

Legal Services **COMMISSIONER**

9/330 Collins St Melbourne VIC 3000 DX 185 Melbourne
t 1300 796 344 (local call) t 03 9679 8001 f 03 9679 8101
www.lsc.vic.gov.au ABN 66 489 344 310

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Law Reform Committee

The Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne VIC 3002

To the Executive Officer

Alternative Dispute Resolution

I refer to the invitation to make comments and submissions in response to the Alternative Dispute Resolution Discussion Paper.

I enclose for consideration by the Law Reform Committee a submission on Alternative Dispute Resolution. One thing to note is that my office is two years old and relatively new. Therefore the experience of my office with, and data on, Alternative Dispute Resolution is limited.

If you have any queries or comments about this matter, please contact me or Caroline Morgan (Senior Policy Officer).

Yours faithfully



Victoria Marles
Legal Services Commissioner

Submission – Alternative Dispute Resolution (ADR)

Introduction

The Legal Services Commissioner welcomes the opportunity to comment on ADR services in Victoria. As an independent statutory provider of ADR, the Legal Services Commissioner has an interest in the outcomes of the Law Reform Committee's inquiry into ADR. The Legal Services Commissioner is a relatively "new" ADR provider. Attention is drawn to our most recent annual report (2006/2007) for further information about our handling of civil disputes.¹

Background to the Legal Services Commissioner

The Legal Services Commissioner is an independent statutory authority created by the *Legal Profession Act 2004*.

The Legal Services Commissioner commenced operations on 12 December 2005. The experience of the Legal Services Commissioner with ADR is therefore limited.

The Legal Services Commissioner has three statutory objectives. They are to:

- handle complaints about lawyers and law practices;
- educate the legal profession;
- educate the community.

In relation to complaints, the Legal Services Commissioner may receive a civil complaint, a disciplinary complaint or a mixture of both. It is civil complaints that are most relevant here.

A civil complaint is a complaint about conduct to the extent that it involves a "civil dispute". A civil dispute is any of the following –

- a dispute in relation to legal costs not exceeding \$25, 000 between a client and a lawyer (**costs dispute**);
- a claim that a person has suffered a pecuniary loss as a result of an act or omission by a lawyer or law practice;
- any other genuine dispute between a person and a lawyer or law practice.

The majority of civil disputes our office receives are costs disputes.

¹ The LSC Annual Report 2007 is available on the LSC website, www.lsc.vic.gov.au.

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The role of the Legal Services Commissioner with respect to civil disputes is to attempt to resolve them.² Where this is not possible, and the dispute is not settled, the parties are notified of their right to apply to the Victorian Civil and Administrative Tribunal (**VCAT**). The Legal Services Commissioner has no role with respect to civil disputes before VCAT.

The Legal Services Commissioner may take any action she considers necessary to assist the parties to reach agreement. This includes referring the dispute for mediation or, in the case of a costs dispute, arranging for a non-binding assessment of the legal costs.

The Legal Services Commissioner has appointed a panel of mediators to assist her in resolving civil disputes by way of a formal traditional mediation process. However, most of the civil disputes settled by the Legal Services Commissioner during the last financial year occurred in-house (ie over the phone or in writing) by staff using mediation techniques. The Legal Services Commissioner referred only nine civil disputes to formal mediation during this period.³

Where a complainant makes a civil complaint involving a costs dispute, the complainant must pay to the Legal Services Commissioner the amount of the unpaid disputed costs subject to certain exceptions. This procedure is unique to our office (the legal regulators in the other states do not have this function). The unpaid amount is then held in trust and distributed once the matter is finalised. In our experience, where money is paid into trust it is more likely to settle.

The Legal Services Commissioner may waive the requirement to pay unpaid disputed costs into trust where it would cause the complainant undue hardship. Generally, lodging disputed costs may reasonably be expected to cause undue hardship to a complainant whose income is below the "poverty line".

Strict time limits apply to the making of a civil complaint involving a costs dispute. This must occur within 60 days after the legal costs were payable or, if an itemised bill was requested in respect of those costs, within 30 days after the request was complied with. The Legal Services Commissioner may accept a complaint made outside of this period (but made within four months after the end of that period) if satisfied that –

- there was a reasonable cause for the delay in making the complaint; and
- legal proceedings have not been commenced for the recovery or review of the legal costs that are the subject of the complaint.

There is a clear consumer protection principle underlying the complaints handling regime administered by the Legal Services Commissioner. One of the purposes of

² In the last financial year, the Legal Services Commissioner was able to resolve the majority of valid civil disputes our office received: p24 of the LSC Annual Report 2007.

³ See p14 of the LSC Annual Report 2007.

Chapter 4 of the *Legal Profession Act* is to provide a scheme for the discipline of the legal profession in the interests of the administration of justice and for the protection of consumers of legal services and the public generally. Another purpose is to provide a means of redress for complaints about the legal profession.

The Legal Services Commissioner may delegate some of the dispute resolution functions to the Law Institute of Victoria Ltd or the Victorian Bar Inc to assist her in managing her workload. There are currently delegations on foot to this effect however they do not delegate the function of mediation.

The main lesson that we have learnt thus far in attempting to settle civil disputes is that costs disputes are most likely to settle where:

- funds are held in trust by the Legal Services Commissioner; and
- the disputed amount is less than \$5,000.

The Legal Services Commissioner considers it has had success in resolving civil disputes in-house rather than by referring all matters for formal mediation.

Comments on the issues raised in the Discussion Paper

The office of the Legal Services Commissioner is two years old, and therefore its experience with, and data on, ADR is limited. Comments are made below in relation to the substantive topics raised in the Discussion Paper.

The current reach and use of ADR schemes in Victoria

This section of the Discussion Paper is about ADR generally, how it is understood and service gaps and duplications that may exist.

The Legal Services Commissioner agrees with the definition of ADR identified by the Committee and developed by the National Alternative Dispute Resolution Advisory Committee (NADRAC). That definition is:

“Processes, other than judicial determinations, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them.”

The Legal Services Commissioner also agrees with the identification of its office as a “statutory ADR supplier”.

ADR service duplication could theoretically occur where the Legal Services Commissioner attempts to resolve a civil dispute and the same approach is then used by VCAT. For example, it is possible that following an unsuccessful mediation arranged

by the Legal Services Commissioner the parties apply to VCAT who then refers the matter to some type of conciliation. It is noted however that VCAT has discretion in its handling of civil disputes and is unlikely to refer a matter to conciliation in these circumstances.

ADR and access to justice

This section poses a number of questions about ADR and access to justice. This includes the preliminary question as to whether diversity in service provision increases access to justice.

The Legal Services Commissioner acknowledges that a number of issues arise from the plethora and diversity of ADR providers that operate in Victoria.

However, it is submitted that often it is in the best interests of consumers, and in particular marginalised persons, for specialist ADR services to operate in addition to generalist ADR providers. This is particularly the case where there is a clear power imbalance between the parties, for example the lawyer and client relationship. Lawyers are generally skilled in negotiation and this arguably tips the resolution scales in their favour. The Legal Services Commissioner approaches dispute resolution with this in mind and with knowledge of the lawyer/client relationship – a generalist service may not do the same.

The approach of the Legal Services Commissioner towards ADR is based on consumer protection principles. Much work is undertaken to improve awareness of our office, as the Legal Services Commissioner is acutely aware that consumer frustrations increase if we are not easy to find and use. An outreach program has been developed and seminars held with community groups such as Probus and Court Network.

Our ADR services are “free” for the parties involved. Although in relation to costs disputes the complainant must lodge the unpaid disputed amount into the trust account of the Legal Services Commissioner. Even then, there are occasions when this requirement is waived.

Measuring the outcomes of ADR

This section is concerned with measuring the outcomes of ADR as well as how to measure the benefits of ADR to society.

The Legal Services Commissioner is required to report on the outcomes of civil complaints in its annual report. This involves reporting on the number of civil complaints where the Legal Services Commissioner:

- settled the dispute;

- was unable to settle the dispute and the parties were advised of their right to apply to the VCAT.

There are clear benefits to society in the use of ADR processes. Principally, the cost and expense of litigation is often avoided through the use of ADR. From our perspective, it is beneficial for consumers, and in particular disadvantaged consumers, to raise their dispute with us rather than do so in court where it can be expensive and intimidating for the uninitiated.

ADR and marginalised communities

This section asks a number of questions about ADR and marginalised communities. This includes whether there is a need to improve data collection about marginalised communities.

Our office is currently unable to produce reports about the types of marginalised consumers who access our services. Therefore, we cannot assess use of our ADR services by “marginalised communities”. We are currently developing a new electronic complaints management system that may allow us to do this in future if we determine it is appropriate for us to produce such report.

To assist marginalised communities access our complaints handling regime, we provide a free enquiries service as well as brochures in simple language. We also assist consumers access interpreting services where relevant.

Regulation of ADR

This section is about regulating ADR. It poses the important question as to whether government should regulate all ADR services and processes. Questions about the training and qualifications of ADR providers are also asked.

The Legal Services Commissioner is a statutory authority and its practices and procedures governed by legislation. This raises the question as to whether introducing government regulations about ADR is necessary with respect to the Legal Services Commissioner or would add any value.

Our complaint handlers are all legally qualified and hold current practising certificates (with the exception of one person, who is currently undertaking her practical year for admission to practice – ie articles of clerkship) and are all trained in dispute resolution. The mediators on the Commissioner’s panel are also all lawyers who are accredited specialist mediators.

The discussion of current regulation practices in section 7.3 of the Discussion Paper is inaccurate with respect to the Law Institute of Victoria. The Law Institute does not have any power in its own right to mediate disputes pursuant to the *Legal Profession Act* but

rather acts under delegation from the Legal Services Commissioner. The Legal Services Commissioner is the ADR service provider under the Act.

Conclusion

The experience of the Legal Services Commissioner is limited to two years with respect to ADR. So far our ADR services have successfully resolved the majority of valid civil disputes that come before us. One of our key lessons has been that costs disputes are most likely to settle where we hold the disputed funds in trust. Further, costs disputes are more likely to settle where the disputed amount is less than \$5,000. We usually settle civil disputes internally, rather than by referral to formal mediation.