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Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2601

By email: https://senate.aph.gov.au/submissions

Dear Mr Hallahan

Re: Senate Inquiry into Access to Justice

The Law Society of NSW is grateful for the opportunity to comment on the Inquiry into Access to Justice. The Criminal Law Committee, Litigation Law and Practice Committee and Dispute Resolution Committees of the Law Society of NSW have considered the terms of reference of the Inquiry and provided brief comments.

In addition to the comments by the Committees the recognition of the benefits of early issues definition and projection of liability can and should inform strategy development in the Legal Aid system. For those who fall outside the increasingly stringent legal aid criteria, the risks and the costs of pursuing a legal matter can be substantial. The well-documented difficulties and costs associated with the swelling pool of unrepresented litigants are testimony to a substantial weakness in our legal support system. Too many people fall through the cracks of our legal aid system and are left to navigate through the courts with little to guide them.

A system of legal assistance which includes improved support for those who need a lawyer to assess their matter would allow clients to make an informed decision on the merits of proceeding to court or exploring other dispute-resolution avenues. In turn, they would not be taking up valuable court resources on matters which have little chance of successful litigation.

Attached are comments made by the Committees for you consideration.

Yours sincerely

Joseph Catanzariti
President

Senate Legal and Constitutional Affairs Committee
Inquiry into Access to Justice

Comments by Criminal Law Committee, Litigation Law and Practice Committee and Dispute Resolution Committees of the Law Society of NSW

The ability of people to access legal representation

Access to justice is one of the cornerstones of a democratic society. Closely allied to access to justice is the right of an individual to legal representation. Access to justice and the right to legal representation have been eroded in recent times due to numerous factors, the major one being lack of funding for legal aid. In addition, there has been a tendency to exclude the right to legal representation as of right in a number of tribunals. This is of serious concern because, contrary to common belief, legal representation reduces the time taken to resolve disputes and, on the other hand, self-represented parties tend to lengthen proceedings.

The right to legal representation in all courts and tribunals should be a fundamental right.

The adequacy of Legal Aid

Legal Aid is a core responsibility of Governments. The Commonwealth and State Governments share the obligation to make available sufficient funds to enable legal aid services to be provided to meet the demand for information, advice and representation for those members of the community who are unable to pay for legal services.

In general terms, there is grave concern at the erosion of Commonwealth funding for legally aided matters over recent years. The Law Society and the Law Council of Australia have consistently raised the issue with the Commonwealth Government about the need to restore and maintain funding to Legal Aid Commissions. There is also particular concern that Aboriginal Legal Services are chronically under-funded.

Severe budget restrictions over the years have reduced the efficacy of legal aid in providing legal assistance to those who do not have the financial capacity to afford private representation. This situation should not be allowed to continue. The preponderance of self-represented people clogging the courts, creating delays and increasing costs (both to the courts and other parties) is a classic symptom of this parlous condition. There should be an acceptance by Governments, both State and Federal, that additional funding is urgently required for legal aid.

The recognition of the benefits of early issues definition and projection of liability can and should also inform strategy development in the legal aid system. For those who fall outside the increasingly stringent legal aid criteria, the risks and the costs of pursuing a legal matter can be substantial. The well-documented difficulties and costs associated with the swelling pool of unrepresented litigants are testimony to a substantial weakness in our legal support system. Too many people fall through the cracks of our legal aid system and are left to navigate through the courts with little to guide them.

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proceeding to court or exploring other dispute-resolution avenues. In turn, they would not be taking up valuable court resources on matters which have little chance of successful litigation.

There is an urgent necessity for the level of Legal Aid funding provided by the Commonwealth to be increased so that Legal Aid Commissions and Aboriginal Legal Services are able to meet the demands of their client base with respect to proper legal representation. The funding provided should enable legal service providers to acknowledge the costs of practice and the market cost of legal services. To do otherwise may damage the clients' perception of the quality of legal aid services and the fairness of the justice system in general.

Where budgetary constraints restrict the availability of legal aid, the impact may be seen in a greater call upon pro bono services and increases in the number of self-represented parties appearing in court.

Work done on a pro bono basis – for free or for substantially reduced rates for somebody who cannot afford full market rates or for an organisation working for disadvantaged groups for the public good – is an important part of the professional life of the legal profession. However, pro bono should not be regarded as an alternative to the adequate provision of legal aid by Governments. Pro bono properly supplements legal aid services by providing assistance to needy people who fail to qualify for legal aid.

Alternative means of delivering justice

It is a matter of necessity and good sense that wherever it is appropriate to use alternative dispute resolution it is used. The Law Society of NSW recognises the increasing capacity and expertise in this domain. Many solicitor's clients stridently press to have their day in court, but there are cases where a more cost-effective outcome may be available, and it remains a core part of our professional obligation to assist clients to access the legal path that best serves their interests.

The Law Society of NSW provides a number of important avenues for practitioners to deliver or access alternative dispute-resolution services.

The Law Society Mediation Program accredits practitioners who are appropriately trained in mediation, to resolve disputes that are referred to the Law Society, and to enable them to participate in the National Mediator Accreditation System (NMAS). The Law Society became a Recognised Mediation Accreditation Body under NMAS in July 2008, and currently has 63 accredited mediators delivering mediation services.

The Law Society also facilitates access to experienced commercial arbitrators for disputes that may arise out of an agreement for sale of land, lease, mortgage or other contractual documents, in accordance with the provisions of the *Commercial Arbitration Act 1984.* Arbitrators from the Law Society membership are also nominated to the Supreme, District and Local Court arbitration panels.

Meeting the challenge of assisting clients to determine the most appropriate solution to a legal problem requires improved mechanisms for early assessment of legal disputes. The Law Society offers a low-cost Early Neutral Evaluation Service with a confidential and non-binding evaluation of the issues in dispute, and the likely incidence and extent of liability.

Criminal Justice System

The Law Society supports the need in the criminal justice system for diversionary schemes and intervention programs. The NSW Drug Court and the Youth Drug and Alcohol Court. have been successful in that the rates of recidivism have been reduced. Other schemes that have met with success have been the MERIT program and the Circle Sentencing Program.

An example of a successful program is the NSW Drug Court. Many of the offenders the Drug Court deals with have major issues that would otherwise see them continue to offend in the community. Prison has failed to deter them from committing crime. The Drug Court aims to treat health issues as well as justice and social issues for these people, to prevent them causing harm to the community by committing offences as a result of their drug dependencies.

Studies by the NSW Bureau of Crime Statistics and Research have found that the Drug Court program is more cost-effective than prison in reducing drug-related crime. For years the Law Society has called on the Government to expand the Drug Court beyond the current catchment area of western Sydney. This would help to ensure that a greater number of drug-dependent offenders are offered the most appropriate treatment and rehabilitation which will assist in reducing recidivism.

Unfortunately, all of the above programs have been greatly restricted in their application across the state. The Law Society, as it has in the past, continues to advocate for the expansion of these Diversionary and Intervention Programs throughout rural and remote NSW.

The ability of indigenous people to access justice

Fine default

In NSW a person's licence is often cancelled for fine default. The licence expires and is not renewed and the person is subsequently charged for driving whilst unlicensed. A person convicted for a second offence of driving without a licence is automatically disqualified for a three year mandatory period. Due to the long period of disqualification, this often snowballs into a driving whilst disqualified conviction and can result in a prison term.

Aboriginal people in remote areas are extremely disadvantaged by the negative impact of unpaid fines and their ability to get a licence. For reasons such as remoteness, lack of transport, hot climate etc, Aboriginal people will often drive their cars even when they do not have a licence.

Public transport is almost non-existent in remote areas and taxis are only available in the large towns. Activities such as shopping, going to the doctors, driving kids to school etc are functions that Aboriginal families participate in as we all do, but the difference is that in these areas, many will drive unlicensed and risk a fine and disqualification and invariably prison.

Criminal Infringement Notices (CINs)

The use of CINs for offensive language and behaviour is of concern. The general use of CINs at twice the rate of non-Aboriginal persons in NSW suggests that either Police are appropriately diverting people but that this offence is more prevalent by Aboriginal persons whom encounter Police, or that net widening is occurring and that CINs are used instead of a warning.

When one considers that offensive language and behaviour constitutes so much of the use of CINs against Aboriginal people, the question arises as to whether these sorts of matters might otherwise have proceeded by way of warning. The suspicion must be that net-widening is occurring.

Criminal law practitioners often experience the situation of a person charged with offensive behaviour who attends court and give instructions to plead guilty. Analysis of the facts by a solicitor may reveal that they do not support that particular charge and that the appropriate charge is one of offensive language. This can lead to an acquittal at hearing or police withdrawing the existing charge and laying the less serious charge of offensive language. Most people would be unable to appreciate the distinction between these two charges and it is therefore vital that they are able to obtain appropriate legal advice.

Whilst the Notice states a person has "21 days" to send the Notice back or pay the fine, it assumes that the person has the capacity to understand the process. Someone suffering from poor literacy or an intellectual disability may not be able to comprehend the process and simply do nothing. Alternatively, the person may appreciate that he/she should seek legal advice but is not able to access it.

In some remote parts of NSW Aboriginal people do not have ready access to a solicitor. In some remote locations there are no solicitors in the local or nearest township and the Local Court may only sit once a month (or less). Typically a person in this situation with a CAN will seek legal advice from the solicitor (ALS or Legal Aid), on the day that they are due to appear in court. Occasionally, a person with a CAN will go to the court even if their matter is yet to come up so that they can talk to a solicitor and get advice. When the Magistrate is not sitting at the remote location the court is shut and not staffed. An example of this is Boggabilla in north west NSW which is one and a half hours drive from Moree. A large number of Aboriginal people live on the Mission at Toomelah (15 minutes drive further away). There is no public transport into Moree. The people generally do not have a driver's licence (or a car) and many do not have a phone. If such a person receives a CIN, for instance a few days after the court has sat, the 21 days notice provision given under the CIN will have expired before the court next comes back to town and the person has had the opportunity to see a solicitor at court. By this time it is too late for the person to elect.

There is no provision to apply for an extension of the 21 day period to elect, or to seek a review at a later time. In the case of a person who does not or cannot obtain legal advice within the 21 day period, he or she is estopped from defending the charge before the court.

Contrast this situation with an offender who receives a CAN and does not attend court on the first return date, for whatever reason. Assuming the Magistrate proceeds pursuant to s 196 of the *Criminal Procedure Act 1986*, the Magistrate then either imposes a penalty or issues a warrant for the apprehension of the offender. Under s 4 of the *Crimes (Appeal and Review)*

Ac t2001, a person who has been convicted in his/her absence has two years in which to bring an application for the annulment of that conviction or sentence. The circumstances under which a court may consider granting such an application are laid down in s 8 of that Act and are quite broad. Indeed, it can extend to a situation where an offender makes a mistake as to the date they thought they had to go to court (*Rukavina v DPP* [2008] NSWDC 214). Furthermore, should a Magistrate refuse to grant the annulment application, the offender can appeal this decision to the District Court.