatives in table 2<sup>40</sup>.

**Table 2: Initiatives to provide an evidence base in the justice system**

Initiative	Agency	Purpose & Scope
Worldwide Governance Indicators <sup>1</sup>	World Bank	Reports on 213 economies on six governance indicators, one of which is “Rule of Law”, Provides cross country and over time comparisons. Uses perception based data from individuals, industry, NGOs and commercial information providers <sup>2</sup> Provides index scores and ranks results.
Rule of Law Index <sup>3</sup>	World Justice Project	Reports on 35 countries, against 10 factors including “Access to Civil Justice” and “Informal Justice”. Uses survey data from experts and general public surveys Provides index scores and ranks results.
Measuring Access to Justice <sup>4</sup>	Hague Institute for the Internationalisation of Law, Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution	Survey tool to gather information from users of formal and informal justice system about the cost, quality and outcome of the “justice pathway” they follow to resolve common legal problems. Aims to be used for a variety of purposes including identifying access problems, evaluating performance of legal system and monitoring effects of reforms
International Framework for Court Excellence <sup>5</sup>	Federal Judicial Centre & National Centre for State Courts (USA), The Subordinate	A framework of values, concepts and tools by which courts worldwide can voluntarily assess and improve the quality of justice and court administration they deliver. Covers seven areas of court excellence.

<sup>40</sup> Thanks to Elizabeth Shearer for providing this input

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	Courts of Singapore, Australian Institute of Judicial Administration	Includes non-adjudicative functions such as alternative dispute resolution. Self assessment questionnaire provided. Applies to formal justice system.
Australian Report on Government Services <sup>6</sup> – Court Administration	Productivity Commission	Measures performance of State and Commonwealth Courts in Australia to demonstrate Equity, Effectiveness (including Quality and Access) and Efficiency using a common set of output measures. Does not include specific outcome indicators
Legal Needs Surveys	Various agencies in the UK, USA, Canada and New Zealand, and in Australia, the New South Wales Law and Justice Foundation <sup>7</sup>	Surveys to describe the incidence of legal problems within the community and the actions taken by people to address legal problems. Encompasses everyday justice, informal justice and formal justice systems. Indicates a higher incidence of legal problems among some population groups and a significant level of unmet legal need.
<p>1: <a href="http://info.worldbank.org/governance/wqi/index.asp">http://info.worldbank.org/governance/wqi/index.asp</a>.</p> <p>2: Kaufmann, Daniel, Kraay, Aart and Mastruzzi, Massimo, The Worldwide Governance Indicators: Methodology and Analytical Issues (September 2010). World Bank Policy Research Working Paper No. 5430. Available at SSRN: <a href="http://ssrn.com/abstract=1682130">http://ssrn.com/abstract=1682130</a>.</p> <p>3: <a href="http://worldjusticeproject.org/rule-of-law-index">http://worldjusticeproject.org/rule-of-law-index</a>.</p> <p>4: <a href="http://www.measuringaccesstojustice.com">http://www.measuringaccesstojustice.com</a>.</p> <p>5: <a href="http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf">http://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf</a>.</p> <p>6: <a href="http://www.pc.gov.au/gsp/reports/rogs/2010">http://www.pc.gov.au/gsp/reports/rogs/2010</a>.</p> <p>7: See, for example, Coumarelos, C, Wei, Z &amp; Zhou, AH, Justice made to measure: NSW legal needs survey in disadvantaged areas, Law and Justice Foundation of NSW, Sydney, 2006, Pleasence, P. (2006) <i>Causes of Action: Civil Law and Social Justice</i>, Second Edition, LSRC Research Paper No. 14, Norwich: The Stationery Office, Currie, A The Legal Problems of Everyday Life, 2007, 2006 National Survey of Unmet Legal Needs and Access to Services at <a href="http://www.lsa.govt.nz">http://www.lsa.govt.nz</a>.</p>		

Some examples of the development of performance measures and targets were found in the literature. For example, the FCA Annual Report (2011) reports performance against targets (eg 70 per cent of matters pending conclusion are less than 12 months old (target was 75 per cent) and 73 per cent of reserved judgments are waiting less than three months after the conclusion of trial (target was 75 per cent) (FCA Annual Report 2011).

The evaluation of the Legal Aid for Indigenous Australians program examined the performance framework (which covers both the criminal and civil justice aspects of Legal Aid provision):

The Performance Framework in place, including both the qualitative and quantitative indicators, does not give enough assurance to AGD about the quality of services delivered or the success of the Program. AGD should reassess this framework to provide a more sophisticated set of indicators or look to other ways of assessing the impact of the Program nationally, and at the Provider level. (DF&D 2008).

The Institute of Community Engagement and Policy has developed a comprehensive indicator framework for ‘Healthy, Safe and Inclusive Communities’ (Wiseman et al, 2007). The community indicators represent the operationalisation of the Victorian

Community Indicators Project and provides indicator measures in the domains of: Social, Economic, Environmental, Democratic, and Cultural. For details on the 2007 survey methodology for reporting against the indicators, see CIV, 2007. While ‘family violence’ is explicitly included in the framework, there is no direct reference to civil justice. As yet, the indicators in the ‘Services Availability’ section have not been developed and this may provide an opportunity to overcome the omission.

The ROGS includes a performance framework on courts administration which includes efficiency data on:

- Backlog by type of court and jurisdiction (number and percentage);
- Attendance (a proxy indicator) by type of court and jurisdiction (averages);
- Clearance rates by lodgements, finalisations, jurisdiction, type of court (number and percentages);
- Net recurrent expenditure per finalisation in supreme courts, the Federal Court of Australia, district/county courts, magistrates’ courts, children’s courts and coroners’ courts by jurisdiction (SCRGSP 2012);

Clearance ratios are also reported in the annual reports of the Family Court and the NSW Department of Justice.

The performance indicators developed for the CLCs in 2002 “have not proven to be particularly effective” – they are considered to be too simplistic and not useful (AGD 2008, p.91).

A new Performance Framework for the Family Relationship Services Program was developed between 2005-07.

### **Research and Evaluation**

Apart from providing policy advice to the Commonwealth Attorney-General, NADRAC is charged with promoting the use and raising the profile of ADR. In fulfilling its objectives NADRAC is specifically empowered not only to provide advice on the need for ADR research but also to facilitate ADR research and participate in research conferences. The continued development of dispute resolution relies upon an improved understanding of ADR processes and interventions. High quality and broad ranging research which helps to answer important questions for funders, service providers, practitioners, users and the broader community will help to achieve this objective. The first ADR Research Forum was held in 2003, followed by 2005 and 2007 (see Hardy and Kellam 2007).

The aim of the 2007 Forum was to optimise research in ADR by promoting information sharing and collaborative effort among those involved in conducting or commissioning ADR research or evaluation. Over 100 participants and speakers took part in the Forum over the two days (Hardy and Kellam 2007). The Forum demonstrated the range of research topics and methodologies used to conduct research in this rapidly growing field. The topics covered the practice of ADR in contexts such as family conflict (Bagshaw and Howieson), hospitals (Shirley and Cockburn) and the workplace (Manning). A number of

articles also considered the implications of ADR in a legal context (Rundle, Ardagh and Cumes and Howieson). Other areas covered include the important issue of access to ADR processes (Sourdin), how mediation training can be culturally appropriate (Bagshaw) and ethics for a mediation ‘profession’ (Field). The articles also demonstrate that the methodological approaches to research are very diverse. There are large-scale, long-term empirical projects including surveys, interviews, focus groups and observations of practice (Bagshaw, Rundle, Sourdin); case studies (Bagshaw and Manning); and theoretical analyses (Field, Shirley and Cockburn, Howieson, Ardagh and Cumes).

The Australian Government’s consultation options paper on the Resolution of Small Business Disputes (discussed in Classification 2) notes that, “to date, there has been very little research conducted regarding ‘business-to-business’ dispute resolution arrangements for small business, including ADR (DIISRTE 2011).

### International research

A preliminary assessment of the impact of the financial crisis on various facets of the civil justice system in the US identified five significantly affected areas that warrant further empirical research and additional data collection: (1) state judicial branch resourcing, (2) patterns of litigation, (3) securities litigation and enforcement, (4) trends in the legal services industry, and (5) legal aid and the provision of legal services). The study sought to discover where there are significant gaps in data that must be addressed before a comprehensive empirical investigation of the civil justice effects of the financial crisis can be undertaken (Greenberg & McGovern 2012).

According to the assessment, data availability is variable for different aspects of civil justice system performance and policy. Limited and low-quality data across many dimensions of civil justice system performance will hamper future empirical efforts to trace the lasting effects of the crisis and ‘Great Recession’. They urged that it is imperative that research efforts continue: Long-run strain in the operation of the civil justice system, or changes in its basic function and institutional characteristics, could have serious policy ramifications going forward.

Further, preliminary data suggest some observable civil justice trends in the immediate wake of the financial collapse. There are preliminary data to suggest that litigation demands on some parts of the civil justice system have increased; that funding for state courts may now be trending downward; and that there have been disruptions in the legal services economy, in the provision of legal aid, and in the operation and staffing of courts. It remains to be seen whether any of these effects can be attributed with precision to the financial collapse, or whether some of the effects reflect longer-run emerging trends, particularly as government institutions move into a mode of austerity and deficit reduction.

The report noted the following:

Specifically, state court systems have experienced increased stress and funding restrictions, though the complexities of state court funding mechanisms mean that it is necessary to rely on anecdotal evidence of gauge the true extent of these changes. In terms of litigation, the numbers of civil claims in state courts are on the rise, but it is difficult to pinpoint the precise effects of the crisis due to a lag in data reporting. Data on securities litigation suggest that the financial crisis has had a mixed impact on securities litigation activity, with some evidence suggesting a surge in litigation, although government enforcement activity remained flat. In the legal

services industry, employment has fallen dramatically as firms face tightened budgets and explore alternative fee arrangements and new employment models. Finally, one of the more troubling findings that warrants further investigation concerns the effects on the provision of legal aid: An increased demand for such services and funding, coupled with a diminished supply, may reduce access to the justice system for the most vulnerable members of society (Greenberg and McGovern, 2012).

The US Court Statistics Project within the National Centre for State Courts (NCSC) collects and analyses data relating to the work of the US courts. The Project has developed a guide to statistical reporting and presents awards for ‘Reporting Excellence’ (NCSC 2009).

The UK Network on Family Regulation and Society organised an internationally-facing agenda-setting workshop in late 2009 to draw upon internationally recognised expertise to assist the Network in elaborating a theoretically informed, methodologically astute, innovative research agenda. The workshop was funded jointly by the Economic and Social Research Council, the Arts and Humanities Research Council and the Nuffield Foundation with contributions from the Family Law Bar Association and four universities. A ‘sandpit’ technique, commonly used in the natural sciences, was used to move from papers to proposals. Delegates identified 21 key research issues in the sandpit and then worked up proposals on the five most popular ideas.

### Findings

#### **Classification 7: The research and evidence base**

- There are many examples in the research literature where the paucity of data and data systems are highlighted, indicating the need for improved comparability of data. A useful analysis of the differences in concept and definition of the term ‘mediation’ provides a good example of the need for common agreed definitions.
- There are a number of examples in the literature over the last five years where performance measures have been developed within services – some have been useful, others have been found unsatisfactory. All rely on comparable data being available if they are to be useful and reliable.
- The literature provides some examples of innovative approaches to fostering research that may serve as useful models as an evidence base is being developed.

## Findings in relation to the state of civil justice research and evaluation in Australia

### Data Challenges

Identifying the information which should be collected about the civil justice system and identifying possible data sources is not an easy task. Moreover, the resources for collecting and analysing data may be difficult to come by. The task is made more complex by the large number of courts, tribunals, government agencies and other organisations involved in the provision of civil justice services and the lack of any uniformity in the management systems used by courts/tribunals, even within the same jurisdiction.

This patchwork of data can only become a meaningful evidence base for the broader civil justice system through a deliberate process of identifying what it is important to know – that is, the questions that need to be answered, followed by a mechanism through which all parties agree to implement a common definition of the concept to be measured.

There are two broad potential sources of data on which to build an evidence base: administrative data, which can be collected as a by-product of the administration of the system; or survey data, which requires the design and collection of questions from a particular group of stakeholders. Both can require considerable levels of investment.

At this stage of development of the civil justice evidence base in Australia, there is not yet agreement on what is most important to measure, nor on how often it needs to be measured – both of these questions need to be answered before the best potential source of data can be identified. For example, if a measurement is only required every five years, a survey may be a preferable option to administrative data.

### Administrative data

Administrative data, such as a compilation of statistics about settlement rates of cases or the ethnic background of clients can be a rich source of information if it is fit for purpose. To be of use as evidence across the system, such data needs to be based on common agreed definitions of the item or event being counted. There also needs to be a clear understanding of the reason why an item should be collected – that is, when these data are collected and analysed, how they will contribute to the evidence base.

The first step in many empirical research projects is to examine the available data, or perhaps to collect them by examining files or court records. Unless the use of the data as information is understood, it is unlikely to be collected or valued in any way.

There are various administrative data reporting mechanisms currently in place across the civil justice system. Where services receive funding from governments, regular reporting is usually required as an accountability mechanism (for example, reporting by Legal Aid Commissions to the State and Territory governments and the Attorney-General's Department). This accountability reporting provides a real opportunity for the various governments involved in funding services to cooperatively standardise concepts and definitions so that some basic comparable data become available.

Other mechanisms currently used to report data include the annual reports of many courts, tribunals and other services. Standardisation of this reporting and the implementation of reporting requirements would enhance this potential evidence base enormously.

As a starting point in relation to ADR data, Professor Kathy Mack has drawn up the following list of some basic minimum data items that could be collected by all courts and tribunals (by integrating it into existing forms and procedures). Kathy Mack's full list, with justification as to why each data item is important, is provided at Appendix C.

1. Was ADR used in this case: YES NO
2. What ADR process was used in this case? More than one?
3. What/Who initiated ADR use?
4. Timing information
5. Case type
6. How was the case finalised? When?

A further data item that would be very useful to collect is information on when the dispute actually arose – a date which is likely to pre-date the appearance of the dispute in official records, perhaps by years.

A stronger profile of who is using the civil justice system – in its various forms – would be assisted by national data standards relating to demographics. This could lead, for example, to better identification of cultural issues or the extent to which clients are repeat litigants.

**Recommendation 1:** That a list of data items/concepts considered essential be developed as a starting point for clarifying what is important to measure in improving the civil justice system

For a national data collection to be realised, there are a number of steps that would need to be implemented. At the outset there needs to be at least in-principle agreement from all governments that the national standardisation of data in particular areas is desirable. This would require the case to be made at a high level for national consistency, based on the benefits to be gained from this investment in national standardisation. It will be important that this case is based on concrete examples of the way in which civil justice delivery could be enhanced by nationally consistent data.

**Recommendation 2:** That a high level case be developed and considered by all governments at a high level that demonstrates the benefits to be gained from, and seeks in principle commitment to, national consistency of data in particular areas of the civil justice system.

The next step would be to establish infrastructure, albeit fledgling, that facilitates and drives the development of common concepts and definitions. The NADRAC Report drew attention to the fact that there is no well-resourced institutional support for data

collection, comparative evaluation of and targeted research about civil justice services including ADR. It noted the important contribution made by the Australian Institute of Criminology in the development of an evidence base in criminal justice and the similar contribution made to family justice by the Australian Institute of Family Studies.

Similarly, the development of a nationally consistent and useful evidence base drawn from administrative data across Australia's health, housing and community services sectors has only been achieved through the creation 25 years ago of the Australian Institute of Health and Welfare (AIHW). The Institute has developed mechanisms by which all states and territories work together to standardise and agree on concepts and definitions that allow activities, outputs and outcomes to be compared across the states and territories in the areas of health, community services, disability services, homelessness, housing, child protection, juvenile justice and early childhood.

The Australian Bureau of Statistics also plays a role in relation to standardising and reporting data collections in related areas. Nationally consistent data in relation to education and early childhood is currently under development.

**Recommendation 3:** That options for development of infrastructure to facilitate and drive the achievement of nationally consistent data across the civil justice system in Australia be explored and costed.

One of the key mechanisms used in the human services sectors to achieve national data consistency has been the negotiation of National Information Agreements with all governments. National Information Agreements are in place in a number of sectors of human services across Australia, particularly where services are delivered by states and territories:

- National Health Information Agreement<sup>41</sup>
- National Community Services Information Agreement
- National Housing and Homelessness Information Agreement

**Recommendation 4:** That the potential for development of a National Information Agreement relating to the civil justice system be explored in the context of the infrastructure options.

### Survey and longitudinal data

A survey of the population, or a segment of it, is a vital source of data and information in many research projects. In relation to civil justice, the NSW surveys undertaken by the NSW Law and Justice Foundation have provided a strong foundation for analysis of

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<sup>41</sup> See Appendix D: National Health Information Agreement, 'Agreement between the state/territory government health authorities, the Australian Institute of Health and Welfare (AIHW), the Australian Commission on Safety and Quality in Healthcare and the Commonwealth of Australia, December 2011 [http://www.ahmac.gov.au/cms\\_documents/National\\_per\\_cent20Health\\_per\\_cent20Information\\_per\\_cent20Agreement\\_per\\_cent20- per\\_cent20Final.pdf](http://www.ahmac.gov.au/cms_documents/National_per_cent20Health_per_cent20Information_per_cent20Agreement_per_cent20- per_cent20Final.pdf)

population demand and supply. Most research and evaluation projects encountered in this project have employed some form of survey of the affected population.

The wealth of data available through the Longitudinal Survey of Australian Children (LSAC) and the Household, Income and Labour Dynamics in Australia (HILDA) provide useful adjuncts to some of the research questions. Once further work is undertaken on the highest priority questions for the civil justice system, an assessment of the usefulness of a longitudinal study or tracking of individuals can be made.

There may be potential for the ABS to add questions in relation to civil justice to existing surveys (or the census) or to conduct surveys that provide relevant information. These options should be explored with the ABS once there is greater clarity about what needs to be collected.

### **Fostering quality research**

There has been a significant volume of research over the past five years into the effectiveness of ADR and FDR, both within Australia and internationally, carried out by many academics, practitioners and ‘pracademics’. The National Alternative Dispute Resolution Advisory Council (NADRAC) has played a key role in fostering research in relation to ADR. Publication of articles and the facilitation of research forums serve as important mechanisms to foster research (see discussion of the NADRAC research forums in Classification 7).

Useful ideas to foster empirical research can be found in overseas examples, such as the UK Network on Family Regulation and Society agenda-setting workshop that received funding to draw upon internationally recognised expertise to assist the Network in elaborating a ‘theoretically informed, methodologically astute, innovative research agenda’.

The approach adopted in relation to research within the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) in recent years may be a useful model to consider. As a result of an audit of the research that was occurring across the department, using funds available in various silos, FaHCSIA now pulls together a department-wide research agenda that lists the highest priority areas where research should be undertaken. A department-wide Research and Evaluation Committee assesses both the overall strategy and individual research proposals. In addition, FaHCSIA has set up a research and evaluation panel of providers for use by all Commonwealth agencies in commissioning research.

**Recommendation 5:** That AGD consider formulating a civil justice research strategy in collaboration with the states and territories and other key bodies, to focus attention on the highest priority areas of desirable research.

### **Barriers that inhibit research**

One of the constraints on the production of high quality research on the civil justice system in Australia appears to be the limited number of academic researchers involved. While university centres focusing on civil justice research are making a useful contribution to the evidence base, and there are some highly productive and skilled

researchers in the field of ADR and FDR, there do not appear to be any academic researchers currently working in the field of judicial decision-making.

The paucity of researchers may be related to the opportunities that exist for potential researchers outside academia. It has been suggested that in academic circles there is a stigma attached to civil justice research, which is seen as ‘soft’ or relatively ‘non-academic’ – more related to good practice than to academia. Despite the fact that ‘everyday justice’ is the area where most people come into contact with the civil justice system, it is not considered particularly weighty in academic terms.

A decision by the Skills Council to move the training of mediators to the TAFE sector has meant that most universities (except in South Australia) do not run courses on mediation and this may have reduced the links between academia and ADR.

A particular reason for the limited number of civil justice researchers may be related to the academic status, or rankings that their research attracts. Consultations with researchers in the course of this project indicated that the rankings applied to civil justice research do not encourage universities to foster such research. Further investigation suggests that the specifications in the Higher Education Research Data Collection (HERDC) managed by the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) may underlie this comment. Universities are required to submit data every year to the HERDC. These data are used to assess the relative research and research training performance of higher education providers and in turn drives the allocation of the Australian Government’s Research Block Grants to universities.

Publications are measured against the definition of research provided in the HERDC specifications (DIISRTE 2012) which are reviewed every year in consultation with universities and other relevant stakeholders. There was insufficient time in the course of this project to investigate whether and how the specifications might impact in a negative way on civil justice research. This is an issue that warrants further investigation, with a view to understanding whether the AGD is able to influence the specifications in a way that might foster the government’s aim of strengthening the civil justice evidence base.

Under the specifications universities can only count those publications which are major works of scholarship and report original research activities for the first time. Freely available research-related reports published by external institutes or public agencies and departments are unlikely to meet these criteria. Many of the books published by professional bodies do not report original research findings but report the results of evaluations, or compile existing information for the benefit of professionals or practitioners.

Until 2012 the specifications excluded ‘online books and book chapters, which have not been published by a commercial publisher and/or offered for sale’. In removing the restriction on online publication DIISRTE comments:

In removing this specification, the department has noted the sector’s view that the 2011 HERDC specifications did not cover electronic publications appropriately. The department will convene a working group comprising membership from the sector and publishing industry in the first half of 2012 to consider the “Research Publications Return

– Return 2” section of the HERDC specifications. The working group will examine in detail the appropriate parameters by which research published electronically is defined and included in future years of the HERDC (DIISRTE 2012).

**Recommendation 6:** That the AGD further investigate, in collaboration with the DIISRTE, why the ratings applied to civil justice research in universities do not appear to encourage such research.

### The availability and visibility of research

In the course of this project, the authors were made aware of the existence of comprehensive evaluations and empirical research studies that are not publicly available<sup>42</sup>. These evaluations are in the main prepared under contract to government departments or other bodies and involve confidentiality conditions. Examples of such evaluations include Queensland Healthcare complaints, or motor accidents in Victoria<sup>43</sup>. In her background paper on pre-action protocols Sourdin has noted:

Much literature in this area is ‘hidden’ as evaluations that may be useful are not always publicly available and overseas literature may not be readily located. In addition, professional groups that may have views about pre-action schemes may not publish submissions or other material that is relevant...’ (Sourdin 2012, p.21).

The need for such confidentiality is unclear. It may arise from concern that the findings may not be altogether positive and may therefore give rise to unwanted negative publicity. However a strong case can be argued for the desirability of transparent research that acts as a catalyst for change. This is the principle that underlies the public reporting of performance indicators. It would be of interest to determine whether such confidential reports could be made available if requested under Freedom of Information. A potential way forward would be for the AGD to write to State and Territory jurisdictions and other bodies who may have commissioned confidential evaluations to start a conversation about at least making abridged versions of such important research available publicly. This is particularly important where the purported aim of such research is to inform future public policy making and program design.

**Recommendation 7:** That the AGD initiate discussions with the states and territories and other relevant bodies who may have commissioned confidential evaluations or other research to determine whether the research (or abridged versions of the research) can be made publicly available.

Other grey literature that is not easily accessible includes research undertaken for Ph.D theses. The concept of a Clearing House for civil justice research, which is under development at the Australian Centre for Court and Justice System Innovation (ACCJSI) at the Monash University Faculty of Law, provides a mechanism for such research to be made available, at least in abstract form, with the potential to seek permission of the owners if further access is required.

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<sup>42</sup> For example a number of such studies were referred to during the 25 May State and Territory Forum to discuss the civil justice evidence base project.

<sup>43</sup> Personal communication from Professor Sourdin

The Clearing House has been initiated with a small grant from the AGD (see the funding section below). Although it is only in the very early stages of development, the Clearing House will have three streams covering monitoring and data, evaluation and research. It is timely for the existence of the Clearing House to be promulgated by AGD as a mechanism for sharing the evidence base. States and territories and other relevant bodies could be invited by AGD to make suggestions about the use of the Clearing House to encourage joint ownership of the concept, and to support it through the posting of relevant research abstracts and access details.

A further issue that has surfaced in the course of this project is the constraint on free access to articles published in commercial journals. While the HERDC specifications (discussed above) require publication in a commercial journal in order to achieve academic ranking, this requirement presents some barriers to the free sharing of research. Again, this could be investigated as a role for the Clearing House to act as a signpost to recent research available in particular journals.

**Recommendation 8:** That the AGD discuss with ACCJSI ways in which the AGD can encourage and support use of the ACCJSI Clearing House as a means of sharing research on the civil justice evidence base, including writing to states and territories and other relevant bodies inviting their participation.

### Research funding

It is not a simple task to develop a picture of the funding environment for civil justice research in Australia. While a full understanding of the environment is outside the scope of this current project, some useful information has been gathered, and recommendations are made to guide any further investigation of funding processes or strategies.

Some indication of the quantum of funding spent on research can be gained from the data collected by the Australian Bureau of Statistics (ABS 2010) from Australian higher education institutions in the Survey of Research and Experimental Development (SRED)<sup>44</sup>. The survey is conducted biennially and based on a single calendar year reference period – the most recent being for the year ended 31 December 2010. For the 2010 survey, 40 Australian higher education institutions were in scope, and each self-classified their research efforts.

The SRED indicates that research on ‘Law and Legal Studies’ totaled \$137.8million across Australia in 2010, which represents 1.7 per cent of the total research spend recorded in the SRED of \$8.2billion. The ‘Law and Legal Studies’ share increased from 2008, when it represented 1.3 per cent of the total of \$6.8billion. Within this total, there is no indication of any breakdown between the criminal and civil justice systems.

The Australian Research Council website provides another source of information on broad categories of research. Funded projects in the ‘Law and Justice’ category totaled \$11.5million since 2002. (Total funded projects over this period were \$3.6billion). A

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<sup>44</sup> R&D as collected by the ABS is defined in accordance with the Organisation for Economic Co-operation and Development standard as ‘creative work undertaken on a systematic basis in order to increase the stock of knowledge, including knowledge of man, culture and society, and the use of this stock of knowledge to devise new applications’.)

perusal of the projects listed against this category suggests that very few are related to the civil justice system<sup>45</sup>. An explanation for this may be found in the limited number of researchers and the relatively 'soft' characterisation of civil justice research within academia, both of which are discussed above under Barriers that Inhibit Research.

As discussed above, the relatively 'lightweight' academic ranking of research in the civil justice field may be a factor that discourages universities from applying funds to research in this area.

Other funding available for research comes from within government departments that are responsible for policy and program administration. This funding is made available in accordance with the relevant procurement and grants guidelines which may involve open tender, limited tender or direct source processes according to the circumstances. As noted in the findings, a significant amount of the quality research located during this project was produced under commission from governments or other bodies seeking to evaluate the effectiveness of particular programs. Examples of this include the joint funding by AGD and FaHCSIA of the study into Adolescents experience after the 2006 Family Law Reforms or the AGD resources used to review the Commonwealth Community legal Services program. Similar examples can be found in the states and territories, such as the Victorian Department of Justice funding the study into mediation in the Supreme and County courts in Victoria. It has not been possible to gain an understanding of the quantum of such funds, which would vary from year to year depending on program implementation and review cycles. Moreover, as noted earlier, much of this evaluation work is confidential and not able to be accessed.

Apart from departments of justice, evaluation funds may be made available from other departments such as FaHCSIA, Immigration or DIISRTE where there are programs that encompass civil justice matters. For example DSIRTE funded the survey and analysis of the small business dispute resolution. Communication from FaHCSIA suggests that it would be impossible to determine what quantum of funds were applied to civil justice research as it is often fairly peripheral to the main purpose of a study<sup>46</sup>

A further source of funding for research is located within the budgets of various organisations that play a role in relation to civil justice – but again no quantum is available. Such bodies include the Australian Institute of Family Studies (which has contributed to the research on outcomes for children and families in relation to FDR), the Australian Institute of Judicial Administration (which is funding the study on pre-action protocols), the Australian and Victorian Law Reform Commissions, the Federal Court (the *Solid Work You Mob are Doing* report) and NADRAC, which sponsors research forums and disseminates research.

Apart from commissioned research, there are few other buckets of funding available to provide resources for researchers to undertake studies. Within the federal AGD there are small grant programs that are relevant here. The Grants to Australian Organisations

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<sup>45</sup> In the 2012 Discovery Projects round, 17 of the 778 projects were in the field of law, although none appeared to be particularly relevant to an evidence base for the civil justice system.

<sup>46</sup> Personal communication from Polly Plowman, FaHCSIA research and ethics.

Program (GAOP) <sup>47</sup> provides funding for ‘activities that contribute to an equitable and accessible system of federal civil justice’. The activities must aim to improve access to education, information, advice and support services relating to federal civil justice. Of the two funding streams under the GAOP, one provides a contribution to projects or activities recommended by the Standing Committee on Law and Justice and the second stream provides competitive grants to eligible organisations for projects that provide education, information or support services targeted at disadvantaged Australians or communities. The Civil Justice Clearing House at the ACCJSI has been funded by a small grant from the GAOP.

Another bucket of earmarked funds within AGD is the Native Title Anthropologist Grants Program which is a \$1.4m grants program established in 2010 specifically to attract a new generation of junior anthropologists to native title work and to encourage senior anthropologists to remain within the system. Funds are set aside to conduct research and evaluation under the Indigenous Justice Program. A range of evaluations are underway through the National Indigenous Law and Justice Framework. Funding is also available for evaluations relating to the Northern Territory Service Delivery as needed.

The overall picture of research funding that emerges from this brief investigation is that the most reliable source of funding for empirical research can be found within government departments and other civil justice related bodies which commission program evaluations in relation to particular programs or reforms. Such research can involve large-scale, long-term empirical projects including surveys, interviews, focus groups and observations of practice, as well as case studies and theoretical analyses.

The funding available within universities and major research funding bodies, particularly the Australian Research Council, are subject to competitive pressures in an environment where the academic weight of civil justice research is not well recognised.

### **Findings in relation to gaps in research**

While it has not been possible in the timeframe to ensure that all research over the past five years has been identified, this scan has revealed gaps across many areas of the classification framework, as discussed in the findings under each classification. These are reproduced at the end of this chapter.

While there has been some very useful research relating to demand and supply for legal services in NSW (the NSW Law and Justice Foundation’s 2006 *Justice Made to Measure* report), this is limited to services in relation to socially and economically disadvantaged people and leaves a significant gap in the identification of legal needs in other demographics and other State and Territory jurisdictions.

Understanding the extent to which the community and business is aware of the options for resolving civil disputes has been undertaken through a number of surveys. However there is no research about the effectiveness of different methods of attempting to build enhanced awareness in the population.

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<sup>47</sup> For information on the GAOP see

<http://www.ag.gov.au/Aboutthedepartment/Grants/Pages/GrantstoAustralianOrganisationsProgram.asp>

There is also a significant gap in relation to cost – both the cost of the system and the extent to which the cost to users is a barrier to access. In terms of the cost of the system itself, evidence about how various processes impact on timeliness, based on comparable data, is a necessary precursor to understanding cost effectiveness. The research underway into the impact of pre-action protocols should fill an important gap in this regard. An upcoming study into timeliness (see Classification 3) may also add to the research base in this area.

The way in which the skills and training of practitioners influence the outcomes of disputes has been researched through a number of studies but it remains an area where further research is warranted, for example in relation to adversarial behaviour as well as expertise in mediation. There do not appear to have been any studies into the impact of adversarial behaviour or processes on outcomes for business.

The elements that constitute good quality services have been studied in the course of service evaluations. However the extent to which people accept early resolution, outside of the courts, appears to be closely related to their perceptions of fairness and authority and this remains an area where further research is warranted.

The extent to which disadvantaged people can access the system has been investigated in a number of research studies. However there appears to be very limited empirical evidence on how businesses and corporations access the system or the impact of system complexity on their needs.

In terms of the civil justice system processes that are covered in the research, there is a clear predominance of research into alternative dispute resolution (ADR) and family dispute resolution (FDR) over every other facet of the system. There do not appear to have been any substantive studies into judicial decision-making. For example, given the paucity of nationally consistent data there does not appear to be any evidence about how many contested hearings there are in civil law matters across Australia or how long those hearings take. The extent to which there is duplication of matters between conferences in an Appeal Tribunal and in court hearings is also unknown. In addition, very little research was encountered into the impact, efficiency or effectiveness of appeal tribunals.

Descriptive information aside, some work has been identified on system complexity in the field of ADR but there is a significant gap in relation to judicial decision-making.

### **Findings in relation to the quality, utility and effectiveness of the research**

Much of the empirical research encountered through this scan of the literature over the last five years has been carried out in the course of program evaluations conducted under contract, primarily to government departments. The quality of this research is consistently high, using both quantitative and qualitative methods traditionally employed in social science methodologies. Available administrative data have not always been of high quality but have generally been supplemented by surveys, interviews with stakeholders and consultations.

The difficulty with these evaluations is that they do not necessarily provide evidence for a particular aspect of the system, but tend to be focused on the effectiveness of a particular service. They are therefore useful, but not sufficient, forms of evidence in relation to the system.

Much of the academic research over the past five years is analytical in terms of assessing the factors that impact on various findings. This kind of analytical research will be important in working out what is important to measure. But there is limited use of data. Most studies make comment about the paucity of data and the need for a better approach to collecting comparable data (see earlier findings in this regard).

In some of the research it is not always possible to disaggregate findings between the civil and criminal parts of the justice system – for example the NSW Law and Justice Foundation survey on legal needs, or the evaluations of Legal Aid Commissions.

The considerable body of sound empirical research in relation to the impact of the 2006 reforms to the *Family Law Act 1975* dominates the field. Research into the impact of FDR on children and families also has a very high profile – although some of it is less about the impact of the civil justice system and more about the impact of family breakdown

The scan of international literature has identified some good examples of methodologies that could be replicated or adapted to provide useful research within Australia. For example, the Barendrecht, Mulder and Giesen (2006) study on ‘How to measure the price and quality of access to justice?’ (see Appendix A).

### **Findings in relation to the draft Objectives**

Some reflections on the draft objectives for the civil justice system are provided here as a result of the experience gained through the scan of empirical research.

In attempting to populate the classification framework under the draft objectives, it has not always been clear where a particular research question should be located within the framework. For example, research that goes to the wellbeing of Indigenous clients of the service (Classification Six) is also relevant under Classification Four in examining the quality of services and client satisfaction.

The draft objectives do not appear to adequately encompass the concept of system quality. For example, services need to be accountable and to follow standards and procedures. It is suggested that the wording of Objective Three could be reconsidered to ensure that the concepts of service quality and user satisfaction are included. Research that relates to these aspects has been included under Classification Four.

The notes to the draft objectives clarify that the use of the word ‘people’ is broad in nature and should be interpreted to include other bodies, such as corporations or businesses. However this broad interpretation is not immediately obvious, particularly in Objective Four which refers to ‘personal’ circumstances.

## Appendix A: Research findings and methodologies

### **Barendrecht, M., Mulder, J. & Giesen, I., 2006, How to Measure the Price and Quality of Access to Justice?**

#### *Selecting variables*

An important point when choosing variables is their level of generality. Paths to justice can range from formal to informal; from between party paths to paths with a neutral decision-maker; from local to international; from one level to multiple layers. Ideally, the variables should be the same for every path to justice and for any kind of claimant. From a practical point of view, however, it may be necessary to develop separate lists of variables for different paths or different categories of claimants.

#### *Concrete variables*

For each of the variables, reliable and valid indicators have to be chosen, which are also practical and which can be established in a rather straightforward way. Using several different indicators, however, may cause problems in relation to the interdependency of some indicators, or even the variables themselves. It is likely that the level of stress one experiences, for example, is (at least to some extent) related to the amount of money and time spent during the process of following a path.

#### *Scale*

One could take an economic (cost-benefit-like approach) and try to calculate the monetary value of all variables. A disadvantage to this approach is that it is difficult to measure emotional factors like stress or fear in terms of money. Another problem is whether or not it is possible to estimate variables like the time spent by the claimant in an appropriate way.

A second possible approach is to score the variables in a qualitative way. For instance, variables could be scored on a scale from 1 to 5 (where 1 stands for no travelling expenses and 5 for very high travelling expenses). In the case of variables that are hard to put a price on, like the emotional ones, this can be a good way of scaling. The point system provides insight in the level of costs incurred, for instance the level of stress that occurs whilst following a path: whether there is none (1), some (2) or a lot (5).

It is also possible to develop a system that combines these two approaches. Some variables are measured in money terms, others in points on a scale. When developing a scale, another issue is how to take into account the relative level of costs in relation to the value or the importance of the stakes in the dispute.

### **Cunneen, C., & Schwartz, M., 2009, ‘The family and civil law needs of Aboriginal people in New South Wales: The Priority Areas’**

The research findings showed that:

- Housing problems are a major issue.
  - Overall, 41.2 per cent of focus group participants identified disputes involving landlords, 7.7 per cent disputes involving supported

- accommodation, and 4.9 per cent identified other legal needs in relation to housing.
- Of those Indigenous people who identified a dispute with a landlord, only a quarter indicated they had sought legal advice.
  - Disputes with the NSW Department of Housing emerged as a major issue in stakeholder interviews. Lack of knowledge among Indigenous people about fights was problematic.
  - Instead of seeking legal advice, tenants tried to solve problems with the landlord. This is problematic due to the power imbalance, and engenders a sense of frustration and impotence (Cunneen & Schwartz, p.732).
- Focus group participants indicated that 26.8 per cent had experienced disputes with neighbours. Two-thirds had not sought advice, and had generally resulted in a negative outcome including a criminal conviction, an apprehended violence order, and some had moved out of the residence (Cunneen & Schwartz, p.733).
  - Half of the focus group participants who had responsibility for a young person in education reported problems with suspension or expulsion (the most pronounced problem), bullying or harassment (Cunneen & Schwartz, p.733).
  - Employment issues were identified by 20.9 per cent of focus group participants. The most common related to disputes over pay, followed by bullying, harassment and intimidation in the workplace. In some communities there was asymmetry of information about employment conditions under Community Development Employment Projects (Cunneen & Schwartz, p.734).
  - 15.6 per cent of focus group participants had been directly affected by Government policies relating to stolen wages, trust funds or ‘stolen generations’. The majority of participants (92.9 per cent) had not received any advice relating to the Aboriginal Trust Funds Repayments Scheme. Lack of information and perceived lack of support in lodging claims was highlighted in some communities (Cunneen & Schwartz, p.734).
  - Discrimination was experienced by 28.1 per cent of focus group participants. Commonplace areas of discrimination included shops, clubs and hotels. As well, the private rental market and employment were also identified. Discrimination was viewed more as a ‘fact of life’ than as an unlawful act, and thus actionable (Cunneen & Schwartz, p.736).
  - 32.9 per cent of men and 26.3 per cent of women had a dispute with Centrelink. The survey results and focus group discussions indicated that few people sought legal advice on these disputes (Cunneen & Schwartz, p.737).
  - More than one in three people identified as having recent debt-related problems and these covered a wide range of problems ((Cunneen & Schwartz, p.738). Only five of the focus group participants indicated that they had sought legal advice for their problem (Cunneen & Schwartz, p.739).

- 19.9 per cent of focus group participants experienced a dispute accessing superannuation or with a financial institution. Other consumer issues identified were funeral funds and door-to-door sales ((Cunneen & Schwartz, p.739).
- Of those who reported being a victim of crime, 55.8 per cent had no knowledge about the victims compensation scheme ((Cunneen & Schwartz, p.740).
- Most Indigenous people had not completed wills, and almost half of men, and two-thirds of women indicated they would like legal assistance to do so (Cunneen & Schwartz, p.740).
- A significant issue raised by focus group participants and stakeholders was the lack of knowledge and access to family law (Cunneen & Schwartz, p.741).

Cunneen & Schwartz noted that there were no large scale surveys of legal needs in Australia specifically on Indigenous people. Conclusions that can be drawn about general levels of legal need within Indigenous communities are limited. Existing data collections do not include unrecognised legal needs.

### **Dimos, D., 2008a, Civil Law Policy Review Background Paper.**

Recommendations were made in a number of areas:

- civil law policies – the findings;
- Unmet legal need – coverage of the State civil law policies (early intervention, ancillary matters, employment law matters, victims compensation applications and appeals, victims compensation restitution, privilege claims by victims of sexual assault or domestic violence, FOI matters, and privacy matters, gross injustice if applicant is unrepresented, motor vehicle property damage, personal injury including medical negligence, neighbourhood disputes, commercial and investment disputes, consumer protection – professional negligence, coronial inquests ancillary matters, and children;
- Policy ambiguities – public interest matters, public interest environment matters, and short term – clarify ( a number of) policy ambiguities;
- Civil law program capacity to provide enhanced legal services to priority client groups – minor assistance (paralegals, tools and precedents, structured assistance), legal education for advice service and outreach, civil law program communication strategy, future client surveys, future directions.

### **Forell, S Cain, M & Gray, A., 2010, *Recruitment and retention of lawyers in regional, rural and remote New South Wales.***

#### *Major findings*

- Only seven per cent of all public legal assistance positions in NSW were vacant on the census date. This was unexpected. In some country regions the actual level of vacant positions was well below the State average and in three RRR regions there were no vacant solicitor positions. Nevertheless, in a number of regions one

- or more of the three major legal assistance services did not have an office and consequently there were few public legal assistance positions in the first place.
- There were other indicators of recruitment and retention difficulties aside from vacancies. In some RRR areas the level of public legal assistance solicitor positions occupied by a non-incumbent (such as a person acting up in the position or a locum) was high. In many of the same areas, solicitor positions had been filled for only relatively short periods of time. The greatest concentration of recruitment and retention difficulties was noted for the Far West, Murrumbidgee and South Eastern regions.
  - The ratio of residents to all locally based solicitors (public and private) increased with remoteness. Inner Regional areas had a ratio of one solicitor for every 1,000 residents. This increased to one solicitor for every 2,000 residents in Outer Regional areas. In the Remote and Very Remote areas of NSW, there was only one solicitor for every 3,000 residents.
  - Nineteen Local Government Areas (LGAs) in NSW did not have a single solicitor — private or public — based in the area. All 19 LGAs were characterised by resident (and relatively disadvantaged) populations of less than 7,000 persons, and the populations of the majority were in actual or relative decline. This is likely to suggest that, in the more remote and less populated parts of country NSW, there may not be enough legal work — private or public — to sustain a full-time *resident* solicitor. People living in these areas may well have to travel to their closest regional centre to obtain legal assistance, although outreach and local court services may also be available.
  - Solicitors in the most remote areas of NSW were generally younger and less experienced than elsewhere in the State. In contrast, solicitors in Inner and Outer Regional areas were older and more experienced than solicitors elsewhere in the State. Bearing in mind the lower salaries offered in some services, the qualitative interviews noted the particular difficulties in recruiting appropriately *experienced* lawyers to public legal assistance positions in RRR areas, especially the more remote areas of NSW which may offer little in terms of lifestyle benefits.
  - The interviews with lawyers and legal service managers indicated that most lawyers working in RRR NSW were originally from major cities. The opportunity to gain legal experience was a major motivation for taking public legal assistance solicitor positions in RRR areas; while higher paying positions and, in remote areas, stress and burnout, were major reasons given for leaving such areas. The qualitative interviews also indicated that services went to great lengths to cover vacant positions and maintain continuity of services to clients. The challenges of remote area practice were particularly noted.

### **Conclusions**

There are realities to the recruitment, retention and availability of lawyers in RRR areas that need to be acknowledged:

- Different RRR areas have their own unique characteristics. Some RRR areas have recruitment and retention difficulties and some do not. The difficulties experienced vary from region to region.
- Some RRR areas tend only to attract relatively inexperienced solicitors or solicitors prepared to stay for a fixed and relatively short period of time. However, having a more senior solicitor in more remote areas may be preferable given the nature of the work and the work conditions.
- Some RRR areas are experiencing economic, social and population decline and resident services, including legal services and private solicitor numbers, are likely to decline accordingly.
- There are significant disparities in the salaries of equivalent solicitor positions across the public legal assistance services. This almost certainly contributes to the movement of solicitors between these services and from more remote areas to inner regional areas and urban areas.

### **Forell, S., & Gray A., 2009, Outreach legal services to people with complex needs: what works?**

The review's findings were based upon a comprehensive and systematic review of research and evaluation reports on outreach legal services to disadvantaged people in Australia and overseas (see Campbell Collaboration, 2009 for details on systematic review methodology) and for an appraisal system devised for health related research data (see JBI 2008). Despite some acknowledged questions concerning the methodology, the authors maintain the approach provided a robust, transparent and replicable method to trial for the review and synthesis of mixed method data (Forell & Gray 2009, p.3).

Only studies on outreach legal services were included in the review. 'Legal services' were defined as legal advice and assistance services which may or may not provide representation. Money and debt related advice services and debt management were also included. The literature review was not limited by study design, however no randomised trials or case controlled studies examining the legal outcomes of outreach services were found. In selecting the studies to be reviewed, Forell and Gray looked for evidence about 'effectiveness' and the elements within programs which contributed to success or otherwise. They defined 'effectiveness' in terms of whether outreach services:

- reached disadvantaged people with complex needs
- provided the range of legal assistance services needed by those clients
- improved clients' circumstances or addressed their legal issues
- were sustainable, including consideration of costs and resources (Forell & Gray 2009, p.4).

Forell & Gray concluded that properly resourced, appropriately placed outreach legal services, which have solid links to their client group, skilled advisers and strong referral networks can:

- reach disadvantaged clients with complex legal needs and who otherwise would not have received legal assistance;
- assist these clients to address their legal issues, improve their circumstances and may increase their willingness to seek assistance in future;
- reduce the stress and anxiety associated with having outstanding legal issues, such as debt related issues; and
- reduce the burden on host agencies by providing them and their clients with access to specialist support/expertise (Forell & Gray 2009, p.14).

Forell & Gray noted that further high quality research in Australia is needed on the:

- effectiveness of legal outreach for different client groups, different legal issues and in different locations;
- relative costs and benefits of outreach legal assistance to ‘hard-to-reach’ clients and the community compared to other service delivery models;
- role of community legal education in outreach services; and
- longer term impact of outreach legal assistance on ‘hard-to-reach’ disadvantaged clients.

### **Gramatikov, M., & Klaming, L., 2009, ‘Justice as Experienced by the User: A Study of the Costs and Quality of a Path to Justice in The Netherlands’**

#### *Design and sample*

A cross-sectional design was used to collect data on perceptions about the costs and quality of procedures and outcomes of the procedure at the Consumer Dispute Commission.

- The respondents received an invitation for participation in the study via the Consumer Dispute Commission - people who were invited were also told that they would receive a monetary reward for their participation.
- Those who were willing to participate were asked to contact the researchers of the study via email, telephone or by resending a response form.
- 850 individuals were invited to participate in the study.
- 30 persons responded to the invitation which results in a response rate of 27.1 per cent.
- 34 of them were invited to participate in a focus group study.
- In addition, 74 respondents were asked to participate in the study at a later point in time.

#### *Procedure*

- Respondents were contacted via email after they had indicated that they wanted to participate in the study in order to inform them that their registration had been recorded and that they would receive an invitation for an online survey within the next days.

- The authors decided to use a computer-based survey for those participants who had access to the internet because of its advantages in terms of costs and data processing.
- However, in order to prevent any selection bias, respondents who did not have access to the internet received the same questionnaire by mail.

### *Measures*

All responses to the dependent and independent variables were made using 5-point scales.

- *Cost.* The cost component of access to justice included several questions on the money and time spent on the procedure as well as the perceived stress.
- *Quality of procedure.* The quality of the procedure measure included three facets. Procedural justice included eight items (decision control, process control, consistency, bias suppression, accuracy, correctability, ethicality, trustworthiness), interpersonal justice included four items (politeness, dignity, respect, propriety) and informational justice included five items (honesty, four measures of justification).
- *Quality of outcome.* The quality of outcome measure included 10 items (equity, need, effectiveness, acceptance, outcome fairness, expectations, compliance, appeal, predictability, legitimacy).

### **Gramatikov, M., Laxminarayan, M. & Barendrecht, M., 2010, Assessment of the Validity and Reliability of a Methodology for Measuring the Costs and Quality of Access to Justice**

#### *Choice of Units of analysis*

The authors note that surveys of legal services, legal needs and justiciable events have close links to their research interest, but the measurement of cost and access to justice requires a different methodological approach.

Ultimately the authors decide that their research interest dictates to choose paths to justice as units of analysis and individuals as units of measurement. This will allow them to develop theoretical models, state hypotheses and conceptualise legal and social artefacts.

#### *Advantages and disadvantages of various data collection methods*

The article also contains a discussion of the advantages/disadvantages of quantitative interviews, focus groups and users diaries. See box 4 below:

#### **Box 4: Advantages and disadvantages of data collection methods**

##### **Interview (in person)**

- Depends on the validity of the questionnaire.
- Paths to justice in different countries could differ.
- Good if randomised sampling is achievable • Non-response will be a smaller problem.
- Structured questionnaire improves reliability.
- Combination with other quantitative and qualitative methods could improve reliability.
- The most expensive mode of interviewing

- Postal addresses of users are the most likely contact information that available data sources will contain □ • Interviewers could contact respondents in different places.
- Interaction between interviewer and respondent could be problem.
- Uncertainties on used mechanisms to solve problems □ • Accessibility to data could be a threat.
- Translation is threat.
- Memory decay effect.
- Level of public legal education differs across countries

### **Interview (telephone)**

- The same as in-person interviews
- Randomisation is difficult as not all residents numbers are listed in directories
- Time of conducting phone interviews could be threat to reliability
- Structured questionnaire improves reliability
- Much better than in- person interviews but more expensive than self-administered and internet based
- In many jurisdictions it is highly unlikely that phone numbers of users of justice are collected
- In many countries phone interviews could exclude sizable populations from the
- Combination with other quantitative and sample
- Using CATI7 could improve response rates
- Response is expected to be lower than face- to-face but higher than self-administered interviews
- Systematic randomisation is impossible
- Problem is low internet penetration rates in many countries
- Spam filters could distort the sample
- Response rate could be very low
- Response could be biased due to the level of technical experience of the respondent
- Problems with response rate could be anticipated
- Randomisation could be difficult qualitative methods could improve it.

### **Interview (internet)**

- The same as in-person interviews
- Uncertainty of who exactly is the respondent • Technical problems could be an issue
- Very cheap but also the results have limited potential for inferences
- The same as telephone interviews

### **Interview (self- administered)**

- The same as in- person interviews
- Structured questionnaire improves reliability • Combination with other quantitative and qualitative methods could improve reliability
- Relatively good cost- effectiveness as compared to other modes of interview
- Postal addresses of users are the most likely contact information that available data sources will contain

### **Diary method**

- Depends on the validity of the questionnaire (same threats as in interviews)
- Limited external validity

<ul style="list-style-type: none"><li>• Selection could be a problem</li><li>• Attrition could be a threat</li><li>• Good possibilities for drawing of systematic random sample</li><li>• Using incentives to respondents could jeopardise reliability</li><li>• Good cost effectiveness</li><li>• The same as in internet interviews</li></ul>
<b>Content analyses of case files</b> <ul style="list-style-type: none"><li>• Limited internal validity regarding perceptions and attitudes</li><li>• Accessibility of case files could be a problem</li><li>• Expensive method for data collection</li><li>• •Good opportunities given access to units of measurement</li></ul>
<b>Direct observations</b> <ul style="list-style-type: none"><li>• Requires expert judgements which could cause measurement error.</li><li>• Requires expert judgements which could cause measurement error • Allows deep understanding of the perceptions and the context</li><li>• Low external validity as most qualitative data collection methods</li><li>• Difficult to repeat</li><li>• Requires lots of resources • Uncertainty regarding duration of paths to justice could result in costs</li><li>• Should not be a problem as far fewer respondents are required.</li></ul>
<b>Quasi-experimental design</b> <ul style="list-style-type: none"><li>• Relatively higher control on the research setting</li><li>• Limited use due to practical difficulties to reconstruct experiences with</li></ul>

Ultimately the authors conclude that a combination of the three could be a suitable strategy to achieve the research objectives.

### **Michael Heise, Why ADR Programs Aren't More Appealing: An Empirical Perspective, 2010.**

- The study presents a longitudinal view of the universe of state appellate activity drawn from the most representative sample of state trial activity in the United States.
- Notably, research on ADR program efficacy typically runs into a substantial research design quandary - for disputes routed through an ADR program, researchers can only guess about a dispute's outcome had it remained exclusively in the formal adjudication system. Uncertainty about the counterfactual persists and confounds analyses about the independent influence, if any, of ADR program participation on case settlement or disposition time. The research design used in this study addresses some of the counterfactual uncertainty in various ways.

#### *Limitations:*

- Data limited to tried cases – does not include cases appealed after dispositive pretrial motions.

- Sample focuses on nation's largest counties and state courts of general jurisdiction, therefore data might not convey those aspects of the civil justice system, if any, peculiar to smaller counties or rural areas or to cases heard in special jurisdiction courts.
- Focus on state courts precludes generating implications for federal courts.
- Study of settlement activity is limited to the appellate context. These cases, by definition, resisted settlement during the trial stages and persisted into the appellate stage. Whether findings from this study of appeals context are relevant to the pre-appeals context requires further study.

### **Kuo-Chang Huang, How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan.**

*Conclusions:* Very few empirical studies have examined the effect of legal representation from the perspective of formal litigation. Relevant studies have largely focused on legal representation in the inferior courts or informal proceedings, such as juvenile courts, administrative tribunals and settlement negotiations.

- *Limitations:* Cases did not include:
  - Small claims and summary cases.
  - Loan and matrimonial cases
  - Cases arising out of special statutes, such as maritime cases, labor disputes, and intellectual property rights cases.
  - Cases that have been filed but are still pending.

The use of the official database has its drawbacks:

- Database contains no information about the identities and characteristics of litigants.
- The lack of such information renders it nearly impossible to directly tell whether a case arose in the context of “individuals against individuals,” “individuals against corporations,” or “corporations against corporations.”
- It also precludes this study from conducting demographic analysis.

### **Law & Justice Foundation of NSW, 2006, *Justice Made to Measure.***

Some of the main findings of the study were:

- a relatively high incidence of legal events over a one-year period;
- some individuals, such as those with a chronic illness or disability, experience a wide range of legal events;
- a substantial rate of inaction in response to legal events;

- traditional legal advisers such as lawyers, legal service agencies and courts were rarely used;
- a substantial proportion of people experienced barriers in seeking help; and
- a high rate of satisfaction with the outcome of events that had been resolved.

### **McClellan, The Hon Justice P, 2010, *Civil Justice Reform – What has it achieved***

In looking at the available studies and evaluations, McClellan cites the Victorian Law Reform Commission's (VLRC) *Civil Justice Report*. The report's findings were not based upon an empirical study and relied on international reviews commentaries from judges in various court jurisdictions. While not offering an authoritative opinion on the success of case management in Australia, the VLRC nevertheless supported the expansion of judicial case management in Victoria (VLRC, 2008). Its main arguments in support were:

- it curtails the “disruptive self-interest of parties and their lawyers”
- it compels parties to behave efficiently (this contention is supported empirically) (VLRC 2008);
- increased efficiency enhances access to justice for would be litigants;
- it accepts “the economic reality that resources are limited” and that judges are in a position to control litigation; and
- it occurs in a courtroom environment which provides safeguards against misuses of judicial power being perpetuated under the guise of managerialism. (McClellan 2010, p.52).

Evaluations of the benefits associated with costs varies (see McClellan 2010, pp.54-55). McClellan notes that data available on the NSW Supreme Court indicate that analysis of “long cases” since 2006 and 2007 (when judicial case management was introduced), show the proportion of cases settled before hearing rose from 36 and 38 per cent to 78 per cent in 2008 (McClellan, p.54).

McClellan notes the reasons why empirical research on the consequences of civil justice reform have rarely been undertaken in Australia are:

- Difficulties in testing the success of any particular reform without knowing what might otherwise have been the case (an effective control)
- Even when a control is available and is utilised, there are difficulties in establishing a cause and effect relationship.
- A case which is successfully resolved in mediation might have settled in any event (McClellan 2010, p.49).

### **Wilczynski, Ross & Connell, 2009, *Evaluation of the Regional Solicitor Program, final report***

- This evaluation was small-scale with some notable limitations:

- Primarily drawn on research with stakeholders who are closely involved in the Regional Solicitor Program.
  - While perspectives of some external stakeholders included in the research, the conclusions of the report largely relied on the self-reporting of participating solicitors and firms of the impact and effectiveness of the Program.
- Timeframes for the evaluation in both stages of the research precluded the opportunity to test and explore the findings of the analysis of grants data and cost-benefit evaluation with the participating firms.
- The evaluation did not include consultation with clients of the Program, for logistical and ethical reasons.
- When designing the methodology, it was determined that the scope of the evaluation would not permit consultation with more than a handful of clients, which would provide limited insight into the impact of the Program on access.
  - The report notes that it is possible that insights into client satisfaction could be gained from consulting with a small number of Program clients, however it is also likely that clients' assessment of service quality would be strongly influenced by the outcome of the matter in which they were represented or advised, which may or may not actually reflect on the quality of service provided by the Program Solicitor.

## Appendix B: NADRAC data findings from the Resolve to Resolve report

The Report requested submissions relating to the importance of research and evaluation into ADR processes. The following submissions were noted in the report, and indicate the widespread support for growing the research and evidence base in the field of ADR:

	Submission
The Federal Magistrates Court of Australia	The Court supports wholeheartedly further research into and evaluation of ADR processes. The Court acknowledges that some of the raw data needs to be supplied by it. Appropriate funding should be maintained or provided to enable the courts to collect and interpret such data. A body external to the courts could be established to collect information across courts and tribunals and use such information to carry out necessary research and to provide a dialogue as between the courts and tribunals, State and Federal, of best practice on a general or individual jurisdictional basis.
The NSW Bar Association	No statistics are kept on matters that are referred [by a court] to mediation (by consent or otherwise) to private mediators. Where court matters are settled at a private mediation, the parties must terminate the proceeding by filing consent orders or a notice of discontinuance. They could be required to state when filing those documents whether the matter had settled as a result of a private mediation.
The Law Council of Australia	There is no doubt that comparable data and research is vital to the evaluation of any developments of ADR. Funding constraints and lack of targeted resources for continuing evaluation of ADR initiatives and court involvement requires review. There is a lack of empirical data on the effectiveness of court-ordered ADR in federal and state courts (a lack of comparative data is also due to the constraints in the collection of data at a state level). There is a need for more research on the effectiveness, including the cost effectiveness, of ADR at all government levels and court jurisdictions. Additional data needs to be gathered about qualitative measures such as perceptions of fairness and access to justice by users of court services including ADR.
The Law Institute of Victoria	Supported the gathering and recording of data on the use and effectiveness of ADR processes. However, it also stated: [it] recognised the inherent inconsistency between the object of collecting data and the object of preserving the confidentiality of ADR processes... it considers that the preservation of confidentiality is paramount.
Private ADR orgs (i.e. Australian Commercial Disputes Centre Ltd)	Strongly supported the development of strategies for the collection of data by providers of private ADR services.

## Appendix C: Collection of court statistics on ADR

Prepared by Prof. Kathy Mack, Flinders Law School for Dr. Robyn Sheen

Identifying the information which should be collected and possible data sources is not an easy task, and the resources for analysing data once collected may be difficult to come by. The task is made more complex by the large number of courts, tribunals, government agencies and other organisations involved in the provision of ADR services and/or collection and analysis of data across many fields, as well as different information management systems utilised by courts/tribunals within the same jurisdiction.

Nonetheless, some basic data could be collected by all courts and tribunals, especially if such data is integrated into existing forms and procedures. Such minimum data might include:<sup>48</sup>

**1. Was ADR used in this case:                    YES                    NO**

This information will simply identify how often ADR is used as part of civil litigation. It provides an important baseline so that any changes in ADR use can be related to changes in policy or practice, or to identify the kinds of cases or jurisdictions where ADR use is more or less frequent. This basic question raises the issue of what ADR means. For example, does it include court led settlement conferences? As a starting point, until a common definition can be developed, a clear statement of what ADR comprises as part of a court/tribunal's data collection will be needed: (see additional comments made at 2.)

ADR may be used independent of court processes, either in advance of court action or during the course of litigation. Capturing data about this ADR use may require information from parties and legal representatives as part of the court's data collection process.

**2. What ADR process was used in this case? More than one?**

This could either be open ended or based on a list of choices (e.g. mediation, early neutral evaluation, arbitration [binding/non-binding], etc) with an "other" category. It allows the kinds of ADR used and the frequency of different processes to be identified and compared within a court over time, across courts within a jurisdiction or nationally.

What is called "mediation" in one jurisdiction may differ in significant respects from a process called mediation elsewhere. Where possible or practical, common definitions, such as those developed by NADRAC, should be used. Nonetheless, collecting the suggested data would be a significant improvement over the current situation, even without common definitions.

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<sup>48</sup> This list, and the explanations for the individual items are drawn from a memorandum prepared by the ABA Section on Dispute Resolution Task Force on Research and Statistics in 2005. See <http://meetings.abanet.org/webupload/commupload/DR014500/newsletterpubs/TopTenApril2006.doc>

### 3. What/Who initiated ADR use?

Possible response categories might include one or both parties, legal representatives, court rule, court staff, judicial officer, court order/consent, court order/resisted. One of the important policy issues about ADR is the issue of voluntariness and the impact of some degree of pressure through court rules or court referral. It is widely thought that the low uptake of ADR can be improved by some degree of compulsion, even in advance of litigation.

### 4. Timing information

Courts currently collect a substantial amount of information on case timing. It would be important to collect the same basic litigation timing information in all cases, whether ADR is used or not, so that any differences in the cases where ADR is used can be identified.

Timing information could include date of any demand letter or required pre-action protocol, the date the claim is filed, date of choice for or referral to ADR, date of first ADR process, date of ending of ADR process, timing of discovery, dates of case management events, date trial date set, trial date, date of notice of appeal, and other key points in the progress of litigation.

Dates can be expressed as calendar dates or relative to other case events, eg before/after filing of the claim, before/after discovery, before/after other case management events, before/during/after trial.

This information will enable an understanding of when ADR is most often used, and can be linked to other data to see whether different forms of ADR are characteristically used at different points in the litigation cycle, or whether there are different paths to ADR use at different stages.

### 5. Case type

In order to draw conclusions about variations in ADR use or paths to ADR by case type, this category will need to be more fine grained than simply civil or criminal. At the same time it is important not to have too many categories.

### 6. How was the case finalised? When?

How a case is finalised could include adjudication in whole or in part, settlement in whole or in part, withdrawal of a claim, default or summary judgment or other method. As with the timing information, finalisation information should be recorded in all cases, so that any comparison with cases in which ADR is used can be identified.

It might also be possible to seek information about whether party negotiation, lawyer negotiation or ADR process led to partial or complete resolution, though this is unlikely to be available as part of regular court data, unless the parties and/or their lawyers were

asked specifically about causation. It is very difficult to identify whether ADR directly leads to a settlement, or to an earlier or better settlement, given that most cases settle eventually anyway.

### **Other Issues**

There are many other issues on which data could be collected, such as cost increase or savings, whether ADR had benefits other than settlement, satisfaction with the ADR process or other indicators of ADR quality. These would require more detailed interrogation of parties and their lawyers, and a more elaborate evaluation process which could not be easily integrated into existing routine court data collection processes.

### Appendix D: National Health Information Agreement

The National Health Information Agreement (NHIA) is an agreement between the state/territory government health authorities, the Australian Institute of Health and Welfare (AIHW), the Australian Commission on Safety and Quality in Healthcare and the Commonwealth of Australia. The Agreement was established to coordinate the development, collection and dissemination of health information in Australia, including the development, endorsement and maintenance of national data standards. This includes a commitment to co-operate through the Australian Health Ministers Advisory Council agreed governance arrangements for information management.

The current National Health Information Agreement came into effect on 1 December 2011. This Agreement retains the main features and scope of the predecessor Agreements signed in 2004 and 1993 with updated provisions reflecting changes to national health information governance arrangement and other matters.

Specifically, the objectives of the NHIA are to:

- promote the collection, compilation, analysis and dissemination of relevant, timely, accurate and reliable health information concerned with the full range of health services and of a range of population parameters (including health status and risks), in accordance with nationally agreed protocols and standards;
- develop and agree on projects to improve, maintain and share national health information;
- cooperate in the provision of resources necessary to address national health information development priorities efficiently and effectively;
- provide the information required to research, monitor and improve health and the delivery of health services;
- provide the information required to facilitate nationally agreed projects which promote the development and reform of the health care system in accordance with the priorities of the Australian Health Ministers' Advisory Council;
- promote the extension of the range of national health information and encourage other groups and individuals in government and non-government sectors to participate by making available information that they hold; and
- work towards improving consistency in data definitions, classifications and collections between health, community services and housing assistance.

National Health Information Agreement, 'Agreement between the state/territory government health authorities, the Australian Institute of Health and Welfare (AIHW), the Australian Commission on Safety and Quality in Healthcare and the Commonwealth of Australia, December 2011

[http://www.ahmac.gov.au/cms\\_documents/National per cent20Health per cent20Information per cent20Agreement per cent20- per cent20Final.pdf](http://www.ahmac.gov.au/cms_documents/National_per cent20Health per cent20Information per cent20Agreement per cent20- per cent20Final.pdf)

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