



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ADR/CLI/ELCS/LLP:PWeh1263113

3 March 2017

Maureen Tangney
Executive Director
NSW Department of Justice
GPO Box 31
Sydney NSW 2001

By email: civiljustice@justice.nsw.gov.au

Dear Ms Tangney,

Justice for everyday problems: Civil Justice in NSW

The Law Society of New South Wales welcomes the opportunity to comment on the "Justice for everyday problems: Civil Justice in NSW" consultation paper. The Litigation Law and Practice, Alternative Dispute Resolution, Children's Legal Issues and Elder Law, Capacity and Succession Committees contributed to this submission.

Q. 17 What else would you find useful to help you get advice and assistance?

The Law Society has two main services that can help members of the public to get advice and assistance.

The Law Society's Solicitor Referral Service helps members of the public find law firms that are appropriate for their individual circumstances and needs by providing the contact details of three firms in an individual's geographical area that offer legal services in the required area of law. By searching its database of around 1,600 firms, the Service can also identify solicitors who make home, hospital or prison visits, speak languages other than English, make legal aid applications and so on.

The Law Society's Pro Bono Scheme refers eligible members of the community who need legal assistance to firms willing to provide legal services on a free or substantially reduced fee basis. Assistance can include legal advice, preparation of documents and, if required, representation in court. The Pro Bono Scheme also provides legal assistance on an 'in-house' basis for eligible applicants. While pro bono work is a highly commendable and long-standing tradition of the profession, the Law Society maintains that it is not a substitute for a properly funded legal aid scheme.

The Law Society also publishes information for members of the public about their legal rights and court processes. There may also be a role for government to provide up to date fact sheets with information about common legal problems and how members of the public can obtain further information and assistance. The Law Society notes the option of creating a central referral service that links the various available pro bono and advice services so that people can quickly obtain access to the most appropriate advice.

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Q. 19 What or where are the gaps in the cheap and quick options for dispute resolution?

The Law Society considers that there may be scope for additional use of external dispute resolution schemes, in particular ombudsman schemes. Many of the high volume, low cost matters within courts and tribunals could be assisted by the development of such schemes, such as disputes involving residential tenancy, retail, strata and council rates. Such schemes would be particularly appropriate for matters where the issues concern hardship and not legal liability.

This could have benefits such as reducing the burden on the courts, reducing debt recovery costs and encouraging people to engage in proactive negotiations around outstanding debts. An additional benefit is that people are not required to attend in person and can deal with their disputes by letter, email or telephone. This could improve access to justice for regional, remote and vulnerable people who may be unable or unwilling to attend a court or tribunal setting.

The Law Society recommends that, if considered, such schemes provide the option of having legal representation.

Q 20 How can we improve awareness of the available options for informal dispute resolution?

The Law Society notes that there may be a role for courts and tribunals to play in providing information to members of the public regarding informal dispute resolution options and relevant service providers, including ombudsman schemes, community legal centres, Legal Aid and mediation services. Many members of the public are not aware of the range of services currently available and may take their matter to a court before exploring other options.

Q. 22 How else could we ensure that you have access to quick and cheap options for dispute resolution?

The Law Society considers that addressing the following areas could improve access to quick and cheap options for dispute resolution.

Local Court limit

The Law Society supports increasing the jurisdiction of the Local Court Small Claims Division to \$20,000 to facilitate a quicker and cheaper method of resolving civil monetary disputes. Any expansion should ensure that safeguards are in place so that appeal rights are not reduced.

In addition, consideration could be given to enacting changes providing for the transfer of proceedings from the General Division to the Small Claims Division in the following circumstances:

- where evidence is available that the disputed amount is less than the jurisdictional limit of the Small Claims Division notwithstanding that the amount claimed by the plaintiff may exceed the jurisdictional limit; and
- where the parties agree to the proceedings being transferred to the Small Claims Division.

However where proceedings are transferred by consent to the Small Claims Division the appeal provisions, which provide a right to both parties to appeal on the basis of an error of law, should be preserved. An amendment to s 39 of the *Local Court Act 2007* would need to be made to preserve the rights of appeal where the amount of the dispute exceeds the jurisdictional limit of the Small Claims Division but the proceedings were dealt with in that Division by consent.

Case management

The *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) emphasise the importance of case management. For example, section 56(1) of the Act states:

The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

The Law Society acknowledges the increasingly active role being assumed by courts in the management of cases and the efforts the courts have made to introduce case management systems tailored to the specific needs of particular jurisdictions. Whilst case management procedures may impose an additional workload on the judiciary and administration systems, effective case management procedures ultimately assist in reducing the workload and provide opportunities to control the work of the court. The Law Society supports the application of case management practices and in particular the involvement of the court in narrowing the issues which will ultimately be decided by hearing.

Practitioners are required to comply with the case management principles of the courts and to actively prepare their clients' cases for hearing. The *Civil Procedure Act 2005* (NSW) and associated rules set out the sanctions available to the court for a party's failure to comply with case management directions, including the making of adverse costs orders against a defaulting party. However, anecdotal evidence from Law Society members suggests that courts are reluctant to use these powers. For example, where parties are not meeting deadlines, a Registrar might only occasionally make a costs order.

Litigation costs might also be reduced if matters could be "fenced in", for example, by the introduction of pre-determined set times for the running of certain categories of matters, the introduction of limits in appropriate matters to the number of affidavits each party to the proceedings may prepare or restricting the number of interlocutory processes, which is one area where costs accumulate quickly, often for little benefit. Consideration could also be given to the introduction of written submissions only in appropriate matters. This approach would particularly suit appeal matters but further careful consideration would need to be given to when it could usefully apply.

Alternative dispute resolution

Current court practice, in both the District and Supreme Courts, encourages early alternative dispute resolution (ADR). There are several models of ADR including mediation, arbitration and conciliation. Some types are more formal than others. The Law Society provides general information about ADR on its website to help the community understand all of their options in regards to resolving disputes. There may also be a role for government to better promote bodies that offer ADR services and for courts to provide additional information to parties on the benefits of ADR and options available to parties.

The take-up of ADR could be improved if registrars or judges raise this option with the parties at an early directions hearing or call over. The Law Society understands that the ACT Magistrates Court will soon be providing a mediation service at a fixed fee of \$1,500 per mediation. The Court will engage private mediators to deliver the services. Such a service may be of value to those involved in civil litigation in the NSW Local Court.

Alternatively, there may be an opportunity for courts to introduce a pre-filing requirement to mediate some matters. This may be beneficial for parties and could reduce pressure on the courts.

The Law Society has long supported ADR procedures to resolve civil disputes. The President of the Law Society is responsible for appointing arbitrators, mediators, independent solicitors, experts and valuers pursuant to relevant dispute resolution clauses in contracts, agreements, terms of settlement, consent orders and so forth.

The Law Society also offers a range of high quality programs in several types of ADR including:

- The Law Society's Mediation Program assists people wishing to resolve a dispute through confidential, face-to-face mediation sessions. The Program is aimed at people who want to

avoid going to court and who are willing to negotiate in good faith with the opposing party to reach a settlement. All mediators are qualified solicitors who meet stringent selection criteria and undergo advanced mediation training. The Program has been running since 1991 and is based on best practice principles of mediation.

- The Law Society's Conveyancing Dispute Resolution Scheme provides assistance in disputes concerning a contract for the sale of land. The Scheme is run by the Law Society's Property Law Committee and aims to offer an impartial and authoritative alternative to litigation or arbitration. Under the Scheme, the Committee is available to adjudicate on disputes and provide the parties with a binding determination. This Scheme is available provided there is acceptance by the disputing parties of the following pre-conditions:
 - Both parties and their solicitors must agree on the issue(s) submitted for determination
 - Both parties and their solicitors must agree to abide by the determination of the Committee
 - The amount in dispute does not exceed \$25,000.

The Law Society has developed a model clause regarding mediation for solicitors to use in agreements which is available on the Law Society's website at:

<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1086976.pdf>

The Law Society has also developed rules for expert determination, an ADR process whereby an independent third party with recognised expertise in the subject matter in dispute assists the parties to resolve disputes. These rules are available on the Law Society's website at:

<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/065097.pdf>

The Law Society notes that, despite best efforts to resolve disputes early and as informally as possible, there will inevitably be matters which will require determination by the courts.

Q. 23 What are the barriers you faced when you have been involved in a court or tribunal process?

The Law Society considers that the following barriers can arise for people involved in civil disputes.

Court fees

The *Civil Procedure Regulation 2012* (NSW) set out the fees payable in civil courts. These have increased significantly in recent years and represent a substantial part of the cost of litigation in NSW. Any additional increases will have the effect of restricting access to justice and run counter to the objectives of the civil justice system, being that 'just, quick and cheap' dispute resolution should be available for all. Certainly this is the view expressed by many of our members, both from city areas and throughout NSW.

The Law Society receives correspondence and anecdotal statements confirming that increases in court fees significantly impair the ability of clients to pursue their matter. The Law Society considers that any increase in court fees should be limited to CPI 'catch-up' increases and should result in a corresponding increase in the service level provided by the courts.

High court fees also place a burden on practitioners who are personally liable for the fees, including hearing allocation fees and hearing fees. This can present practical difficulties in terms of securing funds for litigation and weakens the ability of solicitors, especially from small firms, to take on work because of security for costs issues.

According to clause 9(5) of the *Civil Procedure Regulation 2012* (NSW), a hearing allocation fee becomes payable (a) immediately after a date is allocated for hearing the proceedings, or (b) when the court or a registrar notifies the parties in writing of the court's intention to allocate a date for hearing the proceedings, whichever occurs first. The hearing allocation fee is not refunded by the

court if the matter is settled before the hearing, despite the fact the judge may have the opportunity to proceed with another matter or matters on that day.

Information for the public on choice of forum

The Law Society considers that there may be a role for Government to play in providing information about the choice of forum for pursuing legal claims, particularly in relation to NCAT and the Local Court. This is an area in which there is considerable confusion amongst members of the public.

Court funding

Despite ever increasing court fees and charges, there appear to be ongoing inadequacies in the level of resources allocated to the courts.

Particular pressures on access to justice are experienced in country areas where courts have ceased to sit over the last decade. The number of circuit court hearings conducted by the District Court of NSW in rural areas has reduced and the circuits have been limited to regional centres. The number of circuit court hearings conducted by the Supreme Court has also reduced. The Law Society has called on the Attorney General to identify rural and regional areas poorly served by court house facilities and to reopen court houses in those areas and/or increase the frequency and locations of circuit court hearings.

Fundamental issues also arise where the courts are not sufficiently resourced to provide effective access to justice through efficient processing. Adequate funding for courts is essential to ensure that they work effectively and provide satisfactory service to litigants. At the very minimum, courts must be adequately staffed to allow efficient processing. In recent years, courts have been subject to reductions in staff in a number of registries which have led to significant delays in processing. There has also been a decline in the level of staffing in Local Courts in regional and rural NSW resulting in delays for both hearing and filing of matters. While demand on court services, and therefore court staff, is uneven and subject to peaks and troughs, there must be more that can be done to ensure that unreasonable delay is eliminated.

Funding for legal assistance

The Law Society has consistently maintained that Treasury should fund Legal Aid as a core priority of government. The Law Society has also maintained the importance of adequate funding for Community Legal Centres to provide legal advice and assistance for disadvantaged and vulnerable people in civil matters. We note with concern the current substantial cuts to funding for community legal centres and legal aid nationwide. 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 success.

Services not "linked"

As mentioned above, the Law Society is concerned that there are a range of services available but these are not coordinated or easily accessible to those with the least resources to find them. A way of joining up existing services and referral locations could be of value to litigants.

Q. 24 What are the gaps in services and information for you to represent yourself?

In an attempt to further reduce the costs and length of hearings, some legislation removes the right of a person appearing in a court or tribunal to make their own decision about whether they want to be legally represented. In these instances, a person who wishes to be represented by a lawyer is required to ask for permission from the court or tribunal member hearing the matter.

In the Law Society's view, it is not the case that restricting legal representation automatically saves time and money. To the contrary, the absence of legal representation can result in more protracted

hearings with more assistance needed to guide an unrepresented person through unfamiliar procedures and to avoid irrelevant issues. Further, there is a real risk of unfairness, particularly where the other party, which may be a government agency or sophisticated industry group, has appearing for it experienced officers who are familiar with the relevant practice and procedure. Preserving for parties the choice to be legally represented in court and tribunal proceedings would ensure more matters are dealt with expeditiously and without risk to fairness.

In addition, it appears that the increasing number of self-represented litigants appearing in courts and tribunals is creating delays and increasing costs both to the courts and other parties.

Q. 25 What do you think about online and virtual courts and tribunals?

The Law Society acknowledges that the willingness of courts in NSW to embrace technology has improved the 'user-friendliness' of the legal system. The websites of courts are informative and accessible, e-filing is assisting with efficiency as is the ability to communicate with a judge's associate by email. Increased reliance on technology could reduce litigation costs, eliminate unnecessary (and expensive) formal correspondence and save time through the electronic lodgement of various case materials. Greater use of telephone, video and email for direct communication between parties and the courts has the potential to simplify procedures such as call-overs and routine applications which can be dealt with without the need for parties to attend the court.

The Law Society notes that the introduction of electronic filing in NSW civil courts has made matters more efficient and cost effective. The Law Society has for many years supported the creation of an electronic conveyancing system, anticipating benefits and efficiencies for all participants in the conveyancing process and the community at large. The Property Law Committee has been extensively involved in stakeholder consultation, through its own liaison with Land and Property Information and as a constituent member of the Law Council of Australia's National Electronic Conveyancing System (NECS) Working Group.

However, the Law Society also notes that the use of technology is not always appropriate, and that online and virtual courts and tribunals in particular create new issues for practitioners and litigants, which cannot always be foreseen. For example, the Law Society notes that there are practical issues with the availability and reliability of audio-visual link (AVL) arrangements, particularly in regional areas. Solicitors will have to attend court to use an AVL suite, not all courts have an AVL suite and, of course, private practitioners do not have the equipment in their offices. In a large number of regional towns there is no access to AVL facilities at all, either in the courts or in the township generally.

There may be opportunities for courts, tribunals and government agencies to partner with larger community based organisations in regional and remote areas that have acquired access to AVL as part of their infrastructure; in some cases these community based organisations may be the only organisations in the local communities, excluding private corporations, that utilise AVL technology. Further, consideration of the use of such technology within a partnering or collaborative framework for children and young people would also be worthy (see below in relation to the needs of children and young people).

Finally, the Law Society notes that increased reliance on technology to administer and deliver court services may have a disproportionately adverse impact on litigants who do not have ready access to online services, such as litigants in regional and remote areas (including, for example, Indigenous communities) or in disadvantaged circumstances. In addition, older people and people with disability may not be able to access some of the initiatives that are being suggested such as online interfaces and apps. A 2013 study revealed that computer use in general, and internet use in particular, are

negatively associated with age.¹ Not all members of the community are digitally competent and this may affect their access to justice.

Q. 28 What do you think about a single enforcement regime for court and tribunal orders?

The Law Society considers that this proposal has merit but notes that this would be a complex exercise, and that further consultation would be required.

Q. 29 Are there other ways we could make the enforcement process quicker and simpler?

The Law Society suggests that an online flowchart on court and tribunal websites that describes each option for registration and enforcement would be useful. In addition, courts and tribunals could issue enforcement guidelines to parties immediately after monetary judgments are made.

Q. 33 What else could we do to create an everyday justice system that meets the needs and expectations of everyone in NSW?

The Law Society notes that the consultation paper does not specifically contemplate children having civil justice problems. We submit that children experience many of the civil justice problems that adults do, and also have unique civil justice problems.

Research by the Law and Justice Foundation of NSW indicates that “young people, like their older counterparts, are not immune to experiencing the adverse consequences of legal problems. In addition, for young people aged 15–17 years, there are strong gender differences in the rate with which some adverse consequences are reported.”² According to the findings, for respondents aged 15 to 17 years, 20.9% of girls compared to 15.9% of boys experienced “substantial” legal problems, that is, legal problems that had a “moderate” or “severe” impact on the everyday life of the respondent. The most common substantial civil law problems experienced by the girls related to education (bullying, harassment, exclusion, fees, other), neighbours, and employment (conditions). For the boys, the problems most commonly related to personal injury (other than motor vehicle-related), unfair treatment by police, education (bullying, harassment), and services (phone, internet, TV).³ Legal problems related to education (bullying, harassment) were the most frequent cause of stress-related illness amongst 15 to 17-year-olds,⁴ and a common cause of relationship breakdown for 15 to 17-year-old female respondents.⁵ We note that other civil law problems experienced by children include those in relation to discrimination, housing, government payments, contracts, credit/debt, and consumer issues.

The Law Society considers that children’s access to legal services has improved greatly in the last 20 years, but there are still not enough services to meet their legal needs. It is well known that children and young people do not seek legal advice and assistance as often as adults do, even though they experience legal problems. Generally, children and young people have not been able to advocate for themselves in the civil justice system.

The Law Society notes that, although the consultation paper refers to improving services in order to increase access to the civil justice system, most of the initiatives identified in the consultation paper are based on self-help or self-advocacy, focusing on improving websites and access to self-help

¹ Jenny Chesters, Chris Ryan, Mathias Sinning “Older Australians and the take-up of new technologies” 2013 available at: https://www.ncver.edu.au/_data/assets/file/0031/7789/older-australians-2598.pdf.

² Law and Justice Foundation of NSW, ‘Updating justice: No 38, February 2014 – Youth and the law: the impact of legal problems in young people’, February 2014, 1.

³ Ibid, 3.

⁴ Ibid, 4.

⁵ Ibid, 5.

tools. We consider that self-help is not a realistic option for children and young people because of their youth, immaturity and lack of experience. Rather, legal advocacy is of fundamental importance to this group.

The Law Society believes that improvement in access to justice for children and young people in the civil justice system must include an increase in access to legal advocacy for civil matters. We note again our concern regarding the current substantial cuts to funding for community legal centres and legal aid nationwide. It is our view that this will have a significant adverse impact on access to justice for children and young people.

The Law Society also recommends that existing technology that is most accessible for children should continue to be utilised and improved.

If you have any queries about this submission, please do not hesitate to contact Ella Howard, Policy Lawyer, on (02) 9926 0252 or by email at ella.howard@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President