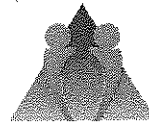


Submission No. ADR/19
Received 22/11/2007
Law Reform Committee



**VICTORIAN PARLIAMENT LAW REFORM COMMITTEE
ALTERNATIVE DISPUTE RESOLUTION DISCUSSION PAPER**

**SUBMISSION BY THE HEALTH SERVICES COMMISSIONER,
VICTORIA**

DATE: 23 November 2007

Thank you for the opportunity of responding to this important Discussion Paper. The Office of the Health Services Commissioner (HSC) was established by the *Health Services (Conciliation and Review) Act 1987* to provide an independent and accessible review mechanism for users of health services and to provide a means for reviewing the quality of health care provision.

The HSC is therefore a health complaints alternative dispute resolution (ADR) mechanism covering both assessment and conciliation. The legislation provides that a user of a health service should first have made an attempt to resolve their complaint at the point of service. At the conclusion of the assessment process a complaint may be resolved, declined or referred to formal conciliation.

Complaints may be about any health service provider in Victoria and include issues around wrong diagnosis, wrong treatment, access to services, rights issues etc. Nearly all complaints contain within them issues around failures of communication. The aspirations of the complainant are important in determining how the complaint is to be handled. Complainants may be seeking an explanation, an apology, compensation, quality changes and the like.

I shall now address the relevant questions posed in the Discussion Paper.

Question 1: ADR provision in civil disputes

The services outlined in 3.1 reflect the ADR suppliers in Victoria. There is a widespread range of services and there are no obvious service gaps.

Duplication exists (certainly within the health complaints area) but good communication protocols between services can minimise the impact of these.

Question 2: Data collection for ADR in the civil jurisdiction

Data collection is important for the reasons outlined in 3.2.2. Consumers can be reluctant to provide information they see as irrelevant to their complaint. Many agencies, including HSC, report the data in their annual reports. Perhaps the problem is the data is collected and reported but rarely analysed or interpreted. This is because the skills required to do this adequately are generally not available.

Question 5: ADR service diversity

5(a) Does the current diversity of ADR providers in Victoria increase access to justice? If so, how?

Yes, the diversity of ADR providers does increase access to justice in civil disputes. They provide information about the law in general and refer people to appropriate legal advice and to other agencies so people can find their way through the large amounts of information to the most appropriate means of addressing their complaints.

5(b) What issues are associated with a diversity of ADR service providers? How can these issues be addressed?

One major issue for this diversity is the need for ADR providers to understand the range of services available in order to make appropriate referrals. It is very frustrating for a person to feel they are being passed from one agency to another where no one can assist them.

Question 6: Mechanisms for making a complaint

People should be able to make a complaint in a form that allows the respondent to understand the issues raised and to be certain that the complainant has consented to the issues being discussed with a third party (the ADR service). There is no problem with a verbal complaint but someone has to put it in writing and ensure the written issues are in fact the complainant's issues.

There is also a need to ensure the complainant understands that she or he is giving permission for the respondent and the ADR service to discuss the relevant aspects of their grievance.

When a person comes to ADR through a complaint mechanism such as that provided by the HSC, it is of benefit if the ADR service assists the complainant to formulate the complaint in order to encapsulate the issues for the benefit of the complainant and the respondent. The assistance in the formulation of the complaint may be a policy and practice of the ADR service provider, or mandated in legislation such as the *Health Records Act 2001*, section 45(6).

Question 7: Other service features affecting access to justice

ADR services should be free, should provide access to interpreters/translators, and have outreach programs to the general community and marginal groups. Most ADR services incorporate these features.

Additional mechanisms for lodging a complaint, such as electronic lodgement, will increase the accessibility of ADR services for those living with a disability, or for whom mobility is very difficult or isolated geographically or physically.

Question 8: Time and cost factors affecting access to justice

Most people who bring disputes to HSC would never have taken the litigation course if HSC did not exist. If they had consulted a lawyer they would have realised fairly quickly they had no recourse to the law with the issues they raise.

However for the small number of complainants who have the option of litigation or ADR there is no doubt the costs to the complainant are far less and the outcome more timely under ADR.

The cost to the Government is another matter as costs are generated for all cases, regardless of substance or merit.

HSC would not support a user pays option in ADR with the possible exception of a successful compensation outcome where the user could contribute the costs of experts' opinions from the proceeds of settlement (as they would in successful litigation). The Department of Human Services has canvassed the idea of making users and stakeholders pay and this was rejected. It is important for the HSC that it is Government funded to ensure there is independence and no perceptions of bias.

Question 9: Increasing consumer awareness and understanding of ADR

There is a need to promote ADR services to improve awareness and access. A Government funded publicly available database and wider promotion of the services would be desirable.

Question 10: Increasing accessibility of dispute resolution mechanisms and ADR providers

- 10(a) A successful ADR process should teach the complainant (and the service provider) how to complain more effectively in the future. It should show the complainant how to write an effective complaint letter and how to communicate to resolve disputes. Most ADR services encourage and assist the complainant to attempt to resolve the issues themselves first. It is the experience of the HSC that in the health sector those organisations that have effective complaint mechanisms assist Victorians to resolve disputes.
- 10(b) Referral loss is not necessarily an issue. Even people who reach the correct agency with their inquiry do not follow up by formalising the complaint. Inappropriate referrals definitely are an issue. A complainant who is referred on to an agency who cannot assist is likely to give up, even if the next referral is appropriate. ADR services have a responsibility to ensure they have adequate referral protocols that require them to check the suitability of the referral before they make it.
- 10(c) A central gateway may be a good resource but it would need to be accurate and reliable and, therefore costly.

Question 11: Referral to ADR by legal advisors

Most legal advisors are aware of ADR services. Those who do not may benefit from a campaign aimed at educating and informing all Victorians.

Question 12: Court referral to ADR

The referral of medico-legal matters from court to ADR is already in practice and seems to be effective from the HSC's point of view. A matter should not be referred back to ADR if this has already been attempted and failed.

Question 13: Mandatory referral to ADR

A major reason for HSC's high success rate in conciliation is because it is a voluntary process. However the courts have referred potential litigants back to HSC before allowing them access to the courts and this has been successful.

Question 14: Online ADR

Online ADR has possibilities for the resolution of complaints in the health sector. Online ADR is not a substitute for other methods of dispute resolution; it is one option made available to an ADR service provider to the parties in dispute. Guidance will be required on the appropriate situations for its use.

Online ADR bridges distances, results in cost savings associated with travel and venues and enables parties to access expertise outside their local area.

Online ADR improves transfer, retrieval and storage of data and enables delayed communication 24 hours per day. It improves access to justice for some groups by mitigating disadvantages such as geographic isolation, confinement or imprisonment, disability, threat of physical violence, shyness in face-to face settings and socio-economic status cues. Traditional ADR mechanisms advantage people who are physically attractive, articulate, well educated or members of a dominant ethnic, racial or gender group.

Privacy and security are issues in an online environment as they are for traditional ADR services. Privacy and security of data concerns can be addressed by using secure websites with encryption and password protection. Such security measures mean that online ADR is about as secure as traditional ADR.

The provision of an online ADR services assumes the parties have:

1. access to a computer with minimum hardware and software support,
2. accessibility of sites to people with disabilities and slow online connection speeds, and
3. language of services offered.

Question 15: ADR and access to the courts

As lawyers take on "No Win - No Fee" cases there appears to be adequate access to the courts for medico-legal cases with potential merit.

Question 16: Power imbalances

Power imbalances are addressed appropriately in ADR where skilled people are employed. Mediation and conciliation should never be carried out by well meaning amateurs.

ADR processes can be mandated through either legislation or regulation or the ADR service provider's policy and practices.

Question 17: Non-suitability of ADR processes to some disputes

ADR appears suitable for most disputes about health service provision. Exceptions may be complaints where sexual exploitation of patient/client has been alleged and other cases of serious professional misconduct, however a settlement in ADR does not preclude a subsequent referral to a professional registration board for investigation.

There does seem to be a need for sufficient goodwill and a willingness to resolve a matter for ADR to succeed. Some people do want their day in court no matter what else happens and these are unlikely to resolve through ADR.

Question 18: Confidentiality of ADR process and outcomes

Confidentiality of ADR does raise issues and it may be a matter of balancing individual benefit against the public interest, however a person whose case is resolved in conciliation through HSC can still make a complaint to a professional registration board about the same issue.

Question 29: Measuring and reporting civil ADR outcomes

It should be possible to record and report on the broad categories of ADR outcomes. HSC does this in Annual Reports. The advantage to this is that it is possible to see what is happening in ADR, for example, most complaints resolved through HSC result in further explanations, very few result in cost recovery, procedural changes or compensation. This shows that ADR is achieving a very different category of outcomes from that which is possible in court.

Question 30: Measuring the outcomes of civil ADR for individuals

We should record what the ADR achieved and the participant satisfaction with that outcome. There are no costs savings in most cases resolved by HSC because these are not cases that would ever be heard in a court.

Question 33: The benefits for society of the use of ADR processes for civil disputes

There are many suggested benefits to society from ADR as listed in the Discussion Paper. Also important is the obvious demand for ADR services, it seems the community wants avenues of response and redress when they raise issues, even if the issues are not on the scale that warrants legal action. People want to be heard when they have something to say.

Question 35: Data collection on the use by members of marginalised groups of civil ADR services

Good data collection will inform us whether we are reaching marginalised groups. Age, ethnicity, CALD, etc are all useful indicators on who uses ADR. HSC collects and reports this data in Annual Reports.

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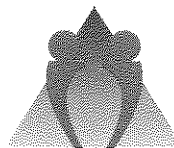
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22 November 2007

The Executive Officer
Victorian Parliament Law Reform Committee
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Dear Sir/Madam

Please find enclosed a submission to the Victorian Parliament Law Reform Committee's Alternative Dispute Resolution Discussion Paper.

Should you have any queries, please do not hesitate to contact me on (03) 8601 5216.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Beth Wilson'. The signature is fluid and cursive, written in a professional style.

BETH WILSON
Health Services Commissioner

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