**Discrimination Law – DDLS input**

Figures relating to complaints received in the ADCQ and AHRC are available in each Commission’s Annual report (the figures quoted in your document are close enough).

We agree with the actions suggested in your 12 November 2013 meeting as a starting point. However, we do prefer the emphasis to be on the first three actions.

There is greater cost benefit in having a complaint that is well-structured and supported by relevant documents in the first instance, rather than simply putting resources at the later stage to:

* advise clients on ‘appropriate’ settlement outcomes
* represent clients at conciliation conference
* represent clients at QCAT

The following cases form our own case work are examples of how early assistance can achieve a better outcome for aggrieved clients.

**Client A**

A client lodged his own complaint to ADCQ in an employment matter (a course of conduct of alleged harassment and dismissal on the basis of impairment). After lengthy negotiations on the issue of accepting for conciliation out-of-time allegations, the client followed up on a referral to our centre for assistance in progressing the matter through the conciliation stage (not only representing him at the conference itself).

We identified that another corporate respondent (new respondent) which was a business associate of the original respondent in the employment situation should be included in the complaint and requested ADCQ to add them before any conciliation conference was to be scheduled.

Further negotiation were undertaken because by that stage, the allegation involving the new respondent (breach of s 15A ADA) was >12 months old. ADCQ agreed to accept the new respondent and a conciliation conference was scheduled and attended.

At the conciliation conference, the new respondent showed that they did not breach s15A ADA and the complaint was subsequently withdrawn against that respondent. However, their verbal evidence (backed up later by written statement) clearly showed that the original respondent did discriminate against the client.

The conciliation conference did not resolve the matter and negotiations continued against the original respondent. Because the new respondent would have been a compelling witness in support of our client, the matter finally settled with a substantial payment to our client.

*Review*

Assistance to advise on ‘appropriate settlement outcomes’ or to represent the client at a conciliation conference based on the client’s own original complaint and respondent, would not have achieved any payment at all as the original respondent was determined to avoid any such outcome. The evidence provided by that respondent (proven by the new respondent to have contained false statements) would have adequately defended the original complaint.

It would have been very difficult to pursue the matter to QCAT without the evidence of the new respondent (which that respondent provided only to defend its inclusion in the complaint), so representation at QCAT (whether paid or pro bono) most likely would not have been successful either.

**Client B**

A client had lodged a 19 page complaint to AHRC regarding alleged harassment of her child on the grounds of the mother’s disability. She followed up on the referral to our centre for assistance.

We identified and clarified the grounds of the complaint, so that the respondent knew what they had to answer to, and obtained appropriate documentary evidence. Negotiations continued after the conciliation conference and the matter was settled with compensation payment and payment for therapy for the child.

*Review*

If the complaint was not properly structured and evidence presented in time for the conciliation conference, any representation at the conference stage (to process the original complaint) would not have been successful in resolving the matter. Advice on settlement at that time would have been that there were insufficient grounds, and no settlement could be expected. Furthermore, we expect that advice would have been to not refer the complaint to QCAT.

**Client C**

A client was referred to us after she had lodged a voluminous complaint to ADCQ alleging discrimination in employment, as well as multiple incidents of alleged misconduct and maladministration by several persons.

We advised the client that most of the allegations would not support a complaint of discrimination and were better handled through other channels which she was already pursuing.

We wrote to ADCQ to clarify the grounds for the complaint and identify one event which did support an allegation of discrimination. The conciliation conference failed to resolve the matter.

We advised the client on difficulties in referring the matter to QCAT without supporting witness statements (which she had been unable to obtain at that time).

The client referred the complaint to QCAT and represented herself throughout (our guidelines did not allow for support in QCAT at that time). After a long process involving several hearings regarding legal representation, the matter was final determined (based on legal argument put forward in our amendment of her complaint and witnesses then willing to come forward) and she was awarded compensation. The respondents were unsuccessful in their appeal.

*Review*

If the client was not assisted early on to clarify what the real (and only) allegation of discrimination which could be pursued through ADCQ (and then QCAT), legal representation at the conciliation conference stage still would not have resolved the matter.

Since any referral to QCAT is bound by the original complaint facilitated by ADCQ at Conference, legal representation at QCAT most likely would have been ineffective as well.

**Employment law impacts**

ADCQ reported that 65.6% of discrimination complaints related to work.

AHRD reported the following statistics:

33% complaints under DDA related to work

83% complaints under SDA related to work

25% complaints under RDA related to work

In our view, there is insufficient attention paid to assisting clients to lodge General Protections applications in FWC.

This can be a speedier alternative to commencing a drawn-out process in ADCQ or AHRC.

If the matter cannot be settled at FWC, and a certificate is issued to that effect, the client can still lodge a Complaint with ADCQ to have the matter conciliated and referred to QCAT (rather that proceed in the costs jurisdiction of the FCCA).

**Client D**

We assisted a client by drafting his application to FWC for General Protections dispute (with appropriate attachments), and advised him further on negotiations during the conference. He was able to ask for a break during the conference so that he could contact us for further advice. The matter was successfully resolved. It avoided the lengthy process of a formal complaint to ADCQ or AHRC.

**NDIS**

The NDIA and Legal Aid have indicated that only complex and novel matters will be funded (in disputes involving administrative decisions). Faulty decisions may be considered discrimination in the administration of Commonwealth laws and programs.

We can expect that as the NDIS rolls out, there will be more clients needing advice and representation.

**Pro bono – conflicts of interest**

Pro bono representation, especially by large firms in actions against corporate respondents is limited by conflict of interest. It would assist if more firms could get on board to provide the assistance.

**Promoting services to the community**

We can do better to promote the service and the assistance we can provide to the community to address unmet need on this area. Use those figures to support the economic case for better funding.

**Social media**

Explore the use of social media to get the messages out to the community.

ADCQ uses Facebook and You Tube. AHRC uses both and Twitter as well.

**Conclusion**

It is important to represent complainants through the conciliation conference, and to provide adequate representation in QCAT if the matter is referred (and has sufficient merit).

However, it is crucial to structure the complaint properly to establish that merit before the conciliation conference, if the matter is to have the best opportunity of being resolved at conference or determined at a final hearing.

This also serves to ‘weed out’ complaints which would be assessed as lacking in substance. We have no problem in advising clients not to proceed (or to withdraw if they have already lodged a complaint) where they are misguided as to the merits of their complaint. This is an additional cost benefit in avoiding lengthy and costly effort in matters which have little prospect of success.

It has been our experience that AHRC does not terminate complaints for lack of substance, and attempts to conciliate all complaints regardless of merit).

We expect that similar early work in matters other than impairment/disability would achieve better outcomes as well.

In addition, given the high ratio of complaints in the area of work, more emphasis should be place on training to provide adequate advice and representation in FWC actions.