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## **Court referral to ADR: Lessons from an intervention order mediation pilot**

Melissa Conley Tyler and Jackie Bornstein

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# Court referral to ADR: Lessons from an intervention order mediation pilot

Melissa Conley Tyler \* and Jackie Bornstein \*\*

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*Over the past two decades courts and tribunals around Australia have introduced a range of alternative dispute resolution (ADR) techniques such as mediation as a standard part of their case management procedures. However, there is still significant variation in how ADR processes are administered in different courts and tribunals. This article reports on an independent evaluation of a Dispute Settlement Centre of Victoria and Magistrates' Court pilot mediation project. This project focused on diversion to mediation of non-family intervention order cases. The Project was a successful model mediation diversion program, achieving well on indicators such as awareness, clarity of eligibility criteria, proportion of eligible cases referred, client satisfaction with mediation and the number of agreements reached. Given the relatively few studies of such programs to date, the results of this evaluation offer useful insights on a number of issues of judicial administration, including promotion of mediation diversion programs, referral and intake processes, supply of mediation services and liaison between the court and mediation providers.*

## INTRODUCTION

Courts and tribunals around Australia have progressively introduced a range of alternative dispute resolution (ADR) techniques as a standard part of their case management procedures.<sup>1</sup> While there was initial scepticism about ADR in some quarters,<sup>2</sup> mediation and other ADR techniques are now an entrenched part of the justice system in most jurisdictions.<sup>3</sup> This mirrors similar experience overseas.<sup>4</sup>

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<sup>1</sup> For an overview, see Mack K, "Court Referral to ADR: The Legal Framework in Australia" (2004) 22 *Law in Context* 112; Sourdin T, "ADR in the Australian Court and Tribunal System" (2003) 6 *ADR Bulletin* 55; Ransome K, "The Role of Consensual Dispute Resolution in Tribunals" (2004) 14 *JJA* 45; National Alternative Dispute Resolution Advisory Council (NADRAC), *Who Can Refer to, or Conduct, Mediation? A Compendium of Australian Legislative Provisions Covering Referral to Mediation and Accreditation of Mediators* (Attorney-General's Department, August 2004): see [www.nadrac.gov.au](http://www.nadrac.gov.au) viewed 13 December 2005.

<sup>2</sup> Young PW, "The Courts and Mediation: A Warning" (1993) 67 *ALJ* 491.

<sup>3</sup> Mack, n 1; Sourdin, n 1; NADRAC, n 1. Studies of particular jurisdictions are available, including Boule L, "In and Out of the Bramble Bush: ADR in Queensland Courts and Legislation" (2004) 22 *Law in Context* 93; Wood J, "Federal Court-annexed Mediation Seventeen Years On" (2004) 14 *JJA* 89; Martin J, "Friendly Persuasion: How Mediation Benefits Case Management: The Experience in the Supreme Court of Western Australia" (1996) 6 *JJA* 65; Cannon A, "State Courts and Tribunals and ADR" (2002) 12 *JJA* 25; Sourdin T, "Legislative Referral to Alternative Dispute Resolution Processes" (2001) 12 *ADRJ* 180 (focus on New South Wales and federal jurisdictions); Bell R, "Mediation in the Family Court of Australia: A Legal Framework" [2003] *Bar News: Journal of the NSW Bar Association* 42; Department of Justice, "Mediation Expansion in Court of Petty Sessions" (2003) 30 *Brief* 34 (Western Australia); Waldron, Chief Judge, "County Court Mediation Centre" (1996) 27 *Litigation Lawyer* 21 (Victoria); Ierodiaconou M-J, (2005) "Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?" *University of Melbourne Legal Studies Research Paper No 113*. On the impact of

There is increasing use of mandatory ADR,<sup>5</sup> which is weathering initial controversy<sup>6</sup> with evidence on settlement rates showing no clear difference between voluntary or mandatory ADR.<sup>7</sup> In some instances, ADR is being employed for a substantial proportion of cases.<sup>8</sup> However, there appears to still be significant variation in how ADR processes are administered in different courts and tribunals.<sup>9</sup> This suggests that best practice in this area is still developing.

Some of the issues of judicial administration that arise in court use of ADR include promotion of ADR, identification of suitable cases for ADR, referral to suitable ADR service providers, evaluation of the quality of ADR services received and suitable reporting procedures. While some work has been done on these issues – eg on the suitability of cases for referral to ADR,<sup>10</sup> the changing role of judicial officers<sup>11</sup> and the likely impact on judicial education<sup>12</sup> – most of these areas remain relatively under-researched. There have been relatively few published evaluations of Australian court-based ADR programs to date.<sup>13</sup>

This article outlines the findings of a review of a pilot mediation project conducted by the Dispute Settlement Centre of Victoria (DSCV) in conjunction with the Magistrates' Court of Victoria (Magistrates' Court) from 2002-2003.<sup>14</sup> This project focused on diversion of non-family intervention order cases under the *Crimes (Family Violence) Act 1987* (Vic) as part of wider initiatives within Victoria to increase access to ADR.<sup>15</sup> An independent evaluation of this project was completed by the International Conflict Resolution Centre at the University of Melbourne in June 2004.<sup>16</sup>

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ADR as a civil justice reform see Davies GL, "The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System" (2003) 12 JJA 155.

<sup>4</sup> See eg Phelan A, "Dispute Resolution in India: Judicial Performance and the Rise of Alternatives to Courts" (2003) 12 JJA 121; Yong PH, "Judicial Administration: Current Trends and Future Challenges" (1995) 5 JJA 37 (Singapore); Zalar A, "Managing Judicial Change through Mediation" (200) 6 ADR Bulletin 156 (Slovenia); Paleker M, "Court Connected ADR in Civil Litigation: The Key to Access to Justice in South Africa" (2003) 6 ADR Bulletin 48; Shaw J, "Mediation Gets a Boost from England" (2003) 75 *Australian Quarterly* 35.

<sup>5</sup> Mack, n 1; Sourdin, n 1; NADRAC, n 1. For specific discussion of mandatory mediation see Venus P, "Court Directed Compulsory Mediation: Attendance or Participation?" (2004) 15 ADRJ 29; Venus P, "Advantages in Mandatory Mediation" [2003] Law Soc J 46; McIntosh M, "A Step Forward: Mandatory Mediation" (2003) 14 ADRJ 280; Lancken S, "What Cases Will a Court Refer to Mediation over the Objection of one of the Parties?" [2002] Law Soc J 66; Spencer D, "Mandatory Mediation in New South Wales: Further Observations" (2001) 12 ADRJ 141.

<sup>6</sup> Olsson L T, "Inspiration or Desperation?" (1996) 5 JJA 236; Shaw, n 4; Ingleby R, "Court-sponsored Mediation: The Case against Mandatory Participation" (1993) 56 Mod L Rev 441. See also Sourdin T, "Judicial Management and Alternative Dispute Resolution Process Trends" (1996) 14 Aust Bar Rev 185.

<sup>7</sup> Mack K, *Court Referral to ADR: Criteria and Research* (Australian Institute of Judicial Administration and National Alternative Dispute Resolution Advisory Council, 2003) p 17: see [www.nadrac.gov.au](http://www.nadrac.gov.au).

<sup>8</sup> Mack, n 1; Sourdin, n 1.

<sup>9</sup> Mack, n 1; Sourdin, n 1.

<sup>10</sup> Mack, n 7; Wade J, "Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge" (2001) 18 *Mediation Quarterly* 259.

<sup>11</sup> Sourdin T, "Facilitative Judging" (2004) 22 *Law in Context* 64; Cannon A, "What is the Proper Role of Judicial Officers in ADR?" (2002) 13 JJA 253; Sackville R, "From Access to Justice to Managing Justice: The Transformation of the Judicial Role" (2002) 12 JJA 5; Colbran S, "Judicial Performance Evaluation and Settlement Skills" (2002) 11 JJA 180; Doyle J, "The Judicial Role in a New Millennium" (2001) 10 JJA 133; Brennan G, "Key Issues in Judicial Administration" (1997) 6 JJA 138; Rogers A, "The Managerial or Interventionist Judge" (1993) 3 JJA 96.

<sup>12</sup> Sourdin T and Davies T, "Educating Judges About ADR" (1997) 7 JJA 22. See also Colbran, n 11.

<sup>13</sup> The most significant evaluations of Australian programs include Alexander N, "Mediation on Trial: Ten Verdicts on Court-related ADR" (2004) 22 *Law in Context* 8; Cannon AJ, "An Evaluation of the Mediation Trial in the Adelaide Civil Registry" (1997) 7 JJA 50; Briefing Note, "Plaintiffs' Satisfaction with Dispute Resolution Processes: Trial, Arbitration, Pre-trial Conference and Mediation" (1997) 7 JJA 18. See Mack, n 7, for a comprehensive discussion of the international studies.

<sup>14</sup> The full title of the project was the Dispute Settlement Centre of Victoria Magistrates' Court Mediation Diversion (Intervention Order) Project.

<sup>15</sup> The pilot was announced by the Attorney-General as part of the "Strengthening ADR Initiative" in line with the government's overall "Growing Victoria Together" strategy. Also see News and Views, "New Bar Scheme for Magistrates' Court Mediations" (2004) 130 *Victorian Bar News* 50.

<sup>16</sup> Conley Tyler M, Bastian B and Bornstein J, *Review of the DSCV Magistrates' Court Mediation Diversion (Intervention Order) Project*. Prepared for the Dispute Settlement Centre Victoria by the International Conflict Resolution Centre, University of Melbourne. 2004.

## BACKGROUND

In July 2002, the Dispute Settlement Centre of Victoria launched the Magistrates' Court Mediation Diversion (Intervention Order) Project (the Project) in conjunction with the Magistrates' Court. The DSCV is a business unit of the Department of Justice that provides an informal, impartial, accessible, low-cost dispute resolution service to people in Victoria.<sup>17</sup> The Magistrates' Court has jurisdiction over a range of criminal and civil matters under the *Magistrates' Court Act 1989* (Vic).

The Project was established in response to the growth in the number of complaints seeking intervention orders between non-family members between 1994 and 2003.

### Intervention order complaints in Victoria

Intervention orders were developed to deal with violence in intimate relationships.<sup>18</sup> These are situations where there are difficulties of evidence and where victims are in a particularly vulnerable position. The basic aim of intervention orders is to protect victims and prevent future violence based on evidence of past misconduct. Intervention orders were developed as a criminal/civil hybrid: an order is sought as a civil remedy; however, breach of an intervention order is a criminal offence.

In Victoria, the *Crimes (Family Violence) Act 1987* (Vic) enables people who have been assaulted, molested, harassed or threatened by a family member to seek an intervention order. The order may prohibit personal contact, approaching within a specified distance or entering specific premises or a locality. The intervention order is made for a specified time, often one year, before it automatically expires. A similar regime for intervention orders applies in six other Australian jurisdictions.<sup>19</sup>

In 1994, s 21A was inserted into the *Crimes Act 1958* (Vic) to enable non-family members to seek intervention orders in cases of stalking. The aim of s 21A was to deal with cases of predatory stalking such as repeatedly telephoning or following a person. Such behaviour invades privacy and, in a very small proportion of cases, can escalate into serious assault. However, the drafting of these provisions is wide: the applicant does not need to prove that serious harm was caused nor that the defendant intended to cause harm or fear.<sup>20</sup> This means that the stalking provisions are wide enough to encompass interpersonal disputes between neighbours, work colleagues and others, even where there has been no physical violence or serious threat of violence. This raises questions about the use of court time and resources to deal with what could be characterised as private disputes.

Applications for stalking intervention orders under s 21A have grown rapidly. Unlike applications for family violence intervention orders, which have remained relatively steady at around 15,000 per year, the number of stalking applications rose almost threefold between 1995-1996 and 2002-2003 to around 5,000 per year (see Figure 1). A review of stalking intervention orders during 1999-2001 showed that 25% were between neighbours.

To add to concerns about the use of these orders, a relatively low proportion of complaints result in orders made. Between 1995 and 2003, orders were made for an average of only 55% of complaints. Orders were refused in neighbour disputes at a higher rate than any other relationship type.

Given these concerns and the increasing use of stalking intervention orders by neighbours, it is not surprising that alternative dispute resolution methods such as mediation were investigated as an alternative to court-based dispute resolution in Victoria. Prior to 2003, only New South Wales, Queensland and the Australia Capital Territory had formal processes in place providing access to

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<sup>17</sup> See [www.justice.vic.gov.au/disputes](http://www.justice.vic.gov.au/disputes) viewed 13 December 2005.

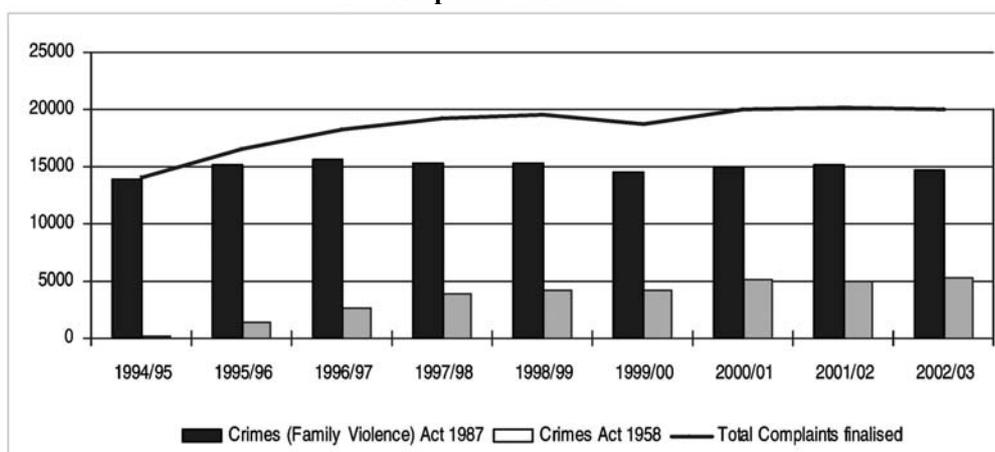
<sup>18</sup> The authors gratefully acknowledge the assistance of the Department of Justice Legal Policy Branch's research and development of concepts in this area.

<sup>19</sup> Such orders may be referred to as "restraining orders", "protection orders" or "apprehended violence orders" in various jurisdictions. See *Crimes Act 1990* (NSW), s 562AI; *Peace and Good Behaviour Act 1982* (Qld); *Restraining Orders Act 1997* (WA); *Summary Procedures Act 1921* (SA); *Justices Act 1959* (Tas); *Protection Orders Act 2001* (ACT).

<sup>20</sup> Each piece of legislation is wide enough to enable intervention orders for at least some non-violent interpersonal disputes, including neighbourhood disputes. For example, the New South Wales Bureau of Crime Statistics and Research found in 1997 that 27% of applicants for apprehended personal violence orders were neighbours. However, arguably Victoria's provisions are among the most broad.

mediation for intervention order disputes. New South Wales has been the most active in diverting cases to mediation.<sup>21</sup>

**Figure 1: Total number of intervention order complaints finalised by Act under which complaint was made\***



\* Magistrates' Court data, Court Services.

### The mediation diversion project

The DSCV provides a telephone advisory service and mediation for a range of disputes. Parties first speak with one of DSCV's five dispute assessment officers who discuss the nature of the problem and options for dealing with it. If mediation is selected, mediation can then be arranged with one of DSCV's 180 sessional mediators. These mediators come from a range of cultural and professional backgrounds and are located around Victoria. Mediators who complete DSCV's training and accreditation process become members of the DSCV panel and are paid for each mediation session they provide.

While DSCV had always provided mediation for selected intervention order matters, these services had been ad hoc and largely through self-referral. However, following the introduction of stalking legislation, DSCV staff noticed a steady increase in the number of mediations conducted relating to intervention order applications.

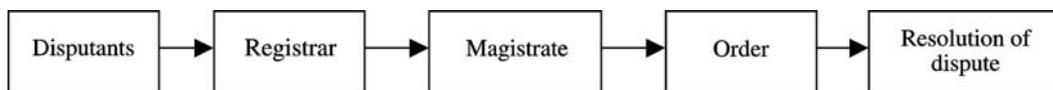
In the 2002-2003 budget, the Victorian Government announced its commitment to strengthening alternative dispute resolution, including a pilot project to tackle the expanding jurisdiction of intervention order applications, particularly in neighbourhood disputes. The overall aim of the Project was to divert selected intervention order matters to mediation at the DSCV either before or after a complaint was submitted to the Magistrates' Court. The Project was funded from July 2002 to June 2003, with services provided from October 2002.<sup>22</sup> The Project was initially introduced at both the Melbourne and Sunshine Magistrates' Courts, then extended to Frankston and Broadmeadows courts from February 2003. A mediation diversion project officer was hired to conduct the Project as a member of DSCV staff supervised by the DSCV's Manager. A key part of the role was to promote the service among potential referrers. Cases referred were then mediated by DSCV's panel of mediators. The overall aim of the Project was to supplement the standard court model of dispute resolution by enabling referral to mediation at various points.

<sup>21</sup> Mediation services are provided by Community Justice Centres (CJCs), free statewide through a network of community mediators. CJCs are the largest provider of mediation services in Australia, involving a panel of 551 mediators and conducting 2,729 mediations during 2001-2002: see [www.lawlink.nsw.gov.au/lawlink/Community\\_Justice\\_Centres/ll\\_cjc.nsf/pages/CJC\\_index](http://www.lawlink.nsw.gov.au/lawlink/Community_Justice_Centres/ll_cjc.nsf/pages/CJC_index) viewed 13 December 2005.

<sup>22</sup> The Project was initially introduced at both the Melbourne and Sunshine Magistrates' Courts from 7 October 2002. It was proposed in January 2003 that the Project should be extended to other suburban courts. It was then decided that the Project would also be piloted at Frankston and Broadmeadows courts from 24 February 2003.

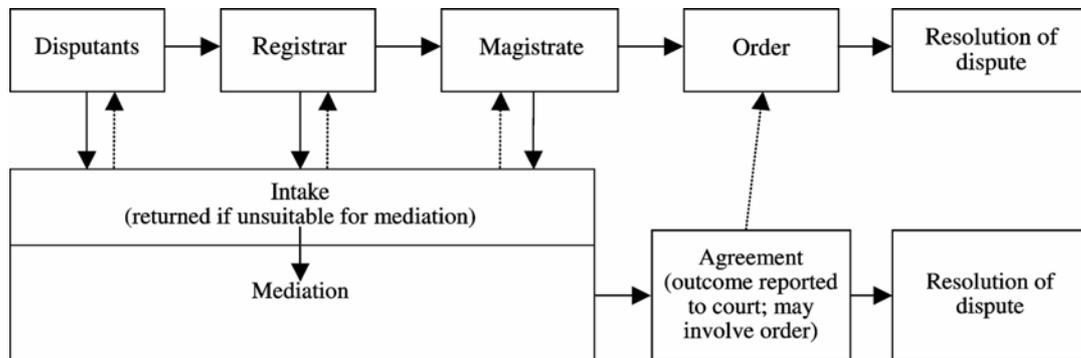
The Project’s dispute resolution logic thus moves from a model where the making of an order is the sole means of settlement (Figure 2) to seeing mediation and agreement between the parties as a potential mechanism for resolving the dispute (Figure 3).

**Figure 2: Standard court model of dispute resolution**



Significantly, the Project model includes multiple points at which disputes can be referred to mediation or returned to the court for dispute resolution.

**Figure 3: Project model of dispute resolution**



The Project model is designed to produce a series of six outputs and four desired outcomes as illustrated in Table 1. These revolve around the key stages of intake, provision of mediation services and agreement/resolution of dispute.

**Table 1: Anticipated project outputs and outcomes**

	<b>Outputs</b>	<b>Outcomes</b>
<b>Intake</b>	<ul style="list-style-type: none"> <li>• Development of promotional materials and marketing strategies</li> <li>• Development of referral and intake procedures</li> </ul>	<ul style="list-style-type: none"> <li>• Delivery of suitable intervention order applications to DSCV for mediation</li> </ul>
<b>Mediation</b>	<ul style="list-style-type: none"> <li>• Review and modification of the DSCV mediation model</li> <li>• Development and delivery of training to DSCV mediators</li> </ul>	<ul style="list-style-type: none"> <li>• Increased capacity and efficiency of DSCV in resolving intervention order cases</li> </ul>
<b>Agreement</b>	<ul style="list-style-type: none"> <li>• Development of an effective reporting mechanism</li> <li>• Establishment of appropriate client feedback measures</li> </ul>	<ul style="list-style-type: none"> <li>• Increased client ability to resolve disputes</li> <li>• Reduced average length and complexity of intervention order hearings</li> </ul>

## **EVALUATION AIMS AND METHOD**

In September 2003, the DSCV commissioned an independent evaluation to assess:

- the effectiveness of the Project against desired outcomes;
- the cost and time benefits of the Project to the Magistrates' Court that participated in the pilot;
- the wider social and economic benefits of the Project to the community; and
- DSCV's capacity to provide further programs in this area.

The key question to be answered by the evaluation was whether the Project had met its objectives. Specific questions included the sustainability of the Project, the benefits to the community and the court system of continuing the Project, ways of increasing the reach of the Project and the potential to expand the Project to other Magistrates' Courts.

The evaluation was conducted using a number of methods:

- document analysis of Project materials, including brochures, procedures, policy guidelines, reporting sheets and training material;
- analysis of qualitative and quantitative data collected by the DSCV, including:
  - case management records and tracking data for all 74 cases mediated under the Project;
  - client feedback surveys returned by 35 intervention order and 296 other DSCV clients;
  - surveys of all 25 panel mediators involved in the Project;
- analysis of Magistrates' Court data provided by Court Services;
- collection and analysis of qualitative data from a range of stakeholders; and
- literature review.

Qualitative data was collected through the following:

- individual interviews with the Chief Magistrate and Supervising Magistrate;
- questionnaire distributed to magistrates in participating courts which received eight responses;
- individual interviews with four registrars (one from each participating court);
- individual interview with mediation diversion project officer;
- individual interview with the DSCV's manager;
- group interview with the other DSCV staff involved in the Project; and
- telephone interviews and liaison with selected interstate programs (New South Wales and Queensland).

## **PROJECT RESULTS**

The evaluation showed that the Project achieved its desired results in terms of promotion, referral and intake, provision of mediation services and reporting and feedback. Each of these areas is discussed below.

### **Promotional material and marketing**

The first challenge for a court or tribunal introducing an ADR process is achieving awareness of the new ADR process among judicial officers, court staff and disputants.

The Project met this challenge by developing a multi-pronged promotion strategy directed towards different target groups. A poster and a brochure were produced that promoted mediation as an alternative to intervention order applications and provided DSCV's contact details. A letter was sent to senior magistrates and senior registrars along with a three-page document for distribution to magistrates and court staff. Finally, a double-sided, one-page document, titled "Mediation and Intervention Orders: Your Questions Answered", was produced, with further details on arranging a mediation, breaches of a mediated agreement and applying for intervention orders after attending mediation. This was ideal for court staff to give to disputants.

These materials were distributed to participating courts in December 2002 and were followed by information packs sent to regional coordinating magistrates and registrars statewide in March 2003. Project promotional meetings were held with court staff at participating courts and presentations were made to court networkers and to the Magistrates' Court Conference. Towards the end of the Project, Victoria Police were provided with information on the Project through e-mail and brochures.

Promotion appears to have been successful among key target groups. Most of the magistrates who responded to the questionnaire were aware of the Project. Magistrates and registrars interviewed were aware of the Project and satisfied with the promotion undertaken by the DSCV. DSCV client satisfaction surveys revealed that the printed information was thought to be helpful or very helpful by 34 of the 35 intervention order clients who responded to the questionnaire. The biggest challenge for promoting the Project was the high level of staff rotation at various participating courts, meaning that an ongoing cycle of promotion was required.

While Project promotion was largely successful, additional promotion strategies that could be used include:

- arranging for mediators to be guest speakers at participating courts;
- establishing a working party at each participating court to develop strategies to improve referral rates; and
- involving "champions" in specific courts to maintain commitment to and ongoing awareness of the Project.

### Referral and intake procedures

The next challenge for any court or tribunal-connected ADR program is establishing intake procedures, including setting appropriate criteria for referral.

The Project established detailed eligibility criteria which were provided to potential referrers to enable them to determine which disputes relating to intervention orders were appropriate for referral to mediation. Referrals could be made at three points: by registrars at the time of inquiry or initial application, by magistrates at the time of application for an order, or by court networkers or Legal Aid staff at any time.

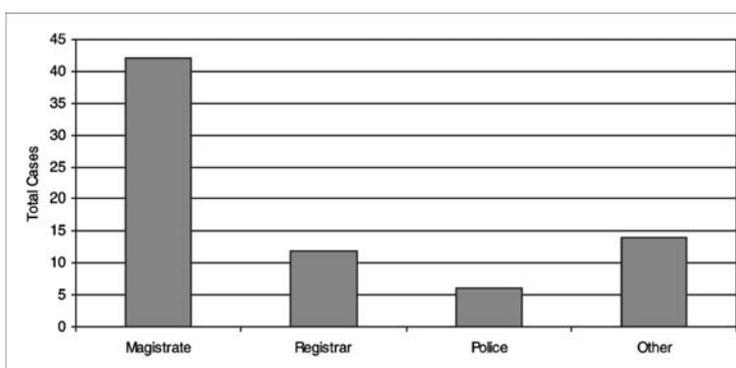
Matters considered suitable for mediation were applications for intervention orders under stalking legislation (s 21A of the *Crimes Act 1958* (Vic)) which involved neighbourhood or workplace disputes and did *not* involve the following:

- pending or existing matters at the Family Court;
- actual or serious threats of violence; or
- Victoria Police as the complainant in the application.

If a magistrate, registrar or other referrer identified a case as potentially suitable for mediation, this could then be referred to the DSCV project officer if the project officer was present at the court or, if not present, court staff would arrange a phone assessment with DSCV staff. If, after this interview, the matter was considered appropriate and the parties were willing to attend mediation, a time would be booked for mediation to take place. There were a few minor teething problems with the Project, such as difficulties arranging access to facilities for non-court staff and problems with listing procedures when intervention order applications were being heard concurrently in multiple courts

The evaluation showed that the referral and intake process was successfully implemented. Referrals were made by magistrates, registrars, Legal Aid, police and court networkers (see Figure 4). Magistrates referred the majority of the total 74 referred cases during the Project (57%), with registrars referring 16% of cases.

**Figure 4: Project cases by referral source\***



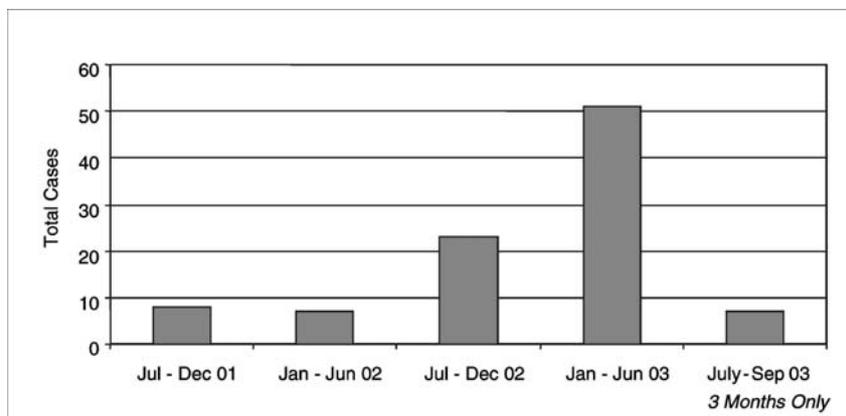
\* DSCV case management data.

Both magistrates and registrars reported that they were aware of, and approved of, the eligibility criteria. The only suggested change was that the criteria could be expanded to cover familial disputes not involving violence, such as disputes between parents and adult children. Both magistrates and registrars reported using the criteria when considering whether applications were appropriate for referral to mediation. There were no concerns raised about whether referral was an appropriate role.<sup>23</sup>

Although stakeholders agreed on the appropriateness of eligibility criteria, there were divergent views on whether the Project had achieved satisfactory levels of referral. Those disappointed typically cited initial expectations and failure to meet referral targets. Those satisfied judged that the level of referrals was significant, given factors such as the short Project timeframe, limited time for court staff to become familiar with the Project and the limited number of suitable cases that presented during this period.

The independent evaluation suggested that referral rates were excellent for a pilot program with a total of 74 cases involving intervention orders dealt with by the DSCV during the Project period. In 2001-2002, the DSCV dealt with 18 cases involving intervention orders compared to 74 intervention order cases in the Project period – a fourfold increase (see Figure 5). This increase was particularly evident during January to June 2003 when the Project was fully operational in multiple court locations.

**Figure 5: Intervention order complaints dealt with by DSCV by period\***



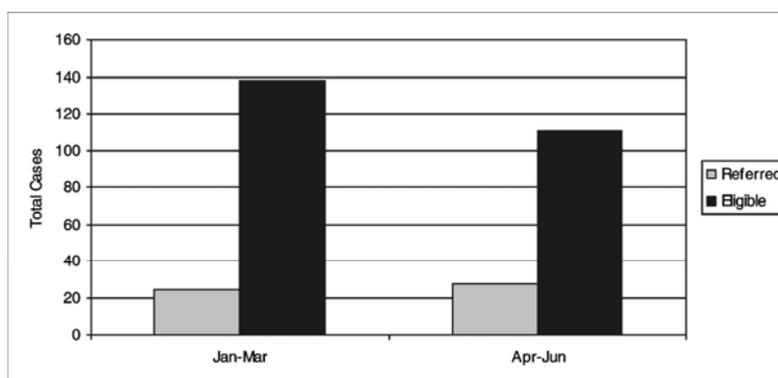
\* DSCV case management data.

<sup>23</sup> Compare concerns summarised in Colbran, n 11, that active involvement of settlement carries dangers of compromising the judicial role.

The eligibility criteria and limited number of courts participating meant that a relatively small number of the total stalking disputes could have been referred to the Project: projected from a detailed study of intervention order cases conducted in the financial year 2000-2001, the proportion eligible would have been approximately 10% of all stalking complaints, or around 500 cases.<sup>24</sup>

Overall, the Project dealt with around one-fifth of these eligible cases during the two quarters it was most active (see Figure 6). This steady increase in cases referred suggests that, given a longer Project period, the number of appropriate cases would most likely continue to increase.

**Figure 6: Intervention order complaints dealt with versus eligible for referral by quarter \***



\* Projected from Magistrates' Court data, Court Services

The major barrier to referral identified by court staff was difficulty influencing clients with applications fitting the eligibility criteria to consider mediation as an alternative. Interstate and international comparisons suggest that this experience is common. For example, Community Justice Centres in New South Wales find that where mediation is offered to parties, 44% will consent to the process.<sup>25</sup> If similar rates hold true in Victoria, this suggests that a reasonable estimate of the cases likely to result in mediation from all participating courts during 2002-2003 would have been 167 (ie presuming that a conservative one-third of all eligible disputants agreed to mediation). In fact, 66 of the intervention order cases dealt with proceeded to mediation at the DSCV during this period. This means that the DSCV ended up mediating almost 40% of the cases that could reasonably have been projected during the period.

### Mediation services provided

The next challenge for a court or tribunal in introducing ADR is to ensure the quality of the mediation services provided. In the case of the pilot Project, the DSCV was a well-established mediation provider which rigorously evaluates and reports on its results as a business unit of the Department of Justice Victoria. The focus was thus on whether the DSCV's existing practices needed adaptation to deal with intervention order disputes.

Before the Project started, the DSCV formally reviewed whether its standard co-mediation model process was applicable to intervention order matters and determined that it did not need to be altered. However, to ensure that mediators provided an appropriate service for cases referred under the Project, the DSCV conducted a training seminar in October 2002 to provide background information

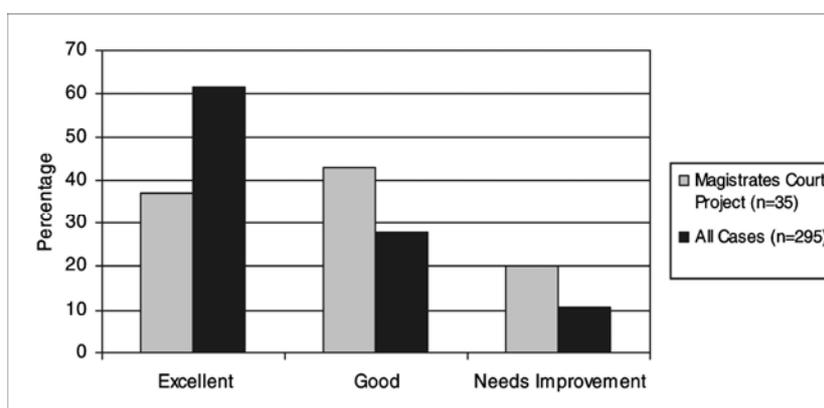
<sup>24</sup> The number of cases eligible for referral is projected from Magistrates' Court data for the financial year 2000-2001. Consultation with Court Services revealed that data on the number of cases eligible for diversion under the Project could not be provided for the pilot year. To estimate the number of cases that would have been eligible during the pilot, the review analysed figures provided by a sample study of intervention order cases in 2000-2001. Calculation showed that in this sample study between 10% to 14% of cases would have been eligible for referral (10% used in this report). This proportion was then projected onto the actual number of cases during the Project in order to generate a projected number of eligible cases.

<sup>25</sup> Overall, CJsCs have found that the acceptance rate for mediation when offered to parties averages around 44%: Community Justice Centres, *Annual Report 2001-2002*.

about relevant legislation, court processes and issues particular to intervention order mediations. As a follow-up, the DSCV conducted a case review in June 2003 to identify any concerns mediators had with the Project. All of the 25 mediators who attended agreed that the seminar and case review were valuable and reported that they were willing to mediate intervention order matters.

The quality of mediation services provided was assessed through feedback received from DSCV client satisfaction surveys. Client responses on satisfaction surveys indicated that, regardless of the outcome, they believed that they had received good service. For example, 34 of the 35 intervention order clients who returned surveys felt that the DSCV staff had been helpful or very helpful before the mediation session. The same percentage found the mediators at the session helpful or very helpful during the process. Overall, 23 of the 35 intervention order clients who returned surveys rated the service received as good or excellent (see Figure 7).<sup>26</sup> This was slightly lower than for clients who returned surveys across all DSCV cases which may reflect the complex nature of intervention order complaints.

**Figure 7: Client satisfaction with DSCV \***



\* DSCV client satisfaction survey. Taken from Q.6: Regardless of the outcome of the mediation how would you rate the service provided by the DSCV?

Longitudinal data on client satisfaction is not available for the Project. Such research is rarely undertaken by mediation services because of resource constraints and the difficulty of long-term client tracking.

### Reporting and feedback

The final challenge for any court or tribunal establishing an ADR program is to ensure that it receives adequate and appropriate information from mediation providers for the cases referred. The Project met this challenge by developing a “Mediation Advice Sheet” which was filled in by the mediator at the conclusion of each mediation session, providing a report for the court detailing:

- whether an agreement had been reached;
- if the applicant wanted to continue with their application; or
- if the applicant wanted to have the application struck out.

Magistrates and most registrars indicated that this form effectively communicated appropriate information back to the courts. However, one weakness identified was that the sheet only dealt with matters that proceeded to mediation. Thus magistrates and registrars did not receive any formal

<sup>26</sup> Compiled from responses to the DSCV client satisfaction survey: “Q.6 Regardless of the outcome of the mediation how would you rate the service provided by the DSCV?”. DSCV client satisfaction surveys are routinely sent out to every party who attended mediation approximately one month after a mediation is conducted. DSCV reports that it has an average return rate of over 50% each year.

feedback for matters that were ineligible or where one or more of the parties eventually refused mediation – apart from the fact that these matters reappeared on their list.

Greater feedback might have helped those making referrals to learn more about case outcomes and thus to improve their skills in identifying appropriate cases for referral.

## PROJECT BENEFITS

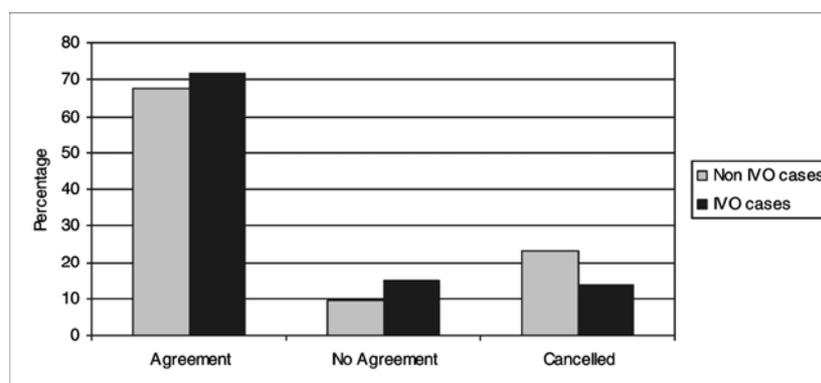
### Desired project outcomes

The desired outcomes of the Project were to increase clients' ability to resolve their own disputes, increase the capacity of DSCV to resolve intervention order cases, create policies and procedures for delivering suitable intervention order applications for mediation and to reduce the average length and complexity of intervention order hearings referred to mediation. Evaluation of the Project revealed positive findings in each area.

The Project had a positive effect on many clients' ability to resolve their own disputes. The following are indicators of increased client ability:

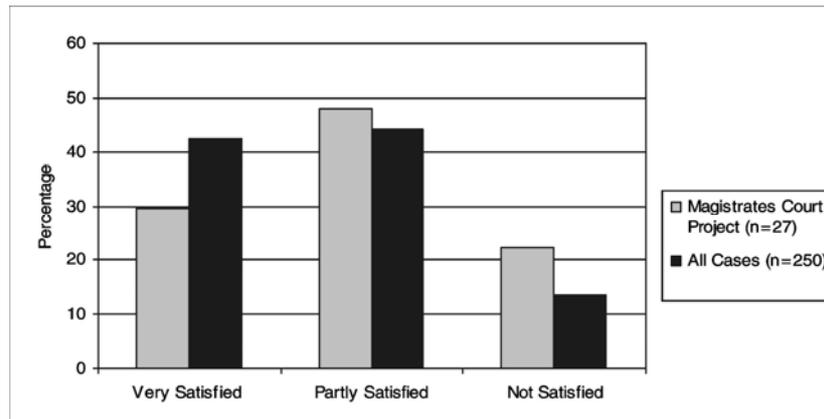
- clients reached agreement in 49 of the 58 mediation sessions that went ahead in the cases referred to the Project. This is a slightly higher settlement rate than for all DSCV mediations (see Figure 8). This suggests that clients' ability to resolve their own disputes was improved, given that they had previously sought to resolve these disputes through court action.
- most clients reported they were very satisfied or partly satisfied with agreements reached (21 of the 27 clients who returned the survey). Although this is a lower rate of satisfaction with agreements reached than for all DSCV clients (see Figure 9), this suggests some level of client empowerment through the mediation process.
- agreements appeared to be durable with 17 of the 24 clients who completed the feedback survey reporting that, where an agreement had been reached, it had worked reasonably well or very well (see Figure 10).

**Figure 8: Agreement rates for intervention order and other cases during project\***



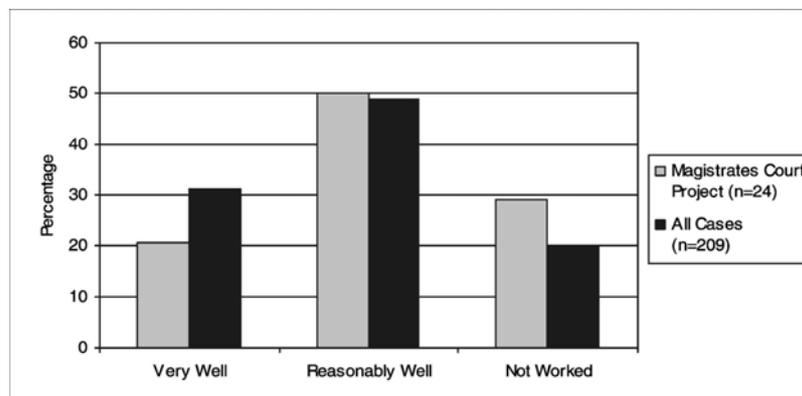
\* DSCV case management data. The “cancelled” category includes: A withdrew, B withdrew, DSCV assist, DSCV withdrew.

**Figure 9: Client satisfaction with agreement reached\***



\* DSCV client satisfaction surveys. Taken from DSCV client satisfaction survey: “Q.4.1 (Was there an agreement reached) If yes, how satisfied are you with that agreement?”

**Figure 10: Client satisfaction with how well agreement has worked\***



\*DSCV case management data taken from DSCV client satisfaction survey: “Q.4.2 Has the agreement worked?”

The Project also produced positive outcomes for DSCV and mediators. DSCV staff reported that both staff and mediators had an improved capacity to deal with intervention order disputes as a result of this Project. The training provided to mediators and the greater number of intervention order mediations conducted by DSCV both contributed to improvements in knowledge and confidence among mediators and DSCV staff in dealing with intervention order-related disputes.

The Project was successful in creating policies and procedures for delivering suitable intervention order applications to DSCV for mediation as evidenced in the percentage of agreements reached in cases mediated through the Project and in feedback received from magistrates, registrars, DSCV staff and mediators regarding the appropriateness of the cases referred.

Finally, there is evidence of positive outcomes for the Magistrates’ Court as a result of the Project. Where a referred case reached agreement at mediation, the complaint would be withdrawn or an order granted by consent, thus reducing the average court time taken to deal with the case and reducing the number of cases with which the court would otherwise be required to deal.

It was definitely worthwhile to be able to refer cases. Most cases didn’t come back to court as they were resolved.

*Magistrate*

I know that mediation definitely did reduce the length and complexity of some of the orders. [It] saved us a lot of heartache in court.

*Registrar*

There were a few matters that would have blown up into huge contests and would have taken up a lot of court time, and mediation was able to assist with that, which was of a huge help.

*Registrar*

It is also possible that mediation had some effect on court proceedings even in cases that did not result in agreement. For example, participation in a mediation session can help clarify the issues in dispute, thus reducing the time and complexity of later court proceedings. Participation in mediation can also convince disputants not to take their dispute any further, reducing the overall number of cases being heard by the court.<sup>27</sup>

Clear evidence was not available in this case to judge whether court time was reduced in cases that did proceed to court. Court Services report that no figures are publicly available on the hearing time taken by magistrates to resolve intervention order complaints. Data from client satisfaction surveys suggest that some progress in resolving disputes was made in cases where mediation was attempted but no agreement was reached: eg 34 of the 35 clients who responded to the survey felt that the mediation process had played a helpful or very helpful role in the final outcome, regardless of whether agreement was reached. By contrast, magistrates reported that although matters that had been through mediation and had subsequently returned to court may have resulted in a clarification of issues, the length and complexity of the subsequent intervention order proceeding was not reduced. Without further evidence, it is not possible to judge the effect of mediation on subsequent court proceedings.

### **Project impact**

While the long-term impact of the Project is the hardest issue to evaluate, there are good indications of positive impact on both the DSCV and participating courts. Stakeholders also reported benefits for disputants and broader social impact flowing from the Project. The DSCV reported a number of benefits as a result of the Project:

- improved skills in dealing with disputes related to intervention orders;
- increased reputation and profile of the DSCV; and
- valuable relationships developed with participating courts.

Similarly, participating courts reported a number of benefits as a result of taking part in the Project. Benefits mentioned by magistrates and court staff include:

- an effective means of dealing with particular stalking cases that have been of concern to magistrates for some time;
- familiarisation by court staff with mediation as an alternative; and
- improving public confidence in the courts' capacity to deal appropriately with neighbourhood disputes.

Magistrates have been saying for years that a number of the stalking cases – in fact a fair percentage – are really not about genuine threatening behaviour with the prospect of violence. What are they? They are more like neighbourhood disputes. What are we going to do with them? They're not right in this jurisdiction; this isn't the right environment for them to be resolved.

*Magistrate*

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<sup>27</sup> Client satisfaction surveys suggest that some disputes that were not settled at mediation did not, in fact, return to court. There were nine cases where no agreement was achieved at mediation and only six parties who returned the questionnaire reported that their dispute returned to court.

The direct impact of mediation on clients is more difficult to measure. Disputants may participate in mediation for a number of reasons. A recent Australian study into neighbourhood mediation reported the following motivations:

- resolving the problem;
- being taken seriously by the other party;
- having the opportunity to tell their side of the story; and
- meeting in a safe, neutral environment.<sup>28</sup>

Disputants may have experienced a range of potential benefits as a result of taking part in the mediation process; however, client satisfaction surveys would not capture this data. For example, it is possible that clients may have become more aware of conflict resolution skills and may apply these skills in other situations as a result of participating in mediation – but without longitudinal studies this is impossible to assess.

An indication of the potential impact of mediation on clients was, however, provided through observations by mediators, magistrates and registrars involved in the Project. Mediators reported observing the following benefits experienced by clients:

- having the opportunity to express concerns and interests and identifying and dealing with underlying issues;
- gaining insight into other parties' perspectives, including improved relationships;
- resolving the problem in a way that both parties' needs are met;
- maintaining a sense of autonomy when dealing with the dispute; and
- protecting clients from the emotional distress and stigma of appearing in court.

DSCV staff also had the following observations:

It's an educative process, as well as just a dispute resolution process, because it does show people ways of communicating. It's all about communicating: lack of communication, inappropriate communication. Parties tend to feel, "If this process works, there is a better way of talking to people." They were empowered to deal with their own issues rather than have a Magistrate tell them that "There is an order against you and that's all there is to it." It's a very empowering process.

*DSCV staff member*

Finally, many stakeholders expressed views on the long-term social benefit of the Project. There is arguably a high public value in heightening awareness and availability of mediation. Suitable disputes are likely to reach agreement as a result of mediation, saving court time and resources and taxpayers' funds:

I worked five years in the court with Court Network and I would see people, when I was doing outreach, come into court dying for an alternative. They would say "I don't want to be here but what else can I do? There's nothing else!" I think the best thing is to offer the public that option.

*DSCV staff member*

For a lot of people that came through, it was a last resort for them and they didn't want to be getting an intervention order. So to have [mediation] offered to them, they were pretty grateful for it.

*Registrar*

The vast majority of intervention orders aren't required and that there are other means that people should go through before getting an intervention order as a last resort. So mediation is an excellent example of that and has probably helped the people with their problems a lot more than just getting an intervention order and ignoring it.

*Magistrate*

I passionately believe in the Project. I would be sad if this were to fall by the wayside. There's so much stuff that you can't measure here. The whole role modelling; people who can resolve things themselves

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<sup>28</sup> Kayrooz C, Dalton C, Colavecchio F and Hibberson C, "Barking Dogs, Noisy Neighbours and Broken Fences: Neighbourhood Dispute Resolution" (2003) 14 ADRJ 71 at 75-76.

then pass that on to their children which then passes on to their children. It has a flow-on effect. It's like preventative medicine. You take the medicine now and prevent things from happening later, surely that's the way to go.

*Magistrate*

Many stakeholders believed that promoting the use of non-adversarial conflict resolution strategies sends a message to society that taking personal responsibility for dealing with disputes and relying on communication rather than adjudication is appropriate for non-violent interpersonal disputes.

## LESSONS LEARNT

The Project was a successful example of a mediation diversion program. The Project accorded well with suggested standards for successful court-annexed ADR, including in its planning, funding, clear and appropriate goals, support from judges and lawyers, management, criteria for referral and screening, trained ADR professionals and quality control.<sup>29</sup> The evaluation of the Project draws attention to areas that can serve as a model for the development of future programs or the improvement of current court ADR programs.

The evaluation highlighted the importance of attention to the development, implementation and distribution of promotional materials. High levels of project awareness contributed to a good referral rate to the newly available ADR service. Also contributing to a promising referral rate was the development of clear and appropriate referral eligibility criteria. Of those eligible cases referred to mediation, good levels of agreement were reached, indicating that the ADR process conducted by the DSCV is an appropriate alternative for resolving non-family-related intervention order cases. A further indication of the appropriateness of ADR as a resolution process for these cases is the level of client satisfaction with mediation, suggesting that mediation is a process that is agreeable to community members. Finally, the evaluation also highlighted the importance of good reporting and feedback procedures from ADR providers to magistrates and court staff.

Evaluation of the project also brings to light potential areas for improvement. Reports from court staff indicate that optimum usage of the service requires promotional strategies that take the frequent rotation of court personnel into consideration. Further strategies could have been developed in order to tackle disputant unfamiliarity with and resistance to mediation. In addition to these potential improvements, the expressed disappointment with referral rates by some indicates that those developing future projects should consider either lowering initial referral-rate expectation for new projects or increasing the timeframe for piloting new projects in order to achieve optimum project awareness, confidence and support.

It is hoped that this study will add to the growing literature on the effectiveness of ADR programs. More research is needed in a number of areas, including the best way to promote ADR within court structures,<sup>30</sup> effective means of addressing client reluctance to engage in the mediation process and longitudinal studies of mediation outcomes.<sup>31</sup> In the meantime, the Project shows the potential of court-connected ADR, particularly in offering more options for dealing with intervention order disputes, and suggests a number of ways of meeting the challenges of judicial administration involved.

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<sup>29</sup> These criteria were proposed by Kathy Mack at a Flinders University seminar and reported in Cannon, n 13.

<sup>30</sup> For a valuable discussion of some of the urgent needs and impediments to ADR research, see National Alternative Dispute Resolution Advisory Council, *Second National ADR Research Forum* (NADRAC, February 2005).

<sup>31</sup> Sacks M, Reichart KS and Proffitt W T, "Broadening the Evaluation of Dispute Resolution: Context and Relationships Over Time" (1999) 15 *Negotiation Journal* 339.