

**ASIC Consultation Paper 298
– Oversight of the Australian
Financial Complaints
Authority: Update to RG139**
Submission by Legal Aid Queensland



Oversight of the Australian Financial Complaints Authority: Update to RG139

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to ASIC Consultation Paper 298 – Oversight of the Australian Financial Complaints Authority: Update to RG 139. LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s Consumer Protection Unit lawyers provide specialist advice and representation in consumer law matters, including housing repossession and mortgage stress, loans and other debts, contracts including telecommunications contracts and unsolicited consumer agreements. Advice is provided to financial counsellors and lawyers as well as clients.

LAQ regularly assists and represents clients through the Financial Services External Dispute Resolution Process and this submission is informed by that knowledge and experience.

PROPOSAL B1

B1 We propose to require that:

- (a) The obligation to report will apply to serious contraventions by a financial firm, including a licensee, a representative or an employee; and**
- (b) AFCA must make reports within a reasonable time, but no later than 30 days, of**
 - (i) becoming aware that a serious contravention has occurred or may have occurred;**
or
 - (ii) identifying a systemic issue.**

In specifying requirements, we will consult with APRA, the Australian Taxation Office (ATO) and AFCA, with a view to harmonising and streamlining reporting arrangements.

B1 Question 1 Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?

LAQ welcomes the establishment of AFCA and recognises the important role that AFCA will play in identifying and reporting serious contraventions of the law and systemic issues.

LAQ supports the proposed process and timeframes outlined in this proposal.

B2 We propose to give guidance in draft RG139 that:

- (a) a contravention will be ‘serious’ (and therefore reportable by AFCA to ASIC) if there are sufficient facts or information to found an objectively reasonable belief that it is serious. We consider that a reasonable belief will be formed if a reasonable person would expect AFCA to report the matter to ASIC, or if AFCA in good faith forms the view that a serious contravention of the law may have occurred;
- (b) the particulars of the contravention, for the purposes of s1052E, will include the identity of the financial firm, including the licensee, representative or employee; and
- (c) AFCA should consult with ASIC if they are unsure about whether they should refer a matter to ASIC.

B2 Question 1 Do you agree with our broad approach to AFCA reporting? If not, why not?

LAQ supports the proposed objective test that will require the reporting of a serious contravention of the law to ASIC. It is important for reasons of certainty for consumers and the industry that an objective test be used.

However, in LAQ’s view, a serious contravention of the law or systemic issue can be evident from one complaint to AFCA and should be capable of instigating an investigation in appropriate circumstances.

LAQ strongly supports AFCA’s ability to consult with ASIC about the potential referral of serious contraventions. Increased communication between AFCA and ASIC is likely to see more serious contraventions of the law and systemic issues identified earlier.

B3 We propose to clarify in our guidance that the primary role of the independent assessor is to:

- (a) respond to complaints about how AFCA dealt with an individual complaint or series of complaints; and
- (b) identify, address and report on issues affecting the AFCA’s complaints handling operations and performance; and
- (c) as appropriate, make recommendations about or provide remedies for identified issues in complaints handling operations and performance.

B3 Question 1 Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?

LAQ supports RG139's proposed guidance about the primary role of the independent assessor. In LAQ's view, the independent assessor will have an important role in monitoring the performance of the new scheme and ensuring that AFCA is responsive to any issues that arise with their complaints handling.

B4 We propose to clarify in our guidance that it is not the role of the independent assessor to: (a) undertake a merits review of an AFCA decision, including a jurisdictional decision; or (b) re-open a complaint or the outcome of a complaint.

B4 Question 1 Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?

LAQ supports the proposed guidance that sets out what the independent assessor is not able to do. In LAQ's view, it is important for consumers and industry that the independent assessor will not act as an appeal body and that this is clearly set out in the proposed guidance.

B5 We also propose to require that the independent assessor must:

- (a) be appointed by the AFCA Board, with its role and functions set out in the AFCA terms of reference;
- (b) have sufficient powers and resources to perform its functions;
- (c) be independent, with appropriate qualifications and experience;
- (d) accept service complaints from all users of the scheme;
- (e) identify, address and report on issues affecting AFCA's complaints handling operations and performance;
- (f) make recommendations, as appropriate, to the Chief Ombudsman and to the AFCA Board;
- (g) identify any issues that may benefit from further review or analysis—for example, in an independent review;
- (h) make quarterly reports to the AFCA Board and ASIC; and
 - (i) make annual public reports on:
 - (ii) complaints received;
 - (iii) findings or recommendations made; and
 - (iv) outcomes achieved as a result of recommendations made.

B5 Question 1 Do you agree with our proposed requirements for the independent assessor? If not, why not?

LAQ supports the proposed requirements for the independent assessor as set out above. In LAQ's view, the public reporting functions are one of the most important roles of the independent assessor because it will:

- ensure transparency of AFCA,
- improve public awareness of the new scheme and its functions, and
- Assist in building public confidence in the operation of AFCA.

In light of this important function, LAQ submits that the independent assessor should be required to make biannual public reports on AFCA.

B6 Our proposed expectations for financial firms are that, by commencement (no later than 1 November 2018):

- (a) any final response or written reasons financial firms give to a consumer about a dispute at IDR will refer to AFCA;
- (b) financial firms will update online information and forms to refer to AFCA, as appropriate; and
- (c) personalised disclosures, including periodic and exit statements, will refer to AFCA.

B6 Question 1 Is this is a sufficient timeframe for financial firms to update all of their legal disclosures (as set out in paragraph 35) and other consumer communications? If not, why not? Please provide specific detail in your response.

LAQ supports the timeframe proposed to allow financial firms to update all of their legal disclosures and other consumer communications.

B6 Question 2 Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so, please provide reasons.

LAQ does not support providing transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement. In LAQ's view, any transitional relief will cause unnecessary confusion for consumers. The transition period in the lead up to AFCA's commencement is enough time for financial firms to meet their disclosure requirements.