Consultation Paper 311: Internal dispute resolution: Update to RG 165

Legal Aid NSW submission to Australian Securities and Investments Commission

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services.

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Australian Securities and Investments Commission's (**ASIC**) consultation about updates to Regulatory Guide 165 (**Guide**) regarding internal dispute resolution (**IDR**) processes.

The Guide is a useful resource for consumers, advocates and industry to ensure efficient dispute resolution. The Guide should aim to encourage not only an efficient dispute resolution process, but also quality decision making that leads to fair outcomes for consumers.

Our submission addresses the consultation paper questions below.

B1Q1 Do you consider that complaints made through social media channels should be dealt with under IDR processes? If no, please provide reasons. Financial firms should explain:

(a) How you currently deal with complaints made through social media channels; and
(b) Whether the treatment of social media complaints differs depending on whether the complainant uses your firm's own social media platform or an external platform.

Legal Aid NSW supports complaints made through social media channels to be dealt with under IDR processes.

We endorse the consultation paper's comments regarding recent consumer research, which strongly indicates that many consumers use social media as a preferred method for customer service interactions with organisations. This highlights the importance of social media being a point of access to IDR processes.

The proposed change to require financial firms' IDR processes to apply to a broader definition of complaints, including complaints made on a firm's own social media platform, may lead to the following benefits:

- greater ease of access to IDR processes for consumers, including consumers who may not be aware of, or comfortable using, traditional complaints processes;
- more consistent outcomes for consumers who make complaints through social media platforms; and
- better data collection of complaints which will allow financial firms to identify systemic issues with products or practice, and proactively resolve them.

We understand that complaints through social media platforms are generally resolved quickly and favourably for consumers. We also acknowledge that there is a need to balance the need to maintain that same efficient and flexible resolution of complaints via social media, while also complying with requirements in the Guide. However, we are concerned about the potential privacy risks for consumers who use social media to make complaints. Some consumers may not be aware that complaints they make to financial firms via social media may be public and could be shared with people in their social network, or visible to people that they don't know online. In addition, information from complaints made by consumers on social media could be added to the information that

social media companies sell to advertisers. This could then lead to the consumers being targeted with advertising for other financial products, including ill-suited products that could cause detriment.

Privacy risks have always existed for social media users. However, if ASIC is to formally acknowledge social media as an avenue to commence IDR, then in our view corresponding safeguards should also be considered. We suggest that:

- ASIC could liaise with appropriate social media companies to identify and mitigate privacy concerns. For example, it may be possible for a social media company not to collect data about a consumer making a complaint to a financial firm on their platform;
- financial firms should be required to provide information to consumers in plain language about the potential privacy risks of making complaints to financial firms through social media platforms;
- ASIC could conduct an awareness raising campaign about the advantages and privacy risks of making complaints through social media platforms, and
- financial firms should be required to always provide a mechanism for consumers to access IDR processes without needing to put their private information on a public platform.

B2Q1 Do you consider that the guidance in the Guide on the definition of 'complaint' will assist financial firms to accurately identify complaints?

Yes, we strongly support ASIC's guidance to clarify the definition of 'complaint', to eliminate any misunderstanding as to what type of communication is captured. The updated information in the Guide will assist financial firms to accurately identify complaints and should promote consistency among financial firms, regardless of their size.

We strongly agree that financial firms should not simply categorise an expression of dissatisfaction as 'feedback', an 'inquiry', or a 'comment' because it was expressed verbally, where the firm considers it to have no merit, or where a goodwill payment was made on the issue without an admission of error.

We also echo ASIC's concerns raised in the consultation paper, that financial firms are narrowing the definition of 'complaint' by requiring customers to expressly state the word 'complaint' or lodge their complaint in written form. In our view, it is not reasonable or realistic for financial firms to expect that all consumers will have the ability to articulate their problem by using certain 'required words', or to have the ability to make a complaint in written form. This is especially relevant for consumers experiencing some forms of vulnerability.

In our experience, clients often seek advice from us following numerous attempts to activate a financial firm's complaint process. In many of these cases, it would appear that the clients were simply not using the 'required word' to activate the IDR process. The proposed additional guidance regarding the definition of 'complaint', if complied with by financial firms, should assist our clients, including those experiencing vulnerability, to more easily and quickly access financial firms' IDR processes.

We welcome ASIC's position that any expression of dissatisfaction within the definition of 'complaint' must trigger the financial firm's obligation to deal with the matter according to the IDR requirement, regardless of the financial firms' structure or size.

B2Q2 Is any additional guidance required about the definition of 'complaint'? If yes, please provide:

(a) Details of any issues that require clarification; and
(b) Any other examples of 'what is' or 'what is not' a complaint that should be included in the Guide.

We strongly support ASIC's expectation that financial firms should take a proactive approach to identifying complaints, so that a customer is not expressly required to state the word 'complaint' or put their complaint in writing, to trigger a financial firm's IDR process (as set in paragraph 31 of the Guide).

However, in our view 'simple requests for information' should not be included in the 'what is not a complaint' category (paragraph 35 of the Guide). In our experience, some clients may not realise that they can make a complaint about a problem they are experiencing. We propose that where a customer makes a request for information, the financial firm should take a proactive approach to identifying whether the customer wants to make a complaint, or needs assistance to make a complaint.

B4Q1 Do you agree that firms should record all complaints that they receive? If not, please provide reasons.

Legal Aid NSW agrees that firms should record all complaints that they receive. This should include capturing and recording complaints received and/or resolved to the complainant's satisfaction, regardless of the time frame within which they are resolved. This should include complaints resolved at the first point of contact, and complaints resolved by the end of the fifth business day after the complaint or dispute was received (which firms are currently not required to record).

Recording all complaints would result in the following benefits:

- firms and ASIC would have more accurate and consistent data about IDR complaints and the resolution of those complaints;
- firms and ASIC would be able to identify and address emerging and systemic issues sooner;
- it may lead to firms having a greater understanding of consumer needs and the drivers of complaints; and
- it may improve product and service delivery for consumers.

B6Q1 Do you agree with our proposed requirements for IDR data reporting? In particular:

(a) Are the proposed data variables set out in the draft IDR data dictionary appropriate?

Legal Aid NSW broadly agrees with the proposed requirements for IDR data reporting.

We note that Item 34 in the draft IDR data dictionary (Attachment 2 to the consultation paper) requires firms to report an outcome for the complaint. There are currently three proposed outcomes that can be recorded: if the complaint was resolved in the complainant's favour in full, resolved in the complainant's favour in part, or resolved in favour of the firm. We submit that firms should also be required to report if the complaint was withdrawn, which is an option for 'complaint status' in Item 19. Firms should also be required to provide reasons for why a complaint was withdrawn, where this is known.

Capturing this data would provide a fuller picture of the number of complaints and their outcomes. For example, in our experience assisting clients with insurance problems, we have seen that consumers often withdraw their claims as a result of an insurers' advice that the claims will likely be denied. Insurers also remind consumers of the benefits of no claim bonuses. This practice reduces insurers' formal claim denial count and information about the withdrawn complaints is not captured. In many cases, our clients are not advised of any IDR or external dispute resolution (**EDR**) options, and are not provided with formal correspondence by the insurer to confirm that a claim has been withdrawn.

(c) When the status of an open complaint has not changed over multiple reporting periods, should the complaint be reported to ASIC for the periods when there has been no change in status?

We submit that where the status of an open complaint has not changed over multiple reporting periods, the complaint should be reported to ASIC as unresolved, along with reasons explaining why it remains unresolved.

B7Q1 What principles should guide ASIC's approach to the publication of IDR data at both aggregate and firm level?

Publishing complaints data has the dual benefit of sharing information about the causes of complaints to assist industry to improve customer service, and helping consumers to make an informed choice when making a purchase.

In our view the following principles should guide ASIC's approach to publishing data:

- accessibility: data should be easily understood by consumers;
- consistency: data should be published with consistent measures to allow easy comparison by consumers and industry over time; and
- transparency: data relating to specific firms should not be de-identified, and should allow consumers, industry and consumer advocates to identify firms by name.

B8Q1 – Do you agree with our minimum content requirements for IDR responses? If not, why not?

Yes. Legal Aid NSW agrees with ASIC's minimum content requirements for IDR responses. We submit that IDR responses should also meet the following criteria.

(i) Easy to understand for the consumer

We recommend that all IDR responses should be provided to consumers in plain language to improve accessibility and inclusivity of the IDR process. A significant number of Australians have low literacy or numeracy levels. For example, a 2019 report by the Organisation for Economic Co-operation and Development stated that "*more than one in five Australians can at most complete very simple reading and/or mathematical tasks, such as reading brief texts on familiar topics or understanding basic percentages.*"[1]

In addition, where a financial firm is aware that a consumer has low level literacy or is likely to find it difficult to understand an IDR response, the financial firm should be required take reasonable steps to ensure that the IDR response is accessible for the consumer, as far as reasonably possible. This could include, for example, communicating via telephone, communicating with a support person, or writing in easy English as opposed to plain language.[2]

(ii) User testing

We recommend that ASIC require financial firms to user test IDR responses with a broad range of consumers, to ensure that the purpose of the IDR response has been achieved. That is, that the consumer (and in particular, a consumer with a low literacy level) is able to understand the reasons for the decision and what their options are, after receiving the IDR response.

(iii) Must include details of who can be contacted for free legal assistance

We submit that an IDR response should be required to include contact details of where the consumer can access free legal assistance in the relevant state or territory.

(iv) Procedural fairness

We support the requirement for a financial firm to set out its findings on the material facts and to refer to information that supports those findings in its IDR response (paragraph 75 of the Guide). We submit that in addition, where a financial firm has information or evidence that may lead it to make an adverse decision, the firm should be required to put this to the consumer and give them an opportunity to respond, before providing a final IDR response.

We acknowledge that there may be a tension between providing an IDR response in 30 days and complying with this requirement. Where this tension exists, we recommend that the consumer be given the option of:

- receiving an IDR response within 30 days; or

[1] Organisation for Economic Co-operation and Development, 'Future Ready Adult Learning Systems Australia (web page), February 2019 <http://www.oecd.org/australia/Future-ready-adult-learning-2019-Australia.pdf>.

[2] Easy English is a style of writing intended to make information accessible for people with low English literacy. It has a number of rules and is distinct from plain English.

- choosing to extend the timeframe, to give the financial firm more time (if required) to comply with above procedural fairness proposal.

Example of an exemplary IDR response

Through our casework experience we have been exposed to both poor IDR responses and exemplary ones. This case study illustrates the impact that an exemplary IDR response can have on a vulnerable client.

Case study – Imran

Imran is a 40 year old man who arrived to Australia as a refugee. He has limited spoken English and no written English skills. His mother became sick so he was required to send a large amount of his intermittent income overseas to allow for her to get treatment. Due to paying for this unexpected emergency he defaulted on his car loan.

The financial firm that lent him the money for the car failed to obtain an interpreter for him when they were in discussions with him over his defaults and the potential repossession. Concerns were also raised about compliance with responsible lending and ensuring our client understood the terms of the contract from the outset.

With the assistance of Legal Aid NSW Imran lodged an IDR complaint with the financial firm.

Within 8 days of lodging the complaint he received an IDR response from the financial firm which ultimately agreed to waive the remainder of the debt that Imran owed. Imran and Legal Aid NSW were impressed with:

- the speed of the response,
- the fact that the response identified all of Imran's concerns (Imran felt like the financial firm understood his concerns because they were outlined by the financial firm in their IDR response),
- the response was written in plain language,
- the ability of the financial firm to clearly express which allegations they accepted and denied. Our experience is that it can be very cathartic for a consumer; compared with the same positive outcome but the financial firm denies all wrongdoing. It also assists IDR complaints in future matters as it informs solicitors about the approach of the financial firm.

B9Q1 Do you agree with our proposed approach not to issue a separate legislative instrument about the provision of written reasons for complaint decisions made by superannuation trustees? If not, please provide reasons.

Yes. Legal Aid NSW agrees with the proposed approach.

B10Q1 Do you consider there is a need for any additional minimum content requirements for IDR responses provided by superannuation trustees? If yes, please explain why you consider additional requirements are necessary.

No. Legal Aid NSW does not consider there to be a need for any additional minimum content requirements for IDR responses provided by superannuation trustees.

B11Q1 Do you agree with our proposals to reduce the maximum IDR timeframes? If not, please provide:

(a) reasons and any proposals for alternative maximum IDR timeframes; and
(b) if you are a financial firm, data about your firm's current complaint resolution timeframes by product line.

Yes, we agree that the maximum IDR timeframe for superannuation complaints and complaints about trustees providing traditional services should be reduced from 90 days to 45 days, and that the maximum IDR timeframe for all other complaints should be reduced from 45 days to 30 days. This excludes credit complaints involving hardship notices and/or requests to postpone enforcement proceedings and default notices where the maximum timeframe is generally 21 days.

We agree that it is important for consumers to have IDR complaints resolved in a timely and efficient manner. A reduction in the maximum timeframes to 45 days and 30 days respectively will help to maintain consumer confidence in the IDR process and may minimise the number of complaints that are withdrawn or abandoned by consumers.

However, Legal Aid NSW recommends that ASIC and firms ensure that:

- the quality of the decision making in IDR complaints is not compromised by reducing the timeframes;
- consumers are not placed under pressure in order for the firm to meet the new timeframes;
- consumers are afforded procedural fairness, as per our recommendation above, at B8Q1(iv).

Legal Aid NSW agrees that, subject to the above points, the reduced timeframes should not be undermined by an over-reliance on IDR delay notifications, which should only be used in exceptional circumstances.

B11Q2 We consider that there is merit in moving towards a single IDR maximum timeframe for all complaints (other than the exceptions noted at B11(b) above). Is there any evidence for not setting a 30-day maximum IDR timeframe for all complaints now?

Legal Aid NSW supports moving towards a single IDR maximum timeframe of 30 days for all complaints (other than the exceptions in relation to credit complaints).

This would provide a streamlined and consistent approach for consumers. However, firms should be given sufficient time to implement a 30 day maximum time frame, to ensure that the issues we have raised in response to B11Q1 above can be properly

addressed. If ASIC moves to implement a 30 day maximum time frame immediately, we are concerned that it may not allow sufficient time for these issues to be adequately addressed, adversely impacting consumers.

B12Q1 Do you agree with our approach to the treatment of customer advocates under the Guide? If not, please provide reasons and any alternative proposals, including evidence of how customer advocates improve consumer outcomes at IDR.

No. Legal Aid NSW does not agree that customer advocates should be required to comply with the Guide. Instead, we suggest a number of changes that are set out below.

Legal Aid NSW has had very positive experiences resolving issues with customer advocates, where firms have offered this avenue as an additional escalation point. Ideally, IDR should operate as effectively as the customer advocate dispute resolution process. We are concerned that imposing obligations under the Guide on customer advocates (such as a total 30 day timeframe to respond to complaints) will negatively impact on outcomes obtained by our clients.

In our experience, some of the main benefits of customer advocate interventions are that the advocates can act flexibly, with a wide discretion to obtain outcomes for our clients, many of whom are experiencing some form of vulnerability. The customer advocate teams are generally senior staff, with extensive experience in financial services matters and in working with consumers experiencing vulnerability. We also understand that customer advocates sometimes play a role in educating IDR staff where errors have been made, or where systemic issues have been identified. The case studies below provide some insights into our experience with the customer advocate dispute resolution process.

Case study – Indigo

Indigo, a single mum dependent on Centrelink, sought assistance from Legal Aid NSW in 2017 when she noticed that her bank account had been subject to a garnishee order in the amount of approximately $3000. It was later discovered that this garnishee order was a result of Local Court proceedings filed against her by a debt collector for credit card debt, originating from one of the major banks.

Indigo's ex-husband had forced her to apply for the credit card during their marriage because he had a bad credit rating and could not access credit in his own name. Indigo suffered severe domestic violence during her marriage, involving physical, emotional and financial abuse. While no longer in the marriage, Indigo was suffering from severe mental health issues and long-term financial hardship at the time that she sought assistance from Legal Aid NSW.

Legal Aid NSW attempted to negotiate directly with the debt collector, but they were unwilling to resolve the matter. Legal Aid NSW approached the customer advocate at the major bank where the credit card debt originated, asking that the bank buy the debt back from the debt collector for the purpose of waiving it in full. The matter was assessed by the customer advocate over 28 business days. The bank agreed to buy back the debt from the debt collector and waived the debt in full. The customer advocate organised for consent orders to be signed by both parties to have the judgement debt set aside in the Local Court.

Case study – Carla

Carla, a young Aboriginal single mum, sought assistance from Legal Aid NSW because she was being pursued by a debt collector for a joint car loan that was taken out by her ex-partner. The loan was originally provided by the motor finance department at a major bank.

Carla did not realise that she was named on the car loan until she began receiving threatening correspondence about the debt from the collector. Carla never had any benefit from the loan because shortly after her ex-partner drove the car out of the dealership, the relationship, which was abusive, broke down and Carla has not seen her ex-partner since.

Legal Aid NSW made submissions to the debt collector, requesting that Carla's liability be reduced to nil in the circumstances. The debt collector was unwilling to negotiate. Legal Aid NSW then escalated the matter to the customer advocate at the major bank. The assessment by the customer advocate took 5 business days, and an agreement was reached that the bank would buy the debt back from the debt collector and the debt was waived in full.

Proposals for change

While we do not consider that customer advocates should be required to comply with the Guide at this time, we suggest the following changes to the customer advocate function.

(i) Options post IDR should be clearly and uniformly explained to consumers

The customer advocate dispute resolution process should remain optional and should not be a prerequisite to making a complaint to the Australian Financial Complaints Commission (AFCA).

(ii) Customer advocate experience should be generally consistent between financial firms

We suggest that the customer advocate experience should be generally consistent between financial firms, so that consumers broadly know what to expect when engaging with a customer advocate. To achieve this, ASIC could facilitate the creation of terms of reference that all customer advocates must adopt. This could include information about general timelines for dispute resolution, communication standards and how to access the consumer advocate. These terms of reference should be tailored to the unique role that customer advocates currently play in the dispute resolution process.

(iii) Customer advocate function should report data to ASIC

We submit that the customer advocate function should report a limited data set to ASIC, which should include the number of:

- decisions per year;
- bank decisions that the advocate supported;
- bank decisions that the advocate enhanced in the customer's favour;
- bank decisions that the advocate substituted in the customer's favour;
- advocate decisions that went to AFCA, and the number of these that were overturned by AFCA;
- customers that decided to progress to the customer advocate function rather than AFCA, after the IDR process; and
- instances where feedback that the customer advocate provided to the IDR team following a decision reversal.

Findings from this data set could provide a basis in two years' time for ASIC to review whether the customer advocate function should become subject to the Guide.

B12Q2 Please consider the customer advocate model set out in paragraph 100. Is this model likely to improve customer outcomes? Please provide evidence to support your position.

Legal Aid NSW supports the customer advocate model set out in paragraph 100 of the Consultation Paper. However we suggest some changes to the model and obligations on customer advocates, as set out in our response at B12Q1.

In our view, the customer advocate model operates more effectively than IDR, and ideally IDR would operate in the same way. In both the IDR and the customer advocate function, there should be efficient processes, high quality decision making and fair outcomes for consumers. However, in our experience, the current state of decision making in IDR processes does not compare with the more robust and efficient decision making processes in the customer advocate function.

B13Q1 Do you consider that our proposals for strengthening the accountability framework and the identification, escalation and reporting of systemic issues by financial firms are appropriate? Please provide reasons.

Yes. ASIC's proposals for strengthening the accountability framework and the identification, escalation and reporting of systemic issues by financial firms are appropriate and necessary.

Consumer complaints are a key risk indicator for systemic issues within a financial firm. We therefore support ASIC's guidance, which expects financial firms to have an appropriate 'systemic focus' when processing and managing complaints.

We support ASIC's guidance at paragraph 132 of the Guide, which specifies that financial firms must identify possible systemic issues from complaints by requiring staff to consider whether each complaint raises a systemic component, regularly analyse complaint data sets, and conduct root cause analysis on recurring complaints. In particular, we support ASIC's suggestion that financial firms consider building a mandatory 'flag' into their complaints management systems that requires staff to evaluate the potential systemic issue raised in each complaint.

Legal Aid NSW would also welcome guidance from ASIC regarding publishing information on systemic issues and trends. In our view, this information should be made available for consumer advocates, industry and consumers in a streamlined and readily accessible form.

B14Q1 Do you agree with our approach to the application of AS/NZS 10002:2014 in the Guide? If not, why not? Please provide reasons.

Yes, we agree with ASIC's approach to the application of Standards Australia's *Guidelines for complaint management in organisations* (**Standards Australia's**

Guidelines) which has been developed as a best practice guideline for complaint management.[3]

Legal Aid NSW largely agrees with the standards set out in Standards Australia's Guidelines for effective complaint management, and strongly supports ASIC's commitment to take the standards into account when considering whether to make, or improve a standard relating to IDR.

B15Q1 Do the transition periods in Table 2 provide appropriate time for financial firms to prepare their internal processes, staff and systems for the IDR reforms? If not, why not? Please provide specific detail in your response, including your proposals for alternative implementation periods.

Yes. Legal Aid NSW supports the proposed transition time periods.

B15Q2 Should any further transitional periods be provided for other requirements in the Guide? If yes, please provide reasons.

No.

[3] Standards Australia, 'AS/NZS 10002:2014 Guidelines for complaint management in organisations', 2014.