OFFICE OF THE LEGAL SERVICES COMMISSIONER (NSW)

SUBMISSION TO PRODUCTIVITY COMMISSION ISSUES PAPER - ACCESS TO JUSTICE ARRANGEMENTS (SEPTEMBER 2013)

Role of the Office of the Legal Services Commissioner (NSW)

The New South Wales Office of the Legal Services Commissioner (OLSC) receives and deals with complaints about legal practitioners, working as part of a co-regulatory system with The Law Society of New South Wales and the New South Wales Wales Bar Association.

As a complaints handling and disciplinary body, the OLSC does not participate directly in Australia's system of civil dispute resolution, save for the occasional administrative law matter and the resolution of consumer disputes. However, OLSC has some insight into the difficulties faced by the consumers of legal services in accessing and using the system.

The Issues Paper asks:

In what areas can the Commission most add value in undertaking this inquiry?

Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?

OLSC statistics indicate that the following civil disputes generate the most complaints:[1]

1. family law/de facto relationship disputes
2. disputes over deceased estates, including family provision claims (which may continue to increase with Australia's aging population)
3. commercial disputes
4. claims for personal injury

Consumers of legal services may have little understanding of the civil dispute resolution process in which they are involved, and often have unrealistic expectations as to the outcomes the process may deliver. Whilst costs often become the focus of a complaint, dissatisfaction with costs is almost always linked with complaints in relation to the time taken for a case to be finalised, the quality of legal services provided and inadequate communication.

Many of the issues raised in the Issues Paper are outside the purview of the OLSC. However, OLSC provides comment on the following:

3 Exploring legal need
12 Effective and responsive legal services

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[1] OLSC *Annual Reports 2012, 2011, 2010*

13 Funding for litigation

Other stakeholders seem better placed to comment on the remainder of the Issues Paper.

3. Exploring legal needs

The OLSC keeps statistics relating to complaints made in writing and inquiries logged by phone. The OLSC also conducts regular, voluntary, surveys of practitioners, complainants and callers to our Inquiry Line. Some demographic data is obtained from surveys of Inquiry Line callers. Although not representative of that portion of society excluded from the justice system it is, largely, indicative of those in NSW who have problems with the justice system at various levels. Accordingly, the paragraphs immediately below address issues going to legal need utilising data obtained in the 5 years since 2008.

What are the characteristics of individuals who experience multiple problems and what types of disputes are they typically involved in?

Since 2008, 45% of survey respondents were male and 48% were female. The balance did not disclose their gender. This indicates that problems brought to the attention of the OLSC are not gender specific or biased.

There have been few inquiries from those aged less than 35 years. In 10 year spans, those aged 36 – 45 constituted 19.5% of survey respondents, those aged 46 – 55 constituted 25.6%, 56 – 65 constituted 26.2% and the over 65's constituted 17.6%. The last group is of particular concern and perhaps warrants further research by/with special interest groups.

The geographic distribution of the residence of survey respondents indicates roughly similar figures between Sydney suburban (47%) and NSW regional (43%). The balance is distributed between Sydney CBD, interstate and not disclosed.

The majority of survey respondents speak the English language at home (70%). Of the remaining languages spoken at home, Chinese (including Mandarin and Cantonese) constitutes 1.7%, Arabic constitutes 1.5%, Egyptian 0.7% and Serbian and Spanish 0.5% each. Other languages spoken at home are statistically insignificant.

Of the total number of survey respondents since 2008, 1.6% identified as of Aboriginal/Torres Straight Islander descent, 61.6% were Australian born and 34.3% were not born in Australia. A surprisingly high, 19.8% of the survey respondents identified as people living with a disability.

In the context of complaint handling, taking into account that complainants are not questioned about unmet need, we can confirm that the following areas of civil dispute are frequently raised with this office

- between clients and lawyers about legal costs
- between clients and lawyers about negligence
- between lawyers and their clients with opposing parties in family law disputes
- between beneficiaries and family in wills and probate matters.

Participants in the legal process frequently express frustration and anger about the costs involved in commencing and maintaining proceedings in relation to each of the above areas and about the unnecessarily adversarial nature of those proceedings. Those are made about the interaction between parties prior to matters being brought to court, as well as to the proceedings themselves.

12 Effective and responsive legal services

On 5 February 2009, as part of its microeconomic reform agenda, the Council of Australian Governments (COAG) initiated a process to regulate the legal profession across Australia. Over time this led to the drafting of the *Legal Profession Uniform Law* (LPUL). Unfortunately, only New South Wales and Victoria agreed to proceed with the legislation. It will come into effect in 2014 in those states.

The LPUL will substantially alter the regulatory framework in which OLSC operates, moving away from the traditional approach of proscriptive legislation to an approach that is outcomes focussed, where the LPUL sets out the outcomes and behaviours it seeks to foster rather than containing detailed, prescriptive provisions. With respect to legal costs, the LPUL will replace the detailed costs disclosure obligations currently contained in the *Legal Profession Act 2004 (NSW)* with provisions designed to focus on the substance rather than the form of costs disclosure. To that end, the LPUL adopts a principle of *"informed consent"*, requiring a law practice to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs after being given that information. The LPUL imposes an obligation on law practices to charge costs that are no more than fair, reasonable and proportionate. OLSC supports reform and the principles that underpin the LPUL.

Against this background, OLSC provides the following comments.

A responsive legal profession

How appropriate are the restrictions on non-lawyers that prevent them from carrying out certain forms of legal work and how could improvements be made? How might the development of legal skills for non-legal professions improve access to justice, especially for those users who face significant

barriers?

In New South Wales, a person must be admitted to the legal profession and hold a current practising certificate in order to practise as a solicitor or barrister. They must have professional indemnity insurance and are subject to rules regulating their professional conduct and practice, which include a requirement to complete a certain number of hours of continuing legal education each year. These measures operate to protect members of the public who engage legal practitioners, and the OLSC would not support allowing non-lawyers to carry out legal work without similar protections. It is likely the professional bodies would vigorously oppose any easing of the prohibition on unqualified practice.

In New South Wales, there are free government services such as Law Access and Law Assist that assist consumers and facilitate access to justice by providing legal information, referrals and in some cases, advice for people who have a legal problem.

However, bolstering support and advice services, and mentoring and advocacy services, would improve interaction between clients with communication and other difficulties and lawyers and courts.

How do the restrictions on lawyers' business structures and models (for example in relation to ownership and/or advertising) impact on both lawyers and consumers?

In New South Wales, lawyers may operate as sole practitioners, law firms, multi-disciplinary partnerships (MDPs) or incorporated legal practices (ILPs). There are no significant restrictions that appear to impact on either lawyers or consumers.

Traditionally structured partnerships must comply with *Legal Profession Act*, *Legal Profession Regulation* and *Solicitors' Rules*. ILPs and MDPs must in addition have at least one legally qualified practitioner director and the practitioner director(s) must demonstrate they have implemented appropriate management systems (AMS). OLSC, working collaboratively with the Law Society, LawCover (the professional indemnity insurer) and the College of Law, has adopted an "education towards compliance" strategy to assist ILPs in developing and maintaining AMS. These requirements are not onerous and do not appear to impede the ability of lawyers to provide legal services and make a reasonable profit. Studies suggest law practices that have participated in the process attract fewer complaints[2].

There are divergent views as regards restrictions on legal advertising. Personal injury practice in NSW is regulated. Advertising must also comply with the *Australian Consumer Law* and the *Fair Trading Act 1987 (NSW)*. The LPUL does not carry over the restrictions. Advertising enables consumers to

[2] Tahlia Gordon, Steve A. Mark and Christine E. Parker, *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW*, J.L. & Soc. (Dec 23, 2009/2010; Legal Studies Research Paper No 453, U of Melbourne

locate and find out about a lawyer and the services they are able to provide before attending a first consultation. While the impact of the restrictions is unclear, the OLSC is of the view that lawyers should be allowed to advertise, provided advertising is not false, misleading or deceptive, and not so distasteful as to bring the profession into disrepute.

What problems stem from inconsistent regulation of the profession across jurisdictions? What are the costs and benefits associated with creating a national legal profession?

The National Legal Profession Taskforce Consultation Report addressed these matters in its Consultation Report dated 14 May 2010 and particularly in the accompanying Consultation Regulation Impact Statement.

Briefly summarised, the advantages of a national regulatory scheme for lawyers are

- greater consistency of disciplinary decision making and consequent increase in public confidence
- fewer barriers for intrastate firms to trust account establishment and maintenance
- consistent admissions procedures improving interstate movement and access for the profession
- ultimately, a consolidated disciplinary data base
- improved co-ordination and case handling of complaints

The OLSC continues to support the creation of a national legal profession.

What evidence is there of competition in the market for legal services? How do consumers of legal services fare in terms of choice, prices or efficiency in the conduct of legal work? How do the rules or behaviours of professional associations obstruct or facilitate competition and consumer protection in the markets for legal services?

Following the 1994 amendments to the Legal Profession Act in NSW the OLSC was created, it was made compulsory for firms to disclose costs to clients and the Supreme Costs Assessment Scheme was created. The consequent benefits for consumers are hard to measure from our perspective, but the following comments may be of value.

- Competitive pricing between lawyers and conveyancers (in NSW) in property transactions appears to have held down prices, depending on the market and geography.
- Only the most experienced and sophisticated clients have a clear perception of what their legal costs might be. The application of time costing and consistent underestimates of costs, make it difficult for consumers to make informed choices.

- There is a lack of clear, substantiated information for consumers about the steps that might be involved in their case, and therefore what questions they need to ask a lawyer to determine who they choose.

- The professional associations are very protective of their jurisdictions and the involvement of non lawyers in any aspect of legal work (ie conveyancing and migration work)

- Solicitors and Barristers Rules generally serve the best interests of client.

- Competition for clients for small firms and sole practitioners can lead to an increase in costs disputes and short cuts leading to poor quality services.

Are complaints process arrangements sufficiently independent (of government, the courts and professional bodies) and transparent? What principles should apply to ensure that complaints bodies have sufficient powers to investigate and deal with individual complaints and systematic issues?

The Legal Services Commissioner in NSW is an independent statutory authority. The co-regulatory regime in place in New South Wales combines the expertise of professional bodies in investigating certain complaints with independent oversight by OLSC. OLSC has a role in monitoring investigations carried out by the professional bodies, and power to review the decisions of professional bodies.

The complaints process embodied in the *Legal Profession Act* in NSW largely allows the regulators to focus on how an individual legal practitioner has dealt with an individual client in a single matter. The investigation of complaints involving a pattern of conduct by an individual lawyer over multiple matters, or systemic issues within a law practice, is labour intensive and costly, and, depending on the case, may be impossible to prosecute. This has resulted in budgetary blowouts and diversion of resources from other complaint investigations.

It can be difficult to sheet home responsibility for systemic failings to individual lawyers, although provisions allowing for complaints to be made about law practices and deeming all principals responsible for wrongdoing by a law practice (in the LPUL) go some way to addressing this problem.

In addition to investigating complaints, OLSC has power to conduct an audit of the compliance of a law practice (and of its officers and employees) with the requirements of the *Legal Profession Act*, accompanying Regulations and/or the *Solicitors' Rules*. This provides another, arguably more productive, means of addressing minor systemic issues and technical breaches of the legislation but is also very resource intensive.

A large number of complaints received by OLSC involve allegations of negligence. Whilst negligent advice, acts or omissions may be capable of being unsatisfactory professional conduct or professional misconduct, the dividing line between negligence and misconduct is often difficult to establish. Superior courts have held that only in cases where the negligence has been gross or shows a basic disregard for standards of practice can there be a finding of statutory misconduct.

Whilst the OLSC will generally attempt to mediate a resolution to such complaints, complainants are often frustrated at being told their allegations cannot lead to a disciplinary outcome and that only a Court can determine those matters that fall below the 'gross negligence' threshold.

Powers to compel information from the profession, to enter premises and examine documents and to make binding determinations about misconduct should obviously be enshrined in any governing legislation.

Legal Education and skills

What reforms could usefully be made to the academic qualifications and legal training required of prospective lawyers?

A greater emphasis in legal education on communication is warranted. OLSC has published a number of papers on the subject of legal education and training, notably *Legal Education and the 21st Century Law Graduate* presented by the then Commissioner, Steve Mark, at the Continuing Legal Education Association of Australasia 2008 Conference, Raising the Bar – Professional Development for Legal Education Professions, Sydney, 16 October 2008. The paper is available on OLSC's website[3]

Communication skills are of particular importance in effectively managing a client's expectations and ensuring the client is fully informed about costs. Dr George Beaton, a director of Beaton Research + Consulting and Beaton Capital neatly summarised what is required in a recent blog post:

> *Solicitors that demonstrate a cavalier attitude to spending their client's money can expect clients to push back on every single invoice, no matter what the amount. Solicitors that communicate with their clients openly and regularly about fees, demonstrate concern when costs are mounting, and show an eagerness (yes, eagerness!) to discuss their budget constraints and how they can work within them, will find that their clients will more readily accept their rates.*[4]

OLSC is concerned that there are some legal practitioners who lack proficiency in both written and spoken English.

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[3] www.olsc.nsw.gov.au

[4] http://www.validatum.com/blog/cost-consciousness-the-missing-link

There is also an inadequate understanding by the profession of what is required to run a small business (ie a sole practitioner law firm), while maintaining quality of service, proper billing practices and appropriate levels of communication with clients, the Courts and other practitioners.

Billing practices

In February 2004 the Premier of New South Wales called for an Inquiry examining the current legal costs system, the calculation of costs and the methods by which costs were presented to a client. The resulting panel produced a Discussion Paper *Lawyers Costs and Time Billing and finally a Report*, both of which are available on OLSC's website.Although some years old, the Report raises issues which remain live in 2013.

Against this background, OLSC provides the following comments.

What evidence is there of the uptake of alternative fee arrangements in Australia? Are there any barriers (legal or practical) to their uptake? Has the use of alternative fee arrangements altered the costs to both lawyers and consumers?

In New South Wales, lawyers are generally free to chose the basis upon which they charge, although there are some restrictions on the ability to charge uplift fees and contingency fees, and some costs are regulated, most notably in motor vehicle accident claims, and certain other claims for personal injury. There is provision to contract out of some regulated costs.

The experience of OLSC, which deals predominantly with sole practitioners, small to mid size suburban law practices and rural law practices, is that time costing is overwhelmingly the predominant method of charging for legal services.

Despite much discussion and commentary, law practices seem reluctant to embrace alternative fee arrangements such as fixed fees and value billing. It may be that lawyers lack the knowledge, experience and confidence to accurately value and set a fixed price for their services, or that they are reluctant to experiment in difficult economic times, concerned that profit margins will fall. There are commentators who have written extensively about value billing, and the pricing of professional services, see for example *Implementing Value Pricing* by Ronald J Baker (John Wiley & Sons, Inc, 2011).

It is possible, of course, that firms using billing mechanisms other than the billable hour may attract significantly fewer complaints.

The OLSC is not aware of any empirical evidence showing whether the use of alternative fee arrangements reduces the costs to clients. However, taking into account the amount of times spent on recording billable time, preparing bills and negotiating disputes it is hard to see how costs aren't reduced for firms using alternative mechanisms.

What restrictions should apply to billing arrangements, and what cost disclosure rules should apply? Which billing practices more frequently result in client complaints or dissatisfaction, and how much of this relates to poor communication of costs?

In New South Wales, lawyers' costs disclosure and bills must currently comply with the prescriptive requirements of the *Legal Profession Act 2004* and accompanying Regulations, and with the *Australian Consumer Law* insofar as it applies to a particular transaction. The LPUL will alter the costs disclosure regime by moving to a less prescriptive, outcomes based model, underpinned by a principle of "informed consent". It remains to be seen how this will impact on billing arrangements.

In OLSC's experience, the billing practices that attract most complaints are:

- Bills delivered months, sometimes years, after the work was completed, or not within the time frame stipulated in the cost agreement
- Bills that charge an amount well in excess of an estimate previously given, without any prior notification of the increase in costs
- Bills that increase upon itemisation, particularly if a lawyer seeks to substitute a higher itemised bill for the bill originally given and recover the higher costs. This often occurs after a client has requested itemisation, with the result that clients feel they are being punished for requesting a itemised bill
- Bills that inadequately explain how the time recorded on the bill was spent
- Bills that charge for items that might more properly be regarded as part of the overheads of a law practice – printing costs, postage and the like.
- Bills for an amount approaching, equal to or more than the amount of a client's verdict/settlement.
- Bills containing obvious errors, such as arithmetical errors, typographical errors, duplication and application of rates that differ from those agreed.

Many of these complaints could be avoided by fully informing the client of the basis of charging, keeping the client updated as to the costs being incurred and carefully checking bills before sending to the client.

All potential costs should be disclosed to all clients in advance. However, the current regime in NSW oblige lawyers to disclose their costs only over $750 (in NSW) and over $2500 under the LPUL.

13 Funding for litigation

Contingent billing

How has the use of contingent billing improved access to civil justice in Australia, and could it be improved? What regulatory constraints should be used in relation to contingent billing and why?

The use of conditional costs agreements, with or without uplift fees, and delayed payment arrangements undoubtedly assists clients in accessing the civil justice system. Percentage contingency fee arrangements are presently prohibited in New South Wales and will continue to be under the LPUL.

OLSC considers the key issues, from a regulatory point of view, are:

- whether a client is properly informed and has some certainty as to the costs that will be charged, and whether the costs agreement as a whole is fair and reasonable. In New South Wales, costs agreements must comply with the requirements of the *Legal Profession Act 2004* and the consumer protection provisions contained in the *Australian Consumer Law* and the *Fair Trading Act 1987 (NSW)*. A costs agreement may be set aside in whole or in part if not fair and/or reasonable.

- the total costs charged should always reflect the fair and reasonable value of the legal services provided. Charging in accordance with a costs agreement does not preclude scrutiny in a disciplinary context of whether the charges are (grossly) excessive – *Veghelyi v The Law Society of New South Wales* (1989) 17 NSWLR 669; *New South Wales Bar Association v Meakes* [2006] NSWCA 340.

Litigation funders

In November 2005, the Standing Committee of Attorneys-General (SCAG) agreed that further consultation and research should be undertaken into regulating the litigation funding industry. SCAG published a Discussion Paper in May 2006 setting out the legal context of litigation funding and raising issues for discussion. The Discussion Paper predated the High Court decision in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited* [2006] HCA 41, which established that litigation funding was not an abuse of process or contrary to public policy.

In March 2012, OLSC produced a Discussion Paper *The Regulation of Third Party Litigation Funding in Australia* (available on OLSC's website[5]) that discussed developments since 2006 and measures taken to regulate litigation funding.

[5] http://www.olsc.nsw.gov.au/olsc/lsc_publications/olsc_papers/olsc_other.html

There have been further developments since March 2012, most notably the High Court's decision in *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers Appointed)* [2012] HCA 45. The High Court found that a litigation funding agreement is a "credit facility" rather than a financial product with the result that a litigation funder need not hold an Australian Financial Services Licence. OLSC understands the Australian Government is considering whether to legislate to reverse the decision.

Litigation funders should be subject of oversight.

What risks are posed by litigation funding arrangements and how do these differ from the risks posed by contingent and other billing practices? What proportionate and targeted regulatory responses are required to manage these risks, and is more uniform regulation required across jurisdictions on this matter?

From a regulatory point of view, two risks stand out:

1. the risk that a client may lose control over their litigation, with key tactical decisions taken or influenced by the litigation funder, and the interests of the litigation funder taking precedence over those of the client;

2. the risk there may be a conflict of interests between the client and the litigation funder, possibly giving rise to a conflict of duties for the lawyer.

There is also a risk of conflict of interests in contingent, conditional and delayed payment arrangements. As Bergin CJ in Eq noted in *Spence v Gerard Malouf & Partners Pty Ltd trading as Gerard Malouf & Partners* [2010] NSWSC 764:

> *In a "No Win – No Charge" retainer when solicitors' livelihoods and incomes are bound up with and dependent upon the client taking a particular step in litigation, it seems to me that the capacity to provide the client with objective advice about taking that step is compromised. The greater the amount of fees to be lost the greater the prospect of compromise.*

At present, litigation funding arrangements in Australia remain largely under the supervision of the Courts, save for class actions and insolvency proceedings regulated to an extent by the *Corporations Amendment Regulation 2012 (No. 6)* and consumer protection laws. In contrast, litigation funders in the United Kingdom have, since November 2011, self regulated by way of a voluntary code of conduct.

OLSC supports the creation of a uniform regulatory framework for litigation funding, modelled on the *Code of Conduct for Litigation Funders* in place in the United Kingdom[6], imposing mandatory rather than voluntary obligations.

[6] http://associationoflitigationfunders.com/code-of-conduct/

What are the benefits of litigation funding? In what areas of civil justice is it appropriate to consider use of litigation funding?

SCAG's Discussion Paper identified the benefits of litigation funding both in the insolvency context (where such funding is commonly used) and in other matters. The advantages in non-insolvency litigation were stated as being:

- *Levelling the playing field. With their strategic and investigative expertise, as well as their funds, LFCs assist plaintiffs to take action against wealthy or insured defendants. Similarly, LFCs' experience may assist in providing cohesive direction to large class actions.*
- *Introducing budgeting for legal costs. As experienced, well-resourced repeat players, LFCs can supervise the provision of legal services and ensure that costs are kept to a minimum. For example, some LFCs require solicitors to work to a budget. Litigation funding has the potential to create more competition in the pricing of legal services.*
- *Finally, litigation funders must be well capitalised, so defendants are better assured that they will recover their costs, should a costs order be made against an unsuccessful plaintiff.*

The Discussion Paper identified two areas where the use of litigation funding might be particularly beneficial:

1. class actions, where the expense is too great to be borne by any one claimant

2. complex matters, where the initial costs of investigation and collecting expert evidence may be prohibitive.

OLSC's March 2012 Discussion Paper also discussed the pros and cons of litigation funding.[7]

Is the availability of litigation funding encouraging a growth in the amount of litigation in some sectors, with a consequent adverse impact on access to justice for other litigants?

There appears to have been significant growth in litigation funding since the High Court's decision in *Campbells Cash and Carry Pty Limited v Fostif Pty Limited*. OLSC is not in a position to comment as to whether this has encouraged a growth in the amount of litigation in some sectors, at the expense of other litigants.

Is there evidence that firms are settling more cases due to the availability of litigation funding?

[7] http://www.olsc.nsw.gov.au/olsc/lsc_publications/olsc_papers/olsc_other.html

OLSC is not aware of any such evidence.

OLSC thanks the Commission for the opportunity to comment on these issues and looks forward to the Commission's Draft Report.