



THE LAW SOCIETY
OF NEW SOUTH WALES

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10 May 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: nathan.macdonald@lawcouncil.asn.au

Dear Ms Nicoll,

Funding for grants of Legal Aid in family law matters

Thank you for the opportunity to contribute to the Law Council's advocacy on this issue. The Law Society of NSW shares the Law Council's concerns about the challenges faced by Family Law Legal Aid panel practitioners, particularly in relation to the grant amounts in NSW. This letter is informed by our Family Law Committee.

Our members report that under the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) (**Rules**), the amount of legal work required in family law proceedings has increased overall, and has been heavily 'front-ended' towards the early stages of proceedings. However, these changes are not reflected in the current family law cost scales for grants of aid. In the Family Law Committee's view, while a change in the structure and caps on different stages of proceedings might assist, an overall increase in funding is required to ensure the ongoing viability of legal aid work in this field. We are concerned that, while the Budget allocation of \$16.5 million over two years to support legal aid commissions to meet the cost of legal representation in Federal Circuit and Family Court of Australia (**FCFCOA**) proceedings is welcome, it may not adequately respond to the overall increased costs involved.

Noting that this issue features in the Law Council's Call to Parties document, we would support further advocacy following the federal election to address the issue. We also support the Law Council's work with National Legal Aid towards ensuring funding security under the upcoming review of the National Legal Assistance Partnership 2020-2025.

To assist with further advocacy, we outline below the experience of Law Society members in NSW who undertake this work.

Experience of panel legal aid practitioners in NSW

It has been the case for many years that grants of legal aid in family law matters fail to reflect the amount of work undertaken and the care and skill required, and that panel practitioners have typically undertaken additional, but necessary, hours of unpaid work beyond those covered by the grant, in order to assist their most socially and economically disadvantaged clients. Many view this work as a form of pro bono legal work. 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.

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As noted above, the introduction of the Rules has significantly increased the amount of work required in family law matters, particularly at the 'front end'. While grant arrangements vary across state and territory jurisdictions, it is the view of the Family Law Committee that grants are less reflective than ever of the work undertaken. We understand that the difficulties experienced under the NSW arrangements, some of which are outlined here, are indicative of the types of problems experienced nationally.

Pre-action Family Dispute Resolution

A key feature of the Rules is the requirement for the parties to demonstrate having taken genuine steps to resolve the dispute by engaging in mandatory pre-action Family Dispute Resolution (**FDR**). While this shift in emphasis is a welcome development, it is not reflected in family law grants of aid. In NSW, an amount of \$300 is allowed for taking detailed initial instructions and preparing for an FDR event, a task that involves compiling and disclosing all records relevant to financial and/or parenting disclosure. For attendance at the FDR event, a maximum of four hours is allowed at \$150 per hour, with a further lump sum of \$150 allowed for preparing consent orders. However, FDR events typically run far longer - up to 10 hours in some cases.

Initiating court proceedings

In matters that do not resolve at FDR, the 'front-ending' of procedures under the Rules has intensified the deficiency of legal aid grants. In NSW, the lump sum grant of \$1,350 which is allowed for all steps up to the conclusion of a directions hearing does not reflect the work involved up to that point. Our members report that in parenting proceedings, at least 15 hours of work are required to take instructions and prepare the Initiating Application, which must now be supported by Affidavit/s in support, a Genuine Steps Certificate, Undertaking as to Disclosure, Notice of Child Abuse, Family Violence or Risk and Parenting Questionnaire. In property proceedings, the applicant must prepare the same documents, with a Financial Statement and Financial Questionnaire replacing the Notice of Child Abuse, Family Violence or Risk and Parenting Questionnaire. The amount of \$1,350 is provided in respect of that work, together with "communications; preparing court documents; attending to filing and service; all court attendances including [First Court Event and] directions hearings and mentions; preparing and filing consent orders". In practice, typically between two and four separate court attendances are required at this stage of the matter.

Interim hearings

In NSW, if an Interim Application is filed at the same time as the Initiating Application, up to five hours at \$150 per hour is allowed to attend a defended interim hearing. Our members report this is insufficient as, in many cases, over two hours' work is needed just to prepare the required written case outline. One recent matter involving an application for recovery required five separate court appearances, and a total of 44 hours of work including over nine hours in Court.

Court-based Family Dispute Resolution

If the matter is referred to court-based mediation, four hours is allowed for attending the mediation at \$150 per hour, and in exceptional cases up to two hours may be allowed for preparation. However, as these events are listed for either a half-day or a full day, they require many hours of preparation and often an extended attendance.

Complexity and duplication

The difficulties experienced by legal aid panel lawyers are worsened by an issue that applies to FCFCOA matters generally: the requirement for duplicated, or similar, information across multiple FCFCOA forms, which would appear unnecessary. For example, the Notice of Child Abuse, Family Violence or Risk, Parenting Questionnaires and supporting affidavits largely require the same information. We understand these forms are scheduled to be reviewed in the

near future, ideally in light of the way in which the information is used by the Court. We look forward to working with the Law Council as opportunities for advocacy arise in this regard.

Impact on practitioners and parties

We are concerned that the current level of grants will mean that fewer family law practices undertake legal aid work, and those that do, undertake less. Small practices in particular are finding that legal aid work is becoming less sustainable. Without an immediate increase in funding to allow for proper remuneration to attract panel practitioners with sufficient skills and expertise, legal aid commissions may struggle to continue to provide a mixed service delivery model.

This may well contribute to significant unmet need in family law, particularly in regional areas. We understand that in the Bega Valley Shire, for example, 15 years ago there were five solicitors doing family law panel work, and now there are none. The nearest, located in Moruya in the Eurobodalla Shire to the north, covers 72,000 people and 9,700 square kilometres, and is inundated with inquiries.

It may also contribute to the juniorisation of legal aid work, and a diminution of the quality of legally aided matters. If left unaddressed, there is a risk of the mixed service delivery model collapsing due to insufficient numbers of experienced practitioners undertaking legally aided work.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Joanne van der Plaats', written in a cursive style.

Joanne van der Plaats
President