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Mr L. Glanfield
Secretary, Standing Committee of Attorneys-General
Level 19, 8-12 Chifley Square
Sydney, NSW

14th September 2006

Dear Sir,

Re: Litigation Funding in Australia, Discussion Paper, Standing Committee of Attorneys-General, May 2006

Thankyou for your letter dated 30 May 2006 to the Legal Aid Directors' Secretariat inviting a response to the above mentioned Discussion Paper.

Background

National Legal Aid (NLA) represents the Directors of each of the eight State and Territory Legal Aid Commissions. NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal or State and Territory legal systems; or
- Obtain adequate information about access to the law and legal system.

Commissions provide legal assistance (including grants of aid for legal representation) pursuant to already existing enabling legislation. In providing this assistance Commissions utilise transparent systems set up in accordance with their State or Territory's legislation, and any regulatory structures specially set up for LFCs should not be applicable to Commissions. A grant of legal assistance for litigation is made only after an applicant has passed means, guidelines and merits tests, and where available, other mechanisms for resolving the dispute have failed.

On the background of our belief that adequate funding should be provided by Governments to Commissions so that they are able to assist financially

disadvantaged persons with meritorious cases, we are of the view that there is place for commercial litigation lending to enhance access to justice but that consumer protection is necessary. Commissions do not see that they have a role where private options are available. Our answers to the questions in the Discussion Paper are provided in this context.

Issue 1: Should laws against maintenance and champerty be repealed in those jurisdictions where the tort or crime continues to exist (Western Australia, Queensland, Tasmania and the Northern Territory)?

Yes, NLA supports repealing laws against maintenance and champerty to ensure consistency across Australia. However, repealing these laws should not affect any other rules of law about contracts that are contrary to public policy or otherwise illegal. Courts should retain the power to set aside such contracts.

Issue 2: Should a direct contractual agreement between the solicitor and the plaintiff be required in all funded actions?

Yes, this will ensure that the consumer protections (set out in uniform legal profession laws) apply to litigants funded by LFCs.

Issue 3: Should the criteria for legally acceptable funding agreements be formalised?

Yes, legislation should give clear guidance about which LFC activities are permitted. We expect that increased certainty will minimise collateral litigation.

Issue 4: If so, should this be in the form of either or both:

- a list of relevant criteria?
 - a set of required terms or disclosure requirements in the agreement?
- Or should this be in some other form?**

NLA supports both forms of guidance. NLA believes that a set of required terms will encourage a uniform approach. However, the court may still be required to consider the appropriateness of any non-standard terms/disclosure requirements or disputes concerning standard terms/disclosure requirements. A list of relevant criteria (such as those proposed at page 11 of the Discussion Paper) could assist the court.

Issue 5: Should disclosure and other requirements be imposed on LFCs when they enter into non-insolvency funding agreements?

Yes.

Issue 6: If so, what should the requirements be?

LFCs should be required to tell the litigant (in plain English) about all the obligations, liabilities and risks that will be borne by the litigant under the agreement.

There should be a requirement that agreements be disclosed to the Courts.

NLA agrees with the example of capping the proportion of damages awarded which the LFC can "uplift".

Issue 7: Should LFCs be subject to prudential regulation?

While there is not a wholly uniform view within NLA on this point we would like to point out that on the basis that there is full disclosure of the arrangements, there are rules of Court available to satisfy the concerns raised by this issue.

Issue 8: Should LFCs be subject to mandatory disclosure requirements?

Yes.

Issue 9: Should explicit measures to ensure independence of lawyers from LFCs be introduced?

If there is disclosure, then NLA does not have strong views about this.

Issue 10: Should these be in the form of

- prohibitions on certain dealings between LFCs and lawyers?
 - standard terms in contracts between LFCs, lawyers and plaintiffs?
- Or some other form?**

Please refer response to issue 9.

Issue 11: What measures should be taken to encourage more organisations to provide not-for-profit litigation funding?

NLA submits that Governments should first address the issue of the current funding to Legal Aid Commissions which is inadequate to meet even demand.

The Commonwealth Government's decision in 1996 that it would only fund legal aid services for matters arising under Commonwealth law substantially reduced the amount of legal aid funding to Commissions from the Commonwealth Government. To ensure financial survival Commissions had to tighten guidelines for funding casework in a number of areas. First priority

was given to cases involving personal liberty and issues relating to the care of children. Effectively, this meant Commonwealth funding was used for family law and state funding for criminal cases and child protection. As a result, hardly any funding was available for civil casework of the type relevant to the issues raised by this paper.

A priority should be the funding of Commissions so that they are able to provide civil law case work assistance in accordance with means and merits testing. This would be consistent with, and address, the identification of the need for a national civil legal aid scheme by the Australian Legal Assistance Forum (ALAF) representing all of the major legal service providers in Australia, including Aboriginal and Torres Strait Islander Legal Services providers, the Community Legal Centres, the Law Council of Australia and NLA.

Issue 12: Do not-for-profit litigation funding schemes operate other than the schemes described above?

Individual Commissions will provide this information to their State or Territory's Attorney-General as requested.

We note that some Commissions are involved in operating schemes for supporting civil litigation, eg the Legal Aid Commission of Tasmania and the Northern Territory Legal Aid Commission operate civil disbursement funds and Legal Aid Queensland administers the Civil Law Legal Aid Scheme.

Issue 13: If other not-for-profit schemes are operating, how do they work, and are any statistics available to demonstrate their effectiveness?

Please refer response to Issue 12.

Issue 14: Are litigation insurance products desirable in Australia?

NLA does not consider that litigation insurance products would be of any practical benefit to Commission clients because it is very unlikely that they could afford to buy them.

Issue 15: If so, what steps should be taken to ensure that the availability of litigation insurance in Australia is not discouraged or prevented?

Please refer response to Issue 14.

Further information

Should you require any further information please do not hesitate to contact Norman Reaburn, Director of the Legal Aid Commission of Tasmania on 03 62 363820.

Yours faithfully,



Norman Reaburn
for the Chairperson NLA.