



THE LAW SOCIETY  
OF NEW SOUTH WALES

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10 April 2018

Mr Brendan Thomas  
Chief Executive Officer  
Legal Aid NSW  
DX 5 Sydney

By email: [mary.whitehead@legalaid.nsw.gov.au](mailto:mary.whitehead@legalaid.nsw.gov.au)

Dear Mr Thomas,

### **Legal Aid NSW review of fees**

Thank you for seeking the Law Society's input into the Legal Aid NSW's fee review process.

The Law Society's Criminal Law, Indigenous Issues, Children's Legal Issues and Family Law Committees have reviewed the discussion paper and contributed to this submission.

At the outset, we would like to emphasise that the Law Society strongly supports, and continues to advocate for, an urgent increase in funding for Legal Aid NSW.

### **Fundamental issues**

The Law Society is of the view that without an immediate increase in funding to allow for proper remuneration to attract private practitioners of sufficient skill and expertise, Legal Aid will struggle to continue to provide a mixed service delivery model.<sup>1</sup>

We submit that changing the methodology of allocating funds, as suggested in the discussion paper, will not solve the problems. Unless the Government provides substantial additional funding, the issues will remain.

The problem is a combination of a low hourly rate paid to private practitioners, and insufficient time claimable under the fee scales. The system is in crisis and requires more funding.

We suggest that an increase in the hourly rate to \$250 an hour with an annual review and CPI increase, and an increase in the time claimable to undertake matters, would significantly ameliorate these issues.

The issues facing Legal Aid were succinctly summarised in its submission to the Productivity Commission's Inquiry into Access to Justice Arrangements:

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<sup>1</sup> Legal Aid NSW has submitted that the mixed service delivery model, which uses in-house lawyers and private practitioners to deliver legal aid services has been key to the success of the Australian legal aid model. See Legal Aid NSW submission to the Productivity Commission Inquiry 'Access to Justice Arrangements' p42.

While legal aid services are delivered at well below market rates, Legal Aid NSW recognises that the gap between legal aid fees and the market rate is at a level where the delivery of legal aid services by the private profession is at risk. Fees paid to private practitioners have been falling in real terms since the 1990s and are inadequate. Private practitioners with a commitment to legal aid work advise that it is not economically feasible for experienced practitioners to accept legal aid matters.

Legal Aid NSW submits that without an increase in fees paid to private practitioners, there is a substantial risk that Legal Aid NSW will not be able to maintain quality service delivery for disadvantaged people because they will not be able to attract private practitioners of sufficient skill and experience to undertake this work, particularly in rural areas. Legal aid matters will be accepted by less experienced and skilled private practitioners, inevitably affecting the efficiency of the court process. The level of remuneration for private practitioners must be sufficient to ensure that appropriately skilled and experienced legal practitioners continue to undertake all legal aid matters. Legal Aid NSW is unable to support fee increases within available funding and maintain existing services.

However, Legal Aid NSW submits that the legal aid rate should be closer to \$250 than \$150. Furthermore, even that rate would be insufficient to attract the senior counsel and highly experienced private practitioners required to ensure effectiveness and efficiency in complex cases.

The hourly rate for legal aid work must also be considered in light of what private practitioners are allowed to claim under the legal aid fee scales. Resource constraints have resulted in reductions in available work items such as caps on the number of appearances for mentions that can be claimed. The result is that private practitioners are not allowed to claim payment for the amount of hours required to sufficiently perform the work. Therefore, in addition to being paid an inadequate rate, private practitioners are not being paid fully for the work performed.<sup>2</sup>

Many solicitors, particularly experienced solicitors, have reported that they take on legally aided work at a loss and view conducting Legal Aid matters as a pro bono service. While pro bono work is a highly commendable and long-standing tradition of the profession, it is not a substitute for a properly funded legal aid system.

It is often not possible for a private practitioner to properly discharge their professional responsibilities within allocated timeframes. In our view, it is due to private practitioners working many additional unpaid hours that has kept the system going for so long, and this is no longer sustainable.

If fee amounts and timescales for undertaking work are not increased as a matter of urgency, then there will continue to be a significant withdrawal of experienced solicitors from legally aided matters. This is resulting in the juniorisation of legal aid work, and a diminution in the quality of legally aided matters. If left unaddressed, there is a risk that the mixed service delivery model will collapse due to insufficient numbers of private practitioners undertaking legally aided work.

### **Issues raised in the discussion paper**

The issues raised in the discussion paper exemplify the concerns we have – the need for consistency across jurisdictions and arms of the NSW Government, realistic timescales, flexibility for complex matters, and sufficient funding for legal fees and reports.

While we agree with many of the points raised in the discussion paper, we reiterate that without additional funding, a change in methodology will not resolve the issues.

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<sup>2</sup> Legal Aid NSW submission to the Productivity Commission Inquiry 'Access to Justice Arrangements' p42.

### Fee rates need to be regularly updated to keep pace with inflation

We note that the base hourly rate of \$150 per hour in state matters has not been updated since 2007. We submit that hourly rates should be closer to \$250 an hour, as suggested by Legal Aid to the Productivity Commission, and fees should keep pace with CPI increases.

### Hourly rates, including those which underlie any fixed fee calculations, should be consistent across jurisdictions

We strongly agree with the position in the discussion paper that there should be consistency of fee rates across all legally aided work, whether State or Commonwealth and between different areas of legal practice. Developing consistent fee scales across jurisdictions would demonstrate that all types of legally aided work are valued equally.

The discussion paper notes that the fees paid to private practitioners by the Attorney General and the Crown Solicitor substantially exceed the fees paid by Legal Aid NSW. We support private practitioners conducting work on behalf of the various arms of the NSW Government being paid a consistent rate.

### Transparency in the fee scales and grants online system

The Law Society agrees that fee scales are complex to understand and administer, particularly in the way they interact with Legal Aid's grants online system. Members have found that interpreting how the grants online system is applied to the fee scales, and policy documents issued by Legal Aid, is not self-evident.

For example, fee descriptions (which are described as "work type") on the grants online system are unclear and confusing. To illustrate this problem, we note that the work type for family law matters for "court time" means interim hearings only and does not include court mentions and directions hearings. However, legal practitioners have interpreted "court time" to mean any time that they are present in court. Further, the "prep and attend" work type covers not only client meetings, but all court mentions and directions hearings.

The grants online system is also outdated. For example, it still refers to the Federal Magistrates Court.

To improve the usability of the grants online system and to ensure accuracy of claims, we suggest it may assist to build into the grants online system an extended definition/description of the work type item. One practical suggestion is to insert a "pop up" box linked to the work type and containing a definition/description.

Further, some form of training or guide for use of the grants online system would assist in making legal aid work more attractive for private practitioners, along with an increase in the hourly rate.

### Allowances for exceptional matters

We agree that allowances must be made for exceptional matters. As outlined in the discussion paper, this area requires thought and we are happy to be involved in further consultation on how to set appropriate criteria for determining 'exceptional circumstances'.

### Fixed fees need to be set at realistic levels

The Law Society agrees that fixed fees in legally aided matters in NSW are currently set at too low a level.

The Law Society is concerned that the risk of inadequate fees in legally aided matters means that there will be insufficient private practitioners interested in the type or location of work. These concerns are exacerbated in rural and regional areas.

By way of example, in Coffs Harbour, we understand that there are currently at least ten solicitors who are able to undertake legally aided care and protection matters (including three in-house practitioners at the local Legal Aid office), however, only three private practitioners are currently accepting legally aided care and protection matters. Often these private practitioners are all conflicted out of a matter or are unavailable. This negatively impacts on the public who are left with having to find a private lawyer who is at least an hour away in a regional area. Many of these people seeking legal assistance are from low socio-economic backgrounds and public transport is limited in the area (if available at all). Many cannot afford to travel more than an hour to see a solicitor.

Without further government funding, and a subsequent increase in fees across jurisdictions, the public will be left with very limited access to private solicitors accepting legally aid matters, particularly in rural and regional NSW.

#### Reassignment policy for grants if the use of fixed fees is expanded

The Law Society agrees that fixed fees can be problematic where grants are reassigned part way through a matter as the first practitioner may be entitled to claim the full amount of the fee, while the second practitioner will also expect to be paid.

The Law Society notes that legal practitioners have raised concerns that there is no fee to cover the time that practitioners are required to take to familiarise themselves with a new matter. We suggest that one way to incentivise solicitors to take over existing matters is to offer a transfer of file fee that the new solicitor can claim.

#### Legal Aid NSW criminal matters fee scales

The discussion paper acknowledges that \$300 is an unrealistic fee for the preparation of a trial. We also consider \$300 for preparation of a sentencing matter in the District and Supreme Courts to be completely inadequate. A well-prepared and thoroughly evidenced sentence hearing takes a significant amount of time to collate and marshal evidence. Presently, solicitors are often being paid for two hours' preparation when the reality is that it is more likely to take a day or more.

The following preparation may be required in an ordinary sentencing matter:

- Research time and preparing written submissions
- Preparing an affidavit or letter from the offender
- Preparing an affidavit or letter from the offender's family members (two or more)
- Preparing an affidavit or letter/testimonial from work colleagues and employer
- In cases involving Indigenous offenders, preparing evidence to demonstrate a deprived background
- Filing and serving a subpoena and preparation of cross-examination of police officer/s for a section 23 discount<sup>3</sup>, where necessary
- Obtaining psychological reports, where appropriate
- Obtaining Judicial Commission statistics research
- Research of comparative cases
- Preparing the client to give oral evidence on sentence.

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<sup>3</sup> *Crimes (Sentencing Procedure) Act 1999*

Allowing more time for sentence preparation would mean more experienced solicitors who engage in this level of preparation may accept more Legally Aided matters, as they would be properly paid for their efforts. This would lead to a higher quality of evidence before the court, which gives clients the best chance to mitigate their sentences, for findings of special circumstances, and for assisting the client to set up appropriate and effective treatment plans and post-sentence support (which in turn, gives clients the best chance of rehabilitating and not returning to the criminal justice system).

If the Early Appropriate Guilty Plea reforms are successful, it will mean that there will be more sentence matters before the District Court, taking pressure off funding required for trials, which may allow for trial funding to be redistributed to sentence proceedings.

We are also of the view that \$230 preparation for defended hearings in the Local Court, which includes an initial conference with the client, provides a disincentive to prepare properly, which can affect the quality of representation. It would be exceptional that a defended hearing could be prepared in 92 minutes (including a client conference) which is the current time allowable (at the hourly rate of \$150). It would be expected that a client conference to obtain sufficient instructions to prepare a hearing would be not less than an hour in the average case, if not longer, leaving very little, if any, time for other preparation required to competently run a defended hearing, for example:

- Reading the prosecution brief
- Conferencing potential defence witnesses
- Issuing subpoenae
- Legal research
- Preparing cross examination
- Preparing submissions.

We suggest that an 8 to 10 hour capped rate (at the increased fee level) would provide solicitors with greater flexibility as to how they spend their time on the matter, whether on preparation, conferencing or court time. It may be that in some circumstances, significant time is required conferencing a client where the client cannot read or has a cognitive impairment and very little reading or research time is required. There may be other cases where the prosecution brief does not prove the offences charged and time is spent on written submissions rather than spending significant time conferencing the client. In other cases, a technical issue may mean that legal research dominates preparation time. All cases are different and flexibility is required to account for the unique requirements of each case.

We note that flexible, capped hourly rates are available for other grants of aid, for example, sexual assault communication privilege matters and guardianship matters.

We note there has been no increase in fee since 2007 and that matters have changed dramatically in that time. Even a simple Local Court matter involves a far larger brief and more complex evidence. There has been a marked increase in the volume of briefs due to forensic evidence, surveillance and the like.

Defence solicitors have also raised concerns about the amount of work that is required to receive a grant, and the length of time required to make an extension application.

#### Legal Aid NSW family matters fee scale

In the Law Society's view, the access to justice issues that litigants in the family law jurisdiction face are complex and have a long history. Access to legal representation, including legally aided representation, is a significant part of the lack of access to justice. In

family law matters, there are often only two parties. Where parties are unable to pay for legal representation and where Legal Aid represents one inhouse, the other party will need to obtain a private solicitor. It is well documented that there are very few practitioners prepared to do pro bono or legally assisted family law work.<sup>4</sup> We note that the matters that result in litigation are the most difficult. In our view, the current Legal Aid family matters fee scale for solicitors is not fit for the purpose of providing those litigants who require legally aided assistance access to representation for a number of reasons:

### Quantum

Feedback from our members indicate that often they lose money in taking on a legally aided family law matter.

Members have reported that fees for family law matters are not realistic given how family law matters currently progress through the courts. For example, a matter in the Family Court or Federal Circuit Court could go on for two to three years without any hearing but will include mentions. The Law Society submits that the current fee scale of \$1,350 for stage 2(a) under the “family matters – legal practitioner fees” scale is not enough to cover a practitioner attending all client attendances, several years of directions hearings or mentions, and preparing and filing consent orders.

The Law Society notes that the overheads involved in running a legal practice may make it prohibitive for private practitioners to accept legally aided matters because the quantum simply does not cover the operating expenses of running a practice. We understand that this is particularly true in respect of Indigenous matters, because, for example:

- More time is required to build rapport/ trust
- More time may be required to obtain documents
- The family and kinship structure may be complex
- While a lot of information may be provided, it may take time to determine what of the information the solicitor receives is relevant
- A client may provide information that is not in fact true because they think that is what the solicitor wants to hear. We note by way of example the cultural phenomenon of gratuitous concurrence.

The Australian Law Reform Commission review of the family law system is likely to make recommendations for change that have consequences for the carriage of family law matters and we suggest that the family matters fee scale be reviewed again if that is the case.

### Grants model not fit for purpose

Feedback we have received indicates that the “lump sum for a stage” model for grants payment creates significant difficulties for solicitors. Solicitors who use the current grants system in family law matters are required to make assumptions about whether and when a stage of the process will commence or complete. We understand that the Legal Aid Grants division has a policy that if a matter proceeds to litigation, but the grant is not yet in place, Legal Aid will not provide assistance. When this approach is coupled with a lag time in processing grant applications, this situation creates undue stress on practitioners. The feedback we have received from our members is that this system requires the solicitor to not only manage the client and the Court (noting that each judicial officer manages their list differently), but also the Legal Aid Grants division.

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<sup>4</sup> See for example National Pro Bono Resource Centre, *Final Report on Pro bono legal services in family law and family violence – Understanding the limitations and opportunities*, October 2013 available online: <https://www.probonocentre.org.au/wp-content/uploads/2015/09/Family-Law-Report-FINAL.pdf>

By way of example, one of our members noted that they had a matter in which they were an Independent Children's Lawyer, and one of the parties filed an interim application. Our member applied for a grant, using grants online, to appear at the interim hearing one month before the hearing. The grant was ultimately made at 9.15am on the day of the hearing creating significant uncertainty with respect to preparing for the hearing.

Situations such as that are both stressful and avoidable.

Further, the Law Society notes that the Federal Circuit Court has been piloting an Indigenous list in the Sydney registry. The list takes a therapeutic jurisprudential approach and seeks to manage the matters and the litigants so that family relationships may be slowly established and rebuilt. This approach does not easily fit a "lump sum for a stage" model for grants payment which is the current Legal Aid family matters fee scale.

#### Miscellaneous disbursements

The Law Society is opposed to the removal of the miscellaneous disbursements fee. We have received feedback from solicitors that printing documents is often still an important part of advising their clients, particularly those clients from low socio-economic backgrounds. Many of these clients do not have access to a computer or printer, particularly in rural and regional areas, and some do not have their own personal email address. For clients with English as their second language or with learning difficulties, taking a client through a printed version documents can assist with their understanding.

We also note that there is no allowance to cover the cost of retaining and storing files.

#### Travel payments

We understand that it is the practice of grants staff to not provide payment for travel to a court even when it exceeds the 35-kilometre threshold, e.g. solicitors who travel from Port Macquarie to Taree. This practice is another factor that deters solicitors from taking on legally aided work.

We support the establishment of an appropriate travel entitlement scheme and would be interested in assisting with its development.

#### Psychiatric and psychological reports need a fee scale which is realistic and enforceable

We agree that Legal Aid should create a scale, set at a sufficiently high level to attract experts to provide appropriate reports.

Psychologists have indicated to our defence solicitors that they are unable to continue to provide reports in legally aided matters because the time to properly prepare sentence and section 32 reports<sup>5</sup> is far beyond the fee allocated by Legal Aid.

The risk is that this may result in quickly prepared and formulaic reports rather than high quality reports from a wide range of mental health professionals, which is clearly more desirable in relation to the quality of evidence before the court and the quality of diagnosis and treatment options for the client.

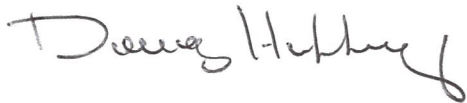
Thank you again for the opportunity to provide initial input into the fee review process. We look forward to further engagement as the review progresses.

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<sup>5</sup> *Mental Health (Forensic Provisions) Act 1990*

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at [rachel.geare@lawsociety.com.au](mailto:rachel.geare@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink that reads "Doug Humphreys". The signature is written in a cursive, flowing style.

Doug Humphreys OAM  
**President**