

16 April 2013

Committee Secretary
Senate Legal & Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

legcon.sen@aph.gov.au

Dear Committee Secretary,

Re: Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia

Introduction

Thankyou for this opportunity to make a submission to the Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia.

About National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

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 appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Inquiry terms of reference

The impact of federal court fee increases since 2010 on access to justice in Australia, with particular reference to:

- (a) the impact of federal court fee increases on low-income and ordinary Australians and operators of small businesses;
- (b) whether these fee increases are reasonable, based on evidence and consistent with other justice policy matters;
- (c) how increases in court fees, and other reform to the courts and justice system, can act as a barrier to accessing justice;

- (d) the extent to which court fee increases may impact on services provided by legal assistance services (i.e. legal aid commissions, Aboriginal and Torres Strait Islander legal services, family violence prevention legal services and community legal services);
- (e) the degree to which the fee changes reflect the capacity of different types of litigants to pay;
- (f) the application of the revenue that has been raised by federal court fee increases; and
- (g) other relevant matters.

This submission focuses on a particular issue raised for legal aid commissions as a result of changes to court fees, being fees now payable by Independent Children's Lawyers (ICLs), and otherwise addresses the terms of reference more generally.

Independent Children's Lawyers

Commissions grant legal aid for the appointment of ICLs to provide independent representation of children's interests in family law matters upon receipt from the family law courts of an order and request for the appointment of an ICL. ICLs may only be ordered by the family law courts where circumstances which would warrant the making of the order exist in the particular case before the court. The role of the ICL is to advocate for an outcome that is in the child's best interests. In performing this role the ICL must gather evidence and present it to the court. Interlocutory applications such as a request to issue subpoenas support the performance of this important function.

Presently ICLs are required to pay the newly introduced court fees in relation to the filing of subpoenas and interlocutory applications. The *Family Law (Fees) Regulation 2012* (the regulations) provide for exemption from liability to pay the fee in certain situations including where the person has been granted legal aid under a legal aid scheme or service, or is younger than 18.

NLA has been informed by the Attorney-General's Department, and understands the courts have been similarly advised, that as a matter of policy the ICL is required to pay the fee. There have since been a number of cases decided by the Federal Magistrates Court¹ which suggest that the exemption should be applicable. Positions/practices around the country continue to differ in relation to whether the fee is required to be paid.

The Australian Institute of Family Studies (AIFS) is undertaking a review of ICLs for the Attorney-General's Department, and we understand that the research is likely to confirm the importance of the ICL role in assisting the court to make orders in the best interests of children.

NLA has raised concerns about ICLs being required to pay the fees with the Attorney-General and understands that the issues are currently being considered.

¹ Wearden & Scotland [2013] FMCAfam268; Croft & Croft [2013] FMCAfam 182; Bennet & Carter (No. 2) [2013] FMCAfam 215; Redden & Mayes & Anor [2013] FMCAfam 272

In particular our concerns are:

Parties in receipt of a grant of legal aid from a commission are exempt from paying the fee. It appears anomalous to us in these circumstances that legally aided representation provided by a commission for the child/ren who are the subject of the proceedings, should not also be exempt.

The Regulation will inevitably affect the overall number of family law grants that can be made, including to other matters in which an ICL is ordered and requested.

It is estimated that the costs impact of the newly introduced fees on commissions across the country would be in the range of \$1.2 - \$2 million per annum given that in excess of 4,300 grants of aid for the appointment of an ICL were made in the last financial year, and early indications from the second half of the last financial year are that the number of orders and requests for appointments from the courts is rising.

Our view is that the regulations should be amended to provide a blanket exemption from payment of subpoena fees for ICLs funded by legal aid. A blanket exemption would avoid the need to make application in individual cases and the associated administrative effort and resources.

Appropriate contributions by court users

In relation to the issue of appropriate contributions by court users, NLA strongly supports a system of fee exemption or waiver for those who can establish financial hardship.

It has been suggested by us however, that the *Family Law Act 1975* should be amended so as to enable improved recovery of ICL costs, including any fees payable such as subpoena costs, by commissions. Currently, the consideration and making of such orders by the courts is not mandatory, and approaches by judicial officers to the issue vary across the country.

Conclusion

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require anything further from us.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A Reilly', written in a cursive style.

Anthony Reilly
Chair