THE LAW SOCIETY
OF NEW SOUTH WALES

7 April 2010

Ms Katherine Lo
Director
Legislation, Policy and Criminal Law Review
NSW Department of Justice and Attorney General
GPO Box 6
Sydney NSW 2001

By email: lpd.enquiries@agd.gov.au

Dear Ms Lo,

Civil Procedure Act 2005 Review

The Law Society's Injury Compensation Committee and the Litigation Law and Practice Committee (the Committee) make the attached submission to the above review.

The attached submission does not go into the issue of pre-litigation protocols. This issue is currently of great significance in Victoria and New South Wales, as well as at the Commonwealth level.

Over the coming weeks and months the Committee will be actively involved in the public debate concerning pre-litigation protocols. However, due to time restraints this submission does not address the issue.

The Policy Lawyer with responsibility for this submission is Patrick McCarthy and may be contacted on (02) 9926 0323 and patrick.mccarthy@lawsociety.com.au.

The Committee would like to thank you for the opportunity to contribute to this review. Please do not hesitate to make contact should you have any queries.

Yours sincerely

Stuart Westgarth
President

THE LAW SOCIETY
OF NEW SOUTH WALES

SUBMISSION TO THE DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL CIVIL PROCEDURE ACT 2005 REVIEW

The Committee

The Law Society of NSW has been invited to make a submission in relation to the NSW Justice and Attorney General Department review of the *Civil Procedure Act 2005* (the Act). Both the Injury Compensation and Litigation Law and Practice Committees have considered the terms of inquiry for this review and for the purposes of this submission will be referred to as 'the Committee'.

The Review

The Committee notes that the terms of inquiry are very broad. It is additionally noted that given the time restraints, the Committee would have preferred additional time to prepare a more comprehensive submission. The Committee notes that the Act has been in force now for in excess of 5 years. Generally the Committee is of the view that it has operated efficiently in conjunction with the *Civil Procedure Rules*. However, some members of the Committee have identified a number of shortcomings with the Act which need further discussion and possibly legislative reform or amendment.

Objects of the Act

The policy objectives of the legislation that are identified in the Second Reading speech have, in the Committee's view, been broadly satisfied. In particular, the Committee is of the opinion that having one set of rules which apply to proceedings in the Supreme Court of NSW, District Court of NSW, Dust Diseases Tribunal, Land and Environment Court (in class 1, 2, 3 or 4 proceedings), the Industrial Relations Commission and the Local Court is a welcomed development. Because of the special nature of the Dust Diseases Tribunal and the Small Claims Division of the Local Court, the Committee notes that it was not appropriate to have the Act apply uniformly to those jurisdictions. As to the latter, clearly matters where the amount in dispute is less than $10,000 are appropriately robustly determined in the Small Claims Division of the Local Court and by quasi judicial officers such as the Assessor and by Magistrates.

The Committee is of the opinion that there are many advantages in having one Act applying to the various jurisdictions referred to above. Generally speaking, the Committee is of the view that the Act has streamlined and simplified procedures. This is demonstrated with the use of the "docket" system where matters are disposed of in a much more expeditious manner than what was the case before the Act came into force.

The Committee also welcomes the use of new technologies such as electronic lodgement of documents and electronic case management. This has improved and assists the function of the Judicial Registrar of the District Court and several Justices of the Supreme Court. The use of the Law Link Forum for case management operates well and allows, for example, Judge Delaney of the District Court to run both the Wollongong and Parramatta District Court List.

The other broad objective of preserving some differences in relation to Courts, despite the use of one Act, is appropriate in the case of the Court of Appeal which continues to use its own Rules. The Committee is of the opinion that this is entirely appropriate having regard to the unique nature of that Court.

In particular, the Committee welcomes the introduction of Part 5 of the *Uniform Civil Procedure Rules* (the Rules) in relation to discovery and preliminary discovery.

Some issues of concern

Having noted the above, the Committee is of the view that whilst the objects of section 66 of the Act has generally been met, there are some instances where matters are forced to be listed for hearing despite not being completely ready for trial. This results in the necessity for a party to bring a Notice of Motion to vacate the hearing date. This can increase costs and ultimately delays the matter and leads to inefficiency. The Committee is in agreement in that respect with the submission made by the New South Wales Young Lawyers Civil Litigation Committee.

The Committee is of the opinion that the case management regime enacted in sections 56-60 of the Act have clearly been a success. Prior to the introduction of these provisions, matters were delayed for many years. The onus was on the Plaintiff to either file a document such as a Praecipe for Trial in the District Court or an Application for State of Readiness Hearing in the Supreme Court and then the matter would be listed for hearing. In the Committee's view, adjournments were too easily granted and this has resulted in matters being delayed for a number of years. Consequently matters would take 2 or 3 years to be listed for hearing and in the Common Law Division of the Supreme Court prior to the special sittings in the late 1990s, matters would take up to 6 years to be heard from the date they were certified as being ready.

The Committee has some concerns with case management in civil procedure. Over zealous enforcement of the Rules dealing with failure to comply with Court orders often lead to matters being listed for hearing when they were not completely prepared. This results in an application being made at the trial for the late admission of documents or evidence. The Committee notes however that in the District Court these issues have been largely resolved.

The Committee expresses concern in relation to cost orders being made against a legal practitioner when their client defaulted in orders. Often this default is due to matters outside the control of the client and the legal practitioner, such as the unavailability of any experts in producing their reports.

It is noted that section 58 of the Act mandates the Court to look at the dictates of justice as an overriding principle. This mandate has in some instances lead to unintended consequences, such as setting down for hearing a matter that would otherwise not be. This is the case despite the High Court's decisions in *Queensland v J L Holdings Pty Limited* (1997) 189 CLR 146 and *Sali v SPC Limited* (1993) 116 ALR 625. In these matters it was held that when granting an adjournment or a delay in proceedings, the court is entitled to consider court resources and the competing interests of other litigants.

Section 96 of the Act deals with the set off of judgments. This provision is an improvement to the old District Court and Supreme Court Rules. A first judgment debtor is now able to seek a set off order in relation to the second judgment. This has expedited those types of cases and this should be applauded.

Generally in relation to the cost provisions under section 98 of the Act, the Committee is of the opinion that the provision is operating reasonably adequately. However it is to be noted

that the Committee takes an issue with how the provision affects offers of compromise. The Committee believes that the effect of section 98 on offers of compromise may place an unsuccessful Plaintiff in personal injury litigation at a disadvantage. It is opined that any cost order adverse to a Plaintiff is of grave significance. This is in contrast to costs orders absorbed by Defendants in personal injury proceedings, where the Defendant is a resourced insurance company. The Committee notes the severe impact of a costs order against an individual, as opposed to a large corporate entity.

The Committee is of the opinion that section 99 which allows costs to be awarded against a legal practitioner in the event of default can lead to injustice especially in relation to the continuing obligations of practitioners to monitor whether a claim has reasonable prospects of success.

In relation to the rules, the Committee welcomes the new discovery rules in Part 5 of the Rules especially concerning preliminary discovery and the rules dealing with discovery by bundles. The Committee welcomes the borrowing of the equivalent provision from the Federal Court Rules.

The Committee notes the current use of the computerised court recording system. A problem with this system has been that parties on occasion miss out on filing appeals on time. The effect of Rule 36.11 is that a judgment or order is taken to have been entered when it is recorded in the computerised court recording system. The old provisions where a party had to take out an order no longer apply. This means that setting aside or varying a judgment or order now must be dealt with under Rule 36.15 – 36.18 inclusive. Parties now only have 14 days in which to appeal a decision under Rule 36.16. The Committee believes this period of time is too short and should be increased to at least 21 days.

Practice Notes

Each of the jurisdictions have developed relevant Practice Notes. The Committee is of the view that each of those Practice Notes operates adequately. In particular Practice Note SC6 dealing with mediation in the Supreme Court and Practice Note SC7 dealing with the use of technology is working adequately. The equivalent in the District Court is to the same effect. The General Supreme Court Practice Note CL5 dealing with case management is also operating satisfactorily.

Practice Note DC1 concerning the case management in the General List of the District Court is also operating adequately. Similarly the standard directions that are made by the District Court, DCSD1 is also leading to expeditious hearing of matters.

The Committee is of the opinion that the prescribed charge rate should reflect the market rate of at least $300 per hour plus GST having regard to the fact that the Local Court's jurisdiction in civil cases has been increased to $100,000 and consequently cases that were formally instituted in the District Court will now be brought in the Local Court.

The General Case Practice Note in the General Division of the Local Court is also operating satisfactorily. This Practice Note aspires to finalizing 90% of civil proceedings within 6 months of commencement and 100% within 12 months. The Committee opines that a general reduction in the amount of filed proceedings has come about because of the Act and its utilization by all legal practitioners.

8/4/11