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Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
Melbourne VIC 8003

access.justice@pc.gov.au

Dear Dr Mundy,

Re: Inquiry into Access to Justice Arrangements – response to questions on notice

Introduction

Please find following NLA's answers to questions on notice at the hearing of the Inquiry into Access to Justice Arrangements held in Hobart on the 13th June 2014. We apologise for the delay in providing these answers to you.

Q.1 "To what extent are resources being deployed for providing criminal legal aid for matters that don't have a realistic prospect of incarceration for the individual?" ("..what I want to clarify is that there isn't criminal work being done that isn't going to trigger Dietrich, because then I think that there is a legitimate funding choice to be made available and I think at that point, there is a legitimate question for governments to say, "No, we want that money spent on civil work.")

Resources are not generally deployed to provide grants of legal aid for criminal law matters where there is no realistic prospect of incarceration for the individual.

Resources may be deployed in such circumstances if the special circumstances of the applicant taking account of all relevant factors, including other potential avenues of assistance, justify it in the context of competing priorities for limited legal aid funding. Special circumstances include, for example, circumstances such as intellectual disability, mental health issues, language barriers etc

Duty lawyer services are provided at some courts of summary jurisdiction and support the efficiency of the courts. Duty lawyer assistance may sometimes be provided where people appear unrepresented where there is no realistic prospect of incarceration. Such assistance does not extend to representation at a defended hearing.

Q.2 What reviews or studies similar to the Western Australian review of CLCs have been undertaken in other jurisdictions?

South Australia

Review of Community Legal Centres in South Australia, Keys Young 26 May 1997, report prepared for the Attorney-General's Department of South Australia and the Office of Legal Aid and Family Services.

New South Wales

Review of the NSW Community Legal Centres Funding Program, Final Report, June 2006.

Queensland

Review of the allocation of funds from the Legal Practitioner Interest on Trust Accounts Fund, Final Report, December 2012.

Victoria

Review of Victorian Community Legal Centre Funding Program, Final Report, July 1998.

Q.3 Is the Washington State program where people with “limited practising licences”, a model that could be usefully deployed to assist in increasing the availability of appropriately skilled people to handle family dispute resolution?

NLA understands the concern expressed to Commissioners at the hearing which was then raised with NLA, to have been about non-lawyer Family Dispute Resolution Practitioners (FDRPs) giving legal advice to parties in conjunction with or as part of the dispute resolution process.

NLA is of the view that independent legal advice specific to the individuals involved should be obtained by each participant in the dispute resolution process.

Our experience is that FDRPs accredited pursuant to the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (who need not be lawyers) are generally aware that their role as mediator or facilitator does not include giving legal advice and of the need for people to obtain that legal advice and that they will refer people appropriately for that advice before proceeding to settlement.

Lawyers and social scientists experienced in family court work have an understanding of the likely range of outcomes if the matter were not to resolve at mediation and were to require litigation, which is useful in their dispute resolution role.

To the extent that there is a systemic issue in Australia in relation to the availability of appropriately skilled FDRPs, with wait time being an issue in some locations, NLA suggests that it is largely funding and resource based. To obtain FDR qualifications is expensive, and funding available to legal and/or community services which offer FDR is often limited. This in turn will limit the number of FDRPs who can be retained by services and the number of conferences that can be held. There is already a pool of appropriately experienced lawyers and social scientists who with mediation training could undertake the work.

It is respectfully suggested that more funding should be directed to registered training organisations that provide FDRP training to subsidise the costs of undergoing the training.

Q. 4

a) "that one of the guidelines that they have changed which has been quite controversial in that state is that family law, where one party is not represented, then the other party cannot be successful in getting a grant of Legal Aid even where there may be domestic violence involved.....whether that happens in other states, and,

All legal aid commissions utilise means, merits and competing priorities eligibility tests and will require parties to participate in dispute resolution where appropriate. An application of eligibility tests may result in some cases involving family violence not being funded for a family law trial. These tests are applied at successive stages of the individual matter to ensure that trials are confined to matters where there is a substantial dispute, and that settlement is achieved at the earliest possible point in time.

b) the extent to which that may happen in a case, without the guideline as such but you might find that through means tests and other things, people fail that and you have got people unrepresented in a situation that has involved family violence."

c) "We would be grateful if NLA could ask its members the extent and the cost of alleviating such an outcome."

It is difficult to assess the extent to which this may happen in a case. Applications for legal aid do not reflect the true need for legal aid or all situations involving family violence. Many people do not apply for legal aid if they perceive they will not be eligible for it. Means tests will also exclude meritorious applications for aid where a person will not be able to afford the cost of a private lawyer.¹

It is likely that significant numbers of people experiencing family violence are self-represented because they do not qualify for any legal assistance under means tests and this will continue to be the case. This makes it all the more important to ensure those persons who do qualify for legal aid are assisted in a manner that is proportionate to their needs and the characteristics of the dispute.

Also, legal aid commission data systems recording applications for, and refusals of, legal aid do not all capture whether there was family violence involved in a matter (as distinct from the law type or matter type of the proceedings that might be necessary). Further, family violence may or may not be identified by the applicant at the time of making a legal aid application².

In the 2009-2012 financial years, "legal aid commissions in Australia allocated \$263 million (exclusive of GST) towards family law grants of legal assistance" of which \$65 million related to ICL grants. "...the average funding per family law grant Australia-wide - \$1,700 (GST exclusive) - was lower than the average funding for ICL grants (\$5,371)³".

¹ See Legal Aid and Self-Representation in the Family Court of Australia, Hunter, Giddings, and Chrszanowski, May 2003.

² Where the making of the application is supported by a legal aid commission staff member, or other person alert to issues of family violence, it is more likely that where there has been family violence that it will be identified, but people can be reticent about disclosing family violence until trust is established.

³ P.23 Independent Children's Lawyers Study, Final Report, May 2013, Australian Institute of Family Studies, noting "Queensland data was excluded from the analysis reported in the figure, as data covering the number of family law grants during this period were not available."

In the same time frame approximately 131,790 applications for legal aid for commonwealth funded family law matters were received. Of these approximately 36,274 were refused. Of those refused, potentially many may have involved family violence with family violence being a very common feature in matters managed by legal aid.

Various figures produced by the family law courts suggest significant self-representation once proceedings have been filed. For example, the 2012-2013 Annual Report of the Family Court of Australia reflects that for 2008-2013 the proportion of finalised cases in which at least one party was self-representing varied between 26-29%, with the percentage increasing to between 32-36% for trials in the same period.⁴

It is suggested that the expanded definition of family violence, an increased awareness of the nature and extent of family violence, and responses to family violence, such as the Notice of Risk pilot in South Australia, are relevant in the context of demand and cost into the future. An evaluation of the South Australian pilot and comparison of data with other family law court registries is understood to be capable of potentially indicating how frequently or not issues of risk are being appropriately brought to the courts attention when matters are filed.

Even with the proper identification of family violence in matters being filed at the courts, data collected by the family courts will not reflect those matters where a victim of family violence did not make an application to the court, even though such an application might have been warranted.

In light of the above, our estimate of the cost involved in alleviating the situation could easily be twice current levels of funding.

Q.5. “..where a woman has experienced substantial violence from her partner and goes to the Family Court to seek a resolution of the property of the marriage and it’s beyond question that she has experienced significant violence from the man, ... is that a circumstance in which she would be provided Legal Aid?...there are no children involved.... let us know in which jurisdictions she might get legal aid?”.

It would be uncommon for a legal aid commission to make a grant of legal assistance where there were property issues but no children involved.

Whether the grant is made will depend on an application of the means and merits test, whether there is a need to obtain injunctive relief in relation to the person and/or property, the availability of other services and the capacity of the woman to obtain those services, any personal circumstances (which may be constituted by family violence or the circumstances surrounding it), and an assessment of competing priorities and available funds.

All legal aid commissions have experience of refusing aid in such circumstances. Legal aid commissions use funding guidelines as a mechanism to assist in rationing limited funds in an environment of competing priorities.

All legal aid commissions, would like to be in a situation to always help the woman described, however with existing funding constraints this is not always possible.

⁴ Family Court of Australia, Annual Report 2012-2013, p.55 & 56

Conclusion

Please do not hesitate to contact us if you require any further information.

A handwritten signature in black ink, appearing to read 'G. Turnbull', with a stylized, cursive script.

Yours sincerely,
George Turnbull
Chair