



ADR Directorate
Department of Justice and Attorney-General
Locked Bag 5111
Parramatta NSW 2124

28th October 2009

Dear Madam/Sir,

Comments on Draft Recommendations

We welcome the opportunity to provide some brief comments about the Draft Recommendations, specifically in relation to the Model Litigant Policy.

About Kingsford Legal Centre

Since 1981 Kingsford Legal Centre (KLC) has provided legal advice and advocacy to people in need of legal assistance. KLC is both a community legal centre and part of the Faculty of Law of the University of New South Wales. KLC provides specialist legal advice in areas such as discrimination, employment law and victims' compensation. KLC provides general advice on a wide range of legal issues and undertakes casework for many clients who, without our assistance would be unable to afford a lawyer.¹ KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Our casework

KLC has an expertise in discrimination law which means that each year the Centre runs a number of cases against government agencies. We also represent tenants in disputes with their landlords, including the Department of Housing. In the past we have run cases against respondents such as the Department of Housing,

¹ In 2008 KLC provided 1,575 legal advices and opened 230 new cases.

Department of Transport, Department of Community Services. These are sometimes represented by in house representatives and other times by the Crown Solicitor's Office. The experience we have had relating to the use of alternative dispute resolution or preparedness of these respondents to settle cases varies substantially.

1. No real attempts to negotiate unless a hearing is imminent

Many government agencies, represented by in-house counsel or staff, do not make real attempts to negotiate or resolve a complaint or case. Frequently negotiations are not conducted in good faith until a hearing date has been set and the hearing is imminent. This is a waste of resources and the good will of complainants and makes complaints harder to resolve. Frequently we have experienced a respondent who does not turn their attention to the case at hand until shortly before hearing day which means that attempts to settle a case are unsuccessful.

Case study: Maria

Maria has a complaint against her previous employer, a government agency for whom she worked happily, for over 22 years. Due to this history she was keen to continue work with them despite what she considers to be unlawful treatment of her: being prevented from returning to work due to health issues. KLC has attempted on numerous occasions through oral and written communications to negotiate with the agency. Maria's main aim was to get her job back. In light of this KLC did not seek directions for a hearing because we were keen to pursue negotiations. The agency has not made any real response to our attempts to resolve the complaint and Maria is now exhausted by the process and disillusioned by the agency's behaviour so no longer wants her job and now wants to go to hearing and get compensation.

Case study: Luke

Luke had been in gaol for some time and wanted to continue his studies with a computer in his room. He had a good track record of courses he had participated in and good behaviour.

All attempts to try and negotiate, or even discuss the issue with the Department of Corrective services were rejected. No resolution or discussion of the issue was possible at all. The only avenue left was to pursue the issue through litigation.

2. Lack of transparency in instructions by respondents who are government agencies

Another issue which we face in dealing with other government agencies is the lack of transparency around instructions even when there is a solicitor on the other side.

This means that attempts to resolve a complaint or case are exceedingly difficult .

Case study: Jack

In a case against the Department of Housing, the Department had concerns about the behaviour of Jack. KLC was representing Jack, working with him about ways to address those legitimate concerns. In discussions with the Department it was unclear what action the Department wanted to take until a directions hearing at which the Department of Housing arrived seeking termination of the tenancy and with witnesses to give evidence. This approach exacerbated the situation and made it very difficult to then engage in true discussions.

3. Delay in providing evidence or responding to complaints

Another issue we have faced is delay by government agencies. Frequently the Department of Housing will delay in providing evidence which makes it very difficult to then recommend withdrawing a complaint to a client or in assessing the strength of a case. This then makes resolving the complaint early and effectively very difficult. Furthermore even when complaints reach conciliation conferences, no offers of settlement are made or a constructive approach taken to resolving complaints.

Case Study: Alicia

Alicia had a severe disability and needed her housing adjusted so that she could live in it. The Department of Housing recognised the need for changes however even through formal conciliation did not suggest positive steps or timeframes for needed actions to rectify the situation. Ultimately Alicia died from complications from her disability after several years of negotiations which were unfruitful. She never got the adjustments she needed.

4. Need for advocates to help resolve problems

Due to the nature of our clients, disadvantaged people from low socio economic backgrounds, from culturally diverse backgrounds and/or with disability, many may need an advocate in dealing with a government agency. Some clients who have mental illness may specifically need an advocate in dealing with a problem. However frequently people come to us, after protracted difficulties with a government department, where the involvement of an advocate for the client would have facilitated resolution of an issue but the government department has not recognised this or recommended it to the client. It appears that many government agencies do not recognise the need for an advocate to facilitate resolution of a problem or issue.

Case study: Tak Ping

Tak Ping was having difficulties with paying his rent and ensuring that the flat was kept in good order. He lived with serious mental illness in the community with a treatment plan. Sometimes he did not abide by his treatment plan and experienced a psychotic episode. When he was not well, he behaved in ways which were self destructive. During this time he ran into problems with the Department of Housing. Tak Ping clearly needed help with dealing with a range of issues in his life but the Department did not recognise this and refer him to appropriate agencies for that help.

In summary there are a range of issues which we have dealt with when dealing with government agencies or departments in trying to resolve our clients' problems. The introduction of stronger provisions in the model litigant policy relating to the use of alternative dispute resolution is one step that should be taken to address these concerns.

Our recommendations:

Government agencies and Crown Solicitor's should be accountable for their attempts to resolve complaints/legal cases in a non litigious manner.

There should be some checking at executive manager level of the attempts made by solicitors, human resource departments, supervisors, to resolve complaints effectively without requiring litigation. As well as internal checking, some form of external monitoring should be introduced.

We agree with the recommendation that the Model Litigant Policy should be amended to provide greater emphasis on attempts to resolve the dispute once litigation has commenced.

An annual survey is not sufficient to ensure accountability for implementation of dispute resolution. An alternative mechanism should be developed which ensures greater transparency and accountability for dispute resolution.

We agree with the recommendation that Local Government should be bound by the Model Litigant Policy including use of non litigious methods to resolve disputes.

We support the introduction of an interagency working group as an overarching body

to promote best practice in the area of dispute resolution. We would also submit the need for each agency to have a working group to analyse the use of dispute resolution methods throughout the agency to ensure that this occurs in each agency.

We look forward to hearing from you in relation to this submission,

Yours sincerely,
KINGSFORD LEGAL CENTRE

Anna Cody
Director