

Literacy, numeracy and  
alternative dispute resolution

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# Literacy, numeracy and alternative dispute resolution

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# Contents

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|                                                                                                                                             |    |
|---------------------------------------------------------------------------------------------------------------------------------------------|----|
| Key messages                                                                                                                                | 4  |
| Executive summary                                                                                                                           | 5  |
| Literacy and numeracy in Australia and alternative dispute resolution                                                                       | 8  |
| Literacy and numeracy amongst Australian adults                                                                                             | 8  |
| The nature of alternative dispute resolution, literacy and numeracy                                                                         | 9  |
| Alternative dispute resolution, training and literacy and numeracy issues                                                                   | 11 |
| Barriers to justice: The impact of limited literacy                                                                                         | 13 |
| Literacy as an equity issue in access to the law: A brief overview                                                                          | 13 |
| Methodology                                                                                                                                 | 19 |
| Nature of the study                                                                                                                         | 19 |
| Survey of individual alternative dispute resolution practitioners                                                                           | 19 |
| Survey of alternative dispute resolution organisations and responses                                                                        | 21 |
| Consideration of the literacy and numeracy demands of materials involved in alternative dispute resolution                                  | 22 |
| Limitations                                                                                                                                 | 22 |
| Findings                                                                                                                                    | 24 |
| The literacy and numeracy demands of alternative dispute resolution, perceived barriers, and impact of limited literacy and numeracy levels | 24 |
| Practitioners' identification of and response to limited literacy and numeracy issues for mediation                                         | 31 |
| Strategies practitioners use to address limited literacy and numeracy                                                                       | 34 |
| Suggestions for enhancing practitioners' future awareness of limited literacy and numeracy of parties                                       | 37 |
| Conclusions and implications for policy and practice                                                                                        | 39 |
| Literacy, numeracy and alternative dispute resolution                                                                                       | 39 |
| Implications for policy and practice                                                                                                        | 41 |
| References                                                                                                                                  | 43 |
| Support document details (appendices A–G)                                                                                                   | 45 |

# Key messages

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The difficulties experienced by users of adult dispute resolution in Australia are investigated in this report and processes that lead to difficulties are identified. The report offers suggestions for professional development and specific strategies for mediators to assist those who have limited literacy and numeracy.

- ✧ This study demonstrates that limited literacy and numeracy can be a barrier to fair participation in alternative dispute resolution processes, despite its being promoted as a fair and equitable process for all. It is likely therefore that participants in alternative dispute resolution who have limited literacy and numeracy are not achieving fair outcomes from these processes.
- ✧ Application forms for participation in the alternative dispute resolution process and some associated documentation require fluency at a level equal to at least a level IV certificate in the Australian Qualifications Framework.
- ✧ It is possible that individuals who have limited literacy and numeracy are not accessing alternative dispute resolution processes due to the literacy and numeracy demands of the forms and guidelines, and a general reluctance to engage with the law.
- ✧ Alternative dispute resolution practitioners need awareness training to enable them to identify potential literacy and numeracy difficulties in clients, especially as many adults will not willingly disclose such difficulties due to public embarrassment. To date this has not been a specific focus.

# Executive summary

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This study investigated the literacy and numeracy demands of alternative dispute resolution processes, with a particular focus on mediation. Alternative dispute resolution plays an increasingly significant role in the settlement of legal disputes, in both Australia and overseas. Parties involved in family disputes and small business or trade disputes are expected to settle differences by mediation. Parties in larger commercial or administrative disputes can be ordered to mediation by the courts, which will then not hear such cases unless alternative dispute resolution processes have failed to reach resolution. It is possible for alternative dispute resolution to involve only the mediator and the parties in dispute, that is, without support from legal representatives, family, friends etc.

This report provides a brief summary of the instances of mediation and associated processes from courts and tribunals in Australia. The summary shows that the number of instances is large, and is known to be increasing. This study is therefore timely in addressing an equity issue that may arise in alternative dispute resolution procedures.

Alternative dispute resolution processes are promoted as providing quick, inexpensive and fair outcomes for legal disputes. The adversarial nature of Australian court procedures requires a 'winner' and a 'loser'. Alternative dispute resolution aims to provide a 'win-win' solution and is promoted as a largely oral process, focusing on communication between parties. However, this system of dispute resolution does involve considerable paperwork to access the system, and ongoing written activities, numerical calculations and oral communication by the mediator and parties. It also requires prior documentation of the dispute. The paperwork, and the reading and writing explicitly and implicitly required were the focus for an examination of the literacy and numeracy demands of alternative dispute resolution.

Equity issues in accessing the law for those who do not speak English as their first language have been recognised. In the criminal law context, the impact of poor literacy and numeracy is often discussed as a factor in criminal history and recidivism. However, the equity issue of access to the civil law for Australians who speak English as their first language, but with limited literacy and numeracy, has not been addressed.

This study investigated the significance of alternative dispute resolution processes for these participants. According to the International Adult Literacy Survey (ABS 1997), between 1.5 million English speaking Australians may have very limited literacy and numeracy skills, and an equivalent number may have skills that put them at risk in such situations. Further, these Australians are drawn from all walks of life, including paraprofessionals and tradespeople, and across all ages, but particularly from older age groups who may have had restricted access to formal education. Limited literacy and, to a lesser extent, numeracy skills, still tend to bear a stigma in our society. Many individuals become skilled in concealing their difficulties, and most will avoid the embarrassment of disclosure, either by themselves or by others. To admit such a difficulty within alternative dispute resolution may cause a further equity issue, such that their position is weakened. However, not only are communication skills important in establishing interests and claims, but most disputes also involve the resolution of financial matters. Limited

numeracy and understanding of the impact of an agreement may be equally as critical as limited literacy.

This study, therefore, explored three research questions:

- ✧ What alternative dispute resolution processes might create difficulties for Australians who speak English as their first language with limited literacy and numeracy?
- ✧ Have alternative dispute resolution practitioners identified limited literacy and numeracy as an issue for parties, and what strategies have they used to manage such a situation?
- ✧ What strategies would be effective in promoting awareness of alternative dispute resolution practitioners of literacy and numeracy issues?

Findings of the study were based on two major sources of information. The first source was surveys of alternative dispute resolution organisations and individual alternative dispute resolution practitioners, both with legal qualifications and without, across all states and territories. Six organisational and 51 individual responses (return rate of 22%) were provided by the practitioners, nearly half of whom had more than 11 years of experience in alternative dispute resolution. These practitioners were engaged across all areas of alternative dispute resolution, from family disputes, aged care and community issues, workers' compensation, land and housing disputes, to major construction and civil conflicts. Half of the practitioners had engaged in resolution of disputes that had been ordered to mediation by the courts.

A further source of information to determine the written literacy and numeracy demands of alternative dispute resolution was an analysis of documents against the National Reporting System (ANTA & Department of Employment, Education and Training 1994–95) to obtain a measure of the literacy and numeracy demands of these activities. A sample of forms and guidelines for accessing mediation and a sample of the documents provided from an actual mediation was used. These analyses demonstrated that both sets of materials required the types of literacy and numeracy skills indicated at least level 5 of the National Reporting System, the highest level. This level matches the language and mathematical skills expected of at least certificate level IV in the Australian Qualifications Framework. From the perspective of literacy and numeracy experts, then, the written literacy and numeracy demands of accessing and participating in alternative dispute resolution processes are seen as very high.

The survey findings include a range of perceptions, and illustrate different degrees of responsiveness to the issue of low literacy and numeracy. At the 'big end' of town, alternative dispute resolution practitioners involved in large commercial disputes tended to be barristers or industry experts of considerable experience. These practitioners indicated that solicitors were always involved in representing the parties and were considered to be responsible for the management of documents and final agreements. It was expected by these respondents that the solicitors would also have identified any literacy and numeracy difficulties in their parties.

Almost half of the alternative dispute resolution practitioners (25) indicated that they had never identified limited literacy and numeracy as an issue. Another 20% of practitioners (10) indicated that they had identified a limited literacy and numeracy capability of parties through personal observation. In many cases, practitioners referred to parties who spoke English as a second language, or Indigenous Australian participants. Several explained the strategies they had used to deal with the issue when it had arisen. These respondents provided a range of examples of alternative dispute resolution and literacy and numeracy issues.

The majority of practitioners agreed that the processes of alternative dispute resolution could present an equity barrier to those with limited literacy and numeracy skills. Most suggested the need for specific professional development or professional development materials for practitioners for dealing with literacy and numeracy issues in English speaking Australians. To date, this has not been a specific focus of training courses in this area, although equity issues are

an important component overall. A number of practitioners who had identified literacy and numeracy difficulties indicated that they had drawn upon the general principles for dealing with issues of equity and power relationships contained within the procedures for alternative dispute resolution to resolve the specific dispute as fairly as possible. A number of practitioners were concerned that, with the benefit of hindsight, an issue of limited literacy and numeracy may have been overlooked.

Overall, the study has highlighted four key findings:

- ✧ Alternative dispute resolution processes do present high literacy and numeracy demands for the involved parties.
- ✧ While many alternative dispute resolution practitioners in the study indicated they were aware of potential literacy and numeracy issues, and a number identified strategies to manage the situation, many practitioners may not be aware of the limited literacy and numeracy skills of parties to disputes, or may rely on others to identify these prior to alternative dispute resolution.
- ✧ While alternative dispute resolution practitioners undertake training to address general issues that cause equity imbalances, they may need specific training for dealing with the issue of limited literacy and numeracy for English speaking Australians.
- ✧ Perhaps most importantly, it is possible that the literacy and numeracy demands of accessing alternative dispute resolution may prevent Australians, for whom these alternative processes are most suitable, from participating in these processes to resolve disputes.

Additional information relating to this research (appendices A–G) is available in *Literacy, numeracy and alternative dispute resolution: Support document*. It can be accessed from NCVER's website <<http://www.ncver.edu.au>>.

# Literacy and numeracy in Australia and alternative dispute resolution

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## Literacy and numeracy amongst Australian adults

In 1996, a survey of aspects of adult literacy (ABS 1997) in Australia assessed different dimensions of the literacy skills of Australian adults aged 15 to 75. In the survey, individuals were interviewed in their home on a range of tasks of different difficulty. All tasks focused on literacy and numeracy in written, or tabular and graphical forms with text. The adult performance was reported in terms of five levels (1 to 5), with level 1 being the least proficient. For example, level 1 tasks required simple form-filling, decoding of simple words (ABS 1997), and undertaking simple calculations (ABS 1997, p.67). Level 2 tasks were slightly more demanding.

The easiest task in Level 1 directs respondents to look at a medicine label to determine the 'maximum number of days you should take this medicine'. The label contains only one reference to number of days and this information is located under the heading 'DOSAGE'.

The reader must go to this part of the label and locate the phrase 'not longer than 7 days'.

(ABS 1997, p.101)

The findings were that some 15% of Australian adults may have difficulty processing functional literacy tasks at level 1. Combining results for adults able to complete only tasks of levels 1 or 2 difficulty, 40% of Australians are shown to have difficulty with literacy and quantitative literacy tasks of moderate expectations. While a greater percentage of Australians with English as a second language had skills assessed at level 1 or 2, more Australians with English as a first language were at these levels—some 1.5 million English first-language speakers at level 1 compared with approximately one million other first-language speakers (Cumming 1997, p.69).

The assessed performance of older groups was of even more concern. For Australians with English as a first language, 21% of men and 31% of women aged 55–74 had skills at level 1. Nearly 10% of all with level 1 skills were managers and professionals, while a further 24% were paraprofessionals and tradespersons. Thus, 'successful' middle-aged Australians may have difficulties dealing with basic business or personal paperwork, if isolated from supportive communities of practice.

Limited literacy impacts on individuals in various phases of life. Literacy is correlated with work and study success (see, for example, McMillan & Marks 2003). Limited literacy affects individuals' contributions to society, even when employed and engaging successfully in society in multiple ways. An area of major social consequence for all Australians, law-abiding or not, is the legal system. From a legal perspective, most consideration of literacy matters has been the relationship between literacy and criminality. Another focus has been language and cultural differences, with interpreters provided in many legal contexts. Research has considered translation effects on validity of evidence, and cultural issues in law in general. Culture and power in the discourse of the courtroom and other legal settings have also been considered (Maley 1995). However, the impact of limited literacy and numeracy for the general population on fair access to and participation in the legal system has not been the focus of research in Australia.

# The nature of alternative dispute resolution, literacy and numeracy

The current trend in the Australian legal system for settling disputes—from family matters, personal finances or small business matters, to employment issues—is the use of alternative dispute resolution, including arbitration, negotiation and mediation. Ten years ago, only 6% of major commercial disputes were settled within the court system. Since then, the percentage has been steadily declining (Sourdin 2002, p.10). The trend is to settle out of court, either with or without alternative dispute resolution. The expectation of many jurisdictions is that parties will have participated in alternative dispute resolution prior to seeking recourse in the courts. Courts can order disputes to arbitration.

Appendix A (which can be found in the support document) provides a summary of publicly available statistics on alternative dispute resolution associated with various court and tribunal systems in Australia over the period 2002–03. The analyses of these statistics for that year across states and a range of courts and tribunals show some 13 000 instances of mediations in a variety of contexts and purposes. For example, for the Victorian Civil and Administrative Tribunal report for this period, nearly 2500 cases were listed for mediation, 71% proceeded, and the overall mediation success rate was 64%. Areas of dispute included anti-discrimination, domestic buildings, planning and environment, and retail tenancies. These areas clearly involve individuals in personal matters and small business activities.

The statistics demonstrate that, across the states a high proportion of disputes, some 60 to 70%, were settled through alternative dispute resolution. They also demonstrate the proportion of mediations that have been ordered by the courts, including, for example, in the Queensland Supreme Court, where some 15% of mediations were court-ordered in cases parties did not participate by consent. These statistics are neither exhaustive nor inclusive of the number of small disputes for which individuals may directly seek resolution without recourse to courts. However, they show the extent of alternative dispute resolution taking place.

Alternative dispute resolution refers to a range of processes used as alternatives to litigation in the court system and which have largely evolved from community-based systems of resolving disputes. It was perceived to be ‘responsive to the needs of the parties, consensual and preserving of relationships’ (Astor & Chinkin 2002, p.4) and based on a service ‘run by ordinary people (that is non-professionals) who would be empowered to resolve their own disputes according to community norms’ (Astor & Chinkin 2002, p.5). It is noted with some irony that a process originally established as ‘alternative’ to mainstream law has been quickly embraced by the law.

The rise in alternative dispute resolution is due to a number of factors, not least being the expense and time delays encountered in pursuing matters in court. The adversarial nature of our court system is not necessarily the best process for settling many minor community or family-focused disputes, especially in situations where parties to the dispute will continue in close association after the dispute has been resolved. In general, alternative dispute resolution seeks to provide a ‘win-win’ situation (Menkel-Meadow 1995). Moreover, alternative dispute resolution is promoted as being quick, economical, and above all else, fair—where agreements are consensually derived and where power imbalances are controlled (Candlin & Maley 1994). It is considered that this system increases access to social justice for disadvantaged groups (Wanis-St. John 2000).

However, alternative dispute resolution promotes a different environment from a law court for the parties to a dispute. In a court, unless a party chooses to represent themselves, in which case considerable assistance is usually provided by the judiciary and other legal officers, a party will have a legal representative. In alternative dispute resolution, the players are the mediation practitioner and the people involved in the dispute. An individual may be unrepresented by legal

counsel, although sometimes a ‘friend’ may be present. The presence of legal representatives or any other parties can be at the *discretion* of the mediator.<sup>1</sup>

In dispute resolution the individual parties may become removed from supportive communities where literacy and numeracy problems have remained hidden. The embarrassment or shame that many feel about their limited literacy, and to a lesser extent, numeracy, may still prevent them from making it known. In a Canadian report on literacy issues in law in general, the Honourable John Maher of the Provincial Court in Alberta noted:

[Illiteracy] is largely invisible. It cuts across lines of race, gender and culture, although many of its victims suffer from those other forms of ‘systemic discrimination’. Because of the social stigma attached to it (largely by its own victims), its invisibility is frequently encouraged by its victims, who attempt to hide their condition. (Maher 1996, unpaginated)

A further issue is that alternative dispute resolution is promoted as an *oral* process, seen to enhance access, equity and communication. However, as Rogers, McCafferty and Brownhill 1997, pp.69–71) note, this system in practice can involve substantial pre-conferencing written activities, including financial considerations:

... a written agreement should be entered into between the independent (mediator) and the parties. The agreement should include not only the independent’s fees, but also other elements, such as the process to be used, the powers of the independent, the requirements for disclosure of documents or information, confidentiality, and the consequences of breaching the process agreement.

... the provision of a short statement of issues, not more than five pages long, by each party to the independent and to the other side ... other documents as may be necessary.

(Rogers, McCafferty & Brownhill 1997)

More threatening for those with limited literacy, are the ongoing and implicit written literacy demands during the process.

... if there is an issue you want to return to, please *write* (authors’ emphasis) it down ...

(Rogers, McCafferty & Brownhill 1997)

After initial identification of issues during the process,

... the mediator will then prepare a list of issues, and questions that must be answered ... the mediator will frequently use a whiteboard or a flipchart to record the issues that have been raised by the parties. The issues may be listed as dot points or, more effectively, as a question begging an answer ... The theory behind identifying issues on a whiteboard is that it allows the parties to see that they are jointly working together to answer the questions. This externalises the dispute, or takes it outside themselves, even off the table, and puts it in a very visible and neutral position ... This does a lot to relax the parties ...

... reaching agreement: A solicitor should make sure that the agreement is written down in a way that accurately reflects your client’s understanding of the agreement that has been made ... At the end of the document you add miscellaneous provisions and include definitions.

(Rogers, McCafferty & Brownhill 1997)

If solicitors are not present, alternative dispute resolution practitioners are to ensure that such final agreements represent the actions to follow and the understandings that have emerged from the dispute resolution.

Not only is alternative dispute resolution growing rapidly, but also the more recent innovation of online dispute resolution has been expanding at an even greater rate. A study conducted for the

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<sup>1</sup> For example, *Supreme Court of Queensland Act 1991* Uniform Civil Procedure Rules 1999 Rule 326 Mediator’s role ‘... (2) The mediator may decide whether a party may be represented at the mediation and, if so, by whom.’

Department of Justice identified 76 such sites and services worldwide (Conley Tyler & Bretherton 2003 summarised in Conley Tyler 2003). Guidelines to online dispute resolution practitioners emphasise issues of computer literacy for parties but do not in general consider the issue of basic English literacy and numeracy. The use of online dispute resolution presents a dichotomy: consider the increased literacy and numeracy demands that accessing this system may create for those with limited capacity in this area. However, it is conceivable that online dispute resolution could provide a forum where parties can be assisted, operating within a supportive community, to present their case and where, therefore, limited literacy and numeracy need not be exposed.

Notwithstanding, those with English as a first language but with basic literacy difficulties, as shown by the Australian Bureau of Statistics (ABS) survey outcomes (1997), are likely to be disadvantaged in alternative dispute resolution processes, whether with or without support. They will either not engage with such procedures to prevent public disclosure of their difficulties due to public embarrassment; for example, '[t]he hearing itself went smoothly, despite ... the employer's counsel. He was more than adversarial ... even belittling "H"'s functional illiteracy ...' (Mogill 2000, p.207). Or they will be disadvantaged in coping with the actual procedures, especially settlements. Either approach is likely to lead to disadvantage for the individual, including a high likelihood of financial disadvantage. Given the growing incidence of alternative dispute resolution processes in law, it is timely that the impact of limited literacy and numeracy skills on access and engagement should be investigated.

## Alternative dispute resolution, training and literacy and numeracy issues

The alternative dispute resolution practice is a growing field, and as noted, it covers a variety of processes. While the focus of this study is on mediation, we will use the general term 'alternative dispute resolution' on the grounds that the research findings from our and previous research will have applicability to all aspects of alternative dispute resolution, in particular, to those that place high individual literacy and numeracy demands on participants.

Alternative dispute resolution practitioners are drawn from a range of paraprofessional and professional backgrounds. For example, a person experienced in the construction industry may eventually participate in resolving disputes arising in that industry, although such a background is not required. At present, an individual may designate themselves a mediator and advertise for work. Many alternative dispute resolution practitioners undertake accredited training programs through universities or other bodies accredited with the two main professional alternative dispute resolution associations in Australia, the Institute of Australian Mediators and Arbitrators and Leading Edge Alternative Dispute Resolution (LEADR [formerly Lawyers Engaged in Alternative Dispute Resolution]). Appendix B provides information on available court lists of alternative dispute resolution practitioners, organisations offering accredited alternative dispute resolution courses, and a brief summary of recorded input into alternative dispute resolution policy development in Australia. This information demonstrates the breadth and depth of alternative dispute resolution practice in Australia.

Many alternative dispute resolution practitioners have legal backgrounds, either with solicitor and/or barrister training practice. In the main, courts draw from such practitioners for alternative dispute resolution, especially for court-ordered work.

Following the growth in alternative dispute resolution practice in Australia, a non-statutory body, the National Alternative Dispute Resolution Advisory Council was established by the Australian Government in 1995 as a result of the 1994 report of the Access to Justice Advisory Committee chaired by the Hon. Justice Ronald Sackville, entitled *Access to justice—An action plan*. The role of this advisory council is 'to advise the Government and Federal courts and tribunals on alternative

dispute resolution issues with a view to achieving and maintaining a high quality, accessible, integrated Federal ADR system'. The National Alternative Dispute Resolution Advisory Council's charter includes advice to the Australian Government regarding 'minimum standards for the provision of alternative dispute resolution (ADR) services', and more importantly for this study, of 'the suitability of ADR processes for particular client groups and for particular types of disputes'.

A 1997 report by the advisory council focused on issues of fairness and justice in alternative dispute resolution (National Alternative Dispute Resolution Advisory Council 1997). A strong theme of the report is establishing equity in alternative dispute resolution by addressing potential power imbalances, identified as possible due to a range of demographic characteristics such as gender, rurality, culture and disability. Communication issues for second language speakers are raised:

4.37 In view of the fact that ADR processes like mediation rely on the participants negotiating their own solution, with legal representatives, when present, assuming only a supporting role, effective communication is an essential factor. As with the formal justice system, where people from non-English speaking backgrounds are engaged in negotiations, it is imperative that they have the back-up and support of professional interpreters ...

(National Alternative Dispute Resolution Advisory Council 1997, pp.77–8)

Issues of access to information and effective communication are raised for those who may be disadvantaged due to 'low educational and literacy levels'. However, these are discussed in relation to other categorisations such as socioeconomic disadvantage (National Alternative Dispute Resolution Advisory Council 1997, s.9.23, p.177), the elderly (s.5.31, p.100), Indigenous Australians (s.4.103, pp.93–4), disability or rural background (s.8.13, p.155), although in contrast to the final category of educational and literacy disadvantage, the comment is offered:

8.29 Dispute resolvers should be wary of stereotyping people living in rural and remote areas. Notwithstanding the general comments above, there are cultured, well read and well educated, broadly tolerant people in all sorts of communities, including those in rural and remote areas. (National Alternative Dispute Resolution Advisory Council 1997, s.8.29, p.161)

Overall, the focus of the National Alternative Dispute Resolution Advisory Council report is on raising awareness among alternative dispute resolution practitioners of the contexts that could affect power imbalances and informed participation, with detailed suggestions for practitioners regarding strategies and accommodations to reduce such effects. This focus provides an appropriate background for considering the impact, on participation in alternative dispute resolution, of limited literacy and numeracy in speakers of English as a first language, and for developing effective strategies to address the professional development of practitioners. While the focus of this study is on the practical relationship between literacy and numeracy and alternative dispute resolution participation, the underlying issue is much broader—systemic fairness and justice for all participants in a legal system. As the Canadian court system has noted:

The term 'systemic discrimination' is a loaded phrase which carries with it a connotation of 'organized unfairness' ... The 'systemic discrimination' in the administration of justice against the illiterate arises from two sources. Firstly, the everyday demands of the justice system, like those of society in general, require an ability to read and write and to process and understand written communication. Secondly, it is by and large taken for granted by many court personnel, that those who appear in court, as witnesses or parties (alleged victims and accused) have that ability.

(John Howard Society 1997)

For too long individuals with low literacy skills have been viewed as 'illiterates' living on the margins of society, unable to function as well as their 'literate' counterparts. In reality, the one-third of all Canadians who have weak literacy skills perform vital roles in society and deserve not to be discriminated against in political, employment and contractual situations.

(Drumbl 1993)

# Barriers to justice: The impact of limited literacy

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## Literacy as an equity issue in access to the law: A brief overview

The right of individuals to full participation in the law has long been recognised as an important component of Western democracy. Discussion and debate about the law and its administration have increasingly focused on equity issues, in particular, on perceived barriers to a citizen's ability to participate fully in the legal system. Gender, ethnicity, disability, and lack of fluency in the dominant language are widely acknowledged as potential access barriers. Indigenous language differences and consequences for engagement with the law are recognised and addressed through research such as that by Eades (1992) and others.

Equity thus provides a conceptual framework for discussion of the relationship between literacy barriers and the right of individuals to full participation in the legal system. A barrier that has received less consideration than other areas is the impact on engagement with the law for those with limited literacy in their first language.

The language surrounding law and the justice system is very complex and context-specific (White 1983). As White noted, members of the legal profession have, on average, high levels of literacy, and legal processes are largely dependent upon written materials. Most non-legal people encountering the legal system, even those with high literacy, experience difficulty understanding the discourse and cannot participate without the assistance of a professional person with legal training. A very considerable body of research and publications exists on issues of language and the law or forensic language/linguistics, examining the discourse of judges, the language of statutes, and the language of the courtroom, and even the comprehensibility of police cautions to suspected criminals. Forensic linguistics also focuses on linguistic sources of disadvantage before the law, particularly for 'weaker' parties in law (see, for example, Gibbons 1994, 2003).

Given the complexity and the focused nature of language surrounding the law, those with limited literacy levels can be expected to encounter significant barriers to participation in the justice system. Limited literacy may act as a barrier to justice in terms of individuals' limited knowledge of the system, and their effective participation in the process. Both factors can significantly influence outcomes at all levels of the justice system.

Canadian case law explicitly upholds the right of a citizen to 'understand' (John Howard Society of Canada 1996). In a landmark judgment of the Supreme Court of Canada (cited in John Howard Society 1996, p.22) it was determined that, under the Canadian Charter of Rights and Freedoms, 'a person is not informed unless they have understood the information conveyed'. This case 'established the principle that a message has not been communicated unless the person receiving the message understands it'. This judgement has significant implications for the court system in Canada as it highlights the barriers to justice faced by those with limited literacy, as well as those who are not fluent in the language used in the specific court.

Several groups in Canada have developed and promulgated awareness of literacy barriers to participation through investigation-based reports (Canadian Bar Association Task Force on Legal Literacy 1992; McDougall-Gagnon-Gingras 1993; John Howard Society of Canada 1996, 1997; Reach Canada 2003). The Canadian studies generally claim that solicitors, barristers and judges encounter many people with limited literacy but that few recognise the magnitude of the potential disadvantage their clients face in interaction with the legal system. However, the work on access and fairness in law with a focus on literacy that has been undertaken in Canada has not been replicated internationally. A review of the available literature on limited literacy and access to the justice system reveals that awareness of the relationship between these is limited in most countries. For example, the American Bar Association (1987) acknowledged limited literacy as a social problem and encouraged legal practitioners to support efforts to promote literacy, but did not specifically address literacy issues as barriers to participation in the justice system. In Australia, the Law and Justice Foundation of New South Wales (2003) in a report, *Access to justice and legal needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, noted that literacy and numeracy are significant issues. However, no Australian research on the relationship between literacy and access to justice has been located to date.

The Canadian Bar Association Task Force on Legal Literacy (1992) reviewed the relationship between literacy and use of the legal system and found that little had been published on this issue. As a result the task force conducted surveys with members of the literacy and legal communities.

The survey of the literacy community identified that:

- ✧ Most legal material is written, and is written in language that is highly complex and context-specific.
- ✧ Adults with limited literacy are intimidated by this language, and by the legal system, and are not aware that lawyers and the legal system generally can assist them.
- ✧ Adults with limited literacy seek alternative sources of information, primarily through oral advice from members of personal networks.
- ✧ Information sourced orally is difficult to verify without recourse to the printed version.

Results from the survey of the legal profession led the task force to note ‘... a surprising lack of awareness among lawyers that limited literacy interferes with access to justice’ (Canadian Bar Association Task Force on Legal Literacy 1992, p.11). The survey found that:

- ✧ Seventy-three per cent of lawyers studied had experience with clients of limited literacy.
- ✧ Lawyers lacked awareness of the difficulties faced by limited literacy clients.
- ✧ Lawyers presumed a background competence in identifying legal problems that people with limited literacy skills do not have.

Despite acknowledging the needs of limited literacy clients and advocating accommodation of those needs, practitioners relied on adjustments to practice procedures that still presume an ability to deal with legal material, most of which is written (Canadian Bar Association Task Force 1992, p.12). Reading difficulties can relate to ‘finding information in signs, schedules, letters, contracts, summonses’ and so on (Canadian Bar Association Task Force 1992, p.23). A client who is unable to read cannot use written material as a basis for action. Adults with limited literacy are often intimidated by the system and do not perceive that the system can assist them. Furthermore, the Canadian research indicated that adults with limited literacy ‘rarely initiate legal action to protect their rights’ (Canadian Bar Association Task Force 1992, p.27).

The task force concluded that there were two major aspects to be addressed:

... raising awareness in the legal community about limited literacy, and giving directions to efforts to remedy the issues raised by limited literacy as those relate to law and access to justice ... (Canadian Bar Association Task Force on Legal Literacy 1992, p.13)

## The work of the John Howard Society of Canada

The John Howard Society of Canada is a non-profit organisation which provides support to those criminally accused. The society actively advocates for changes in the criminal justice system and public education on criminal law and its application. The society has been very active in investigating limited literacy and its impact on the justice system, and, more recently, has promoted the need for raised awareness by members of the judiciary and the legal profession (see <<http://www.johnhoward.ca>>). It is useful therefore to consider the work of this body and its relevance for improving access to the law for Australians with limited literacy.

The John Howard Society commissioned a study of the experiences of people working in the justice system and the extent to which they have recognised the impact of limited literacy on accused (McDougall-Gagnon-Gingras 1993). Analysis of one-hour interviews with 80 participants, sampled from police, probation officers, defence and crown lawyers, and judges, revealed their prior experiences with limited literacy clients. Those interviewed reported reliance upon non-verbal cues; self-identification by the client of their limited literacy status, or by defence counsel; direct observation of the client's inability to read documents in court; and reading and writing avoidance behaviours, as strategies for identifying limited literacy clients. The participants commented on the frequency with which indirect inferences can be made about a client's limited literacy from background information supplied to them. Participants claimed that for accused with limited literacy, forms are often completed by officers, and followed by verbal explanation to various degrees.

Many professionals in the justice system rely upon extensive verbal explanations of processes and documents. Since those with limited literacy often attempt to hide their literacy status, asking a client 'do you understand?' will inevitably be answered 'Yes', as will the question 'Do you *really* understand?'. The report concluded that this is a very faulty mechanism for ensuring understanding (McDougall-Gagnon-Gingras 1993, p.24). The report identified limited literacy as only one issue among many for accused persons.

## Raising awareness of legal practitioners

The John Howard Society of Canada (1996) published a manual designed to assist lawyers, judges, police, court staff and others working specifically in the court system, in which they set out to raise awareness about literacy issues and access to justice. Quotes from interviews with a sample of judges and lawyers demonstrate their awareness of the barriers faced by limited literacy individuals. This report identifies a higher level of awareness of the barriers than that noted earlier by the Canadian Bar Association Task Force on Legal Literacy (1992).

The report distinguished between functional literacy and legal literacy, noting the reliance of the court system on printed and written information, and advocated that lawyers and others in the court system should acknowledge that legal literacy encompasses the ability to read as well as having familiarity with the legal context, and hence, they must assist clients with limited literacy to understand information and meanings relating to the legal system. There is little recognition of the difficulties faced by people of limited literacy in interpreting legal terminology and information, and interacting with the legal system. Because of the embarrassment felt by those with limited literacy, judges and lawyers are often unwilling to screen clients to determine their literacy levels. The report notes that it is common for people with limited literacy skills to have low self-esteem and to be especially intimidated by people in authority. In conclusion, the report

calls for a systemic approach to identification of such clients and for dealing with their specific requirements.

Subsequently, the John Howard Society (1996) identified a specific goal: to raise the awareness of the Canadian judiciary to access barriers associated with limited literacy. A report, *Literacy and the courts: Protecting the right to understand*, and a videotape, *Literacy and the courts*, are offered to judges and other professionals involved in the administration of criminal law. The report suggests that the criminal court system discriminates against people of limited literacy, as it requires an ability to read and write, and to process and understand written communication. If judges are to judge fairly, they must become aware of the role of literacy practices in the court system, and the possibility that these practices can act as barriers to participation in the system by people with limited literacy. Specifically, Maher (1996) suggested that judges should not make assumptions about the literacy level of witnesses or parties, and should not assume any legal literacy, that is, understanding of legal terms or conventions.

A more recent online report, *Literacy, disability and access to justice* (Reach Canada 2003), acknowledged that limited literacy is not a disability but can limit a person's access to the justice system in a similar manner. The report highlights the concept of accommodation, that is, fostering 'a person's opportunity or capacity to achieve things in his or her own way, which may sometimes differ from how a majority of others in a society may achieve them'. The authors claim that those with limited functional literacy face barriers to access and participation in the justice system, and suggest that adjustments should be made to accommodate their situation. The nature of legal language raises a barrier for most people in the drafting of laws, legal procedures, contracts, court decisions, tribunals and commissions. These barriers are exacerbated in the case of those of limited literacy.

Throughout Canada, the Bar Association, the John Howard Society and Reach Canada have mounted campaigns to raise awareness by the legal and justice administration community of the likelihood of encountering limited literacy clients and witnesses. Professional development opportunities have been provided for judges, barristers and solicitors.

The Canadian Bar Association (2002) through a program called *Lanyers for literacy project*, has supported initiatives to improve lawyers' awareness of clients' literacy levels and to enhance their communication skills with limited literacy clients, for example, a pamphlet *Communicating clearly: How client literacy affects your law practice and what you can do* (Canadian Bar Association 1996) is available. Public awareness campaigns about the relationship between literacy and access to justice have been implemented in most provinces of Canada. Nonetheless, it is worth noting that the Canadian work has had the criminal justice system as its prime focus.

The use of technology has been suggested as a means to help limited literacy clients. Mitchell (2000) claimed that processes of the courts are replete with barriers to access, and suggested that the system should provide fair access to the exercise of their legal rights. She refers to literacy barriers encountered by pro-se litigants (those acting by themselves without legal representation), and acknowledges that many courts now assist clients to complete forms, but suggests that through 'the use of internet-based forms, pro-se litigants could help themselves by using on-line information assistance'. As noted, however, this raises new issues and possible barriers for those with limited first-language literacy.

## Literacy and the justice system in Australia

In Australia, the Law and Justice Foundation of New South Wales (2003) in *Access to justice and legal needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW* noted that literacy and numeracy are significant issues. The project report referred to the 1991 Australian Survey of Aspects of Literacy previously discussed, and suggested that:

Most information about the law is text based. Those with poor literacy skills may experience difficulties in both accessing information about legal rights and obligations, and in understanding any information they do manage to access.

(Law and Justice Foundation of New South Wales 2003)

The report also suggests that people with low levels of education and literacy have difficulty with the complexity of court processes, as well as with requirements in some jurisdictions for written applications and correspondence.

## Literacy, numeracy and alternative dispute resolution

While there is some evidence in the literature to suggest that awareness of limited literacy as a barrier to participation in the criminal and litigant court system is increasing, there are very few references to the significance of literacy barriers in alternative dispute resolution. Issues of language for speakers of languages other than English have been considered, as has the impact of Indigenous English, although these processes of resolution are promoted as consistent with Indigenous cultural values and as providing a means to maintain control of disputes.

The National Alternative Dispute Resolution Advisory Council report, *Issues of fairness and justice in alternative dispute resolution* (1997), previously noted, acknowledges the potential for power imbalances between participants in alternative dispute resolution. The report notes that situations can arise where participants are not equal in their capacity to utilise this process. These power imbalances can be related to race and/or gender, but can also reflect communication difficulties. Parties can differ in their ability to access and process information. Procedural bias can, in some cases, be attributed to language skills (p.28), non-English speaking background (p.18), or inequality in cognitive capacity (p.40). The report noted that some disputants 'will be less well equipped ... in their communication skills or in terms of the information available to them, for example, than others' (p.31). To engage in alternative dispute resolution, participants must be able to 'speak, hear, observe, reason, sustain a logical argument, remember, concentrate, understand, negotiate, communicate' (p.40).

The report proposed that alternative dispute resolution practitioners must respond to the specific needs of the individuals with whom they work and not make assumptions about the capacities of disputants on the basis of generalisations. All parties should be 'provided with what they need to participate equally and achieve a fair and just outcome' (National Alternative Dispute Resolution Advisory Council 1997, p.31), that is, substantive equality, which requires that unequals be treated unequally.

In alternative dispute resolution, a practitioner can introduce written text in several points in the process. Lists of issues might be prepared for discussion by the disputants, documents may be tabled for discussion, and finally, a written agreement is prepared by the practitioner. Boulle (2001, Item 5.44) noted that some clients in alternative dispute resolution had limited literacy—'Practical experience has taught me to be conscious of the fact that a significant proportion of adults are not literate'—and advocated that mediators must be aware of clients' potential difficulties with text, particularly in written agreements. The Society of Ontario Adjudicators and Regulators (undated) recognises the key role of the mediator in alternative dispute resolution in the preparation of a written agreement, 'especially in the presence of literacy and/or fluency issues'.

The research reviewed and cited focuses on literacy, particularly on understanding and communication. The international research does not refer to numeracy, despite the considerable range of financial considerations and mathematical procedures involved in legal cases. Most importantly, we have not located any research on limited literacy and numeracy as a barrier to participation in the justice system in Australia, and no Australian or international research on such barriers to participation in alternative dispute resolution processes, the focus of this study.

Recognition of the growing significance of alternative dispute resolution in Australian legal processes, and the real issue of limited literacy and numeracy for many Australians whose first language is English were the catalysts for this investigation of the impact of limited literacy and numeracy on participation in alternative dispute resolution. The study explores practitioners' perceptions of barriers that limited literacy and numeracy may pose for alternative dispute resolution and the extent to which participants' limited literacy and numeracy have been identified by practitioners, as well as practical strategies practitioners have developed to manage such issues. Perhaps most importantly, we sought advice from practitioners about how the issue of literacy and numeracy demands of alternative dispute resolution could be addressed within the profession.

# Methodology

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## Nature of the study

The study comprised information from two sources:

- ✧ surveys of individual alternative dispute resolution practitioners (appendix C) and organisations (appendix D) involved in alternative dispute resolution, especially mediation
- ✧ analyses of the literacy and numeracy demands of a sample of alternative dispute resolution materials.

Initial stages of the study included ethical approval from Griffith University and development of the surveys. The nature of the surveys was informed by the research literature findings which influenced the positive approach to practitioners and the seeking of vignettes that may be useful exemplar information for others. Both the surveys for individual alternative dispute resolution practitioners and organisations were critiqued by expert mediator Professor Nadja Alexander of the Centre for Peace and Conflict Studies, University of Queensland, and modified accordingly before administration. Professor Alexander was also significant in identifying the need to survey individual alternative dispute resolution practitioners (a shift in the original focus of the study), the range of backgrounds practitioners would bring, and possible sources of identification of alternative dispute resolution practitioners and organisations for the survey.

At this stage, it is important to emphasise that this study is exploratory: to determine whether alternative dispute resolution practitioners had encountered and recognised literacy and numeracy issues in alternative dispute resolution, as well as locating information on strategies for addressing such issues. The purpose of the study was not to provide a comprehensive overview of, say, the percentage of alternative dispute resolution practitioners who were aware of literacy and numeracy difficulties, or the number of parties engaged in alternative dispute resolution with limited literacy or numeracy. The purpose of the survey was to gain as comprehensive an overview as possible of literacy and numeracy issues within a range of alternative dispute resolution contexts.

## Survey of individual alternative dispute resolution practitioners

The aim of the survey for individual alternative dispute resolution practitioners was to identify difficulties that limited literacy and numeracy might cause in alternative dispute resolution; their familiarity with literacy and numeracy issues for English as first-language speakers; the strategies that alternative dispute resolution practitioners had used to address such issues; and recommendations by practitioners for appropriate ways to provide professional development in this area. The terminology used in the survey was 'low literacy and numeracy' as these terms are more commonly understood. However, in this report, in keeping with terminology used in the adult literacy and numeracy sector, the findings are discussed in terms of 'limited literacy and

numeracy', in recognition that individuals have different literate and numerate capacities in different contexts.

In addition to questions regarding the background of alternative dispute resolution practitioners, such as their training, experience and accreditation, practitioners were asked for information about their usual areas of alternative dispute resolution (for example, family, small claims, industrial); whether issues regarding literacy or numeracy had arisen during alternative dispute resolution and how they might identify these; and how they had been able to resolve any such literacy or numeracy issues within an alternative dispute resolution process. Practitioners were asked to provide vignettes from practice, and, finally, for any recommendations to practitioners for increasing awareness of literacy and numeracy issues within alternative dispute resolution.

## Method of administration

A list of alternative dispute resolution practitioners was compiled from electronically available court lists, and lists published by organisations such as the Institute of Australian Mediators and Arbitrators. From this list, a random sample of 232 alternative dispute resolution practitioners from across Australia were selected for the survey. A return rate of nearly 28% was achieved, although spread unevenly across the states. This, however, reflected the numbers of surveys that could be distributed, which in some states or territories were quite small. Fifty-one responses were provided in all, drawn from all states and territories, nearly two-thirds (65%) from New South Wales and Victoria (see table 1 in appendix E), providing a rich resource for analysing literacy and numeracy issues in alternative dispute resolution and directions for future training.

## Characteristics and areas of alternative dispute resolution of practitioners

The characteristics of the alternative dispute resolution practitioners to the survey, their accreditation and areas of practice are recorded in tables 2–6 in appendix E. The purpose of the study was to identify issues relating to the impact of limited literacy and numeracy on alternative dispute resolution, and to gain information from practitioners that could usefully inform future practice. Therefore, the critical issue in examining the background information of the practitioners was identifying a depth of experience and breadth of practice suitable for informing the study.

Eighty per cent of the alternative dispute resolution practitioners were male. The majority recorded considerable years of experience, with 49% reporting over ten years of alternative dispute resolution experience. Sixty per cent were accredited with the Institute of Australian Mediators and Arbitrators, nearly 30% with Leading Edge Alternative Dispute Resolution, 20% with a law society and 8% with a bar association. Forty-five per cent noted other accreditations (see table 3 in appendix E).

Alternative dispute resolution practitioners had a range of professional qualifications (appendix E, table 4). Approximately half were legally qualified and practising as solicitors or barristers. However, 37% were not legally qualified. Some alternative dispute resolution practitioners noted other professional qualifications directly related to their work, such as in engineering or accountancy. Overall, the individual alternative dispute resolution practitioners who responded to the survey were well experienced, with a range of professional backgrounds.

One possible critical factor for literacy and numeracy difficulties in alternative dispute resolution is the role of the court in ordering parties to mediation, and the role of the alternative dispute resolution practitioners in establishing the assistance to be available to the parties, such as legal representation. Approximately half of the practitioners (Appendix E, table 5) engaged in court-ordered alternative dispute resolution in a range of courts, including supreme, district and county courts, and tribunals, with such work (up to 80%) constituting a considerable part of the practice

of some practitioners. Therefore, they were well placed to provide insights into the impact of court-ordered mediation on parties with limited literacy and numeracy.

The practitioners cited involvement in a range of alternative dispute resolution settings with a range of parties to provide informative comment and suggestions regarding literacy and numeracy impact on alternative dispute resolution. Most practised in a number of areas, with the exception of those involved in large commercial alternative dispute resolution (Appendix E, table 6). Contexts for alternative dispute resolution ranged from family and social environment disputes, to workplace and a range of construction and commercial environments. These contexts also present a range of possible scenarios for alternative dispute resolution. In small social settings, parties are likely to be similar in background and power; in small claims and local government settings, one party will be an individual while the other is likely to be more powerful or authoritative. In commercial settings, especially large commercial disputes, both parties are likely to be well resourced. Since large financial sums are likely to be involved, both parties are likely to have adequate legal representation, even for alternative dispute resolution procedures.

Appendix E: Individual alternative dispute resolution practitioner participants in the study can be found in the support document on NCVER's website <<http://www.ncver.edu.au>>.

## Survey of alternative dispute resolution organisations and responses

A similar letter requesting participation, and a questionnaire addressing similar areas of interest as the Survey to Individual Mediators were developed and sent to 28 organisations (appendix F) involved in alternative dispute resolution, including law societies. Briefly, the advice sought from the organisations, in addition to information about accreditation and awareness of any professional development in literacy and numeracy for alternative dispute resolution practitioners was:

*Do you consider ADR practitioners are usually able to determine if a party to be involved in ADR has difficulties in literacy or numeracy? If so, how would they do this?*

*From the experience of your members, what aspects of ADR processes could cause difficulties for parties with low literacy levels? What do you consider would be the possible impact for different types of ADR (for example, negotiation, mediation, voluntary versus court-ordered mediation)? (again, any vignettes of actual mediation experiences would be welcomed)*

*What aspects of ADR processes could cause difficulties for parties with low numeracy levels? What is the possible impact for different types of ADR (for example, negotiation, mediation, voluntary versus court-ordered mediation)? (again, any vignettes of actual mediation experiences would be welcomed)*

*How do you consider such issues in literacy and numeracy could be/have been addressed?*

*Finally, what suggestions would you make for enhancing awareness of ADR practitioners of the potential of encounter with clients with literacy and numeracy difficulties and who may not make these difficulties known?*

Six organisations replied, with one survey returned due to change of address. The responding organisations came from five states, and included law societies, a bar society, the Institute of Australian Mediators and Arbitrators state chapters, a community organisation and a supreme court registrar. Three of the responses, from different strata of organisations, were from Victoria. It is interesting that the original intent of the study was to focus on responses from institutions. However, identification of the individuality of alternative dispute resolution practitioners' work, and the limited central control of alternative dispute resolution accreditation at the time of the study led to a change in direction to focus on the individual surveys. In general, the responses from the organisations indicated that this was the appropriate approach to have taken. Responses

from organisations tended to be provided by individuals in the organisations, an approach that had been indicated as appropriate in the invitation to participate.

## Consideration of the literacy and numeracy demands of materials involved in alternative dispute resolution

Alternative dispute resolution requires completion of forms, exchange of documents, and communication among parties prior to, during and on completion of the alternative dispute resolution. As shown in the first chapter, the actual engagement of parties during an alternative dispute resolution process can require on-the-spot reading, writing and listening skills. However, the documentation that arises from participation in general, from the initial request or order to participate in alternative dispute resolution may exert considerable literacy and numeracy demand. In order to explore the nature of the literacy and numeracy demands to be met by participants, a sample of documents was provided to adult literacy and numeracy and communication consultants, Ms Rosa McKenna and Ms Lynne Fitzpatrick of COMMET Pty Ltd, for analysis against the National Reporting System. The National Reporting System provides a scale for reporting adult literacy and numeracy performance against five levels, with level 5 being the highest. This level is similar to an Australian Qualifications Framework certificate level IV or higher. The National Reporting System has also been used in the context of training packages and other workplace materials.

The materials provided for analysis included application forms for participation in alternative dispute resolution, as well as a sample of authentic documents arising out of a dispute resolution provided by a practitioner.

## Limitations

Through the review of literature, we established that limited literacy and numeracy may create a barrier to fair and effective participation in the justice system in general, with limited research exploring this issue outside areas of criminality. We also established that little is known about the impact of limited literacy and numeracy on fair participation in alternative dispute resolution, especially the increasingly commonly used process of mediation. This study, therefore, is very much an initial investigation of this area. It has sought to identify issues of awareness, strategies for ameliorating limited literacy and numeracy in public encounters, and offer suggestions for the future. Sufficient information has been gained to move forward.

The focus of the study and findings is on explicit and hidden written literacy and numeracy requirements, and concern that what is promoted as a fair and mainly oral process also requires a considerable degree of high-level reading, writing and mathematical skills, disadvantaging those with limited skills in these areas. However, the whole alternative dispute resolution process is based on oral communication and negotiation. While practitioners may endeavour to keep oral language at an everyday, rather than legal level, the listening and communication demands are constant and very high. It has been suggested, but without empirical evidence, that lack of reading and writing skills increased the hearing demands for parties in legal contexts. Without the ability to rely on written prompts, the total oral communication demands of processes may also be increased. Therefore, in reading the findings of the study, the reader is reminded that participants in an alternative dispute resolution process are experiencing a constant literacy and numeracy-filled context, listening, speaking, thinking critically about options, considering spatial and numerical information, as well as undertaking reading and writing in these areas. This context should be used to frame the reading of the findings.

The study is not a representative study of alternative dispute resolution practitioners' awareness of literacy and numeracy issues. A limitation of the study is simple recognition that alternative dispute resolution practitioners who reported that literacy and numeracy issues were not an issue in their practice may not have identified that the issue was present. As one practitioner did indicate, 'If I don't know, how would I know?'. This limitation is considered in the final chapter.

# Findings

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## The literacy and numeracy demands of alternative dispute resolution, perceived barriers, and impact of limited literacy and numeracy levels

As noted previously, while the original focus of the study was to be on information collected through alternative dispute resolution organisations, identification of the range of ways alternative dispute resolution practitioners could enter practice and their autonomy, changed the direction of the study to focus on these individuals as a major source for information. However, the organisations are critical in considerations of literacy and numeracy issues in alternative dispute resolution, as these organisations help to establish accreditation guidelines and promote professional development activities. In this section, we combine the responses from both the surveys.

Thirty-two of the individual alternative dispute resolution practitioners identified specific aspects of alternative dispute resolution processes that may create difficulties for parties with limited literacy levels. For one respondent, the primary presumption that parties are functionally literate and numerate presented the first barrier.

Within ADR, there is an apparent presumption ... that participants are functionally literate. Usually in workplace disputes they are, but not always.

Several practitioners noted issues related to the use of written materials as barriers in mediation for parties with limited literacy and/or numeracy: whether understanding of paper documents (agendas, agreements, notes and background materials); writing on the whiteboard; difficulties in writing expectations and issues; as well as the general issue of the language demands in settlement and alternative dispute resolution documentation. Once again, the perceptions ranged across a range of alternative dispute resolution contexts.

Written documentation is prevalent—processes like preparing an agenda, writing on a whiteboard.

Understanding concepts and language in settlement documentation.

... court-based mediation. Basic lack of comprehension about the documents, the notices explaining the process, pre-mediation procedure and the process itself. A party with a low literacy level is in an unequal bargaining position, for example, in minor civil claims which I mediate in Magistrates' Court where parties are not represented, in both negotiating and mediating.

One alternative dispute resolution practitioner suggested that, while it is commonly assumed that background materials have been read by all parties, that is not always the case, whether parties are literate or not.

Thirteen alternative dispute resolution practitioners referred to difficulties encountered when one or both parties has limited numeracy, noting that such difficulties are more likely to become

apparent when financial matters are discussed. Their comments, drawn from a range of contexts, but with many in construction and commercial negotiations, identified that lack of numeracy could put a party at a disadvantage at the time of settlement.

Much injustice can occur through the power imbalance of numeracy skill and the assumption that all professionals have it.

Calculating percentages, whether offers are 'good'.

In some building cases, calculations and quantities are relevant, hence low numeracy adversely affects all stages, and may even have been the prime cause of the dispute.

It is common in research on the impact of limited literacy and numeracy for the emphasis to be on literacy, with numeracy a very secondary matter. In alternative dispute resolution, the considerable documentation and the process have the capacity to be the major barrier. However, the majority of alternative dispute resolution cases will involve a financial dispute and will require a financial settlement. Many disputes arise from property location and developments, requiring not only basic numerical calculation skills, but skills in reading maps and interpreting data. The responses provided by the practitioners indicate that limited numeracy can be very much an issue for alternative dispute resolution.

[The same] as for literacy, but numeracy [difficulties] could be seen in map reading and documents.

While financial matters are very commonly an issue, practitioners noted that, in this context, parties may still be very unwilling to disclose their numeracy difficulties.

This is more subtle. There is often discussion on options which involve numbers but rarely do people explicitly indicate their low levels.

Finally, one practitioner reported, in some apparent frustration, experience 'with the low numeracy levels of lawyers who are often unclear (or just plain wrong) about the financial outcomes'.

The impact of limited literacy and numeracy was considered by some alternative dispute resolution organisations to be potentially considerable.

The negative impact would obviously be greatest on unrepresented parties. Beyond that, people with poor literacy would be disadvantaged in terms of understanding the concepts of 'without prejudice negotiations'; 'confidentiality'; the effect of Terms of Settlement, especially if they are complex.

Board work is common, that is, agreements and background information are written upon board for clients to reflect and keep. Court-ordered mediation and conciliation are more time-pressured. More risk of literacy problems (a) not being detected or (b) not adequately addressed.

In property, Family Law mediation and conciliation, numeracy is an important capacity. Discussions can include complex calculations. It is common to have clients with poor numeracy skills, which requires modification to the process. Again time pressures in court ordered are a problem.

One organisational response indicated that literacy and numeracy issues would not be relevant to their alternative dispute resolution practitioners.

As barrister mediators we normally rely on legal advisors who also participate therefore relying on them to deal with client literacy/numeracy issues.

Another response cited a case where limited literacy and numeracy had not interfered with effective outcomes.

Although the majority of parties who play an active part in mediation are from a higher socioeconomic group and have a high range of literacy and numeracy skills, there are some exceptions. I am unsure why but a number of farmers who have low level literacy and numeracy skills who have taken part in testator family maintenance applications have played an active part and have not, in my view, been disadvantaged by their inability to read and write.

Seven respondents nominated the failure by some parties to understand the process of alternative dispute resolution as a significant issue for parties with limited literacy. This lack of understanding might become apparent at different points of the mediation and relate to specific literacy or numeracy skills interacting not just with the documentation, but with the whole alternative dispute resolution process.

In the initial understanding of the situation ... this could be a communication problem where the map, plan, figures document is misunderstood. In the stage of negotiating the lack of literacy could be a block to creative solutions or even trusting the other party. In reality, testing the lack of literacy could lead to misunderstanding possible outcomes, both positive and negative.

At a broader level, a failure to understand the nature of the mediation process can be problematic.

In some cases, the parties do not understand the differences between adjudications and non-adjudicative processes. For example, they may expect an arbitrator to mediate or vice versa. The difference between conciliation and mediation is also not generally understood. Many have not heard of expert appraisal as an ADR process.

Limited numeracy can impact on the process and on cost and time factors in alternative dispute resolution. Reliance on others to assist with financial considerations can be a problem, while lack of certainty that a party fully understands costs in an agreement that has been reached, and is knowingly agreeing to the outcomes, presents problems for other practitioners.

One obvious difficulty is the possibility of having to continually break off the mediation to allow one party access to expert assistance in doing their sums.

Unless there is a support person or someone who might have to represent the person, it would be almost impossible to avoid a power imbalance between the parties.

Alternative dispute resolution practitioners were asked if some types of alternative dispute resolution might be more affected by limited literacy and numeracy. Practitioners' responses were mixed, although overall, most indicated that the type of alternative dispute resolution would not be the major issue, as all would make the party vulnerable. The smaller the negotiation (one-on-one), the more the person was likely to be affected. The organisational responses were mixed in observations about the likely impact of limited literacy and numeracy on alternative dispute resolution and on the balance of powers between parties. However, several individual practitioners noted the impact in terms of power imbalance, an area they attempt to address.

There is obviously the standard problem of a power imbalance. In my experience, there are always imbalances between the parties across a whole range of matters. The skill of the mediator is to be able to identify them and see that they do not provide an unbalanced outcome. If the party with the preponderance of power achieves an agreement which the other party cannot or will not perform, reality testing a possible agreement for robustness is important to establish whether the stronger party wants an agreement of a kind that will not work.

Where parties are attempting to negotiate between themselves, the party with the better negotiating skills, or who is more articulate, usually achieves a better outcome—one more

sympathetic to their point of view—than the other person. The mediator can balance the situation so that both receive a ‘fair go’.

Some practitioners returned to the issue of whether parties understood the overall purpose and processes of mediation.

All types of ADR will present difficulty to any party with low literacy skills.

The unfortunate formalisation and love relationship that Australians have with legalism. At various workshops the poor Anglo-Saxon has trouble with *informalism* which is the root of satisfactory outcomes in my experience of ADR.

The organisations in general did not foresee additional, or different impacts of limited literacy or numeracy in court-ordered alternative dispute resolution compared with voluntary alternative dispute resolution.

... in the vast majority of settlement conferences or mediations in the Supreme Court of x the parties are represented by legal practitioners. Low levels of literacy or numeracy will not be apparent or, alternatively, will not be relevant.

Another response identified a different problem of time pressures.

Board work is common, ie. Agreements & background information is written upon board for clients to reflect and keep. Court-ordered mediation and conciliation is more time pressured. More risk of literacy problems ... not being detected or not adequately addressed.

## Literacy and numeracy demands of alternative dispute resolution documentation and processes

Engagement in alternative dispute resolution processes requires the completion of a number of forms to begin dispute resolution, as well as engagement with documentation about the dispute, prior and during the alternative dispute resolution process. While many disputes may be taken by parties directly to alternative dispute resolution, a common route is through a formal complaint. For example, at present, to commence a domestic building dispute in Victoria, an application form for the Victorian Civil and Administrative Tribunal must be completed. Claims below \$10 000 are listed directly for hearings, claims between \$10 000 and \$100 000 go to mediation automatically, and complex claims or those in excess of \$100 000 will ‘generally’ be referred to mediation.

The application form has four pages of guidelines with examples. On the face of it, the form appears to be relatively straightforward and simple—two pages, lots of white space, apparently short sentences and limited request for information. However, the substance of the questions is as follows:

Name of applicant(s)

Address(es) [*include phone/fax number(s)*]

Status [*specify whether owner, builder, sub-contractor, architect, or other*]

Address for service of documents [*if different from above*]

Site address [*if different from above*]

Name of Respondent(s)

Address(es) [*include phone number/fax number(s)*]

Status [*specify whether owner, builder, sub-contractor, architect, insurer, or other*]

## ORDERS SOUGHT

I apply to the Tribunal for the following orders *[describe the order or orders sought e.g. \$ as cost of rectification]*

on the following grounds *[give a brief description of the ground or grounds eg. stairway poorly constructed]* *[Please attach a separate page if insufficient space]*

The total claimed does [or does not] exceed \$10,000.

Total claimed \$

Insurance appeals *[give insurer's reference number and date decision received]*

THREE COPIES ARE TO BE FILED WITH VCAT (address provided)

## NOTICE TO THE RESPONDENT

The Tribunal Registry will send you notice in writing of the date, time and place of the listing of this matter, together with information about the Domestic Building List. If your address for service is incorrectly stated in this application, you are required to immediately notify the Registry and the other parties in writing.

(Victorian Civil and Administrative Tribunal website)

Clearly, the advice is that such a form should be filled in with assistance, preferably expert assistance—appropriate advice for all home builders with a dispute, regardless of literacy and numeracy skills. However:

A party may be legally represented at a hearing if all parties agree, or with the permission of the tribunal, or if a party (such as an insurer) who is permitted to be represented is so represented. The extent of the participation of legal representatives at a mediation is largely dependent on the co-operation of the parties.

An unrepresented mediation would clearly provide difficulties for those with limited literacy and numeracy. The weaker party is reliant on the goodwill of the other party.

To obtain a preliminary sense of the literacy and numeracy demands of these types of materials, samples of materials used in the process of entering a mediation, along with samples provided by a practitioner from a building dispute involving a house owner and the builder were provided to adult literacy and numeracy consultants. The consultants were asked to consider these materials against the National Reporting System framework. As noted, this framework has been developed in Australia for estimating the demands of different educational programs and work activities. Its use has been expanded to include identification of appropriate literacy and numeracy training needs and consideration of literacy and numeracy demands. It is the most appropriate current rating tool for looking at demands of materials in English. The framework has five levels. Most tertiary training programs would require engagement with material at level 4 or above. As a guide, a level 5.1 descriptor is *Reads and interprets structurally intricate texts in chosen fields of knowledge and across a number of genres, which involve complex relationships between pieces of information and/ or propositions.*

The first materials were a set of guidance notes and an application for conciliation and arbitration issued by the Institute of Australian Mediators and Arbitrators. Table 1 provides the summary rating of these materials against the National Reporting System.

**Table 1: National Reporting System alignment of Institute of Australian Mediators and Arbitrators materials**

|                | Reading  | Writing  | Oral communication             | Numeracy       | Learning strategies |
|----------------|----------|----------|--------------------------------|----------------|---------------------|
| Guidance notes | 5.1, 5.2 | –        | 5.8, (5.6, 5.7) <sup>(a)</sup> | –              | –                   |
| Application    | 5.1, 5.2 | 5.4, 5.5 | –                              | <sup>(b)</sup> | –                   |

Notes: (a) Guidance notes refer to possibility of an oral hearing (5.3 [h]). Given the possible nature of the interchange, it is likely a high level of transactional and interpersonal skills would be required.

(b) Would vary in complexity from case to case; would involve all 4 numeracy Indicators at a particular level.

Overall, if the guidance notes and application form are to be handled as written materials and without assistance, they require the highest level of fluency, level 5 of the National Reporting System at least. The difficulty is compounded by two main factors: the legal terminology even in its simplest form, terms such as ‘conciliation’, ‘liable’, ‘omission’, words not commonly used outside a legal environment, and others, such as ‘orders sought’, ‘rectification’, ‘service of documents’ and ‘grounds’ (not the land on which the residence is being built). The other factor is the complexity of the sentence structures, including the use of conditional clauses (‘if’, ‘unless’) or the use of negatives. Applicants are also required to complete financial details in the application. The written skills demanded by such forms are high.

While the application forms are presented as simple documents, rules of the various dispute resolution organisations require the parties to sign that they have read the rules which include this language. In addition, as the consultants noted:

[Q2 on the application] requires that those completing the form can write with objective writing skills, separation of fact from opinion/fantasy, sequencing, dot point form. It requires skills at NRS 5 (logical and transparent organisational structure, using support material effectively, command of structures, register, vocabulary, punctuation, layout).

The demand for numeracy skills was also high. Moreover, if the participant was engaged in oral hearings, ‘it is likely a high level of transactional and interpersonal skills would be required’.

The general comments made by the consultants regarding the sample guidance and application form were that:

Many people without skills at NRS 5 (a significant section of the population) could be disadvantaged in this process unless there is some provision of support available. In addition to the skills required directly in applying for Arbitration or Conciliation, there are also the implicit literacy skills in the process ... it requires that people have understood that the process is ‘paper-based’, understand what is relevant by way of supporting documentation, and kept ‘paperwork’ in some sort of orderly manner.

### *National Reporting System alignment of documents involved in a mediation*

The mediation documents provided for analysis drew from a middle-range financial dispute over construction and building contracts. Table 2 provides the consultants’ analysis of the National Reporting System alignment of the demands of these materials. Once more, the requirement was at the highest level of the system. Again the analysis focuses on the written literacy and numeracy demands. Clearly, the level of oral communication, listening and speaking skills, and strategic thinking during mediation would also be extremely high. As the practitioner who provided the example commented, both parties (one a representative) in the dispute were educated, literate and articulate in their fields. One party sought to enhance their argument through complex legal arguments. The other party’s representative made only simple representations that were found

sufficient. However, reliance on increasing the complexity may be common in disputes among unequal parties. Construction and building contract disputes are also quite frequent.

**Table 2: National Reporting System alignment of sample mediation materials**

|                                                            | Reading       | Writing  | Oral communication | Numeracy               | Learning strategies |
|------------------------------------------------------------|---------------|----------|--------------------|------------------------|---------------------|
| Documents that a party to mediation may have to comment on | 5.1, 5.2, 5.3 | 5.4, 5.4 | –                  | 5.10, 5.11, 5.12, 5.13 | –                   |

The literacy and numeracy consultants commented:

The mediation examples under discussion are those involving claims of costs related to building contracts. These are complex written accounts given the various roles of Proprietor, Builder/architect, Contractors, and Sub-contractors, compounded by legal terminology: Arbitrator, Claimant and Respondent.

... To participate in this Arbitration seems to require that all Parties are familiar with the contents of all documents, and are able to use them to support their position ... It would seem that the Claimant is also required to know how to structure a Claim, i.e. that a Claimant needs to know to separate out legal expenses from other costs. Is this sort of knowledge reasonable to expect from a participant without legal training?

The documentation is confusing, in that there are two columns of figures, one which gives item expenditure, and the other appears to give a total figure for items. The Arbitrator interpreted the figures differently from how they were interpreted by the Claimant. How the columns of costings were to be read and added may have been at the core of the dispute.

A second issue related to the case, was the exclusion of ... from the original schedule on which the claimant based his tender price. The Respondent admitted that this was an omission on his part, but argued that the supporting documentation was sufficient to indicate the existence of the ... It was the responsibility of the tenderer to 'read between the lines'. This was supported by the Arbitrator.

The arbitration process would seem to indicate a numeracy level at NRS 5 is required. This means a person needs to be able to argue their case at arbitration by:

- ✧ Locating and accessing information not provided, and identifying miscellaneous and/or misleading information.
- ✧ Examining and ordering information, representing it in an alternative form for the audience
- ✧ Using developed estimating skills to check calculations and outcomes
- ✧ Comprehending activities or tasks which include mathematical symbolism and language and rely on knowledge of mathematical conventions.

The literacy and numeracy consultants found that the mediator's report was also very demanding in terms of literacy and numeracy. This mediation was a middle-level dispute in terms of contracts and costs. Some may consider this an unlikely area of dispute for those of limited literacy and numeracy skills. However, as noted in the introduction to this report, Australians from all levels of occupations and socioeconomic status have been identified as having limited literacy and numeracy. Many of these Australians were working in trade areas and handling budget estimates, invoices and so on. As one practitioner had noted, problems with the 'paperwork' are an underlying cause of many disputes.

The outcomes of these analyses of documents, both prior and related to a mediation, indicate that, in terms of written documents, alternative dispute resolution processes place high literacy

and numeracy demands on parties. Discussion concerning the content of such documents must also place high oral communication demands on parties, while the actual process of mediation during which whiteboards and the supporting documentation are used, must create a highly, and ongoing, demanding language environment.

## Summary of findings of literacy and numeracy demands of alternative dispute resolution

The responses by individual alternative dispute resolution practitioners and organisations and the alternative dispute resolution document analyses converge in finding that alternative dispute resolution involves considerable prior and ongoing written activity, demanding high levels of reading, writing and mathematical skills. These activities are likely to challenge parties to a dispute with limited literacy and numeracy in their first language, English. The challenges would seem insurmountable if the alternative dispute resolution were to proceed without representation or assistance. Power imbalances may still occur if one party had limited literacy and numeracy skills and required assistance. Furthermore, the pressures of court-ordered mediation may increase the impact and imbalance created by limited literacy and numeracy.

Alternative dispute resolution is promoted as an oral process. The foregoing discussion indicates that not only the explicit and implicit reading and writing demands may create barriers for those with limited literacy and numeracy in English, but also access to alternative dispute resolution; the concomitant oral communication processes may create additional challenges for those involved in disputes.

## Practitioners' identification of and response to limited literacy and numeracy issues for mediation

Our conclusion is that alternative dispute resolution may present difficulties for those with limited literacy and numeracy. We have also noted that many Australians with English as their first language, of all ages, in all types of work or personal situations, may have limited literacy and numeracy. The question that arises is whether such individuals have difficulty in engaging successfully with alternative dispute resolution, and whether limited literacy and numeracy is still affecting their ability to engage with the law.

From the review of literature, we noted a Canadian study which reported that 73% of lawyers had identified clients with poor literacy. While this figure is more likely to be expected in the criminal context, the alternative dispute resolution practitioners in this study noted that many disputes arise due to problems with the 'paperwork'. The expectation is therefore that many Australians engaged in alternative dispute resolution are likely to have limited literacy and numeracy.

Do parties come to alternative dispute resolution with limited literacy and numeracy? A number of alternative dispute resolution practitioners provided written vignettes, sample files and materials demonstrating that this occurred. The selection below demonstrates the significant and specific impact that limited literacy or numeracy skills could have on outcomes. Additional vignettes are provided in appendix G.

An Aboriginal man, badly injured feet at work, provided with workers' compensation form to complete—does not as he cannot read it. Eventually comes to attention of Aboriginal Legal Aid Solicitor who puts in an out of time application. Aboriginal worker returns to work before he should disregarding Doctor's advice—makes injury much worse. Then is required by insurer to attend to see specialist interstate. This is explained by the solicitor but worker decides it is too difficult for him to travel interstate and refuses, thus losing right to workers' compensation.

At one workplace grievance mediation the workers (4) refused to sign a long and 'legalistic' agreement to mediate. It turned out that the manager was illiterate. The workers in the dispute with him still protected him—a good omen for the mediation.

I did a coaching session with a party who was an Aboriginal. In the course of the mediation I summarised what I understood was going on using the whiteboard to draw in diagrammatical expression of what I saw was happening in view of the process of the meeting. I explained what the bits of the drawing were as I went along. At the end of my summary both parties asked me questions and the Aboriginal guy became very active and in a later stage in the mediation asked if he could use the board to describe what he wanted to say. Hence the use of drawings and the explanations to go with it became a major sense of communication for this mediation. Perhaps for some people they use the written format to understand and the problem therefore is making sure the written is 'shared meaning'.

A number of practitioners referred to situations where English was not the first language of parties.

In one dispute over construction of a new house one party with limited English could not understand the difference between 'overlooking' and 'overshadowing'. She was so emotional about it that she never did and we did not get an agreement even though building a mirror image house would have solved all problems.

The individual practitioners, all of whom had extensive experience in this area, were asked if they had identified whether a party in an alternative dispute resolution process had literacy and numeracy difficulties, and how this becomes apparent.

The data indicated that literacy and numeracy issues were largely determined by the specific context. In general, many alternative dispute resolution practitioners (22) practising for the 'big end' of town, or for large-scale commercial, building and construction bodies, indicated that they had not experienced such situations. These practitioners indicated:

Not usually. In most cases, the parties are usually represented by solicitors and or barristers who provide the parties with advice in understanding the particular ADR process, their legal rights, and the financial consequences of agreements or concessions.

Three respondents in 'social' areas of alternative dispute resolution (family, workers' compensation, community disputes) indicated they were not aware of limited literacy of clients, noting that 'in court-ordered mediation either the parties are legally represented or the relevant registry *usually* has some notice'. In situations where parties to the alternative dispute resolution are supported by solicitors or the like, then it is these individuals who are in a position to identify literacy and numeracy deficits. One respondent indicated that the large proportion of a mediation was 'oral', and hence, literacy would not be an issue.

Just over the majority of the practitioners (26) indicated more direct awareness of literacy and numeracy issues, and their capacity to determine limited literacy and/or numeracy. Seven practitioners nominated specific categories of persons where difficulties had been encountered. These practitioners, with a variety of alternative dispute resolution experience, practised in a range of contexts, from building development to workers' compensation to aged care.

Five referred to parties experiencing difficulties because of limited fluency in the English language. Of these, two barristers noted that limited fluency in English should not be confused with limited literacy—difficulties are 'usually only ethnic/linguistic, not literacy per se'. Another alternative dispute resolution practitioner felt that he was able to identify parties with limited literacy and/or numeracy, as 'I have worked in traditional/immigrant societies and therefore may be more attuned', while another indicated awareness when an interpreter was present.

One practitioner indicated that if the party was an Indigenous person, they should be represented in alternative dispute resolution by a solicitor, as should a person with a disability. An aged

person is also usually advised by an aged care provider or advocate, or family member. These responses confirm awareness among practitioners of the different information access requirements raised by the National Alternative Dispute Resolution Advisory Council (1997) for different cultural groups, but perhaps showed less insight into possible literacy and numeracy issues.

## Ways of identifying limited literacy and numeracy

Ten alternative dispute resolution practitioners indicated that they had identified instances of limited literacy and numeracy through personal observation of the behaviour of a party or parties in a dispute. These responses occurred across a range of contexts, commercial as well as social, and encompassed documentation and its discussion, oral language skills, or apparent numeracy difficulties through failure to comprehend settlement proposals. Again reference was made by some alternative dispute resolution practitioners to specific groups such as those with 'mental impairment' (medical negligence mediation), or second language speakers.

Easily, as I mediate with the lower end of the building industry which is dominated by New Australians and local tradespeople.

If there is a significant deficiency, it would become apparent during the discussion or written material.

One practitioner recorded two instances of parties staring incomprehensibly at the whiteboard when used.

Four of the practitioners nominated the specific cues they use and which other practitioners could adopt to alert them to limited literacy; for example, paying close attention to statements such as 'I forgot my glasses' during or prior to mediation. Some respondents noted that awareness of literacy or numeracy difficulties could occur late in the process.

In most situations, I have asked all parties if using pen and paper or whiteboard or maps or plans are [sic] useful in discussing the issues. I always take the position that all paper needs to be fully explained as I take for granted that someone may not have the assertive power to express their lack of literacy. It is also evident in the course of the meeting if a person is unable to interpret the information being provided.

If a party was skilled at concealing their disability, I could [would] be unaware of it.

These responses showed that limited literacy and numeracy of parties had been observed and were not confined to the cultural categories previously nominated, nor to the background of the individual. The practitioners were working to resolve industrial relations and workplace disputes, equal opportunity and sexual harassment issues, contracts, commercial, building, and local government matters, partnerships and franchise, as well as family and personal injury disputes. The responses provide confirmation that a number of Australians working and living across the spectrum of income, activity, cultural groups and socioeconomic class not only become engaged in alternative dispute resolution, but also may, and have limited literacy and numeracy. More importantly, the implication is that the parties do not initially draw attention to these difficulties; practitioners have identified it for themselves during the process.

Several alternative dispute resolution practitioners referred to disclosure by the party or by another agency. These practitioners tended to be drawn from the social end of mediation—family, small claims or community disputes.

One practitioner indicated using general socioeconomic status as an indicator to check on literacy.

I agree that low level literacy is not synonymous with low socioeconomic status or unemployment. However, indicators of low socioeconomic status or unemployment tend

to make me more aware of possible limitations to the literacy level. Also, I find literacy level in English is no indicator of intelligence (particularly in second language contexts).

For a number of alternative dispute resolution practitioners the significant issue was the extent to which any or all of the parties understood legal procedures. One response revealed the possibility of underlying literacy and numeracy difficulties for a party.

My mediation practice usually originates as an advocate for a builder or property owner. Both parties rarely have any knowledge of 'legal process'. Many of my builder clients are usually *reliant on their wife to do the books and write letters* (our emphasis). Property owners also are not familiar with the process and both parties think the system can be 'bluffed'.

The organisational responses varied on the issue of whether limited literacy and numeracy of parties to a dispute would be identified by practitioners. Some indicated that individual difficulties would be quickly identified by practitioners.

There is no doubt at all that the mediator would see this, very early on in the process. Many building disputes arise because the contractor has not attended to 'the paperwork' which is a reflection of poor literacy. I'm sure this occurs in a lot of other areas of commercial dispute.

Mediation intake requires careful assessment & willingness plus capacity, including literacy capacity.

Others however were less sure.

We do not consider that ADR practitioners are normally able to determine if a party is having these difficulties and these issues are not covered in training (basic or advanced). ADR practitioners with a teaching background may be better placed to recognise these difficulties in parties.

One difficulty is knowing with certainty that a party does in fact have literacy and/or numeracy problems.

## Strategies practitioners use to address limited literacy and numeracy

Alternative dispute resolution practitioners are generally trained in strategies to address conflict and to seek to redress potential power imbalances. As the National Alternative Dispute Resolution Advisory Council report (1997) cited shows, issues of equity and fairness are the major focus of alternative dispute resolution, reflecting its origins in community, non-legal and non-adversarial settings. Practitioners are trained in and need a range of skills and alternative communication strategies. Organisational responses to the surveys noted that training and professional development emphasising the importance of being sensitive to issues with the potential to create imbalance or difficulties in successful alternative dispute resolution for both parties. The oral processes of alternative dispute resolution were considered appropriate for addressing limited literacy and numeracy among parties, with the current training of practitioners considered by most to be useful. In commercial disputes, legal representation was also likely.

In regard to mediation, parties use their oral capabilities primarily and it is often difficult to identify any lack of literacy or numeracy unless they have a demonstrated difficulty in reading or understanding what is written on the whiteboard.

Many individual practitioners indicated that literacy and numeracy did not present a problem, not only because of representation or the high commercial value of the disputes being resolved, but also because the practitioners considered that techniques acquired through training, and sensitivity to issues, should prevent problems.

Few problems encountered. Any linguistic/cultural (difficulties) are usually comfortably dealt with via interpreters, support persons, mediators' technique etc.

With numeracy, figures normally only arise in commercial matters where parties are numerate.

Literacy levels vary commonly between parties in neighbourhood/community disputes. Among Anglo-Australians of any age, in my experience, low literacy of itself has not proved to be problematic in the progress of a mediation ... Occasionally a party may have a support person (who is literate/numerate) and can also assist here, particularly in a private session before the end of the mediation to go through the agreement with the party and then, with the party/mediator, before re-convening the session for a signing phase.

Three practitioners in the area of family, workers' compensation and community also indicated no awareness of difficulties for parties.

Five individual alternative dispute resolution practitioners highlighted the need to have and to use a range of skills and alternative communication strategies to overcome problems arising from limited literacy and numeracy. They saw the need for practitioners to quickly diagnose limited literacy in a party or parties. The responding practitioners practised across the spectrum of mediation contexts.

Need to communicate using hearing, vision and reading. Identifying strengths and weaknesses of parties. Mediation and negotiation give better chances of identifying and finding better methods to communicate.

I see the role of the mediator as quickly identifying with a person of low literacy and helping them through patience and understanding and a vast range of mediation skills to make the process more readily understood and user friendly.

Specific strategies were also suggested for different circumstances. For example, where a party does not have English as their first language, alternative dispute resolution practitioners should arrange for an interpreter. For others, support persons should be included.

Where parties with limited literacy and numeracy had been identified, a range of specific strategies and tactics had been used to manage the situation. These strategies included the following.

## Expansion of communication by the mediator and other parties

Practitioners described using simple terms rather than 'legal or technical jargon', summarising the details of the dispute carefully, and allowing parties to talk. Most emphasised 'slow and careful explanations'. Discussions with expert advisors to parties were undertaken. One practitioner indicated a deliberate approach to establishing whether any literacy or numeracy difficulties existed, while others constantly 'caucused' with the parties to encourage them to re-express the documents in their own words and their understanding of the specific details.

Private enquiry prior to session starting. Open questioning—'do you have difficulty with...?', and if so, I will adapt the agenda setting/agenda focus accordingly; the mediator uses more roundups/referrals/reminders of stage reached etc.

With literacy, mediation needs to be adapted so that whiteboard is not used and simple language is adopted.

## Use of multiple communication channels

Practitioners described the importance of using all channels of communication, including vision and hearing, or use of analogies, to communicate. In one case, where a practitioner identified that a party had literacy and numeracy difficulties, they:

ceased use of whiteboard and used verbal skills—in both cases, parties were legally represented anyway.

## Use of different forms of representation of information

Alternative dispute resolution practitioners who were aware of numeracy issues identified a number of strategies to ensure that the parties to the dispute understood the finances involved and their implications. Use of a variety of techniques to represent numbers orally, visually and in written form is a standard adult numeracy instructional practice. The practitioners differed in the value placed on visual versus oral explanations for literacy and numeracy.

Wherever there are numbers involved I always try first and get the parties to commit these numbers to paper, in simplified format. That is important even for persons who on the surface are highly intelligent or highly intellectual or have high education.

By explaining on a whiteboard, best and worst case scenarios and the financial consequences.

## Use of another advocate to assist the party or parties

Several practitioners used advocates or support people to assist parties, although this was also not always seen as a successful approach. Some also explained they allowed additional time.

Use advocates to help explain, but it is really not satisfactory.

## Mediator to act as an advocate for one or both

A number of respondents had indicated the need for parties to alternative dispute resolution to understand that the role of the practitioner was not to propose a solution. However, in circumstances of deficit literacy or numeracy skills, several practitioners indicated the need to take on an advocacy role for at least one of the parties.

By helping them put their view across & ensuring the other party understands them.

At a mediation session (one for VCAT), I said to the parties that I am a 'team leader' and helped to resolve their issues by doing the calculations for both parties, and since have generally operated as a mediator, expert appraiser in this manner.

## Use of alternative dispute resolution practitioners' social skills

A number of practitioners commented on the personal skills required to manage potential low literacy and numeracy skills, including patience. Others emphasised the need to avoid causing embarrassment, noting that parties are 'never willing to say they have problems'. Also identified as important in a practitioner was the ability to put people at their ease, including using humour. One practitioner noted that the issue of limited literacy and numeracy required imagination, the support of the other party, and was managed with 'great difficulty'. Literacy and numeracy difficulties were seen as putting a party at a disadvantage. Unfortunately, parties in alternative dispute resolution are in dispute, and often their own emotional involvement will impact on the mediation processes.

Practitioners must be human and understanding in their presentation and manner. I believe you do not have to embarrass any party but questions specifically asked will identify if the party understands the consequences.

... an approach that gives some empathy, eg. I had similar problem earlier in my life and was able to overcome. My child/sister/brother has some similar problem we assist in overcoming ... Possibly sounds a bit simplistic but obviously this approach would be to start out diplomatic. It does work.

Not with any great success. A great deal of explanation, but there will still be an unequal bargaining power. It is also further complicated when one party may be represented and the other party is not, and is probably the party with more problems with literacy and numeracy. Then the mediator is in the position of attempting to explain in detail without giving advice.

## Summary of issues

The responses from many alternative dispute resolution practitioners reflected the general response that alternative dispute resolution training should alert practitioners to factors that create equity imbalances among parties and that limited literacy and numeracy constituted such factors. However, a number of responses indicated that these had not arisen as issues for their practice, or that they relied on others to identify the existence of these problems. Overall, it is uncertain whether there is a systematic awareness of potential literacy and numeracy difficulties among parties, but it is clear that there is a receptiveness among alternative dispute resolution practitioners to any difficulties that emerge in disputes for parties, and that practitioners then respond with the use of techniques developed during their training.

The strategies used by alternative dispute resolution practitioners echo some of those used by adult literacy and numeracy educators—use of multiple forms of communication, including visual diagrams, expanding communication, checking understanding through the parties' own words and summaries. The most effective strategies would appear to be ensuring representation for the parties, in a way that did not cause embarrassment, and expanding the role of the practitioner to include an advocacy aspect. While the latter strategy mirrors the role played by judges and legal representatives in court when a party is unrepresented, it may cause some conflict in alternative dispute resolution when the neutrality of the practitioner is perceived as essential to the outcome. The strategies provided by the practitioners demonstrate the importance of detailed and extensive explanation by the practitioner of financial calculations and their implications as crucial to a fair and successful alternative dispute resolution outcome for all parties.

## Suggestions for enhancing practitioners' future awareness of limited literacy and numeracy of parties

The alternative dispute resolution practitioners and organisations surveyed suggested a number of ways to increase awareness of and strategic skills for dealing with limited literacy and numeracy of parties with English as their first language. The suggestions comprise two main approaches:

- ✧ training and professional development as part of mediation training or as ongoing professional development through workshops and seminars, possibly online
- ✧ publications and resources, including publication of this study report in a suitable journal, brochures on ways to identify literacy and numeracy difficulties, feedback from members to organisations for publications in their magazines.

In the responses from organisations, specific strategies were suggested in relation to how limited literacy and numeracy could be identified by practitioners in future. These strategies, which could be incorporated into training and professional development materials, included taking more time, ensuring the presence of representation or support persons, and modification of the process as necessary. Careful assessment of parties on take-up of alternative dispute resolution was also recommended.

[ADR as a] model of service delivery requires full assessment.

[Practitioners should] assume literacy and numeracy problems exist until [they] have evidence to the contrary.

At the preliminary conference, checking with parties [should identify] the literacy and numeracy issues—normally this happens or would occur at the outset.

Judges/magistrates prior to compulsory order where parties are self-represented could check this prior to ordering.

Examples of the ‘techniques’ used by people to hide their illiteracy would help, eg, when I was at Uni I worked in a hotel drive in bottleshop ... and one of the employees was illiterate. He coped by having ‘learnt’ the labels (i.e., colour, logo etc.—not the words) which, when you think about it given the wide variety of stock, was harder than reading the labels.

Ongoing monitoring was also considered important.

ADR practitioners should be trained to check back with parties as to their level of understanding of what is written on the whiteboard. To ask for example: ‘In what way is it helpful to have things recorded?’ Education [should be provided to address the issue] similar to on family violence.

The provision of additional human resources was seen as desirable.

Provide ‘assistants’, e.g. family accountant, another mediator who acts as a ‘coach’ to the client who has numeracy difficulties, legal advisors present in mediation.

Of course, as had been hoped, this study did alert some practitioners to an area they had not previously been aware of, but will now take into account.

No suggestions, but this questionnaire has alerted me to the problem and I will take more notice in future.

## Summary of ways forward

As perhaps an anticipated outcome, this study provided useful information on current awareness and strategic management of limited literacy and numeracy in alternative dispute resolution. The respondents were, on the whole, receptive to the issue that many Australians with English as their first language may be engaging with alternative dispute resolution while possessing limited literacy and numeracy. For the practitioners, this was a potentially serious matter that could affect the outcome of successful dispute resolutions. Both individual and organisational responses suggested that ongoing professional training and awareness-raising were important, offering practical suggestions for implementation of these.

One area that neither practitioners nor organisations addressed was the literacy demands of the processes required for initial engagement with alternative dispute resolution and the documentation necessary for establishing a dispute resolution. These are in the hands of the courts and the mediation organisations. While the information obtained in this study indicates that Australians with limited literacy and numeracy do engage with alternative dispute resolution, for many of these it may be by default; they are required due to an infraction of the law, or they are a party pursued. The question remains as to how accessible alternative dispute resolution is to those with limited literacy and numeracy.

# Conclusions and implications for policy and practice

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## Literacy, numeracy and alternative dispute resolution

Alternative dispute resolution is a growing legal and quasi-legal procedure utilised in Australia and internationally to resolve disputes between neighbours, family members, community and large commercial businesses. It is promoted as fair, quick and economical. Parties come to alternative dispute resolution from all walks of life, with various work and social backgrounds and needs from alternative dispute resolution. The growing frequency of alternative dispute resolution events is well documented.

The brief introduction to this study indicated that the Australian Survey of Aspects of Literacy found that many Australians with English as their first language may encounter difficulties dealing with relatively simple written and numerical tasks. The results of the survey showed that people engaged in a range of occupational strata were included. Low levels of literacy and numeracy are not synonymous with social class, ethnicity or work levels. On the basis of random probabilities, adults with limited literacy and numeracy are likely to become engaged in alternative dispute resolution. However, as some of the responding practitioners indicated, individuals with limited literacy and numeracy may be more likely to end up as parties in alternative dispute resolution due to problems encountered in interpreting contracts, franchises, building and other social interactions.

Alternative dispute resolution is promoted as a predominantly oral process. However, premediation agreements, documentation and processes require considerable written and numerical considerations. The process of reaching settlement is oral, but supported by numerous spontaneous written activities. The agreed settlement is a written document often involving considerable financial considerations. If the dispute concerns a complex matter, the documentation produced during the dispute, as the examples provided by mediators have shown, may also be extremely complex and involve complicated calculations and figures. The literacy and numeracy demands of alternative dispute resolution, while perceived as a community-evolved simple process, are high for any participant.

For a party with limited literacy and numeracy to be required to engage in alternative dispute resolution without representation is a formidable expectation. The fact that many individuals with limited literacy and numeracy will not disclose these difficulties makes the role of practitioners even more difficult. When undertaking the review of literature, we noted that the majority of examples regarding the impact of limited literacy related to criminal charges. Perhaps none was so telling as the account of an individual who signed a confession, was found guilty of criminal charges and went to prison—rather than disclose that he could not read. The alternative dispute resolution practitioners responding to this survey could provide similar examples of parties in alternative dispute resolution who did not disclose literacy or numeracy difficulties, and an example where both sides of the dispute worked together to keep the integrity of an individual intact.

From this study, we draw four major conclusions about literacy, numeracy and alternative dispute resolution, and more general issues about access to the law for those with limited literacy and numeracy.

## Research into literacy and numeracy and the law

Through the literature review, we identified that little research has been conducted on issues of literacy and numeracy and equal access to the law. We found no previous empirical research on literacy and numeracy issues in alternative dispute resolution. The review of literature demonstrated that broader issues of access and social justice, of simply being ‘fully informed’ as a party in legal and quasi-legal systems, are important. This was supported by a number of respondents in this study who indicated that, for them, understanding legal processes was as much an issue for parties as the issue of limited literacy and numeracy.

## Commercial alternative dispute resolution

Some contradictions occurred in the outcomes of our survey. Many individual alternative dispute resolution practitioners and some organisational responses indicated that limited literacy and numeracy was not a concern in large commercial alternative dispute resolution procedures. In part this was because the parties were likely to have legal representation. The alternative dispute resolution practitioners either suggested that limited literacy and numeracy had not arisen as an issue, or that the representatives were relied on to identify such issues and to work with the parties in explaining process and outcome. However, many alternative dispute resolution practitioners did provide instances of limited literacy and numeracy. These practitioners worked across the spectrum of alternative dispute resolution contexts, from family disputes, through workplace disputes, aged care and health, to building and commercial contracting. As some of the examples showed, the documents exchanged by parties place high literacy and numeracy demands on all concerned. The practitioners indicated that they would try to make the matters clear, and that they would seek representation where necessary and possible. These strategies, however, rely on the practitioners being able to identify literacy and numeracy as barriers in alternative dispute resolution.

## Strategies for dealing with literacy and numeracy deficits

The practitioners and organisations responding to the survey displayed a range of experience of literacy and numeracy difficulties in alternative dispute resolution. A number provided examples of the strategies employed to assist in alternative dispute resolution, from simple strategies such as use of the whiteboard for visual representations in diagrams, rather than words. However, all practitioners were unanimous about the applicability of the general principles underpinning effective alternative dispute resolution for addressing power imbalances and creating equal outcomes, regardless of source. These practitioners were more familiar with circumstances of cultural difference, second-language issues, age or imbalance of power between an individual and a commercial entity. These are all issues directly addressed in accreditation and professional development of practitioners. Alternative dispute resolution is well positioned philosophically to address any issues of limited literacy and numeracy and to ensure that they do not have negative impact on successful outcomes.

## Professional development

The evidence shows that literacy and numeracy issues do arise in alternative dispute resolution. No respondent, either individual or organisation, could claim participation in or awareness of any professional training regarding this issue, notwithstanding the general training in addressing issues of equality and empowerment. Several responses suggested that practitioners were unaware of potential limited literacy and numeracy of parties and had no systematic means for identifying it.

Others were, had encountered it, and did have simple procedures to put in place. Of those who did, their guidelines require practitioners to have several years experience in this area before accreditation. However, the professional development requirement is only five days. This is a very short time to deal with all potential issues of cultural and other systematic sources of bias that may arise, in conjunction with developing the generic mediation model skills.

Through the study, we have identified a range of strategies suggested by individual alternative dispute resolution practitioners and organisations to enhance awareness in this area. The predominant message is the provision of resources and/or workshops in this area. No respondent indicated that they would not see limited literacy or numeracy as a concern or that such professional development would not be useful to alternative dispute resolution practice.

## Implications for policy and practice

### Development of resources for alternative dispute resolution professional development

The findings of this study suggest the need for the development of specific resources to enable practitioners to deal with limited literacy and numeracy in alternative dispute resolution. These should be simple standard procedures designed to identify any potential barriers to effective participation; they should highlight the importance of continued explanation of complex written and numerical information, and suggest strategies (some of which have been given here by practitioners themselves) for addressing literacy and numeracy issues. Two suggestions are offered as starting points: firstly, literacy and numeracy should not assumed until established; and, secondly, the promotion of alternative dispute resolution as a largely oral process should be tempered by recognition of the considerable written and hearing (only briefly considered in this study) demands made on the parties.

These resources could be prepared by literacy and numeracy associations in conjunction with the National Alternative Dispute Resolution Advisory Council and other organisations. Ideally, they should be integrated with current professional documents and accreditation requirements. Furthermore, it would appear that the advisory council is well placed to work with the courts and tribunals in Australia to examine the application forms and guidelines required for participation in alternative dispute resolution. While this study cannot address the issue, it is worrying that these documents may preclude many with limited literacy and numeracy from participating in what is considered to be the most accessible area of the law.

The most positive outcome from the study is the practitioners' focus on ensuring balance of powers of parties, the awareness of many issues with the potential to cause imbalance, and their overall readiness to engage with materials developed to ensure that the alternative dispute resolution process lives up to its promise of a fair and equitable process.

### Research on access and legal process in Australia

The findings of the study demonstrate issues of equity in access to legal processes beyond alternative dispute resolution for Australians with limited literacy and numeracy. They also indicate the need for considerably more Australian research in areas such as this. Replication of the considerable Canadian research would provide a starting point for consideration of this issue in Australia. This research needs to go beyond correlating poor literacy and numeracy with criminality or socioeconomic status, or education and training of criminals to address recidivism. The research could address the fundamental principle established in Canadian case law that 'a message has not been communicated unless the person receiving the message understands it'.

## Research on the parties' experience of alternative dispute resolution

The initial focus of this study was an investigation of the experiences of alternative dispute resolution practitioners in regard to literacy and numeracy issues. Many practitioners indicated that the impact of limited literacy and numeracy on alternative dispute resolution had never been identified. This is, of course, a limitation to the study. However, others indicated that the issue had arisen, but almost all were optimistic that, through their training and experience, any resultant impact was minimised, if not removed entirely.

The issue that arises is whether this would indeed be the case.

Like most of the literate public, learners are confused and frightened by the legal system. This is made worse if they cannot deal adequately with written material. Learners feel that they are at the mercy of lawyers. Documents are translated for them, and they must take the lawyer's word for it. (Canadian Bar Force 1992, p.27)

*Do parties perceive that they have been empowered in the process? Or, are those with limited literacy and numeracy still reluctant to engage in any legal processes to protect their rights, as indicated by the Canadian Bar Task Force review, and only usually engaged with the law when challenged by others. How willing are those with limited literacy and numeracy to engage with alternative dispute resolution, a method derived from models of informal, and essentially non-literate, community dispute resolution? These are the next questions to be answered.*

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# Support document details

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Additional information relating to this research is available in *Literacy, numeracy and alternative dispute resolution: Support document*. It can be accessed from NCVER's website <<http://www.ncver.edu.au>>. The following information is contained in this document.

- ✧ Appendix A: Published statistics on mediation/alternative dispute resolution in Australian courts and tribunals over the period 2002 to 2003
- ✧ Appendix B: Bodies involved in alternative dispute resolution in Australia
- ✧ Appendix C: Letter and survey to individual alternative dispute resolution practitioners
- ✧ Appendix D: Letter and survey to alternative dispute resolution organisations
- ✧ Appendix E: Individual alternative dispute resolution practitioner participants in the study
- ✧ Appendix F: Organisations involved in alternative dispute resolution in Australia included in the survey
- ✧ Appendix G: Vignettes of mediations involving literacy, numeracy or language difficulties
- ✧ Further reading



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