THE LAW SOCIETY OF NEW SOUTH WALES

Our ref: CLC/IIC/HRC:CBvk131023

13 October 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: john.farrell@lawcouncil.au

Dear Dr Popple,

Independent Review of the National Legal Assistance Partnership

Thank you for the opportunity to contribute to the Law Council's submission to the Independent Review of the National Legal Assistance Partnership (**NLAP review**). The Criminal Law, Indigenous Issues and Human Rights Committees of the Law Society contributed to this submission.

Value of legal assistance

In the context of highlighting the value of legal assistance, we would like to draw attention to the work being undertaken by the Kaldor Centre Data Lab, which publishes and analyses data around Australia's refugee status determination decisions. The Centre has kindly agreed to share its draft submission with the Law Council (attached), which provides insight into the benefits of legal representation in this field of law.

We note also the 2023 report, *The benefits of providing access to justice,* prepared by PWC and commissioned by National Legal Aid, finding that for every $1 invested in legal aid services by the Commonwealth Government, an equivalent benefit of $2.25 was delivered.

We continue to support the findings of the Productivity Commission's 2014 Public Inquiry Report on *Access to Justice Arrangements.*

"Missing middle"

We note that many of the issues raised in the NLAP Review Issues Paper are relevant to the Law Council's previous work in respect of the Missing Middle Project. We attach our 2021 submission and reiterate those concerns.

Effects of under-resourcing the NSW criminal justice system

Our members are of the view that the current level of core funding for the Aboriginal Legal Service (NSW/ACT) (**ALS**) and Legal Aid NSW (as well as the Office of the Department of Public Prosecutions (**ODPP**), though that is of less relevance to this review) is not sufficient to

support the delivery of justice in an appropriate or sustainable manner. We are concerned that insufficient resourcing of these organisations is regularly contributing to significant issues in the criminal justice system, including:

- Providing an inadequate experience of the criminal justice system for victim-survivors;
- Increased risk of errors and miscarriages of justice;
- Causing both regular and major procedural delays; and
- Increasing the risk of unsafe work environments for practitioners.

We suggest that increased investment is critical, particularly when considering the increasing complexity of criminal cases in NSW, large caseloads, and the ramifications of continuing the status-quo. We note that we will separately make submissions on this issue to the NSW Attorney General, but raise the issue here, as the need to increase the quantum of funding for the ALS and Legal Aid NSW is relevant to this review.

Increasing complexity of criminal cases

In recent years, criminal matters in NSW have become more complex. This is due to a variety of reasons, including:

- The increased use of new investigation technology by police, which enables the swifter collection of higher volumes of electronic evidence. Surveillance footage and recordings, as well as Cellebrite downloads of smartphones, for example, have become commonplace in a wide variety of matter types and can substantially increase the volume of evidence served in briefs.
- The increased use of technology by offenders. This is particularly prevalent in, but not limited to, fraud matters. Indeed, the NSW Sentencing Council recently acknowledged that 'technology, particularly through the Internet, has created more opportunities for fraud offences of increasing complexity.'[1]

Indeed, complexity has been linked to increases in the average trial duration for sexual assault matters prosecuted in Sydney, 'from 11.79 days in 2016 to 14.42 days in 2022'.[2]

High caseloads

In the last five years there has been, on average, a 1.5% increase in the number of adults proceeded against by the Police Force in NSW. In the 12 months up to June 2023 for example, 158,572 adults were proceeded against, as compared with 149,608 adults in the 12 months up to June 2019, after a period of lower numbers during the years affected by the COVID-19 pandemic.[3]

Staffing

We are concerned that staffing levels are not sufficient to facilitate working environments that appropriately support the safety and wellbeing of practitioners who engage with traumatic material on a regular, if not daily basis, or to ensure that practitioners are able and equipped to provide a satisfactory level of service delivery.

[1] NSW Sentencing Council, *Fraud* (Report, June 2023), ix.
[2] M Whitbourn, 'Sharp increase in sexual assault cases awaiting trial in NSW', *Sydney Morning Herald* (online, 2 February 2023).
[3] NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics Quarterly Update* (June Quarter 2023) 17.

We note that in the 2022 People Matters Employee Survey, 20% of responding Legal Aid staff reported that they do not have time to do their job well and 34% reported feeling burnt out. We note that, concerningly, these responses are markedly worse than responses from employees in similar industry roles, including the NSW Law Enforcement Conduct Commission, where only 10% reported issues with time and 16% reported feeling burnt out.

Adverse consequences

Our members report significant and wide-ranging consequences of resourcing constraints that currently arise on a regular basis, in addition to affected wellbeing.

By way of example, where the ALS and Legal Aid have insufficient resources, consequences can include:

- Affected capacity to provide sound legal advice and representation. The inability to provide a competitive wage for practitioners affects organisations' ability to recruit and retain practitioners, which has a significant impact on the ability to provide practitioners with an appropriate level of expertise in all NSW locations.
- Significant decisions, including sentence and bail decisions, being made without key information, due to an inability for defence representatives to access expert reports that have the required degree of quality and detail. This can materially affect the ability for Courts to make appropriate orders in respect of defendants, including to ensure the protection of victims and the community.
- Significantly increased costs to the Courts, ODPP and NSW Police Force, due to higher rates of unrepresented defendants, including in Apprehended Violence Order proceedings.
- Increased risk of reoffending and harm to the community, as defence practitioners have insufficient time to consider all options that may be effective in addressing an individual's criminogenic factors and triggers to reoffending, and to explore the availability of appropriate support.

For these reasons, it is our view that increasing core funding for the ALS and Legal Aid NSW has the potential to generate significant savings in other parts of the criminal justice system, as well as, more importantly, delivering more just outcomes for the community.

While we note this is a matter for the NSW Government, rather than specifically the NLAP review, funding for the ODPP and for NSW Courts should also increase to ensure better outcomes. These agencies work interdependently to achieve just outcomes for NSW, and their appropriate resourcing is essential to maintaining a criminal justice system that is functional and trusted by the community.

Funding Aboriginal and Torres Strait Islander Legal Services

In the context of appropriately funding Aboriginal and Torres Strait Islander Legal Services (**ATSILSs**), in our view, the approach to NLAP funding arrangements should be consistent with what is required under the National Agreement to Close the Gap (**National Agreement**).

Key principles in respect of moving beyond a "consultation" approach and towards shared decision-making and genuine partnership are set out in the National Agreement, and are directly relevant to how governments approach legal assistance funding for ATSILSs. In particular, the transformation required by the priority reform areas are relevant to the national approach to funding the legal assistance partnership. We reiterate our support for the Productivity Commission's draft report on the National Agreement, and note again that it reflects the experience of our members, who emphasise the need for genuine partnership with Aboriginal people, from design to delivery.

By way of general example, our members expressed concern that the recent approach taken to justice reinvestment funding at the Commonwealth level will proceed on a time-limited grant basis. We acknowledge and commend the Government on the approach taken in respect of community readiness support and the establishment of the National Justice Reinvestment Unit, as recommended by the Australian Law Reform Commission in its *Pathways to Justice Report*. However, grant processes are onerous and resource-intensive, and the time-limited nature of grant funding is a significant barrier to long term planning and sustainable programming. We suggest that this approach to funding is itself a barrier to the creation of a robust and thriving Aboriginal controlled community sector. The grant-based funding approach may ultimately undermine the success of, in this case, the other features of the justice reinvestment model, which is based on supporting local strengths (and which may not extend to familiarity with the grants application process). We suggest that the transformation required by the National Agreement requires ambition and imagination from governments, and a willingness to re-examine all aspects of its approach to the matters that affect Indigenous peoples. This extends to the models applied to the design and delivery of legal assistance services.

On matters affecting Aboriginal and Torres Strait Islander people, the Law Society's position is to seek to support and amplify the views of Indigenous people. We understand that the view of the ALS is that a critical issue in the effective provision of legal services to Aboriginal and Tores Strait Islander people continues to be the issue of salary parity within the legal assistance sector, and particularly in relation to Legal Aid commissions. Without this foundational lever in place, ATSILS are unable to properly recruit and retain staff, including in relation to backfilling roles. We note that in NSW in May 2023, the ALS was forced to freeze services to 13 Local Courts, the effect of which is that the ALS was unable to act for Aboriginal and Torres Strait Islander people facing new criminal charges in those Local Courts from 15 May 2023.[4] This policy setting is resulting in poor outcomes across the legal assistance sector, adding extra burden to other legal assistance providers and, from the perspective of managing conflicts, undermining the existence of a viable market for legal assistance.

We understand that, for the ALS, the persistent and inadequate levels of funding at state and Commonwealth level denies the ability of the ALS to thrive, and to embed the culturally safe and appropriate model of care it considers necessary to establish in order to truly be in a position to address the social and civil determinants of incarceration. Ideally, ALS offices across NSW should be staffed with Aboriginal field workers, and staff members who can assist with disability, care, family and other civil matters (including fines, housing and education-related legal issues). In many cases, dealing with one legal problem will be little more than a temporary solution to what are likely complex and inter-related circumstances of disadvantage.

In addition to adequate legal staffing, the ALS should be resourced such that its legal services are provided as part of a network of therapeutic services, including mental health, drug and alcohol rehabilitation, and the supports needed as part of, for example, prisoner throughcare, including employment support services. We note that while it is pleasing that in NSW that a number of Indigenous-specific court and tribunal lists have been established to improve the access and quality of justice for Indigenous people, neither the ALS, nor other Aboriginal community-controlled services, have received commensurate resourcing to provide additional services to support these initiatives. We reiterate the concern set out in our submission to the Law Council on the review of the National Agreement that this lack of adequate resourcing may, in effect, set these initiatives up to fail and reduce political appetite in the future to engage again with similar approaches.

[4] Aboriginal Legal Service (NSW/ACT), *Funding crisis to force service freezes within weeks*, 28 April 2023, online: https://www.alsnswact.org.au/lc-service-freezes.

Further, ATSILSs, as should all providers in the legal assistance sector, should be adequately funded to support an advocacy function. In our view, efficiencies are gained by ensuring a mechanism for systemic and policy issues that arise in practice to be identified, articulated and effectively communicated back to governments. This would ultimately exert downward pressure on funding requirements in the future. However, we understand that currently, nearly all of the funding received from the Commonwealth supports the ALS' criminal law practice, and the levels of funding received from the NSW Government are low.

NLAP vs ILAP

In respect of the funding model that should apply, we understand that while some benefits have accrued to ATSILSs under the NLAP model, including greater visibility over funding for the entire legal assistance sector and improved engagement with governments, the gaps identified in the Review of the Indigenous Legal Assistance Program[5] have not, as a whole, been addressed by the NLAP model, including gaps that affect the ability of ATSILSs to deliver more holistic (legal and therapeutic) services, as well as legal services that address the range of legal need.

In our view, urgent consideration is required for a funding model that clearly sets out the obligations of the Commonwealth and states, and which sufficiently and sustainably allows ATSILSs, together with other Aboriginal community-controlled organisations, to provide legal and therapeutic services that address the social, civil and legal determinants of persistently poor outcomes in the care and criminal justice jurisdictions.

Thank you for the opportunity to provide comment. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on victoria.kuek@lawsociety.com.au or 02 9926 0354.

Yours sincerely,

Cassandra Banks
President

Encl.

[5] Cox Inall Ridgeway prepared for the Attorney-General's Department, *Review of the Indigenous Legal Assistance Program 2015-2020 Final Report,* February 2019, online: https://apo.org.au/sites/default/files/resource-files/2019-02/apo-nid253741.PDF.

DRAFT – 20 September 2023

Submission to the Independent Review of the National Legal Assistance Partnership (2020-2025)

Kaldor Centre Data Lab, Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Sydney

Contact: Associate Professor Daniel Ghezelbash, d.ghezelbash@unsw.edu.au

1. Introduction

The Andrew & Renata Kaldor Centre for International Refugee Law at UNSW Sydney is the world's first and only research centre dedicated to the study of international refugee law. The Centre was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

The Kaldor Centre Data Lab was established in 2022. The Lab publishes regularly updated data and statistical analysis of Australia's refugee status determination decisions. The data currently covers review by the AAT and IAA, as well as judicial review by the Federal Circuit and Family Court.

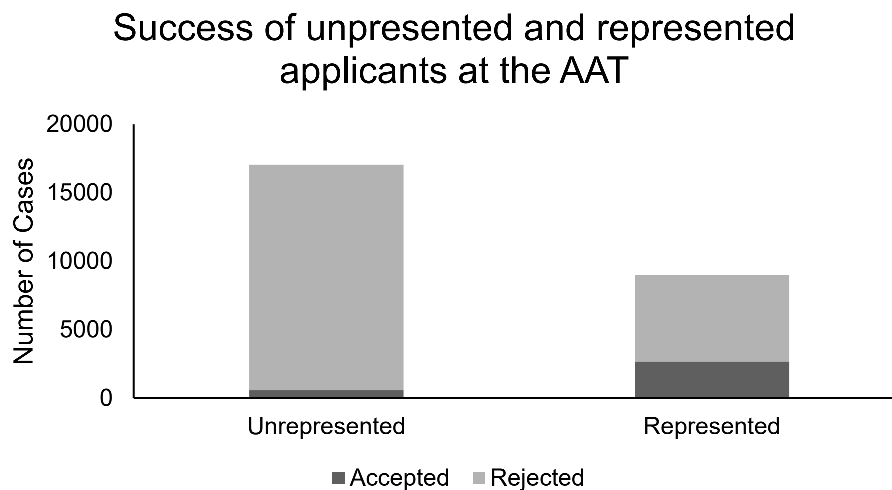
Data on the need and effectiveness of legal representation is not readily available in Australia. At the Kaldor Centre Data Lab, we have access to data on the number of asylum seeker applicants before the AAT and the Federal Circuit and Family Court who were represented, and their outcomes. As a disadvantaged group, in which incorrect decisions involve the risk of returning individuals to situations where they face harm, or even death, the significance of accessible and effective legal assistance is of utmost importance.

Therefore, the purpose of these submissions is to provide detailed statistical insights on the extent of unmet legal need and the impact of access to legal representation for asylum seeker applicants, addressing item 1(c) and 2 of the scope of review.

2. Insights from the data from the AAT

The Kaldor Data Lab currently has data on 26,036 Protection Visa decisions made by the AAT from 1 January 2015 to 18 May 2022. This is the entire caseload of the AAT with respect to Protection Visa decisions during the respective periods and was obtained through freedom of information requests to the AAT.

At the AAT, representation by a lawyer or migration agent appears to significantly increase an applicant's chances of success. Overall, 34% of applicants at the AAT had legal representation. On average, applicants with legal representation were 10 times more likely to succeed than self-represented applicants at the AAT; self-represented applicants were successful in just 3% of cases (being 562 out of 17,055 applications), whereas represented applicants were successful in 30% of cases (being 2,674 out of 8,981 applications).



As there are multiple factors beyond legal representation that may contribute to the outcome of a case, we conducted logistic regression analysis to control for a variety of other relevant variables. We found that applicants who were represented by a lawyer or migration agent were still 5.32 times more likely to succeed that those without representation at the AAT (95% CI [4.69, 6.03]), controlling for all other variables we had reliable data on (namely, the country of origin of the applicant, the individual decision-maker, their gender and date of appointment, and the political party that appointed the decision-maker).

3. Insights from the data from the Federal Circuit and Family Court

The Kaldor Data Lab has also collected and analysed data on 6,756 applications for judicial review of refugee cases in the Federal Circuit and Family Court of Australia from 1 January 2013 to 11 March 2021. These cases were drawn from the Australasian Legal Information Institute ('AustLII') database, which contains the complete record of the Court's published decisions.

40.5% of applicants in the dataset had some form of legal representation (with the presence of a solicitor and/or barrister), 54.6% of applicants were self-represented, 4.3% made no appearance. The statistics show that applicants with legal representation were on average six times more likely to succeed than self-represented applicants. Self-represented applicants were successful in judicial review in just 89 cases out of 3,698 cases. In contrast, represented applicants were successful in 430 cases out of the 2,764 cases. A chi-square test of

interdependence confirms that there is a significant association between having legal representation and having a positive outcome, X2 (1, N = 6080) = 375, $p < 0.001$. The effect size was small (0.248).

4. Evidence on the broader benefits of legal representation

This data demonstrates the importance of access to representation for asylum seekers and refugees. Some of the discrepancy between success rates for represented and unrepresented applicants may be attributable to the screening process that prospective representatives undertake before accepting a case. This creates some selection bias in our data, with those with significant prosects of success more likely to secure representation, than cases with lower chances of success. However, there is a robust body of evidence from other jurisdiction that demonstrates that access to legal representation increases both the fairness and efficiency of refugee status determination procedures. In Canada, recent studies have emphasised that legal representation, and in particular quality legal representation, is one of the most significant factors in the efficient and fair determination and review of refugee status decisions.[1] Similar studies in the Unites States have analysed immigration court data, finding that legal representation is the greatest predictor of an asylum seeker's success before the courts. Representation, they found, not only supports asylum seekers to have their claims heard meaningfully, but is crucial to the efficiency of the asylum system: represented applicants were less likely to bring unmeritorious claims and more likely to appear at future hearings.[2] Likewise, in the United Kingdom, research has linked legal representation to positive effects on both the accuracy of asylum decisions and the efficiency of asylum procedures.[3]

---

[1] Craig Damian Smith, Sean Rehaag and Trevor Farrow, *Access to Justice for Refugees: How Legal Aid and Quality of Counsel Impact Fairness and Efficiency in Canada's Asylum System* (2021), 28-9; Jamie Chai Yun Liew et al, 'Not Just the Luck of the Draw? Exploring Competency of Counsel and Other Qualitative Factors in Federal Court Refugee Leave Determinations (2005-2010)' (2021) 37(1) *Refuge* 61, 70; Nicholas Fraser, 'More than advocates: Lawyers' role in efficient refugee status determination' (2022) 65(2) *Canadian Public Administration* 647, 664. See, also, Sean Rehaag, 'The role of counsel in Canada's refugee determinations system: An empirical assessment' (2011) 49 *Osgoode Hall LJ* 71, 116.

[2] Andrew Schoenholtz and Jonathan Jacobs, 'The state of asylum representation: Ideas for change' (2002) 16(4) *Georgetown Immigration Law Journal* 739, 743-4, 764; Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, 'Refugee roulette: Disparities in asylum adjudication' (2007) 60 *Stan. L. Rev.* 295, 340; Ingrid Eagly and Steven Shafer, 'A national study of access to counsel in immigration court' (2015) 164 *U. Pa. L. Rev.* 1, 2, 9.

[3] Emma Jane Borland, 'Fairness and the right to legal aid in asylum and asylum related cases' (2016) 2(3) *International Journal of Migration and Border Studies* 245, 246, 262; Sonia Morano-Foadi et al, 'The Stratification of Rights and Entitlements: Access to Residency, Welfare and Justice by Migrants in the UK' in Marie-Claire Foblets and Jean-Yves Carlier (eds) *Law and Migration in a Changing World* (Springer, Cham, vol 31, Ius Comparatum - Global Studies in Comparative Law, 2022) 723, 740-2.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ADR:JWnh2040170

12 February 2021

Mr. Michael Tidball
Chief Executive Officer
Law Council of Australia
GPO Box 1989
Canberra ACT 2601

By email: john.farrell@lawcouncil.asn.au

Dear Mr. Tidball,

Missing Middle Project Issues Paper

The Law Society of NSW appreciates the opportunity to provide its comments in response to the Consultation Questions raised in the Law Council of Australia's (LCA) Missing Middle Project Issues Paper. Various Committees and internal departments have contributed to this submission.

In many respects, Australia's justice system operates at a very high standard. However, there remain significant issues relating to affordable access to the justice system. The "missing middle" are in a particularly difficult position, falling between eligibility for Legal Aid, and the ability to afford legal representation to adequately protect their legal interests.

Since the Law Council released the Final Report of the Justice Project in August 2018, Australia has been subjected to prolonged drought conditions, extensive bushfires, and the COVID-19 pandemic. A likely result of these events is that many individuals, communities, and industries have undoubtedly joined the "missing middle" cohort, placing even more importance on finding ways to improve access to justice for this group of Australians.

Our comments do not cover the whole range of issues canvassed in the Issues Paper (the Paper), and we acknowledge the significant work that has gone into preparing the comprehensive Paper. We look forward to commenting further on a Draft Position Paper, once that has been prepared.

Consultation Questions

Question 1

Are there further sub-sectors or communities that are particularly overrepresented in the missing middle and which require additional consideration?

In addition to older persons and people living in rural, regional, and remote areas, our members have suggested the following cohorts and groups for consideration, who may fall into the category either because of limited income, or due to the specific legal challenges they may face:

1. People from culturally and linguistically diverse backgrounds.

2. People living with a disability.
3. Single parents.
4. People with mental health conditions.
5. People experiencing family or domestic violence.
6. People employed in industries impacted particularly by COVID-19, such as aviation and hospitality.
7. Communities impacted by COVID-19, such as tourist destinations that have seen a significant decline in income being generated throughout their whole local economy.

Question 2

Beyond those set out above, are there any further policies or practices that exacerbate challenges for the missing middle which ought to be considered?

Under the Legal Aid NSW means test policy, a principal home as an applicant's place of residence is excluded up to the value of $521,100.[1] The value of any asset in excess of the maximum allowed value must be included in the applicant's net assessable assets.

An individual such as a farmer might "on paper" have a significant asset well over this figure, making them ineligible for legal aid. However, due to the drought, their ability to generate an income has been greatly diminished, they cannot access equity in that property due to serviceability concerns, or even sell it, due to a lack of buyers.

More flexibility in applying the home equity test for legal aid could assist certain individuals who face specific periods of financial vulnerability, for example those impacted by bushfire or drought. Reform in this area could be considered on an annual basis, where exemptions or increased equity allowances could be given to certain defined groups. This could be particularly helpful, for example, for those who have had their incomes severely impacted by COVID-19 restrictions. Consideration could also be given to developing alternative mechanisms for determining eligibility, that take account of such changing circumstances.

Question 3

In addition to those listed above, are there further areas of the law that are notably inaccessible by those in the missing middle?

Further areas of legal need may include: small businesses experiencing legal issues, workers in the 'gig' economy, or those working in industries significantly affected by the COVID-19 pandemic, protecting their employment rights, and individuals and businesses impacted by the COVID-19 pandemic in relation to ongoing obligations under leases and mortgages.

Question 4

Do you regard the unbundling of legal services as being a critical strategy to address the needs of the missing middle? If so, what is necessary to ensure that this can most effectively contribute to meeting the needs of this group?

As noted in the Paper, the legal needs of the missing middle are frequently civil and often in the areas of debt, family law, employment, and health. These can be high cost areas, given most require a tailored response. Except for possibly debt, most of these areas are not amenable to repetitious "cookie cutter" legal services and may not benefit from unbundling.

---

[1] Legal Aid NSW, *Policies: Means test* (08/07/2019) <https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/7.-means-test/7.6.-assets-test>.

Given a lawyer's broad duty of care, practitioners may not receive any commensurable reduction in professional indemnity insurance premiums whilst arguably seeing a reduction in legal services income from unbundling. The issue of limited scope retainers and the potential for a broader scope retainer under duty of care principles is addressed briefly at paragraph 70 of the Paper. It seems that the LCA has suggested further consideration and research in this regard, and we welcome the opportunity to consult with the LCA on this topic.

The Law Society of British Columbia has published some work in this area in identifying the risks in terms of the penumbral duty of care.[2]

The more vulnerable the client (for example where English is a second language, they have a mental or physical disability, are very young or of an advanced age) the more closely the practitioner will have to assess their general law duty of care. Care needs to be taken by the practitioner not to unbundle their duty of care when they are only acting for a part of the client's broader legal issues. In our view, under the current law a practitioner must look at their client's whole legal matter in order to discharge their general law duty of care, even if the practitioner limits their retainer to say, explaining a mortgage document.

In our view there are two further complications to unbundling:

- Costs disclosure requirements are predicated on a full comprehensive legal service. Practitioners must advise clients in relation to the "proposed course of action" and the proposed costs in relation to the whole "matter", not just one aspect of it.

- In NSW, where a practitioner goes on the record as a legal representative for a client, they expose themselves to a liability for payment of court filing fees and hearing fees. A practitioner accepting an unbundled brief to appear on a motion arguably is at risk of accepting liability for any unpaid filing fees and hearing set down fees.

Question 5

Do you regard joined-up legal services as being critical to addressing the needs of the missing middle? If so, what is necessary to ensure that this can most effectively contribute to meeting the needs of this group?

Where legal problems trigger non-legal problems (and vice versa), the provision of joined up services can be a critical strategy to help alleviate the service gap for the missing middle. Our members have identified health justice partnerships as an example of an initiative that is successfully addressing the needs of people who are vulnerable to intersecting health and legal issues.[3] We also note that technology can increase the effectiveness of joined-up services, for example through facilitating effective referrals. One example of technology being used in this way is Justice Connect's Gateway Project.[4]

---

[2] See: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-indemnity-fund/risk-management/practice-management-risks-and-tips/limited-scope-retainers-unbundling/

[3] For more information, see: Suzie Forrell and Tessa Boyd-Caine, *Service models on the health justice landscape: a closer look at partnership* (Sydney, 2018), Health Justice Australia.

[4] Justice Connect, 'Joined up justice' <https://justiceconnect.org.au/about/digital-innovation/joined-up-justice/>.

Question 6

Do you regard pro bono legal services as being critical to addressing the needs of the missing middle? If so, what is necessary to ensure that this can most effectively contribute to meeting the needs of this group?

Pro bono legal services play an important role in assisting this cohort. However, we agree with the Law Council that they are not a substitute for a properly funded legal aid system in Australia. No matter how generous some lawyers may be, they are limited in how much "free" work they can do, given their obligations to their firm and ensuring their own financial security.

A few ideas that could assist the uptake of pro bono work for the missing middle are:

- Increasing pro bono work undertaken by the profession by promoting the idea of applying a "personal interest" test (as opposed to solely applying the "public interest" test that is traditionally associated with pro bono). The "missing middle" cohort encompasses a broad range of people and legal problems and it may only take one lawyer to identify or connect with that individual person in order to assist.

- Promoting awareness of the various disbursement funds that are available for practitioners to claim from, so they will not be out of pocket for any disbursements incurred for pro bono matters. In NSW, this would include the Pro Bono Disbursement Trust Fund Pty Ltd (administered by the Law Society of New South Wales) and, at a Commonwealth level, the Disbursement Assistance Fund (administered by the Commonwealth Attorney General's Department).

- Recognising individual practitioners and firms for the pro bono work they perform in assisting this cohort.

Question 8

Do you regard legal expenses insurance as being critical to addressing the needs of the missing middle? If so, what is necessary to ensure that this can most effectively contribute to meeting the needs of this group?

Given the missing middle are low and middle income earners who are unable to afford representation it seems unlikely that they will be in a position to maintain legal expenses insurance (hereafter "LEI").

From an ethical perspective, the introduction of an insurer (or other third-party payer) increases the risk of conflict with the solicitor's obligations to the client.

We also note that the Law Society made a submission to the Law Council on the topic of LEI in August 2019 (attached), and we reiterate the comments we made at that time.

Question 9

Do you regard third-party litigation funding as being critical to addressing the needs of the missing middle? If so, what is necessary to ensure that this can most effectively contribute to meeting the needs of this group?

The Paper notes the need for further regulatory oversight of litigation funding arrangements.

The Law Society notes its submissions to the Law Council on this issue, in particular in relation to the Inquiry into litigation funding and the regulation of the class action industry (attached). The Law

Society notes that the issue of litigation funding is a contentious and evolving area and it may be prudent to wait for the Government's response to the Inquiry's findings (handed down in December 2020) before speculating on the role that litigation funding can play in relation to the missing middle.

Question 10

Noting the Law Council's opposition to contingency fees, are there similar arrangements that may reduce up-front costs for clients that could assist in addressing the needs of the missing middle?

In relation to pro bono services the key issues are insurance and education. It is not unheard of for a practitioner to think that if they do not charge a fee, they are entitled to provide pro bono legal services regardless of the category of Practising Certificate which they hold. It is important that if the provision of pro bono legal services is promoted on a wide scale that information is also provided to practitioners about requirements for practising certificates and professional indemnity insurance. It would also be worthwhile reminding practitioners that the conduct rules apply irrespective of the fees charged (or not charged).

In our view work needs to be done in the pro bono and "low bono" areas addressing the confusion of whether party/party costs can be claimed on a successful outcome where the agreement was that costs would be paid in the event of recovery of the judgment sums / costs. Allowing such agreements would incentivise practitioners taking on work on a low bono basis.

The key considerations in relation to non-legal professional assistance are a breach of section 10 of the LPUL (the prohibition on non-qualified entities engaging in legal practice) and again the absence of professional indemnity insurance (from a consumer protection perspective). A further issue is that such assistance presumably would not come with the client protection of the ethical rules. Subject to the existing, specific exceptions referred to in the Issues Paper, it is important that legal services continue to be provided by Australian legal practitioners.

Question 11

Do you regard alternative dispute resolution as being critical to addressing the needs of the missing middle? If so, what is necessary to ensure that this can most effectively contribute to meeting the needs of this group?

Yes. Alternative dispute resolution processes have a number of advantages that can assist this cohort; the most relevant being it is more cost-efficient.

Ideas for ensuring that this can most effectively contribute to the missing middle are:

1. Providing ADR programs that are fixed rate, low cost and tailored to the specific area of law. For example, the Law Society of NSW, in conjunction with the Family Court, runs the Family Law Settlement Service (FLSS). The FLSS is a mediation program designed specifically for family law matters. There is a fixed fee payable by each party and the mediators are qualified solicitors with up to date family law experience. Solicitor mediators on the FLSS panel accept referrals at a fixed rate lower than their ordinary commercial rate. The set fee reassures participants in relation to cost, and allows them to budget for it.
2. By conducting ADR processes that keep additional costs low for the parties. An example of this would be by disallowing the use of expert witnesses, which can drastically increase the costs to parties.
3. By encouraging all levels of government, who are often parties to legal disputes, to use ADR more often across all jurisdictions.
4. By providing pro bono assistance for the purposes of legal representation at mediations.

This can assist in levelling the playing field in circumstances where the other party is legally represented.

Question 18

Are there key learnings arising from the legal profession's response to recent crises that can be applied to the missing middle into the future?

The response to the 2019/2020 bushfires saw the profession come together and rapidly put in place a coordinated response to assist those in need. Establishing a well-recognised and published entry point or gateway for legal assistance and referral (at least on a state level) can make it easier to navigate the system.

Further, we saw evidence that there is an incredibly large amount of good will amongst the profession and a willingness to assist. There may be opportunities to harness such offers of assistance and make better connections between those offering to assist and those needing the assistance. Law Societies and Bar Associations can assist in this regard by promoting pro bono work and inviting members to join their various schemes.

If you have any questions in relation to this submission, please contact Ms Nerida Harvey, Director, Access to Justice on (02) 9926 0379 or by email: nerida.harvey@lawsociety.com.au.

Yours sincerely,

Juliana Warner
President

Encl.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: LLP:EEgm1766008

9 August 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

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

Dear Mr Smithers,

Consultation on Legal Expenses Insurance (LEI) in Australia

Thank you for the opportunity to provide comments on the Law Council of Australia's Discussion Paper, 'Legal Expenses Insurance in Australia'. We understand our comments will help inform the Law Council's findings and recommendations on a LEI framework in Australia. The Law Society's Litigation Law and Practice Committee has contributed to this submission.

Threshold questions

We understand the Law Council is currently exploring the 'possibility of the creation of a LEI market in Australia', and how this may address the needs of the 'missing middle'. While we support efforts to enhance access to justice for all segments of Australian society, including the 'missing middle', we query what role, if any, the Law Council and constituent bodies may have in *creating* such a product or market. We also consider further thought should be given to the threshold questions (not included in the Discussion Paper) about whether there is a need for such products in Australia and, if there is, the context in which LEI would be most beneficial to policy holders.

Is there a need for LEI products in Australia?
As outlined in the Discussion Paper, we note an advantage of an LEI framework would be that more people may have access to legal services. Disadvantages include insurers likely having increased control over the legal market and issues associated with adverse selection (where those who are more likely to be litigious take out an LEI policy).

In the Australian context, we note would-be defendants in many situations would likely not need LEI because they would instead have, or need, insurance against the underlying liability. Similarly, many potential plaintiffs, for example, those who have suffered personal injury, may be able to enter into conditional costs arrangements.

In the first instance, we consider additional research should be conducted into whether there is a strong need for such a scheme and whether it would be viable in the Australian legal context. We also recommend specific thought be given to the situations or contexts in which such products would be most beneficial.

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Law Council
OF AUSTRALIA
CONSTITUENT BODY

What role should the Law Council / constituent bodies play in relation to LEI?
We note there are no legal barriers to the creation of LEI products. Rather, there appears to have been limited take-up of such products in the past by both consumers and private sector insurers. The Law Society has no in-principle objections to LEI products being introduced into the Australian market, as long as those products are able to provide meaningful benefits to would-be policy holders (as opposed to 'junk' policies that provide little or no benefit).

We note the paper refers to the 'imminent' entry into the Australian market of an LEI insurer. We consider there is a threshold question of whether there is any need for the Law Council to be involved in contemplating or developing a separate LEI scheme, or whether it may be more useful for the Law Council and constituent bodies to engage with private insurers to ensure any products proposed to be released to market are fit for purpose and capable of meaningfully benefiting policy holders.

However, noting the success of any insurance scheme will rely on the risk appetite of insurers to offer relevant policies and of consumers to purchase those policies, we consider the questions raised in the Discussion Paper are largely academic at this point. We recognise there may, however, be a role for the Law Council and constituent bodies to provide best practice advice and to help ensure any LEI scheme responds to access to justice issues for the 'missing middle'. Our responses to the specific questions raised in the Discussion Paper are outlined below.

1. What can be learnt from international experiences in establishing an implementing a LEI scheme?

If there is a market for LEI products in Australia, we consider the United Kingdom's (UK) model of add-on, rather than standalone policies, may be a suitable model for an Australian LEI framework. We note issues with standalone policies, as outlined in the Law Council's discussion paper, include adverse selection. We also agree that to be feasible, the pooling of many loss exposures into classes, which includes some people who are less litigious, is required to off-set the greater risk resulting from those who are more litigious.

In the Australian context, we consider there may be a market for add-on policies offered, for example, by trade unions in the employment context, by lawyers drafting wills in the succession law context, or by home and content insurers as an add-on policy.

However, noting issues raised during the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, there are potential dangers in add-on policies that provide little or no value to policy holders ('junk' insurance). We recommend any new LEI products be developed to provide real benefit to would-be policy holders, and serious thought be given to the circumstances in which those products should be made available.

2. What can be learnt from previous attempts to establish and implement a LEI scheme in Australia? How can previous barriers to market entry be overcome?

We recommend the perceived value of the scheme be addressed, noting that unless insurers and would-be policy holders recognise the value of such a framework, there will be limited uptake.

Education will likely be a key element of any new attempt to implement an LEI scheme. We note many Australians do not necessarily have 'legal capability' (or the ability to identify that an issue is legal in nature), and therefore may lack the foresight or knowledge to take out such policies.

Australians may also not be aware that under other types of insurance (for example, home and contents insurance), legal expenses fees are not covered. Enhanced education around what may or may not be covered under existing policies may be necessary.

3. If a LEI product were to be introduced in Australia, what elements must be present in order to assist in meeting the legal needs of the 'missing middle'?

We consider that to be successful, a LEI scheme should be available nationwide, if possible.

As outlined above, we recommend careful consideration be given to mechanisms to ensure LEI policies have real benefit for would-be policy holders.

4. What is the potential scope and extent of a LEI scheme in Australia, having regard to coverage and approaches to policy drafting?

As noted above, we consider there are likely limited areas of law in which such policies would be necessary. Ultimately, it is a matter for the market to determine whether a scheme will be viable or not.

5. What role should the Law Council play in the management or oversight of any future LEI scheme in Australia?

While we support independent oversight of any future LEI framework, as outlined above, we query whether the Law Council or constituent bodies should have a role in overseeing the scheme (as opposed to liaising with / raising issues directly with the body responsible for overseeing the scheme). We are not aware of the Law Council having an oversight role over any other type of insurance scheme.

6. Are there any other issues relating to LEI that should be considered by the Working Group?

We do not have any additional issues for consideration by the Working Group, however we reiterate our suggestion to consider whether there is a need for such products in Australia.

Thank you again for seeking our feedback on these questions. Should you have any questions in relation to this submission, please contact Georgina McArthur, Policy Lawyer, on 9926 0275 or email georgina.mcarthur@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

THE LAW SOCIETY OF NEW SOUTH WALES

Our ref: LLP: RHce: 1923756

29 May 2020

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

By email: john.farrell@lawcouncil.asn.au

Dear Ms Nicoll,

Inquiry into litigation funding and the regulation of the class action industry

The Law Society of NSW thanks you for the opportunity to provide input for a Law Council submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into litigation funding and the regulation of the class action industry. The Law Society's Litigation Law and Practice Committee has contributed to this submission.

The Law Society previously provided a submission to the Australian Law Reform Commission ('ALRC') *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*. We **enclose** the letter to the ALRC dated 17 August 2018. More recently, the Law Society provided a submission to the Law Council regarding its confidential Discussion Paper: *Contingency Fee Arrangements.* We **enclose** that letter to the Law Council, dated 19 February 2020. We have restated and built upon several of our comments made in those submissions to the extent that they relate to the terms of reference of the present inquiry. Our response to relevant terms of reference are discussed below, numbered as per the Inquiry's terms of reference.

2. The impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders

Litigation funding has a clear impact on the amount of damages or compensation available to class members in class actions funded by litigation funders. Litigation funders expect that any investment will bring a return beyond the mere recovery of legal fees and disbursements paid. Funding agreements traditionally rely on a percentage of the amount recovered. The percentage may vary depending on when a matter resolves, whereby a lower percentage will be received if the matter resolves at an early stage through to a higher percentage if the matter resolves later.

Funding equalisation orders and common fund orders also impact on the amount of damages awarded to group members. A common fund order will likely have the most dramatic impact on the amount recoverable. For example, a sum of 25% on any gross damages award may,[1] depending on the gross settlement sum, greatly exceed the legal

[1] Based on the percentage recently awarded in *Uren v RMBL Investments Ltd (No 2)* [2020] FCA 647.

costs and any commission payable from funded group members. Assuming a gross settlement sum of $100 million on a securities class action claim, this would mean an award of $25 million for a litigation funder. In addition to having legal costs and disbursements recovered and reimbursed, the litigation funder claims a significant additional amount out of the settlement amount that would otherwise be received by class members.

A funding equalisation order will also impact the amount recoverable, however, it will likely do so to a lesser extent than a common fund order. This is because a funding equalisation order simply spreads the amount of the commission that the litigation funder would be entitled to across all participating group members. In our view, this is a more fair and equitable resolution for all group members whilst still allowing the litigation funder to retain its contractually agreed benefit.

3. The potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs

The current prohibition on contingency fees exists to ensure that plaintiffs do not see the returns from their claim consumed by excessive legal fees. A clear example of this risk is evident in the case of *Fitzgerald & Anor v CBL Insurance Ltd (No.* 2) ("Huon"),[2] considered by the Victorian Law Reform Commission. In Huon, the former trustees of Huon Corporation, suing CBL Insurance Ltd, would have been unable to bring the action without funding, but the high rates of commission charged and significant legal fees meant that the trustees "ultimately received nothing from the amount awarded".[3] The Law Society considers that contingency fees may not, in practice, necessarily provide access to justice, as smaller claims are the most likely to be consumed by contingency fees.

Generally speaking, in most cases a contingency fee arrangement will be higher than the legal costs would have been to litigate a matter because it is based, not on the amount of work employed to litigate the matter, but on a percentage of the eventual outcome.

Whether the introduction of contingency fee arrangements would result in *reduced* costs to litigants in class action matters can only be determined on a case by case basis. We note that in a number of cases the courts have questioned the totality of legal fees charged and payable as part of a settlement. In such cases, the courts have used experts and referees at the settlement approval stage to attempt to gauge whether the fees are fair and reasonable.

Further, in the case of representative proceedings, such as in proceedings involving alleged continuous disclosure breaches where losses by individual shareholders may be quite small, and where the class members have no realistic economic capacity to bring proceedings, any settlement sum which is ultimately payable to them may be gratefully received. As such, there is no real transparency or ability for those class members to analyse whether the result and the amount taken in fees, is a good one from their perspective. This highlights the necessity for close scrutiny by the court of:

i. all the arrangements by lawyers acting for plaintiffs in representative proceedings; and
ii. all the funding arrangements, to ensure that justice is both done and seen to be done.

[2] [2015] VSC 176.

[3] Victorian Law Reform Commission, *Access to Justice – Litigation Funding and Group Proceedings* (Report, March 2018) [2.40].

4. The financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients

A relationship between a litigation funder and a lawyer that is purely contractual is largely accepted and, where it exists, a proper exercise of a lawyer's fiduciary obligations ought to be sufficient to prevent conflicts of interest. However, the litigation funder and law firm may also have a relationship which is not merely contractual; for example, they exist within a single entity and/or under the direction of a single Director. Where this relationship exists, there is a greater risk of a conflict of interest or abuse of process occurring. We suggest that consideration be given to the requirement for a strict separation which prevents a lawyer from acting for an applicant in a class action in circumstances where the lawyer, or a close associate of the lawyer, is also a Director of a litigation funding organisation. Appropriate exceptions to such rules should exist, such as when the litigation funder is a publicly listed company.

5. The Australian financial services regulatory regime and its application to litigation funding

In 2009, the Federal Court of Australia found that the litigation funding arrangements under consideration constituted a "managed investment scheme".[4] Further, in 2011 the NSW Court of Appeal found that a litigation funding arrangement was a "financial product" under s 763A of the *Corporations Act 2001* (Cth).[5] On appeal, the High Court of Australia held that the funder in that case was a "credit facility".[6]

In response to these findings, the Commonwealth Government in 2012 exempted "funders" from the definition of "managed investment scheme", but only on the condition that litigation funders had necessary processes in place to manage conflicts of interest. Exempt litigation funders are subject to the Australian Securities Investments Commission (ASIC) Regulatory Guide 248.

In its Final Report "Integrity, Fairness and Efficiency - An Inquiry into Class Action Proceedings and Third-Party Litigation Funders" ("Final Report"), the ALRC recommended that the existing ASIC Regulatory Guide 248 be amended to require third-party litigation funders to report to ASIC to show compliance with the requirements to meet certain obligations to avoid or mitigate conflicts of interest.[7]

However, the ALRC further noted that the current definition for exemption does not capture the increasingly broad range of litigation funding models that are appearing in the Australian market, meaning that whether an exempt third-party litigation funder is required to comply with Regulatory Guide 248 may be unclear. The ALRC noted that it received competing submissions as to whether the ASIC Regulatory Guide 248 is sufficient to regulate litigation funders,[8] and has previously observed that there is little oversight or action from ASIC in this context.[9]

---

[4] Australian Law Reform Commission, *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Final Report, December 2018) [6.7] ("Final Report") citing *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11.
[5] *International Litigation Partners Pte Ltd v Chameleon Mining NL* (2011) 276 ALR 138.
[6] *International Litigation Partners Pte Ltd v Chameleon Mining NL (Receivers and Managers appointed)* (2012) 246 CLR 455; Australian Law Reform Commission (n 2) [4.15].
[7] Final Report [6.108].
[8] Final Report [6.106].
[9] Final Report [6.109].

The Law Society is concerned with the adequacy of an ASIC Regulatory Guide to effectively manage the potential risks of conflicts of interests and also regulate litigation funders in this context without other regulatory tools to enforce compliance. As noted by the Victorian Law Reform Commission, whilst the courts play a role in supervising litigation funders in legal proceedings, they can only do so on a case by case basis,[10] and the role therefore is limited in several respects.

We note that the Federal Government has recently announced that litigation funders will be required to hold an Australian Financial Services Licence and will no longer be exempt from complying with the statutory regime governing managed investment schemes. In principle, we support litigation funders being subject to greater regulatory oversight, particularly noting the decision in the Federal Court of Australia that litigation funders meet the criteria of a managed investment scheme. We look forward to reviewing the details of the reforms once released.

6. The regulation and oversight of the litigation funding industry and litigation funding agreements

The Law Society recognises the importance of litigation funders in class action proceedings, including the fact that a number of actions would not be able to brought without their funding.[11] However, observed from a purely commercial perspective, a litigation funder is essentially using a chose in action, held by the members in the class, to seek to make a profit. As such, they are providing a type of financial product. Considering the significant financial incentives for litigation funders and the growth in class action proceedings, the Law Society is of the view that regulation is necessary to manage the concomitant risks to group members. We submit that litigation funders should thus be under particular regulatory obligations that are enforceable against them.

The Law Society notes that a number of arguments against introducing further regulation of litigation funders are based on concerns with “over-regulation” and the imposition of unnecessary restrictions in the market and competition.[12] We accept that regulation may have an impact on litigation funding competition and create a barrier to entry into the market for litigation funders. If there are less litigation funders, it may follow that smaller value class actions may not receive funding, and with less competition, commission percentages in litigation funding agreements may rise.

This tension was acknowledged by the ALRC in its Final Report:

> *Tension exists between the perceived need for a licensing regime to ensure that litigation funders have the ability to meet their financial obligations (to indemnify the plaintiff in the event of an adverse costs order and to meet their commitment to fund the plaintiff’s lawyer) and manage the conflicts that are inherent in any funding agreement, and the risk that a licensing regime may unnecessarily stifle competition amongst funders and thus artificially inflate the cost of funding.*[13]

These risks are, in the view of the Law Society, outweighed by the risks and consequences of unmanaged conflicts of interest. The Law Society believes that a licensing regime can be

---

[10] Victorian Law Reform Commission (n 4) [2.21].

[11] *Newstart 123 Pty Ltd v Billabong International* (2016) 343 ALR 662 [51].

[12] See for example, submissions to the Victoria Law Reform Commission (n 8) 19 [2.30] including Julie-Anne Tarr, Submission No 3 to Victorian law Reform Commission, *Access to Justice - Litigation Funding and Group Proceedings* (28 August 2017) and Slater and Gordon, Submission No 28 to Victorian law Reform Commission, *Access to Justice - Litigation Funding and Group Proceedings* (October 2017).

[13] Final Report [1.41].

a powerful regulatory tool due to the possibility of a licence being revoked, its terms being modified or of an investigation being commenced in the event that a licence holder fails to meet or adequately satisfy ongoing conditions of a licence. Accordingly, in a licensing regime, both the conditions of the licence and the form of the regime require careful consideration and should only be imposed to the extent necessary. It is important to ensure that any regulatory scheme protects group members and the integrity of the judicial system but does not overly burden potential litigation funders or prevent potential group members bringing an action.

We also acknowledge the importance of ensuring that any regulatory scheme is consistent across all jurisdictions and subject to national oversight. Class actions can and do span various jurisdictions, and if different regulatory frameworks are in place, there will be operational challenges for the profession and potentially duplicated costs and expenses.

Lastly, we note that whilst the Federal Court of Australia plays an essential role in the regulation of litigation funders, the role and powers of the courts are currently not sufficient to regulate their conduct.[14] The Law Society suggests that the Federal Court and Supreme Court of NSW (and potentially Supreme Courts in other jurisdictions, where supported locally) be given the statutory authority to vary or reject the terms of agreements made between class members and litigation funders, to the extent that it is necessary to ensure a reasonable outcome for group members. We also suggest that the terms of any external funding agreement should be viewed and subjected to approval by the Courts during the early stages of proceedings, to ensure the best interests of class members are preserved. This position is aligned with recommendations made by the ALRC, that leave of the Federal Court be required for lawyers to enforce contingency fee agreements in class action proceedings, and that the Court have the power to vary or reject the fee charged if necessary.[15]

7. The application of common fund orders and similar arrangements in class actions

In addition to comments made above in response to the second term of reference, the Law Society has concerns regarding the Justice Legislation Miscellaneous Amendments Bill 2019 ("the Bill") in Victoria. The Bill, if passed, will allow the Supreme Court of Victoria to make group costs orders in class actions. The group costs orders will introduce the possibility for solicitor contingency fees by enabling the Court to make an order that the legal costs payable to the law practice representing group members be calculated as a percentage of the amount of any award or settlement.

Following the recent High Court decision in *BMW Australia Ltd v Brewster; Westpac Banking Corporation v Lenthall*, where the High Court determined that common fund orders were not permitted by s 33ZF of the *Federal Court of Australia Act 1976* (Cth) or s 183 of the *Civil Procedure Act 2005* (NSW),[16] and pending resolution of whether common fund orders are available under s 33V of the *Federal Court of Australia Act 1976* (Cth),[17] we are concerned that the Bill may create a 'forum shopping' effect on class action litigations across Australia by encouraging the commencement of class actions in Victoria. Moreover, the Bill has the potential to undermine many years of work in moving toward a uniform national framework regulating the legal profession.

---

[14] See Federal Court of Australia, *Class Actions Practice Note (GPN-CA)*, 20 December 2019, 5.
[15] Final Report [7.83].
[16] [2019] 94 ALJR 51 [3].
[17] See *Fisher (trustee for the Tramik Super Fund Trust) v Vocus Group Limited (No 2)* [2020] FCA 579.

8. Factors driving the increasing prevalence of class action proceedings in Australia

The Law Society recognises the clear growth of particular types of class action proceedings in Australia. For example, over the past 25 years shareholder class actions has increased from 12 per cent to 52 per cent of all class action claims.[18]

Though there is no determinative evidence on what precisely underpins the increasing prevalence of class action proceedings in Australia, one can assume that the significant economic potential is a driver of investment in class actions.[19] At least $3.5 billion has been paid by respondents in class action settlements approved by the courts.[20] For litigation funders, not only are costs recoverable, but the advent of common fund orders has meant that the return on investment for litigation funders can be significant. Further, the existence of 'After the Event' insurance policies, which can protect litigation funders and plaintiffs from the risks of adverse costs orders, may also provide an added level of comfort to those who purchase a policy before funding or commencing an action.

We also note that, overall, class actions are a relatively 'new' form of litigation. As the market for class actions matures, some degree of growth is to be expected as knowledge and awareness is developed, successful actions encourage others to proceed, and there exists an option for funding of matters that might otherwise not have been feasible for group members to pursue.

In our view, the issue of most concern is not the growth in class actions in and of itself, but rather, whether unmeritorious or speculative class actions are being pursued as result of driving factors. If so, an appropriate certification or procedure could be considered to require approval from the court before an action can proceed.

11. The consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement.

Creation of conflicts of interest

The Law Society considers that the introduction of contingency fees would raise conflict of interest risks that ought not be accepted, and which are not possible to satisfactorily overcome. Solicitors are bound by their fundamental ethical obligations to avoid any compromise to their professional independence and to avoid conflicts of interest, as set out in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.* While courts might be able to play a role in reviewing such arrangements, we consider that this could only ever be a limited safeguard. We are of the view that the arguments raised by the Law Council on this topic in its confidential Discussion Paper *Contingency Fee Arrangements* were compelling.

It is also noted that solicitors are expected to run the risk of adverse costs orders and security for costs if a scheme such as that proposed in Victoria is introduced. There will be matters where this will create a conflict of interest between the solicitor and the client in the sense that the client may have a claim with merit of which the solicitor forms a view that the

---

[18] Jason Betts, 'Why class action regime should be regulated' *The Australian* (11 May 2018).
[19] Jason Betts, David Taylor and Christine Tran, 'Litigation Funding for Class Actions' in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (The Ross Parsons Centre of Commercial Corporate and Taxation Law, Publication 19), 205, 227.
[20] The Honourable Justice Bernard Murphy and Vince Morabito, "The First 25 years: Has the Class Action Regime hit the Mark on Access to Justice?' in Damian Grave and Helen Mould (eds) *25 Years of Class Actions in Australia* (The Ross Parsons Centre of Commercial Corporate and Taxation Law, Publication 19), 13, 22.

risks of adverse costs or security for costs outweigh the solicitor's interest in taking on the matter.

Disproportionality of fees

The Law Society is concerned that the proportion of settlement payments absorbed in contingency fees may be very significant and that a contingency fee regime may not always be best promoting the interests of litigants, and in particular, group members.[21]

The ALRC noted that in matters that would otherwise have attracted third-party litigation funding, there is a genuine concern that “percentage-based fees will provide a method by which law firms can increase their billings disproportionately.”[22] In recommending that leave of the Federal Court be required for lawyers to enforce contingency fee agreements in class action proceedings,[23] the ALRC considered that “safeguards built into the recommendation are necessary to prevent a ‘windfall’ for lawyers acting in class actions”.[24]

Promote competition between practitioners and third-party litigation funders

A view of some members of the Law Society is that the introduction of contingency fee arrangements may lead to the proliferation of class actions and provide an opportunity to bring more competitive tension into the selection of both lawyers (and their rates) and funders (and their commissions and other contractual terms) and the arrangements by which the lawyers and funders operate together as a common enterprise.

While we accept there would be some increase in competition, it is unclear whether this increase will relate to competition between practitioners and third-party litigation funders. One major consideration is the inherent differences between the roles/interests of solicitors and that of third-party litigation funders. Only a small pool of law firms have the financial resources to compete with litigation funders. From this perspective it is unclear whether allowing contingency fees will in fact encourage competition from smaller firms.

12. The potential impact of Australia’s current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic

Despite the challenges presented by the COVID-19 pandemic to businesses around Australia, it is the Law Society’s view that this should not be a basis to prevent well-founded class actions from proceeding.

We note the recent announcement from the Federal Government that it has modified the continuous disclosure provisions of the *Corporations Act 2001* in an effort to provide temporary relief to companies and officers for a six month period to protect against ‘opportunistic’ class action lawsuits during the COVID-19 pandemic. Companies and directors will now only be liable for sharing wrong information because of “knowledge, recklessness or negligence”.[25]

---

[21] However, some of the Law Society’s members consider contingency fees may be appropriate in class actions where there is considerable judicial oversight but do not support permitting solicitors to enter into contingency fee arrangements in other matters.
[22] Final Report [7.109].
[23] Final Report [7.104].
[24] Final Report [7.116].
[25] Josh Frydenberg, ‘Litigation Funders to be Regulated under the Corporations Act’ (Media Release, Treasury, 22 May 2020); *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth) sch 1 ss 5-9.

On one view, market disclosure rules impose substantial burdens on directors, providing an easy platform for an allegation that after a material price drop “material information was not immediately disclosed at an earlier time”.[26] There are also additional challenges with forecasting, wherein the current continuous disclosure laws do not account for the difficulty for a company which takes three months to prepare a market guidance, but then is required to “immediately” update the market on a change in conditions.

Given the temporary nature of the recent amendments, and the extraordinary nature of the current business environment, it may be difficult to gauge their effectiveness.

Many businesses have insurance that provide at least some form of coverage for claims that arise. However, against this is the observation that a likely consequence of the number of large-scale shareholder class actions is some forms of insurance covering class actions may be discontinued as a result of the significant costs involved in defending class actions. There have been media reports suggesting directors’ and officers’ insurance providers are being forced to either significantly raise premiums or cease to offer this form of cover.[27]

14. Any matters related to these terms of reference

Closely linked to any consideration of litigation funding is the issue of whether the courts should be used as the vehicle upon which an investment scheme business model relies. The courts are a publicly funded resource with finite and limited resources. At its core, litigation funding is an investment with the primary aim of making a profit. Allowing the courts to be used in this way does provide access to justice to group members who otherwise may not be able to bring their own claim. However, an essential component of the business model is funded by taxpayers whom arguably do not benefit from the arrangement.

We also note that litigation funding exists across numerous areas of litigation. Our members note that several of the issues raised in this submission are not only limited to class action matters.

Thank you for considering the issues we have raised in this submission. If you would like to discuss in more detail, please contact Claudia Elvy, Policy Lawyer, on 02 9926 0275 or at claudia.elvy@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

---

[26] Chris Merrit, ’Class-action shakedown’, *The Australian* (9 June 2018).
[27] Damon Kitney, ‘Directors warn of liability insurance crisis’ *The Australian* (26 December 2019).

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: LLP: RHlb1829939

19 February 2020

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

By email: john.farrell@lawcouncil.asn.au

Dear Ms Nicoll,

Discussion Paper: Contingency Fee Arrangements

The Law Society of NSW appreciates the opportunity to comment on the Law Council's confidential Discussion Paper: *Contingency Fee Arrangements.* Our Litigation Law and Practice, Ethics and Costs Committees contributed to this submission.

The Law Society acknowledges that there are a range of views held by both the Law Council's constituent bodies and by its own members in relation to this issue.

However, ultimately the Law Society considers that the introduction of contingency fees would raise conflicts of interest which are not possible to satisfactorily overcome. While courts might be able to play a role in reviewing such arrangements, we consider that this could only ever be a limited safeguard.

The Discussion Paper raises complex issues on matters where there is not universal agreement by the members of the Law Society's Committees. As such, our comments reflect some of the issues the Law Council should consider in making its final recommendations to its Directors. We have grouped issues for this purpose rather than strictly responding to the specific questions in the Discussion Paper. Our comments do not cover the whole range of issues canvassed in the Discussion Paper. In our discussion of these issues, we have repeated some of the comments made in the Law Society's submission in response to the Australian Law Reform Commission's ("ALRC") *Inquiry into Class Action Proceedings and Third-Party Litigation Funders.*

Access to justice

It can be argued that contingency fees have the capacity to encourage an increase in the occurrence of smaller claims, which might improve access to justice.

However, the prohibition on contingency fees exists to ensure that plaintiffs do not see the returns from their claim consumed by excessive legal fees. A clear example of this risk is evident in the case of *Fitzgerald & Anor v CBL Insurance Ltd (No. 2)* (Huon),[1] considered by the Victorian Law Reform Comission. In Huon, the former trustees of

[1] [2015] VSC 493 (2 October 2014).

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Law Council OF AUSTRALIA
CONSTITUENT BODY

Huon Corporation, suing CBL Insurance Ltd, would have been unable to bring the action without funding, but the high rates of commission charged and significant legal fees meant that the trustees "ultimately received nothing from the amount awarded".

Accordingly, the Law Society considers that contingency fees may not, in practice, improve access to justice, as smaller claims are the most likely to be consumed by contingency fees.

The ALRC, in contemplating contingency fees, observed that at least certain types of class action matters may be unsuitable for contingency fees. The ALRC provided the example of personal injury matters, based on "the limitations on the quantum of damages that can be recovered".[2]

Provide clients with greater certainty and clarity regarding the fees that they will be liable to pay

It is argued that percentage-based fee arrangements provide a level of clarity and certainty for class members compared to time-based billing invoices. It is suggested that the latter can be lengthy and complex and may not receive the same level of scrutiny in class actions as other matters, as most class members are not actively involved in the matter.[3] This will ultimately depend on the jurisdiction in which the firm is practising and the relevant applicable legal obligations with respect to costs disclosure and invoicing requirements.

It can also be argued that charging a potentially arbitrary percentage fee is inconsistent with a disciplined profession fairly and transparently charging set fees for discrete pieces of work.

There is also a potential problem with recovery of party/party costs where the solicitor/client arrangement is a percentage based fee.

Promote competition between practitioners and third-party litigation funders

A view of some members of the Law Society is that the introduction of contingency fee arrangements may lead to the proliferation of class actions and provide an opportunity to bring more competitive tension into the selection of both lawyers (and their rates) and funders (and their commissions and other contractual terms) and the arrangements by which the lawyers and funders operate together as a common enterprise.

While we accept there would be some increase in competition, it is unclear whether this increase will relate to competition between practitioners and third-party litigation funders. One major consideration is the inherent differences between the roles/interests of solicitors to that of third-party litigation funders.

A small pool, only, of law firms have the financial resources to compete with litigation funders. From this perspective it is unclear whether allowing contingency fees will in fact encourage competition from smaller firms.

---

[2] Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, (DP 85), 2018, [5.42].
[3] See Law Council of Australia, *Contingency Fee Arrangements- Discussion Paper*, 14 [46].

Reducing costs to litigants in class actions proceedings

We consider that the question of whether the introduction of contingency fee arrangements would result in reduced costs to litigants in class action matters can only be determined on a case by case basis.

We note that in a number of cases the courts have questioned the totality of legal fees charged and payable as part of a settlement. In such cases, the courts have used experts and referees at the settlement approval stage to attempt to gauge whether the fees are fair and reasonable.

The Law Society sees some merit in the procedure endorsed by Justice Lee in *GetSwift*. In that case, the arrangements governing the proceedings that were allowed to proceed included a procedure involving a referee conducting periodic reviews of the accounts issued by the lawyers. This suggestion was described by Justice Lee as "novel".[4] In the Law Society's view this procedure, or an analogous one, may have some merit in some cases. Indeed, having an experienced referee monitor accounts on a regular basis would enable them to get better acquainted with the running course of the dispute and thus also enable that person to be of better assistance to the court when it came to the settlement approval stage.

Further, in the case of representative proceedings, such as in proceedings involving alleged continuous disclosure breaches where losses by individual shareholders may be quite small, and where the class members have no realistic economic capacity to bring proceedings, any settlement sum which is ultimately payable to them may be gratefully received. As such, there is no real transparency or ability for those class members to analyse whether the result and the amount taken in fees, is a good one from their perspective. That highlights two points:

1. the utility of representative proceedings; but also
2. the heightened necessity for close scrutiny by the court of:
    i. all the arrangements by lawyers acting for plaintiffs in representative proceedings; and
    ii. all the funding arrangements, to ensure that justice is both done and seen to be done.

Creation of conflicts of interest

As noted earlier, the Law Society considers that the introduction of contingency fee arrangements would raise conflict of interest concerns, and while the court may play a role in reviewing such arrangements, this could only ever be a limited safeguard. We suggest the arguments to this effect set out in the Discussion Paper are compelling.[5]

We also consider that the removal of prohibitions against lawyers entering into contingency agreements may not be sufficient to overcome solicitors' fundamental ethical obligations to avoid any compromise to their professional independence[6] and to avoid conflicts of interest[7] set out in the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.*

---

[4] *GetSwift* [2018] FCA 527, [127].
[5] Law Council of Australia, above n, 3, 17-19, [58] [61-62].
[6] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, Rule 4.1.4.
[7] Ibid Rule 12.

It is also noted that solicitors are expected to run the risk of adverse costs orders and security for costs. There will be matters where this will create a conflict of interest between the solicitor and the client in the sense that the client may have a claim with merit of which the solicitor forms a view that the risks of adverse costs or security for costs outweigh the solicitor's interest in taking on the matter.

Proportionality of fees

The Law Society is concerned that the proportion of settlement payments absorbed in contingency fees may be very significant and that a contingency fee regime may not always be best promoting the interests of litigants, and in particular class members.[8]

We note that the topic of proportionality of fees was discussed in the ALRC's Discussion Paper: *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*. The Law Society's response, which related to both contingency fees and litigation funding included the following:

In *Clarke v Sandhurst Trustees Limited* (No 2),[9] Justice Lee approved, with some reluctance, a settlement where out of the proposed settlement sum of $16.85 million there needed to be deducted legal costs of approximately $5 million and funding commission rates of approximately $5 million. Justice Lee referred to the evidence of the Chief Executive Officer of the funder in the proceedings, to the effect that it was her experience that it was "not unusual for group members to not receive 50% of the proceeds but the settlement is approved by the court as fair and reasonable".[10] While Justice Lee suggested that that evidence did not accord with his experience, the Law Society is concerned that a funder in this industry is of the general belief that payments made in settling class actions can be fair and reasonable, notwithstanding that they constitute less than 50% of the proceeds. A further concern is that this might appear to be the norm.

In another recent case, *Caason Investments Pty Ltd v Cao (no 2)*,[11] a settlement involving a payment of $19.25 million (inclusive of costs) was approved by the court,[12] with legal costs and disbursements of over $8 million[13] and commission payable to the funder of over $6 million (based on a common funding order at a commission rate of 30% of the gross recovery).[14]

The Law Society does not question the application by the court in each of these cases of the correct principles. However, it is concerned at the proportionality of returns to class members and the totality of legal fees and commissions payable to funding entities. The Law Society accepts that each case needs to be determined on its own facts and that many complexities are involved. It would be glib and incorrect to make a blanket statement that returns to litigants are too small. Having said that, the Law Society is concerned that the court has a sufficient armoury of powers and management techniques at its disposal to properly evaluate the level of fees and commissions in any given case.

---

[8] However, some of the Law Society's members consider contingency fees may be appropriate in class actions where there is considerable judicial oversight but do not support permitting solicitors to enter into contingency fee arrangements in other matters.
[9] [2018] FCA 511.
[10] [2018] FCA 511, [28].
[11] [2018] FCA 527.
[12] [2018] FCA 527, [3].
[13] [2018] FCA 527, [10].
[14] [2018] FCA 527, [165].

Further, the Law Society accepts that while the court may have the benefit of a costs expert, a referee and, in some cases, submissions by an amicus curiae/contradictor, additional measures could be put in place to protect the interests of litigants, such as statutory limitations and caps.

The ALRC also raised the issue of potentially capping legal fees and commission rates and referred to the position taken by the Productivity Commission[15] and in England and Wales.[16] The Productivity Commission identified the following matters that it said might be advanced in opposition to the use of statutory caps, as they relate to contingency fees (rather than litigation funders):

- A sliding scale statutory cap may result in payments disproportionate to work or risk (and this could work both ways).
- The maximum cap may become the default amount awarded to solicitors.
- The introduction of caps may dissuade solicitors from taking on the types of cases that contingency fees might promote – namely, smaller matters with higher risk.[17]

If contingency fees were to be introduced, the Law Society agrees with the recommendation that a correlative power should exist. The question then is whether the exercise of such powers and, the discretions that can be exercised, acting judicially, are sufficient to ameliorate the potential risk of payments to (funders and) lawyers that are so significant and disproportionate so as to undermine faith in representative class proceedings.

The Law Society addressed the points raised by the Productivity Commission, as they related to contingency fees, as follows:

- While caps can be a blunt instrument, the statutory cap could have a built-in safety valve, namely making the cap subject to variation by the court if good reason is shown. This would then cast the onus on the person applying for a variation to establish that in the particular case the cap was not operating effectively.
- Similarly, in relation to the risk that a cap may become the default amount, the court could be given a residual discretion to vary a funding arrangement by reducing the commission payable so that it fell at some appropriate point well below the cap.
- Provided that the cap is set at a reasonable level, solicitors would not be dissuaded from commencing proceedings. Further, if in a particular case there is a high risk associated with success, then solicitors should think quite carefully about all those risks before being prepared to commence such proceedings, rather than launching very risky proceedings in the event that they may pay off with a high return to them.

The Law Society suggests that, if contingency fees were to be considered, consideration should also be given to introducing a combination of caps and a rebuttable presumption of a maximum proportion, coupled at all times with a residual discretion in the court to alter arrangements if it is in the interest of litigants to do so.

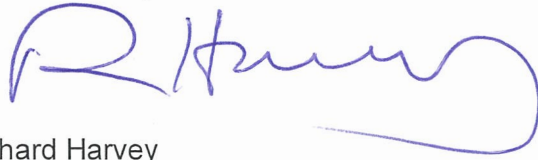
Finally, if caps were to be introduced, they should perhaps be subject to automatic review, say after five years, to assess their operation.

---

[15] Australian Law Reform Commission, *Inquiry into Class Action Proceedings and Third-Party Litigation Funders*, (DP 85), 2018, [5.66]-[5.68].
[16] *Ibid.* [5.69].
[17] *Ibid.* [5.70]-[5.73].

Please contact Liza Booth, Principal Policy Lawyer on 02 9926 0202 or at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Richard Harvey
President