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9 November 2007

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



Dear Ms Riseley,

**Alternative Dispute Resolution Discussion Paper**

I enclose a copy of my submission into the Law Reform Committee's inquiry into Alternative Dispute Resolution.

Yours sincerely,

HELEN VERSEY
Privacy Commissioner

Enc.

submission

Submission to the Parliament of Victoria's Law Reform Committee –

# Alternative Dispute Resolution Discussion Paper

November 2007

Office of the
Victorian Privacy
Commissioner

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# INTRODUCTION

**In preparing this submission, I have considered the issues raised from two perspectives. As Privacy Commissioner, I am concerned to ensure that the provision of ADR services by Victorian public sector organisations and the collection of data concerning such services comply with the *Information Privacy Act 2000* (Vic) ('IPA') and general principles of privacy. I have also reflected on the experience of the Office of the Victorian Privacy Commissioner (OVPC) as an ADR service provider in the five years since the IPA became operative.**

### Q2(b) What type of data would be useful? Why would this data be useful?

Under Information Privacy Principle ('IPP') 1 in Schedule 1 of the IPA, a Victorian public sector organisation must not collect personal information unless the information is necessary for one or more of its functions or activities. Information must be collected by lawful and fair means and not in an unreasonably intrusive way.

The collection of recorded information that does not identify an individual, or de-identified information, would pose no concerns under the IPA. If, however, recorded information was collected that does reasonably identify an individual, caution needs to be taken.

There is a distinction between collecting information which is *useful* and collecting information which is *necessary*. Moreover, the collection of personal information – or information that could potentially identify individuals – will not always be lawful simply because the information being collected has the potential to benefit the efficient running of ADR processes or to enhance consumers' experiences therewith.

### Q4(d) Who should be responsible for the collection and reporting of data in relation to restorative justice use and users? Is there a role for government in this data collection and reporting? If so, why?

When collecting data relating to restorative justice programs, particular caution is required as collecting this data may inadvertently involve the collection of criminal history, which is considered sensitive information under the IPA and therefore subject to more stringent protection (see IPP 10 in Schedule 1, IPA). This type of data should only be collected in a de-identified form unless there is no reasonable alternative to the collection of identifiable data and it is impracticable for the organisation to seek consent. For the purposes of a study investigating the types of users who access ADR services, there is no reason for this sensitive type of information to be collected in a way which could identify individuals. If collected, this data should only be used for the purpose of collection.

**Q6 How should parties be able to make a complaint or lodge a claim with ADR service providers?**

It is desirable that complaint and ADR processes be able to be accessed by as many means as reasonably practical. Section 25(4) of the IPA requires that complaints are made in writing. The OVPC does not collect or have access to statistics on the numbers of potential complainants who are deterred from contacting the office due to the requirement that complaints be in writing. Indeed, it seems unlikely that this type of statistic is capable of being accurately measured or collected. Therefore, whether or not the requirement that complaints to the Privacy Commissioner be in writing deters potential complainants cannot be determined.

Nonetheless, the requirement that complaints be in writing may be a deterrent to certain members of the community, particularly those whose first language is not English or who have literacy difficulties. However, in this context it is worth noting that section 25(5) of the IPA requires employees of the OVPC to assist individuals who wish to make a complaint in formulating their complaint. Moreover, employees of the OVPC have access to the services of an interpreter for dealing with members of the public whose first language is not English. The services of an interpreter can also be accessed by the general public for the purpose of contacting the OVPC. In both cases, the costs of the interpreter service are borne by the OVPC.

Section 25(4) of the IPA further states that a complaint can be lodged with the Privacy Commissioner by hand, facsimile, other electronic transmission or post. A variety of methods for lodging complaints is an important part of increasing access to the services of the OVPC. Where a range of methods for lodging a complaint are provided for, complainants who are in rural or isolated areas and those who do not have access to the internet or other electronic methods of transmission do not face any additional barriers to accessing the services of the OVPC.

**Q8(a) To what extent does ADR increase access to justice by reducing the cost and time required to resolve disputes?**

ADR processes are typically cheaper and faster processes than formal litigation. People who make enquiries to my office concerning potential complaints routinely enquire about fees charged throughout the complaints process, fees associated with the conciliation services provided by the office and whether they can have costs ordered against them through conciliation. When informed of their right to have their matter referred to VCAT, complainants are also interested to learn of the potential costs associated with a complaint at VCAT.

ADR services may not always reduce the time and cost associated with resolving disputes. For example, where a dispute is referred to conciliation under the IPA and that dispute is not resolved by conciliation, complainants have the option of having their case referred to VCAT. Where this occurs, complainants effectively have to go through both the ADR process and a formal process of litigation. However, complainants may still derive a benefit from the ADR process, particularly where they are informed and educated throughout the ADR process about the dispute resolution

skills being used to attempt to resolve their dispute. In this way, although conciliation may be unsuccessful and therefore additional time and costs may be incurred through litigation, the complainant may still have gained invaluable dispute resolution skills which enables them to effectively resolve a dispute themselves – thus saving time and costs – in the future.

**Q8(b) Should user-pays charges be imposed for ADR services? If so, in what circumstances should they be imposed, and how can we ensure that charges do not reduce access to justice?**

Where statutory bodies are responsible for conciliating complaints under specific legislation it is not appropriate that complainants are charged for the ADR services provided. This is particularly the case where the ADR service provider has a discretion as to whether or not to entertain a complaint and as to whether to refer the complaint to conciliation, as I have under sections 29(1) and sections 32 of the IPA respectively.

The potential costs of complaints certainly impacts upon an individual's decision to pursue a complaint. For example, many complainants enquire as to the likely costs associated with the complaints process. Cost seems to play a significant role in complainants' decision to pursue a complaint. For example, since the exemption from the $260 referral fee to VCAT was granted for complaints referred from the OVPC, many more complainants have sought to have their matter referred to VCAT than previously.

**Q10(a)Can we do more to help Victorians to resolve disputes themselves?**

ADR service providers are in the unique provision to assist potential complainants or disputants with timely, relevant information to enable them to resolve their dispute themselves. This educative function of ADR service providers can be overshadowed by the more formal ADR services such as conciliation or mediation. An additional focus of ADR service providers on assisting potential complainants and respondents to deal with matters before they become formal disputes would be beneficial.

Educating potential complainants may involve assisting complainants with the provision of information regarding: relevant legislation, policy and practice guides in plain English; guidance on how to adequately represent their complaint to the respondent; the appropriate individual to address their complaint to within an organisation; what they can expect during the complaints process and; what might be an appropriate or acceptable outcome.

In this context, it may be worth considering placing additional requirements on organisations to attempt to resolve disputes with complainants in good faith, in the first instance. For example, cost penalties could be imposed on organisations that, without adequate reason, refuse to conduct appropriate ADR practices in-house through the services of an ADR provider. Additionally, penalties could be imposed

where an organisation's complaints process is inaccessible or untimely or where additional access barriers are imposed to deter potential complainants.

An example of this is the ADR model currently practiced by the Energy and Water Ombudsman Victoria, which imposes costs on respondent organisations where a complaint has failed to be adequately addressed by the respondent-organisation.

**Q10(b)To what extent is referral loss an issue?**

The OVPC does not collect statistics on the number of enquirers who 'follow-up' with the agency that we have referred them to. I am also unaware of any studies completed which assess the rate of referral loss between ADR service providers in Victoria. Certainly, information on the extent to which inaccurate referrals and subsequent referral loss is an issue amongst Victorian ADR service providers would be beneficial. This information would allow for targeted training to ensure more accurate referrals.

The OVPC receives many enquiries out of jurisdiction. Often those enquiries have been referred to us from another organisation. We are sometimes third or fourth in the referral process. OVPC staff often experience disgruntled enquirers who are irritated at being incorrectly referred to this office. The OVPC collects some data on which organisation (if any) has referred the enquirer to the OVPC. This referral information is used to address inappropriate referrals with the organisations responsible and, consequently, to attempt to minimise the potential for referral loss.

**Q10(c) Should there be a central gateway (for example, phone line or website) for accessing information about dispute resolution and ADR services? If a central gateway for ADR disputes is desirable, who should operate this service and services should it provide?**

A central gateway for accessing information or, perhaps more accurately, referrals to ADR service providers Victoria-wide could be an extremely valuable service. However, for referrals to be accurate, the central service would require highly specialised staff who are essentially trained in all the jurisdictions that ADR services are provided in. It seems unlikely that an adequate amount of appropriately trained staff would be available. For example, the differing jurisdictions between the OVPC, the Victorian Health Services Commissioner and the Office of the Federal Privacy Commissioner can often be subtle and unable to be determined without informal investigations.

As such, the danger of such a service providing inaccurate or inappropriate referrals to the public seems relatively large. The OVPC is conscious of the number of inappropriate referrals it currently receives from large enquiry lines and the consequences of complainant 'drop-out' rates as a result.

I am aware that the Victorian Legal Aid produces a publication, "Know Your Rights", and the publication "Working it Out" published by the Victorian Law Foundation do provide the community with resources about where to complain within Victoria.

**Q16 What potential power imbalances exist in ADR processes? How can these be addressed?**

There will typically be power imbalances between the parties to a dispute; it is extremely rare that each party will have equal resources and standing within the community. In the context of privacy complaints dealt with by the OVPC, the respondent to the complaint will invariably be a Victorian government organisation, contracted service provider or local council. Governments are typically better resourced than complainants and certainly do not have the same 'personal investment' in the outcome of the dispute as complainants do.

Complainants often perceive the government as having inherent power. This will particularly be the case where the government department involved provides an essential service such as housing, health care or education. In these circumstances, complainants may be reluctant to complain for fear of retribution and being 'cut off' from these essential services. Although several pieces of legislation allow protection from victimisation, not all do; the IPA, for example, does not. Broad protections should be afforded those who make legitimate claims against government organisations.

An additional mechanism for addressing the power imbalance between government organisations and individuals may involve a review of government organisations' compliance with *The State as Model Litigant*[1] guidelines for agencies to: act fairly and consistently; avoid litigation; pay legitimate claims; minimise costs; avoid unnecessary technical defences; not take advantage of under resourced claimants; and to appeal only in circumstances of reasonable prospect of success or public interest.

**Q18(a)Does the confidentiality of ADR processes and outcomes create issues? If so, how can these be addressed?**

Under section 67 of the IPA, parties to a complaint cannot be identified without the consent of both parties. Consequently, the complaints process at the OVPC is confidential. The OVPC recognises that this restriction on 'naming' respondents is an issue as it does not allow for an education component in the complaints process. This also means that as a regulator, I am unable to disclose where a breach has occurred, which in turn can impact upon perceptions of transparency of the processes employed by my office.

Furthermore, the private nature of ADR processes in general and the lack of formal determinations does not allow for the reporting of systemic issues in the same way that a public process might. However, any ADR process will allow for the reporting of systemic issues, where the organisation involved is willing to explore (and possibly report on) the systemic issues identified during the ADR process.

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[1] Attorney-General, Victoria, *Guidelines on the State of Victoria's Obligation to Act as a Model Litigant* (2001).

**Q18(b) Is ADR used by powerful parties to avoid setting legal precedents? If so, to what extent is this an issue and how can it be avoided?**

Irrespective of whether powerful parties deliberately use ADR to avoid setting legal precedents, the lack of precedents and jurisprudence resulting from increased use of ADR processes can be a problem. In this context, my office produces Case Notes which are published in a de-identified form and relate the facts and the reason for my decision to decline or refer the complaint to conciliation. Complaints are typically selected to become the topic of a Case Note where I have interpreted the law in relation to a set of factual circumstances that may be relevant to other organisations subject to the IPA.

At anytime during the complaints process, including where conciliation has failed, a complainant can require me to refer their complaint to VCAT. A relatively high percentage of complaints were referred to VCAT in the last fiscal year. 17 of the 54 complaints finalised in the 2006-07 financial year were referred to VCAT, which represents just over 31 percent of complaints. When referred to the public forum of VCAT, there is greater potential for the setting of precedents. Moreover, an appeal from VCAT on a point of law is possible to the Supreme Court of Victoria.

**Q29 Is there a need for sector-wide reporting of civil ADR outcomes? If so, what measures should be used to assess outcomes? Who should collect this data and how should it be published?**

The OVPC routinely publishes de-identified Case Notes which are available on Austlii, in hard copy and on our web site. The purpose of case notes is to inform readers of how I consider a particular set of circumstances within the provisions of the IPA, and how matters have been dealt with by my office. Further, for those matters that have been referred to conciliation and successfully resolved, details of outcomes are also published. Great care is taken to de-identify both complainants and respondents in order to protect the privacy of individual complainants and to comply with the secrecy provisions of the IPA.[2] As ADR is essentially a private process, outcomes should only be published in a de-identified form.

When publishing reported outcomes of ADR, care needs to be taken to consider the possibility that a 'standard' outcome (or outcomes) does not inadvertently develop. Where details of outcomes reached are published, there is a risk that either complainants or respondents will access these published outcomes and base their desired outcomes on what other complainants have achieved, as opposed to what would personally address the complaint for them. In this context, it is important to inform both parties that each case is unique and undue costs and delay can result where each party is seeking or offering outcomes based solely on precedent.

[2] See Section 67 *Information Privacy Act 2000 (Vic).*

**Q35(a) Is there a need to improve data collection in relation to civil ADR use by members of marginalised groups?**

Marginalised groups are traditionally less inclined to access formal complaint processes, particularly government processes.[3] As such, information concerning access to ADR services by typically vulnerable or marginalised demographics may be valuable for better targeting awareness campaigns or identifying barriers to accessing ADR services. When collecting information about marginalised groups, the information should be carefully collected in de-identified form, particularly where the information constitutes sensitive information under the IPA.

**Q35(b) What type of data would be useful? Why would this data be useful?**

As noted above, there is a distinction between collecting recorded personal information which is *useful* and collecting information which is *necessary* and thus lawful under the IPA. Moreover, the collection of personal information – or information that could potentially identify individuals – will not always be lawful simply because the information being collected has the potential to benefit the efficient running of ADR processes or to enhance consumers' experiences.

Given the above, the collection of de-identified data for this purpose is suggested

**Q35(c) How should the data collected be reported?**

Any data collected should be reported in a de-identified manner, particularly where sensitive personal information is collected and reported upon. Further, sufficient care needs to be taken to ensure that circumstances reported upon do not inadvertently identify parties to a dispute.

**Q35(d)Who should be responsible for the collection and reporting of data in relation to ADR use by members of marginalised groups? Is there a role for government and / or private ADR providers in this data collection and reporting? If so, why?**

Any agency responsible for the collection of this type of data – whether a Victorian government agency or not – should be subject to either the Information Privacy Principles or an enforceable code of practice with equivalent privacy protection.

Given that the vast majority of agencies conducting ADR practices would also produce Annual Reports the reporting of de-identified data could be included in these reports for collation by researchers or other interested parties.

[3] See, for example, T. Sourdin, *Dispute Resolution Processes for Credit Consumers*, La Trobe University (2007).

**Q38(a) Is there a need to better promote ADR providers and services to marginalized individuals and communities? If so, how should this be done? For example, what kind of promotional material is required and how should it be distributed?**

As highlighted in the Discussion Paper and borne out in research detailing consumer awareness of ADR service providers,[4] there certainly seems a need for better promotion of ADR service providers and the terms of reference of the services they provide. In promoting ADR services, a variety of communication tools should be utilised, including local newspapers (including those in languages other than English), other forms of print media, community radio and information provided on the internet. Printed and promotional material can be distributed through ADR service providers as well as local councils, community agencies and government organisations. This ensures that consumers who live rurally, those with literacy difficulties, and those with specific physical impairments are not excluded from awareness campaigns.

In this context, all material (particularly written material) should be in plain language and include the use of analogies to highlight ADR processes and outcomes. Material should also be available in languages other than English and general awareness campaigns should also cater for those whose first language is not English. Wherever possible, a simple, consistent message should be developed for use by all ADR agencies and service providers in order to improve consumer understanding of ADR services in general.

**Q38(b) Is there the need for a more coordinated approach by agencies and service providers to provide information (including about ADR) to marginalized individuals and communities? If so, how could this be achieved?**

In the experience of the OVPC, partnerships with similar government/statutory and community agencies are very effective in reaching communities, especially through relevant service providers. The *Koories Know Your Rights!* Project, which is coordinated by Consumer Affairs Victoria, is an excellent example of this approach. The primary focus of this initiative is to educate and support frontline workers who have direct contact with Indigenous communities to assist Indigenous community members to access relevant services and utilise their full range of rights and entitlements.

Throughout this project, frontline workers are being targeted with a series of regionally based information and education events designed to inform them of the range of services available. It is hoped that this will also facilitate dialogue with the agencies about the types of issues facing indigenous communities. Events are tailored to suit each individual locality in order to maximise attendance and participation. In addition to these types of initiatives, ADR forums and conferences are another way to help develop and highlight best practice communication projects.

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[4] See, for example, State Government of Victoria, *Dispute Resolution in Victoria: Community Survey 2007*, Department of Justice (2007).

**Q40(c) What type of data would be useful? Why would this data be useful?**

As noted earlier, the collection of adequately de-identified data as distinct from recorded personal information is recommended. In the unlikely event that this is unable to be achieved a distinction needs to be drawn between collecting information which is useful and colleting information which is necessary. Moreover, in most instances, information should be collected in a de-identified form, so as to protect the privacy of individuals involved, particularly where sensitive information, as defined in the IPA, is involved.

**Q40(d) How should the data collected be reported?**

As noted above, when collecting data relating to restorative justice programs, particular caution is required as collecting this data may inadvertently involve the collection of criminal history, which is considered sensitive information under the IPA and therefore subject to more stringent protection (see IPP 10 in Schedule 1 IPA). This type of data should only be collected in a de-identified form unless there is no reasonable alternative to the collection of identifiable data and it is not reasonably practicable to obtain consent. For the purposes of a study investigating the types of users who access ADR services, there is no reason for this sensitive type of information to be collected in an identified way.