



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EEas:1654311

1 April 2019

The Hon Dominic Perrottet MP
Treasurer
Parliament of NSW
GPO Box 5341
SYDNEY NSW 2001

Dear Treasurer,

2019-2020 Pre-Budget Submission

The Law Society of NSW appreciates the opportunity to provide this submission to the Government for consideration in preparing the 2019-20 State Budget.

The Law Society's submission to the pre-budget process is largely focussed on the need for increased funding for the legal assistance sector, and adequate resourcing for state courts and tribunals. Our recommendations are informed by expert input from the Law Society's policy committees.

1. Resourcing for the Local Court of NSW

In NSW 96% of all criminal prosecutions are dealt with to finality within the Local Court. There is a rising level of demand imposed on the Local Court by reason of significant increases in police resources, which has led to an increase in prosecutions. However, the Local Court has continued to operate without any increase in resources to meet the increasing case load. Local Courts in many regional areas are frequently sitting beyond their hours of operation, sometimes as late as 9:00pm. Excessively lengthy sitting days across NSW impose a significant burden on court users, magistrates, court staff, police prosecutors and legal practitioners, and are unsustainable. These pressures will only increase once the amendments to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) relating to Apprehended Domestic Violence Orders commence and further increase the Local Court's case load.

In addition, practitioners in regional areas are experiencing difficulties with some Local Court registries refusing to file documents in family law proceedings for which they have jurisdiction under cross-vesting legislation. These documents include applications for divorce and certain consent orders. In areas located some distance from a Family Court or Federal Circuit Court registry, this practice places an unfair burden on local residents and practitioners.

The issue of difficulty in filing documents at Local Court registries has also been highlighted by our members who appear in the NSW Industrial Relations Commission ("IRC"). E-filing of documents is not currently possible at the IRC. The IRC website states that "documents can be filed at any NSW Local Court (Central Local Court exempt)". In practice, however, our members advise that Local Court criminal registries in Sydney have stopped accepting any

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documents for the IRC and the Local Court civil registries in Sydney are in discussions with the IRC as to what they are prepared to accept for filing.

While the issue regarding filing of documents has been raised with the Chief Magistrate of NSW, primarily it arises from the continuing pressures experienced across Local Courts' civil, criminal and family law caseloads. As noted above, these pressures on the Local Court are set to increase, which will likely exacerbate delays for court users generally, as well as difficulties in filing documents at Local Court registries.

Recommendations

- The Government should commit to a substantial increase in ongoing funding for the Local Court of NSW in the 2019-20 State Budget.

2. Mental health services for people in the custodial system in NSW

The mental health services available to inmates in NSW are insufficient given the scale of the need arising from demographic and environmental factors. A 2015 study conducted by the NSW Justice Health and Forensic Mental Health Network found nearly 63% of the adult population in correctional centres in NSW had received a mental health diagnosis, most commonly depression and anxiety. In 2010, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health reported that in NSW 43% of prisoners met the diagnostic criteria for at least one mental illness, compared with 15% of adults in the general population. Psychosis was reported as 10 times more prevalent in prisons than in the community.¹

Despite the high rates of mental illness among prisoners in Australia, waiting times for mental health care can be unduly long. A 2015 report by the NSW Inspector of Custodial Services found that the waiting time for people in a correctional centre to see a mental health nurse and psychiatrist was 27 days and 42 days respectively.²

In December 2018, the NSW Legislative Council Portfolio Committee No. 4 - Legal Affairs considered the issue of custodial mental health care across the state in its report into Parklea Correctional Centre. On examination of the material available, the Committee noted it was "extremely concerned about the lack of provision for mental health services and infrastructure in New South Wales... [and] by the blockages that exist due to a lack of mental health care beds throughout the system, most especially forensic mental health beds". The Committee underscored that "substantial investment is required in terms of Justice Health services generally and mental health services and infrastructure specifically".³

¹ UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover* (3 June 2010), 14th session, agenda item 3, A/HRC/14/20/Add.4, 70.

² NSW Inspector of Custodial Services, *Full House: The growth of the inmate population in NSW* (2015), NSW Government, 53.

³ NSW Legislative Council Portfolio Committee No. 4 – Legal Affairs, *Parklea Correctional Centre and other operational issues* (21 December 2018), xii.

Recommendation

The 2019-2020 State Budget should include provide sufficient additional resources for the Justice Health and Forensic Mental Health Network to enable it to meet the health needs of the NSW prisoner population, and their mental health needs in particular, as recommended by NSW Legislative Council Portfolio Committee No. 4 - Legal Affairs in its December 2018 report into Parklea Correctional Centre.⁴

3. Maintaining court services in country NSW

The Law Society has previously raised concerns regarding the closure or partial closure of court houses in rural and regional NSW. Litigants and their legal representatives are frequently forced to travel long distances to court, raising significant access to justice concerns.

The Law Society understands that in several cases, consideration has been given to the judge appearing by audio-visual link ("AVL") from Sydney. While modern technology such as AVL is welcome to assist in the administration of justice, where it is properly resourced, the Law Society has concerns about AVL replacing the attendance of a judge at court hearings.

The Law Society is also concerned that limited sitting periods in rural courts may result in an increased number of matters being allocated to courts in Sydney, resulting in increased costs for rural litigants. The Law Society is concerned that court closures in remote areas have a disproportionate effect on the most disadvantaged in our community, including the elderly, sick, unemployed, disabled, and Indigenous Australians.⁵

Recommendation

The 2019-20 State Budget should include long-term funding solutions for court services in rural, regional and remote areas.

4. Appropriate funding of the process of truth-telling and treaty negotiations

The Law Society notes the recommendations made by the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 in its final report. For the purposes of pre-budget submissions, we note in particular recommendation 3.

This recommendation states that the Australian Government should support the process of truth-telling. This could include the involvement of local organisations and communities, libraries, historical societies and Aboriginal and Torres Strait Islander associations.

In our view, given the national and local nature of such a project, both the Commonwealth and State budgets should make provisions for adequate funding of the nationwide truth-telling project.

Further, we note that there has been momentum for treaty negotiations in a number of states and territories. Notably, Victoria will soon announce the details of an Aboriginal representative body, and in the Northern Territory, Professor Mick Dodson has been appointed NT Treaty Commissioner. The Law Society supports the establishment of a treaty negotiation process in NSW, appropriate to the circumstances of NSW.

⁴ Ibid.

⁵ M. Cain, D. Macourt, & G. Mulherin, *Lawyer availability and population change in regional, rural and remote areas of New South Wales* (2014), Law and Justice Foundation of NSW, Sydney.

Recommendation

Provision should be made in the NSW Budget to support a national truth-telling project, and for a treaty negotiation process in NSW.

5. Funding for specialist Indigenous sentencing courts

Recommendation 10-2 of the Australian Law Reform Commission's 2018 *Pathways to Justice* report⁶ is that specialist Aboriginal and Torres Strait Islander sentencing courts should be established, which incorporate individualised case management, wraparound services and are culturally competent, safe and appropriate. Recommendation 10-3 is that relevant Indigenous organisations should play a central role in the design, implementation and evaluation of specialist Indigenous sentencing courts.⁷

The Law Society strongly supports these recommendations, and note these recommendations reference states and territories.

Recommendations

- Provision should be made in the NSW Budget for funding an Indigenous specific sentencing court in the District Court.
- Provision should be made in the NSW Budget for the expansion of the Youth Koori Court to regional areas.

6. Adequate funding for Aboriginal and Torres Strait Islander Legal Services

The issue of under-resourcing Aboriginal and Torres Strait Islander Legal Services (ATSILS) in NSW is a long-standing one. For example, a 2009 paper notes:

A comparison with the resources allocated to [Legal Aid Commissions] provides the most striking evidence of under-funding for ATSILS. ATSILS provide legal services at a significantly lower cost than LACs⁸ while maintaining comparable levels of client satisfaction. Yet the workload of ATSILS lawyers is significantly higher at 52 hours per week, compared with 42 hours per week for LAC practitioners.⁹

Submissions from the National Aboriginal & Torres Strait Islander Legal Services to the 2018 Review of the Indigenous Legal Assistance Programme (ILAP) state that the ILAP has not resulted in adequate or sustainable funding for ATILS, and that this trend is unlikely to abate:

Because the 2013-14 MYEFO savings measure introduced by the Government is ongoing, the ILAP is facing another projected \$10 million in cuts from 2020-2022.¹⁰

⁶ ALRC, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Final Report*, Report 133, December 2017, 328.

⁷ *Ibid.*

⁸ Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program*, (2003), 3.3.

⁹ M Schwartz and C Cuneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) *IndigLawB* 4. Available at: <http://www5.austlii.edu.au/au/journals/IndigLawB/2009/4.html>

¹⁰ National Aboriginal and Torres Strait Islander Legal Services, *Submission to the Review of the Indigenous Legal Assistance Programme*, 5 October 2018, 49. Available at: <http://www.natsils.org.au/portals/natsils/submission/NATSILS%20ILAP%20Submission%20For%20Website.pdf?ver=2018-10-29-161426-540>

In the Law Society's view, while the Commonwealth bears responsibility for funding ATSILS, NSW also bears responsibility, given that ATSILS deliver services in respect of matters within the state's jurisdiction, including criminal and care and protection matters.

Further, the Productivity Commission's review of Access to Justice Arrangements in 2014 found that some separation of funding for civil and criminal matters is required.¹¹ The Productivity Commission noted that access to legal aid grants for civil matters is highly restricted and governments should separately determine and manage funding for civil legal assistance services. Such funds should not be diverted to criminal legal assistance, though equally they should not be made available at the expense of criminal law assistance. The main benefit of such a change is that a specific funding allocation for civil matters will mean the demand for civil legal services is matched by a more appropriate level of service provision.

We note in particular recommendation 21.2:

The Australian, State and Territory Governments should use the National Partnership Agreement on Legal Assistance Services to make eligibility principles for grants of legal aid for civil (including family) law cases consistent. The financial limits for grants of legal aid for civil (including family) law matters provided by legal aid commissions should be increased, linked to a measure of disadvantage and indexed over time. These limits should be consistent with the priorities and funding identified in recommendation 21.7.¹²

We also note recommendation 21.4

To address the more pressing gaps in services, the Australian, State and Territory Governments should provide additional funding for civil legal assistance services in order to:

- better align the means test used by legal aid commissions with that of other measures of disadvantage
- maintain existing frontline services that have a demonstrated benefit to the community
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding.

The Commission estimates the total annual cost of these measures to the Australian, State and Territory Governments will be around \$200 million. Where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance.¹³

The Law Society continues to support the implementation of these recommendations. We note that given that these recommendations were made in 2014, the estimated total annual cost of the measures of \$200 million is likely to require reassessment. In particular, we support the allocation of adequate funding for ATSILS to provide legal assistance and field officers to address criminal law, family law and care and protection legal need in Indigenous communities.

¹¹ Productivity Commission, *Access to Justice Arrangements Inquiry Report*, No. 72, 5 September 2014, 39.

¹² *Ibid*, 63.

¹³ *Ibid*.

Recommendation

Provision should be made in the NSW Budget for adequate and long-term funding for the Aboriginal Legal Service (NSW/ACT) for its criminal law and civil law work in NSW.

7. Review funding strategy to assist with capacity building in the Indigenous service sector

Funding to the Indigenous service delivery sector must be sufficient to build capacity in Indigenous organisations and the sector more generally to meet the increased demand on the sector and service(s). The NSW budget must provide for up-front investment to support capacity building in the Indigenous service sector to meet growing need.

The Law Society is strongly of the view that true partnerships with Indigenous organisations are critical to successful service delivery to Indigenous people. However, unless this approach is matched by adequate government investment in Indigenous service sector capacity building, Indigenous organisations will be set up to fail, and Indigenous organisations will be pushed out of the market by more mature and larger scale non-Indigenous service providers.

We understand that in NSW, increased outsourcing of public services is resulting in growing demand on the Aboriginal service sector. For example, since the NSW Department of Family and Community Services (FACS) undertook its Safe Home for Life reform in 2014, NSW has seen large scale outsourcing of child protection services to the NGO sector. This has significantly increased demand on the Aboriginal service sector. FACS' new commissioning model (i.e. outsourcing) is only going to place greater demand on an already stretched and under-funded Indigenous service sector.

However, there has not been an equivalent investment from State, Territory and Commonwealth Governments in building the capacity of the Indigenous service provision sector to meet the increased need.

Recommendation

Provision must be made in the NSW Budget to provide for up-front investment to support capacity building in the Indigenous service sector to match the increased demand on the sector.

8. Funding for local councils in NSW

Local Government NSW, the peak body representing councils across the state, has estimated the cost shifting burden on councils to be AU\$6.2 billion over 10 years.¹⁴ Along with rate capping, cost shifting undermines the financial sustainability of the local government sector by forcing councils to assume responsibility for more infrastructure and services, without sufficient corresponding revenue, which imposes a financial burden. Contributions to Fire and Rescue NSW, the NSW Rural Fire Services and the NSW State Emergency Service, lack of adequate funding for public libraries, and the failure to reimburse councils for mandatory pensioner rebates are major examples.

¹⁴ Local Government NSW, *Impact of cost shifting on Local government in NSW* (2018). Available at: https://www.lgnsw.org.au/files/imce-uploads/206/Cost_Shifting_Summary.pdf

Councils are not provided with sufficient financial resources for their responsibilities, including new responsibilities in relation to combustible cladding, managing crown lands, and in relation to the administration of potential new environmental regulation, such as enforcement of short-term rental accommodation regulation.

Recommendation

The 2019-20 Budget should include provision of adequate funding to support all local council responsibilities.

If you have any queries about the above, or would like further information, please contact Michael Tidball, CEO,

Yours sincerely,



Elizabeth Espinosa
President

CC: NSW Attorney-General, the Hon Mark Speakman SC MP
Minister for Counter Terrorism and Corrections, the Hon Anthony Roberts MP
Minister for Aboriginal Affairs, the Hon Don Harwin MLC
Minister for Local Government, the Hon Shelley Hancock MP