



**Professor the Hon Murray Kellam AO**

Chair  
NADRAC  
3-5 National Circuit  
Barton ACT 2600

By email: [nadrac@ag.gov.au](mailto:nadrac@ag.gov.au)

18 March 2010

Dear Professor Kellam

**Model Dispute Management Plan for Government Agencies**

Thank you for inviting our comments on the proposed Model Dispute Management Plan for Government Agencies ('Model Plan').

We welcome this opportunity to expand on the matters discussed at the Roundtable consultation on 8 February 2010. We make eleven recommendations in relation to:

- the need for Commonwealth agencies to ensure that individuals without legal representation are referred to appropriate sources of legal advice and other assistance;
- the Commonwealth's obligation as a model litigant, including the obligation to avoid taking advantage of another party's lack of resources; and
- the need to ensure that the Model Plan is culturally appropriate and adapted to the needs of Aboriginal and Torres Strait Islander peoples.

## 1 Referral to accessible sources of legal advice

It is in the public interest for individuals to understand the legal system and their legal rights.<sup>1</sup> There is also a practical argument for ensuring that all parties have access to some preliminary advice, prior to engaging in any ADR procedure. When people receive basic advice about their rights and applicable procedures, they are better able to represent themselves.<sup>2</sup> Conversely, there is a risk that parties may agree to inappropriate settlements if they do not fully understand their legal rights.

The social security jurisdiction is a case in point. In a high proportion of social security disputes, Centrelink raises a debt against an individual based on incorrect or incomplete information, or an incorrect application of the law. Individuals are often unable to raise or challenge points of fact or law, in the absence of legal advice. On appeal, the Social Security Appeals Tribunal (SSAT) makes its own inquiries into the individual's circumstances and makes a fresh decision. As a result, a high proportion of Centrelink decisions are overturned by the SSAT.<sup>3</sup>

In this highly technical jurisdiction, there is an unavoidable tension between 'the need for early decisions and the need for a thorough examination of complex matters.'<sup>4</sup> If such disputes are settled through ADR, without a full investigation by the SSAT, there is a risk that self-represented individuals might agree to pay debts that are not legally owed, but rather are based on factual or administrative error.

All Commonwealth agencies must comply with the model litigant guidelines contained in the *Legal Services Directions 2005 (Cth)*.<sup>5</sup> This duty derives from the Crown's unique status as 'the source and fountain of justice.'<sup>6</sup> The Government's

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<sup>1</sup> See the remarks of the Hon Justice Kevin Bell in *One VCAT: President's Review of VCAT* (2009) available at [www.vcatreview.com.au](http://www.vcatreview.com.au) (last accessed 25 February 2010) 26.

<sup>2</sup> *Ibid* 78.

<sup>3</sup> See National Welfare Rights Network, Submission to Senate Community Affairs Committee Inquiry into the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009, Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009*, available at [http://www.aph.gov.au/Senate/committee/clac\\_ctte/soc\\_sec\\_welfare\\_reform\\_racial\\_discrim\\_09/submissions/sub77.pdf](http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sub77.pdf) (last accessed 17 March 2010) 37.

<sup>4</sup> *Ibid* 41.

<sup>5</sup> In *Melbourne Steamship v Muirhead*, in 1912, Griffith CJ spoke of the 'old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects.' *Melbourne Steamship v Moorehead* (1912) 15 CLR 333, 342. See also Camille Cameron and Michelle Taylor-Sands, "'Playing Fair": Governments as Litigants' (2007) 26 *Civil Justice Quarterly* 497, 498.

<sup>6</sup> *Sebel Products Ltd v Commissioners of Customs and Excise* (1949) 1 Ch 409, 413, cited in Cameron and Taylor-Sands, *ibid* 498.

status as a model litigant requires it to act 'in accordance with the highest professional standards.' This obligation goes beyond the duty to act in accordance with legal ethics.<sup>7</sup> The model litigant rules, as codified in the *Legal Services Directions 2005 (Cth)*, require the Government to act 'honestly and fairly' in handling claims and litigation.

In line with its special obligations as a model litigant, the Commonwealth should assist self-represented parties by referring them to sources of free or low-cost legal advice, prior to initiating ADR. Routine referral to sources of free or low-cost independent legal advice would reduce the risk of inappropriate settlements. It would also mitigate the inevitable power imbalance between individuals and Commonwealth agencies.

*Recommendation 1:*

The Model Plan should impose a positive duty on Commonwealth agencies to assist self-represented individuals by referring them to sources of free or low-cost legal advice.

**2 Other implications of the Government's status as a model litigant**

The model litigant guidelines also require Government agencies to avoid 'taking advantage of a claimant who lacks the resources to litigate a legitimate claim.'<sup>8</sup>

There is a risk that an agency may, unintentionally, take advantage of a claimant's lack of resources in the context of an ADR procedure. This may happen if, for example, the agency alludes to the high cost involved in litigation, as a way of encouraging the claimant to settle. The Model Plan should include measures to counter this risk. Agencies should be required to explain clearly, at the outset of any dispute, that the claimant is not obliged to settle through ADR, and that he or she is entitled to a hearing in the relevant court or tribunal.

*Recommendation 2:*

The Model Plan should refer to the Government's duties as a model litigant, including the obligation to avoid 'taking advantage of a claimant who lacks the resources to

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<sup>7</sup> Commonwealth of Australia, *Legal Services Directions 2005*, Appendix B, 22-23.

<sup>8</sup> *Ibid.*

litigate a legitimate claim,' The Model Plan should recognise the risk of this occurring in an ADR setting. It should require agency representatives to explain clearly, at the outset of any dispute, that the claimant is not obliged to settle through ADR, and that he or she is entitled to a hearing in the relevant court or tribunal.

### **3 ADR involving Aboriginal and Torres Strait Islander peoples**

Aboriginal and Torres Strait Islander peoples may be disadvantaged if Commonwealth agencies adopt ADR procedures that do not take into account their specific cultural heritage and needs. Agencies need to recognise and accommodate Aboriginal and Torres Strait Islander peoples' dispute resolution styles, and more general cultural differences that may affect their capacity to engage effectively in 'mainstream' ADR. NADRAC has canvassed these issues in its 2006 report, *Indigenous Dispute Resolution and Conflict Management*.<sup>9</sup> It has also made a number of recommendations based on the recent Federal Court Project report, '*Solid work you mob are doing*' – *Case studies in Indigenous Dispute Resolution and Conflict Management in Australia*.<sup>10</sup>

We commend NADRAC for its commitment to access to justice and culturally appropriate dispute resolution for Aboriginal and Torres Strait Islander peoples. We endorse the Statements of Principle and recommendations contained in the 2006 report, particularly Statement of Principle 4, which reads:

Mainstream dispute resolution agencies should address the barriers that affect the effectiveness of their services for Indigenous people and modify their practices to take account of Indigenous needs.

In line with this Statement of Principle, and the findings of the report, the Model Plan should include specific guidelines for Commonwealth agencies engaging in ADR with Aboriginal and Torres Strait Islander parties.

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<sup>9</sup> National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) available at [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_IndigenousDisputeResolutionandConflictManagement](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_IndigenousDisputeResolutionandConflictManagement) (last accessed 2 March 2010).

<sup>10</sup> '*Solid work you mob are doing*' – *Case studies in Indigenous Dispute Resolution and Conflict Management in Australia*, report to the National Alternative Dispute Resolution Advisory Council by the Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project (2009), available at [http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications\\_PublicationsbyDate\\_SolidWorkyouMobaredoi ngReport](http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoi ngReport) (last accessed 12 March 2010).

The proposed guidelines should include the following elements:

- Agencies should appoint liaison officers to give face-to-face presentations to Aboriginal and Torres Strait Islander parties about ADR.<sup>11</sup>
- Agencies should develop and maintain written and audio-visual information materials specifically adapted to the needs of Aboriginal and Torres Strait Islander peoples.
- Agencies' internal staff training should include Aboriginal and Torres Strait Islander cultural awareness training.
- Agencies should recognise that some Aboriginal and Torres Strait Islander people may be intimidated by formal office environments, and may experience 'fear and anxiety' in enclosed spaces. Wherever possible, ADR involving Aboriginal and Torres Strait Islander parties should be conducted in a non-intimidating, culturally sensitive environment.<sup>12</sup>
- ADR should be carried out in a flexible manner, avoiding strict time limits and allowing Aboriginal and Torres Strait Islander parties to 'come and go' as the session proceeds.<sup>13</sup>
- Agencies should recognise traditional gender roles in Aboriginal and Torres Strait Islander cultures, some of which may prevent parties from discussing particular issues with a mediator, or a party, of another gender. Where necessary, ADR should be conducted by a male-female team to accommodate this.<sup>14</sup>
- Wherever possible, Commonwealth agencies should employ Aboriginal and Torres Strait Islander people as ADR practitioners to conduct ADR procedures involving Aboriginal and Torres Strait Islander parties.<sup>15</sup>

*Recommendation 3:*

Agencies should appoint liaison officers to give face-to-face presentations to Aboriginal and Torres Strait Islander parties about ADR.

*Recommendation 4:*

Commonwealth agencies should develop written and audio-visual materials specifically directed to Aboriginal and Torres Strait Islander peoples.

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<sup>11</sup> *Indigenous Dispute Resolution and Conflict Management*, above n 9, 10.

<sup>12</sup> *Ibid* 12.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* 10-11.

<sup>15</sup> *Ibid* 13.

*Recommendation 5:*

Agencies' internal staff training should include Aboriginal and Torres Strait Islander cultural awareness training.

*Recommendation 6:*

The Model Plan should recognise that Commonwealth agencies need to adapt their ADR procedures to the needs of Aboriginal and Torres Strait Islander peoples. To this end, the Model Plan should contain specific guidelines for ADR procedures involving Aboriginal and Torres Strait Islander parties.

*Recommendation 7:*

The guidelines should state that wherever possible, ADR involving Aboriginal and Torres Strait Islander parties should be conducted in a non-intimidating, culturally sensitive environment.

*Recommendation 8:*

The guidelines should state that ADR involving Aboriginal and Torres Strait Islander parties should be flexible, avoiding strict time limits and allowing parties to 'come and go' as the session proceeds.

*Recommendation 9:*

The guidelines should state that where necessary, ADR procedures involving Aboriginal and Torres Strait Islander parties should be conducted by a male-female team, in order to respect traditional gender roles.

*Recommendation 10:*

The guidelines should state that wherever possible, Commonwealth agencies should employ Aboriginal and Torres Strait Islander ADR practitioners to conduct ADR procedures involving Aboriginal and Torres Strait Islander parties.

#### **4 Referral to financial counselling services**

Financial counsellors undertake free, independent advocacy on behalf of people with credit and debt-related financial problems. Financial counsellors can be of great assistance to individuals in dispute with Centrelink, the Australian Tax Office or the Child Support Agency. In these situations, the support of a financial counsellor can lessen the power imbalance between an individual and the agency concerned.

Financial counselling can also help individuals understand their financial circumstances and their limitations, for example, their capacity to enter into payment

plans to repay debt. This knowledge facilitates negotiation and makes it more likely that parties will enter into sustainable, lasting agreements.

*Recommendation 11:*

Whenever a Commonwealth agency engages in a dispute with an individual regarding an alleged debt, the agency should refer that individual to a financial counselling service, prior to conducting any ADR procedure.

Thank you again for inviting our contribution to the Model Plan. Should you wish to discuss any aspect of this submission, please contact Lucie O'Brien at the Federation of Community Legal Centres (Vic) on (03) 9652 1512.

Sincerely



**Hugh de Kretser**  
Executive Officer  
Federation of Community  
Legal Centres (Vic)



**Liz O'Brien**  
National Convenor  
National Association of  
Community Legal Centres



**Richard Foster**  
Executive Officer  
Financial and Consumer  
Rights Council

## **List of recommendations**

### *Recommendation 1:*

The Model Plan should impose a positive duty on Commonwealth agencies to assist self-represented individuals by referring them to sources of free or low-cost legal advice.

### *Recommendation 2:*

The Model Plan should refer to the Government's duties as a model litigant, including the obligation to avoid 'taking advantage of a claimant who lacks the resources to litigate a legitimate claim,' The Model Plan should recognise the risk of this occurring in an ADR setting. It should require agency representatives to explain clearly, at the outset of any dispute, that the claimant is not obliged to settle through ADR, and that he or she is entitled to a hearing in the relevant court or tribunal.

### *Recommendation 3:*

Agencies should appoint liaison officers to give face-to-face presentations to Aboriginal and Torres Strait Islander parties about ADR.

### *Recommendation 4:*

Commonwealth agencies should develop written and audio-visual materials specifically directed to Aboriginal and Torres Strait Islander peoples.

### *Recommendation 5:*

Agencies' internal staff training should include Aboriginal and Torres Strait Islander cultural awareness training.

### *Recommendation 6:*

The Model Plan should recognise that Commonwealth agencies need to adapt their ADR procedures to the needs of Aboriginal and Torres Strait Islander peoples. To this end, the Model Plan should contain specific guidelines for ADR procedures involving Aboriginal and Torres Strait Islander parties.

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The guidelines should state that where necessary, ADR procedures involving Aboriginal and Torres Strait Islander parties should be conducted by a male-female team, in order to respect traditional gender roles.

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The guidelines should state that wherever possible, Commonwealth agencies should employ Aboriginal and Torres Strait Islander ADR practitioners to conduct ADR procedures involving Aboriginal and Torres Strait Islander parties.

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Whenever a Commonwealth agency engages in a dispute with an individual regarding an alleged debt, the agency should refer that individual to a financial counselling service, prior to conducting any ADR procedure.