

Justice for everyday problems: Civil Justice in NSW

Legal Aid NSW submission to the
NSW Department of Justice
Consultation Paper

February 2017

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, immigration, social security and access to essential social services. In 2015-16, the Civil Law Division of

Legal Aid NSW provided over 35,000 advice services, 25,000 minor assistance services, over 14,000 duty services, and 654 representation services, through both in-house and private practitioners.

Legal Aid NSW welcomes the opportunity to provide a submission to the Civil Justice in NSW Consultation Paper. If you require any further information or wish to discuss this submission, please contact:

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Introduction

Legal Aid NSW welcomes the NSW Government's consultation with the community about reform of the civil justice system. As the Consultation Paper notes, civil justice problems are common. Disadvantaged people are disproportionately affected by these problems. The Law and Justice Foundation survey of legal need (LAW Survey) found strong evidence that those with multiple disadvantages are more vulnerable to substantial and multiple legal problems.¹ Particularly vulnerable groups include people with a disability, single parents, the unemployed, people living in disadvantaged housing and Indigenous people.²

As the Consultation Paper also recognises, most people take no or inadequate steps to resolve these problems. These problems can then escalate, with flow on effects for the individual, the community and government. For instance, research demonstrates that unresolved legal problems can result in adverse consequences such as stress-related illness, physical ill health, relationship breakdown, moving home, loss of income or financial strain.³ The Productivity Commission has also observed that “[u]nmet civil legal needs ... can escalate into more serious civil problems, and in some cases, can lead to crime”.⁴

Legal Aid NSW agrees with the challenges identified in the Consultation Paper around the cost, complexity and inaccessibility of the current civil justice system in NSW. Legal Aid NSW also endorses the proposed approach of the Consultation Paper which examines opportunities for better prevention, early intervention, dispute resolution and enforcement. The vision for a people-centred system also correlates with Legal Aid NSW's client centred approach, reflected in our *Client Service Strategy 2016–2020*.

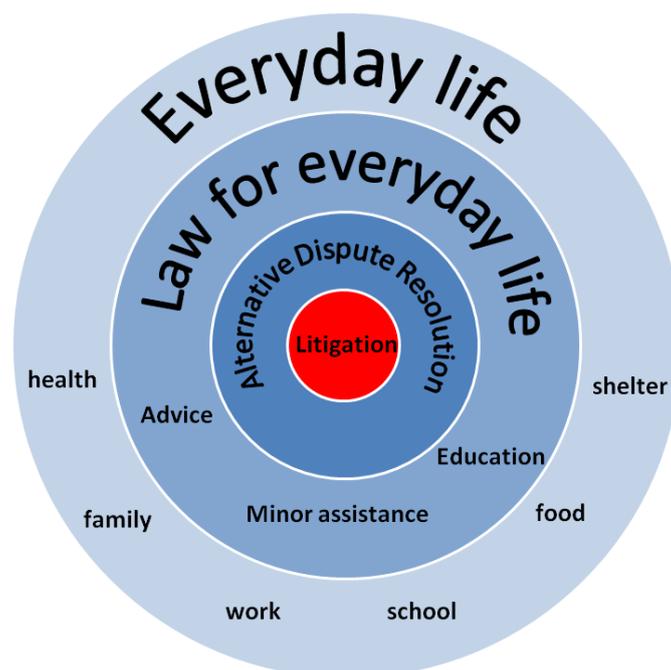
Legal Aid NSW plays an important role in access to civil justice for the NSW community, and in particular for highly disadvantaged members of our community. Legal Aid NSW provides a comprehensive range of state-wide civil law services ranging from information, community legal education, advice and minor assistance through to representation in accordance with our eligibility policies. The Civil Law Division has developed a problem-solving approach to civil law matters based around law for 'everyday life'. We focus on areas that have the most impact on people's lives, including housing, debt and consumer law issues. The diagram below illustrates this approach:

¹ Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in NSW*, Law and Justice Foundation of NSW, (2012) at pp xv and 76; Productivity Commission, *Access to Justice Arrangements* (2014) at p 759.

² Ibid.

³ Coumarelos et al, above n1 at p176.

⁴ Productivity Commission, *Access to Justice Arrangements* (2014) at p 759.



The Productivity Commission has stated that Legal Aid NSW “exemplifies leading practice with its civil law division and services”.⁵

Legal Aid NSW supports the Consultation Paper’s proposals for information, education and tools to inform community members of their rights, and to assist them to exercise their rights and resolve their civil law problems. However, we emphasise that these strategies will have limited impact for highly disadvantaged people. Many of Legal Aid NSW’s clients lack the capacity to self-help because they are illiterate, have English as a second language and/or suffer from cognitive impairment, mental health impairment or low educational attainment. Legal Aid NSW’s children and youth clients, who are vulnerable by virtue of their age and their disadvantaged backgrounds, also lack the resources and expertise to successfully resolve their own legal problems with information and self-help tools.

As the Law and Justice Foundation has commented:

*... there is considerable diversity in the experience, handling and outcome of legal problems. Some people are resilient, while others experience multiple, severe legal problems. Some people achieve good outcomes by capably using self-help strategies, while others rely on expert advice. In some cases, people appear to have poor legal knowledge and poor legal capability, with some people leaving their legal problems unresolved. This diversity means that no single strategy will successfully achieve justice for all people. Rather, the approach to justice must be multifaceted and must integrate a raft of strategies to cater for different needs.*⁶

⁵ Productivity Commission, *Access to Justice Arrangements* (2014) at p 722.

⁶ Coumarelos et al, above n1 at p xx.

From the perspective of Legal Aid NSW and our clients, we therefore encourage the NSW Government to ensure that any strategy for reform of the civil justice system includes legal services for disadvantaged people. The importance of publicly funded legal assistance services for disadvantaged people has been recognised by both the Law and Justice Foundation and the Productivity Commission.⁷

The remainder of our submission addresses the sections of the Consultation Paper, based on Legal Aid NSW's experience with the civil justice issues faced by disadvantaged people.

Section 1: Avoiding common problems

As noted in the Consultation Paper, providing targeted and appropriate information and education can help people understand common civil law problems, and how to prevent or avoid them. Legal Aid NSW provides a range of community legal education (**CLE**), including community legal information, to help achieve this outcome. These information and education activities also help achieve other outcomes identified in the Consultation Paper, such as dealing with problems early, and getting help to solve a problem.

Legal Aid NSW now has a CLE strategic framework that guides the way we do CLE across the organisation. This framework was informed by the findings of a review of Legal Aid NSW CLE and information activities by the Law and Justice Foundation in 2015.⁸ The key findings of the review are relevant to reform of the civil justice system, and the role of information and education in those reforms:

- As people do not conceptualise the problems they are having as legal problems, they do not take a legal portal approach to getting help for their problem. They tend to enter legal portals as a result of a google search or other external search facilities.
- A high number of visitors to the Legal Aid NSW website come to the site looking for legal help rather than community legal information.
- While there has been a profusion of innovation in using technology to provide CLE and information, caution should be shown when assuming the reach and impact of these online strategies, particularly for vulnerable people with poor legal capability.
- The usefulness of CLE depends on the legal capability of the individual users, such as their personal characteristics, life conditions, willingness to engage in self-help, emotional readiness to take action, what kind of legal tasks they need to take, and how complex those tasks are.
- Strategies must be tailored to address specific issues faced by particular groups at a particular time.

⁷ See Coumarelos et al, above n1, Chapter 10 and Productivity Commission, *Access to Justice Arrangements* (2014), Chapter 21.

⁸ Forell, S & McDonald, HM, *Community legal education and information at Legal Aid NSW: activities, costs and future planning* (2015) Law and Justice Foundation of NSW.

- Less is often more when it comes to CLE. What is important is that it is clear and realistic (or modest) in purpose.
- Lack of knowledge or not knowing what to do about a legal problem is only one of a number of barriers to people addressing their legal problems. There are a whole range of reasons people don't take action, including stress, time, cost, damaging relationships and having bigger problems to deal with.

Best practice CLE engages with this reality and supports strategies that build the skills, knowledge and confidence required to resolve legal problems.

Under the Legal Aid NSW CLE Strategic Framework, Legal Aid NSW provides CLE to:

- disadvantaged communities, to help them identify issues as legal problems, to build their capacity to address and prevent legal problems themselves and to link them with legal assistance services
- referring organisations and intermediaries, such as community workers, family members, interpreters, who support disadvantaged clients, and
- the broader community, to help people help themselves.

CLE is not seen as a stand-alone strategy, but rather as one strategy to use on the continuum of legal assistance, and often in conjunction with other service strategies, such as legal advice, and minor assistance. The diagram below illustrates this continuum.

Diagram 1: The continuum of legal assistance⁹



⁹ Pleasence et al., 2014, *Reshaping Legal Assistance Services*, Law and Justice Foundation of NSW.

Section 2: Dealing with problems early

Legal Aid NSW endorses the Consultation Paper's proposal for early intervention strategies to help deal with civil justice problems early. Below are some successful early intervention strategies and services that Legal Aid NSW has employed, which could be built on in any broader strategy to improve access to civil justice in NSW. As we work with disadvantaged and marginalised people, these strategies do not rely on individuals to seek out information and/or self-help tools. While this focus of the Consultation Paper may be appropriate for many in the community, Legal Aid NSW clients often do not have the capacity or resources to navigate online information or self-help tools. Our early intervention strategies therefore involve targeted outreach, collaboration and integration with non-legal services, and a proactive approach to the investigation and assessment of clients' legal and non-legal needs.

The Law Check-Up

Legal Aid NSW has developed the "Law Check-Up" as an early intervention tool for civil law problems. The Law Check Up is a simple one page checklist to help non legal workers 'diagnose' problems that have a legal dimension and link them with legal assistance in their local area. It was developed in light of Law and Justice Foundation research showing that people use a range of non-legal professionals to try to resolve their problems, as well as friends and family (with legal professionals only used in a minority of cases). For instance, the Law and Justice Foundation survey found that 28.5% of people consulted a health or welfare advisor about their legal problem.¹⁰ Legal Aid NSW solicitors have trained over a thousand community workers on how to use the Law Check-Up tool, including health and homeless service providers.

Legal Aid NSW has also developed the Law for Everyday Life DVD, which explains how to spot a civil law problem and where help is available. This video is another education resource used in Legal Aid NSW training sessions for individuals and community workers.

HJPs

Health Justice Partnerships (**HJPs**) involve innovative collaborations between legal and health services, including onsite legal assistance to clients in settings such as hospitals, community health centres, Aboriginal Medical Services, drug and alcohol services and public housing estates. They are being pursued in light of research showing that:

- those with long term illness or disability are more than twice as likely to report one or more legal problems¹¹
- unresolved legal problems play a role in stress-related and physical ill health¹²

¹⁰ Coumarelos et al, above n1, at page 110.

¹¹ Coumarelos et al, above n1 at page 68.

¹² See Pleasence et al, above n9, at page 2.

- vulnerable people often first seek help with their legal problems from non-legal professionals, including health professionals,¹³ and
- an integrated model of service delivery including legal, health and human services has benefits for disadvantaged people.¹⁴

Locating legal services within a health setting enables the early identification and resolution of legal problems and can improve health outcomes. For example, resolving legal issues related to housing and debt can assist in addressing a client's stress-related illness. Resolving underlying legal issues concerning substandard accommodation or homelessness may also address associated health conditions.¹⁵ Legal Aid NSW's HJP work involves training health staff to identify legal issues and supporting them to screen patients by providing them with the Law Check-Up tool.

Legal Aid NSW has been at the forefront in the development of HJPs in Australia.¹⁶ We are working closely with Health Justice Australia, established in 2016 to promote excellence in this rapidly growing area. Three Legal Aid NSW HJPs are outlined below.

Aboriginal Medical Service Western Sydney

Legal Aid NSW has provided legal services on site at the Aboriginal Medical Service in Western Sydney (**AMSWS**) for over five years, and has developed strong working relationships with health care providers on site. This model of service delivery enables very simple cross referral and client centred collaboration. For example, the psychologist working at AMSWS regularly refers clients to the onsite solicitor and at times sits in with her clients to help clients to feel more at ease. Through working with the Legal Aid NSW solicitor over a number of years, the psychologist has become skilled at spotting potential legal issues faced by her clients.

Miller HJP

In November 2014, Legal Aid NSW, in collaboration with South West Sydney Legal Centre, commenced a weekly civil law advice service in Miller. Miller is a highly disadvantaged suburb in South West Sydney. This HJP includes South West Sydney Local Health District, The Hub Community Health Centre and Budyari Aboriginal Community Health Centre. This project integrates health and legal services with the aim of improving overall health outcomes by addressing unmet legal needs contributing to ill health in the local community.

¹³ See Coumarelos et al, above n1, at page 110.

¹⁴ For example AHURI. *Homelessness Action Plan – summary of evaluation findings*. May 2013 pp. 1 – 6 <http://www.housing.nsw.gov.au/help-with-housing/specialist-homelessness-services/info-hub-for-service-providers/research-and-evaluation>

¹⁵ Ibid.

¹⁶ In addition to the HJPs outlined, Legal Aid NSW solicitors deliver regular clinics in HealthOne (Sutherland), Bungee Bidgel Aboriginal Health Clinic (Hornsby), Sydney Children's Hospital (Randwick), William Booth House (Surry Hills) Browne St Community Mental Health Centre (Campbelltown), High St Youth Health Centre (Harris Park), Headspace (Bathurst) – in partnership with Elizabeth Evatt CLC, Mental Health Unit (Central Coast Local Health District) – in partnership with Central Coast CLC, and Aboriginal Medical Services (Collarenebri, Forster, Kempsey, Bourke, Brewarrina, Condoblin, Murrin Bridge, Lake Cargelligo, and Coraki).

Blacktown Drug Health Service

The most recent Legal Aid NSW HJP commenced in February 2017 at the Western Sydney Local Health District Drug Health Service in Blacktown. An integrated cross-practice service is provided onsite at the methadone clinic by experienced criminal, civil and family law solicitors. Client engagement is supported with events such as Fines Days and Work and Development Orders can be accessed on the spot, enabling clients to clear fines by undertaking treatment for addiction.

Integrated service delivery

Integrating legal service delivery with other non-legal professionals can also help disadvantaged people identify and resolve their civil law problems early, and in a holistic manner.

Civil Law Service for Aboriginal Communities

The Civil Law Service for Aboriginal Communities (**CLSAC**) is designed with the specific needs of Aboriginal clients in mind and is targeted to communities and people with the highest levels of disadvantage and unmet legal need. The service is focused on addressing issues that impact on the everyday lives of Aboriginal people, which are often issues associated with money, housing, essential services and interactions with government. CLSAC delivers legal services in an integrated way, working in multi-disciplinary teams that collaborate with other legal and non-legal services.

Every solicitor and intake officer in CLSAC uses an assessment tool to find out if a client has other legal and non-legal issues that require assistance, which they may not have initially identified at presentation. The tool is specifically designed for Aboriginal clients and asks questions about the issues that research and experience indicates that they are likely to face.

CLSAC also maintains an extensive network of relationships with other legal and social services so that staff can connect clients to services they need. Local integration with family support services, domestic violence services, health services and others provides direct pathways for referrals.

Legal Aid NSW has also established a financial counsellor position within CLSAC to provide clients with integrated help with money issues that are often intertwined with other legal issues.

This client-centred approach is currently being expanded across Legal Aid NSW. We have developed other multi-disciplinary teams that are able to provide wrap-around services to the most vulnerable and disadvantaged clients including people experiencing domestic violence, at risk youth, and newly arrived migrants.

Children's Civil Law Service

Legal Aid NSW's Children's Civil Law Service (**CCLS**) was set up in 2013 to provide a targeted and holistic legal service to young people identified as having complex needs. It was informed by a Legal Aid NSW study that profiled the 50 most frequent users of Legal

Aid NSW.¹⁷ This study found that 80% of Legal Aid NSW's 'high users' were children and young people who were 19 years old. The study found evidence of multiple or complex needs in these clients, with more than half being homeless, 94% having spent time in a juvenile detention centre, and 46% having spent time in out of home care.

In recognition of the multiple and complex needs experienced by young people, the CCLS works with criminal law partners to provide a 'wrap around' legal service to young people, with the aim of minimising the young person's interaction with the criminal justice system. The integrated legal service includes the establishment of a social worker and youth worker within the CCLS to provide vulnerable young people with intensive case management with their non-legal needs to better support facilitation of the young person's legal outcomes.

A specifically tailored legal health check for young people has been developed to assist solicitors to identify the civil law issues that a young person may have, but have not been identified. This has been used as a capacity building tool amongst community workers in the youth sector who can be the 'problem spotters', so that they can refer children and young people appropriately and at an earlier stage for legal help.

Online tools

Legal Aid NSW acknowledges the potential benefits of online tools that can help people negotiate their disputes and solve their legal problems. However, we again note the limitations of such tools for highly disadvantaged people. Many of Legal Aid NSW clients are illiterate and/or have low education levels, speak English as a second language, suffer from mental illness and/or cognitive impairment or are experiencing or have experienced trauma. Others would not have access to a computer or a reliable internet connection. The ability of these clients to successfully navigate and use an online tool to resolve a dispute with a large retailer, a social housing provider, landlord, or an energy provider is doubtful. Targeted and tailored legal assistance for these demographic groups must also be provided.

Section 3: Getting help to solve a problem

Access to advice and assistance

For disadvantaged people, the challenges around accessing advice and assistance, identified in the Consultation Paper, are very real. Legal Aid NSW has sought to respond to these challenges through strategies such as CLE, outreach, and partnerships with other legal and non-legal providers. Specialist services are also able to tailor services to target certain communities. For instance, CLSAC has been able to tailor its services to Aboriginal communities by taking legal services directly into Aboriginal communities, and involving those communities in the design and delivery of services in their communities. This has

¹⁷ High Service Users at Legal Aid NSW: Profiling the 50 Highest Users of Legal Aid Services available at: http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf

seen Aboriginal communities drive key aspects of services, such as where legal services are located, who they work with and when they occur.

Referral systems

Legal Aid NSW supports the use of warm referrals, to ensure that clients can access the services they need and do not have to tell their story multiple times. Legal Aid NSW is increasingly using warm referrals both externally and internally. For instance, the Legal Aid NSW Domestic Violence Unit is a specialist service that provides, amongst other things, duty assistance to victims of domestic violence at Apprehended Domestic Violence Order lists at select Local Courts. It has referral protocols with the Civil Law Division of Legal Aid NSW, as victims of domestic violence will typically have civil law needs, such as housing, social security, debt and immigration law problems.

CLSAC also maintains a 'no wrong door' policy. The service maintains relationships with legal and non-legal services so that clients are provided with the legal and non-legal assistance they require. CLSAC has a protocol with the Energy and Water Ombudsman (**EWON**) for direct referrals of vulnerable Aboriginal clients. This referral protocol has assisted with resolution of issues about billing, access to hardship arrangements, as well as identifying and resolving systemic issues around unsolicited door-to-door sales occurring in breach of the Australian Consumer Law. CLSAC is also in the process of establishing a protocol with the Aboriginal Legal Service NSW/ACT (**ALS**) to ensure clients of the ALS are warm referred to Legal Aid NSW for triage, advice and assistance with civil law issues.

External dispute resolution and Ombudsman schemes

Legal Aid NSW is an active user of formal external dispute resolution schemes such as the Financial Ombudsman Service, the Credit Industry Ombudsman and EWON. We act on behalf of clients who cannot resolve disputes directly with financial services and energy and water providers. These schemes provide access to justice for many consumers who would not otherwise be able to access a remedy, in particular those who are vulnerable and/or in financial hardship. Importantly, these schemes are free for consumers, relatively easy to access and can make a binding decision against the trader.

As discussed below, we would strongly support the NSW Government establishing similar schemes to resolve disputes in other areas, including retail, tenancy, strata and unpaid council rates disputes.

In our view, there are certain essential characteristics to an EDR Ombudsman scheme that should be included in any new scheme:

Free to consumers: The scheme must be free to consumers. This is particularly important for consumers experiencing financial hardship.

Certainty of decision making: The ability of a consumer to achieve a binding decision against the trader in a no costs jurisdiction cannot be undervalued. Our experience in the financial services sector is that without EDR, many vulnerable and disadvantaged consumers would not have the resources or means to raise a dispute against the trader.

Accessible: The current financial ombudsman EDR schemes are relatively easy to access, allowing consumers to lodge disputes online or in writing. EDR schemes communicate with consumers through phone calls and written correspondence which is not only more convenient for consumers, but is also less intimidating than a formal court or Tribunal setting. An informal approach means it is accessible to self-represented consumers who typically have less resources and means than traders to deal with their dispute.

Independent: It is essential that consumers have the opportunity to have an independent party review their dispute. In our experience, EDR schemes broker flexible solutions, with regard to what is fair in all the circumstances.

Retail disputes

Currently consumers are encouraged to take retail disputes with businesses and suppliers to the NSW Civil and Administrative Tribunal (**NCAT**). This can present the following barriers for consumers:

- It is an adversarial model of dispute resolution, and consumers are not entitled to legal representation except in limited circumstances. Consumers represent themselves against the business or supplier, which can be intimidating and challenging, particularly for vulnerable consumers. In some situations this may deter consumers from taking their dispute further.
- The consumer is generally required to attend the Tribunal in person, although sometimes telephone hearings can be arranged.
- A filing fee is payable to commence the proceedings, although it is recognised this fee is modest.
- The time and cost to the consumer in pursuing a claim through the Tribunal can outweigh the benefit.
- Obtaining expert evidence can be difficult and expensive.

Case Study – Mohammed

Muhammed is a refugee from the Democratic Republic of Congo who is married with three children. Muhammed works as a pastor and does not earn a significant amount of money. Muhammed purchased a second-hand motor vehicle from a dealership, and signed up to a non-linked loan for approximately \$9,000 to finance the purchase. Less than three months after the purchase, the car broke down with a blown head gasket requiring the entire engine to be replaced. After repairs were done on the vehicle it broke down a second time with the cost of repair too expensive for Muhammed to cover.

With Legal Aid NSW's assistance, Muhammed has been attempting to resolve his dispute with the car dealer through NCAT for almost two years. Proceedings were originally commenced in March 2015 arguing the vehicle was not of acceptable quality. The Tribunal did not find in Muhammed's favour, but advice from counsel stated that

there was a significant legal error in the decision made. Consequently, Muhammed appealed the decision in July 2015. Due to various delays relating to the other party and the scheduling of the Tribunal, the matter was only full heard by the Appeal Panel in May 2016. Further requests for submissions were made in late 2016.

As at January 2017 the matter had still not received a decision. The process has required briefing of counsel, multiple submissions, three separate hearing dates and complex advocacy. This is something that a recently arrived refugee would struggle to navigate on their own. More importantly, it has been three years since the car was purchased and Muhammed has still not obtained a resolution to his dispute. He remains locked into a car loan, which accrues interest daily, for a car which is not roadworthy.

Legal Aid NSW supports the establishment of a retail ombudsman scheme. A retail ombudsman could resolve retail disputes quickly and at minimal cost to all parties. We support a retail ombudsman that is inquisitorial rather than adversarial, and which could be accessed online, similar to the Financial Ombudsman Service. The current UK model of retail ombudsman could be referenced for guidance. The scope of the retail ombudsman could be broad, as in the UK. In order to be effective, the ombudsman's decisions would need to be binding on businesses and suppliers.

In our experience, the frequent need for expert evidence in retail disputes presents financial and logistical challenges for consumers. This is most significant in disputes about motor vehicles. Consumers find it difficult and often expensive to source qualified experts, for example, motor mechanics or auto electricians, who are prepared to write a report that meets the requisite standard for tribunal or court proceedings.

We therefore suggest that government consider the creation of expert panels that could be industry funded and administered by state and territory fair trading bodies. The expert panel would need to include experts in the major cities as well as outer metropolitan and regional areas who could examine and test the motor vehicle and write a report for a set fee. Legal Aid NSW recommends reviewing the Motor Vehicle Disputes Tribunal that exists in New Zealand for guidance.

Tenancy disputes

Tenancy disputes place a considerable strain on the civil justice sector. There are around 50,000 tenancy related applications to NCAT a year. This accounts for 80 per cent of the applications received by the NCAT Consumer Division, which as a division receives around 80% of NCAT's total workload.¹⁸ Terminations for non-payment of rent account for around 42% of all applications in the tenancy list, and 54% of application in the social housing list.¹⁹

The principal issues in these matters are the arrears owing and the best method to resolve them, whether through termination or an agreement to repay the debt. There are obviously strong social and economic reasons to encourage the latter where possible. This is

¹⁸ NCAT annual report 2015-2016. NCAT Quarterly management report Jan 2016-March 2016.

¹⁹ NCAT Quarterly management report Jan 2016-March 2016.

reflected in the *Residential Tenancies Act 2010 (NSW) (RTA)*, which provides that where the tenant pays all the rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord, NCAT cannot make or enforce an order for termination.²⁰ Further, if the landlord does not agree to the repayment plan offered by the tenant, NCAT can put in place such an order instead of terminating the agreement if they think that it is justified in the circumstances.²¹

Legal Aid NSW would support an EDR ombudsman scheme for tenancy disputes and in particular those concerning unpaid rent. Resolving non-payment of rent cases through an EDR process rather than NCAT would result in savings for the justice system and help reduce homelessness. Cases could be decided on the papers based on a ledger supplied by the landlord and evidence from the tenant of their ability to repay the debt. This would encourage participation by tenants who would otherwise be too fearful to attend a NCAT hearing, or unable to take the time off work required to do so.

Case Study – Pam

Pam fell into rental arrears following the breakdown of her marriage. She was left with the sole care of two young children, one of whom was diagnosed with cancer. Soon after, Pam received a notice of termination and her landlord applied to NCAT for orders for termination and possession.

Pam was desperate to maintain stable housing and keep her children close to support networks. She contacted the real estate agent and made a lump sum payment towards arrears and told them the remaining arrears would be repaid with her next Centrelink payment. The agent told her that was “fine”. Pam assumed that because she had agreed with the agent to pay the money, the Tribunal application would be withdrawn. On the day of the hearing Pam was with her son as he received treatment for cancer. While at the hospital she received a text message from her real estate agent saying her tenancy was terminated and was given a date to vacate.

Legal Aid NSW successfully applied to have the decision set aside on Pam’s behalf. A repayment plan was then entered into so that Pam could stay in the property with her children.

Strata

Legal Aid NSW is seeing an increasing number of clients who have been pursued by owners corporations through the court system for unpaid strata levies. We note that according to the Law and Justice Foundation report, *Data insights in civil justice: NSW Local Court* (November 2016), disputes about strata levies made up approximately 3.8% of civil claim types. Whilst that percentage may not seem high, it represents 2,381

²⁰ RTA s89.

²¹ RTA s87.

finalised claims in relation to unpaid strata levies. Of those claims, 43% were finalised by an entering of default judgment against the owner. Once default judgment is entered, and an order made by the Local Court remains unsatisfied, bankruptcy proceedings can be commenced where the debt is more than \$5,000. This indicates that almost half of the owners being pursued for unpaid strata levies in Local Court proceedings are unable or unwilling to engage in the process. Where owners have engaged and defended the proceedings, more than one third have an order made against them that is lower than that claimed by the owners corporation.²²

Often strata managing agents engage solicitors, so the debt ultimately owed by the client increases by the cost of the legal services. The Law and Justice Foundation found that the average additional costs of proceedings to recover strata levies in the Local Court was \$1,070. What may have started as a debt that was serviceable by the client quickly turns into something they cannot pay, even by instalments. At that point the owners corporation can commence bankruptcy proceedings and the cost of those proceedings are also passed onto the client.

Legal Aid NSW advocates for the creation of a strata ombudsman, or an extension of NCAT's strata jurisdiction to cover unpaid levies. Unless an application had been made to either the ombudsman or NCAT, bankruptcy proceedings would not be permitted. The ombudsman or NCAT would be a free service to both the owners corporation and the owner, and would have the power to investigate claims of inaccurate debts being raised against owners, make findings as to the amount owed, and make binding orders, including orders to pay by instalment.

Case Study – Cathy

Cathy has owned a two bedroom unit in a small strata complex for about 10 years. A couple of years ago she fell behind in her strata levies, following some exceptional events in her life, including being diagnosed with cancer. The owners corporation, through the strata managing agent and lawyers engaged by the managing agent, sued Cathy for approximately \$4,000. Cathy tried to negotiate a payment plan but they would not accept payment by way of instalments, so Cathy applied to the Local Court which agreed to an instalment plan. Unfortunately, she was late with one payment and this meant that the instalment plan no longer operated and she owed the whole amount. She was sued again by the owners corporation for the unpaid levies and further levies that had accrued since the last judgment debt.

By the time Cathy came to Legal Aid NSW she owed approximately \$10,000 made up of unpaid levies and legal costs, and bankruptcy proceedings had been commenced against her to force her to sell the unit. She tried to obtain early release of her superannuation, but because she was losing her house because of unpaid levies, not because she had fallen behind in her mortgage payments, the superannuation fund refused. Legal Aid NSW assisted Cathy to successfully defend the bankruptcy

²² Law and Justice Foundation, *Data insights in civil justice: New South Wales Local Court*, November 2016, Table 11, p27.

application and the owners corporation have appealed. The owners corporation are now claiming Cathy owes approximately \$65,000. Less than \$8,000 is attributable to actual unpaid levies, and the remainder is for legal costs for the various proceedings in the Local Court and the Federal Court.

Unpaid council rates

Legal Aid NSW advises people seeking assistance in relation to local councils' management of overdue rates. Many of our clients with complex needs, including those with mental health issues and elderly clients, experience a great deal of stress when they are unable to pay their council rates. Frequently people seeking advice about overdue rates have been served with a statement of claim or are in a position where court proceedings have concluded and judgement has been entered against them. We have observed that many local councils are quick to commence debt recovery proceedings for unpaid rates, even when the amount claimed is low.

Case Study – John

John recently lost his job but is actively seeking full time employment. John's wife works part time and is pregnant with their third child. John and his wife have a mortgage on their property. They are experiencing difficulties in making their repayments and are on their second hardship variation through their bank. John is in arrears in respect of the local council rates and attempted to negotiate an instalment payment arrangement with the local council, without success. The local council commenced debt recovery proceedings in the Local Court.

In response to the issues observed in this area. Legal Aid NSW recommends the creation and implementation of a consistent, mandatory hardship policy across all local councils. This policy should give ratepayers the right to seek a hardship arrangement if they are experiencing financial hardship due to illness, unemployment, family breakdown or other reasonable cause. Short-term financial hardship is a common occurrence, and people should be given an opportunity to recover from their financial difficulties and then resume paying their rates. Longer-term financial hardship is also a reality for many ratepayers and these ratepayers should be given an opportunity to pay their council rates by installments pursuant to a weekly or monthly repayment arrangement. This opportunity should be available to all ratepayers, and not just those receiving a Centrelink benefit. Such a policy would bring local council regulation in line with best practice in the consumer credit, general insurance, telecommunications and energy sectors, where consumers are given protections when in financial hardship.²³ It would also promote efficiency in the

²³ See National Credit Code (Schedule 1 of the National Consumer Credit Protection Act 2009), General Insurance Code of Practice 2014 (Cth), Telecommunications Act 1997 (Cth) Schedule 3 ("Telecommunications Code of Practice 1997"), and all energy retailers must have a hardship policy approved by the Australian Energy Regulator:

justice system, and result in cost savings for local councils and rate payers, as it would keep these matters out of the court system.

Legal Aid NSW also recommends that the hardship policy be supported by an independent system of external review. This system should enable independent review of local councils' decisions on hardship applications. It should have the power to make a final decision on the hardship application that is binding on the local council. It should be free for rate payers to access. It could take the form of a specialist external dispute resolution scheme such as EWON or a specific Local Council ombudsman.

The efficiency of targeted legal assistance for disadvantaged people in addressing systemic issues

While Legal Aid NSW supports EDR schemes as a way of resolving civil law disputes, we also highlight the efficiency and effectiveness of direct, legally assisted negotiation on behalf of disadvantaged people. For instance, in the course of providing targeted casework to Aboriginal communities, Legal Aid NSW has identified systemic issues with the conduct of consumer lease companies that are affecting clients across NSW. In one instance, a company had engaged in unlicensed trading with consumers in Aboriginal communities by providing contracts for the rental of household good items which:

- failed to meet responsible lending obligations
- breached the 48% cap on interest
- failed to meet disclosure requirements
- required consumers to pay amounts which far exceeded the approximate retail value of the goods (upwards of 300% of the value of the goods), and
- engaged in misleading conduct about dealings with the two companies.

Legal Aid NSW approached this issue by conducting a bulk negotiation on behalf of over 50 clients with approximately 300 leases with the household lease company. We were able to negotiate substantial refunds, compensation and ownership of the goods for all our clients.

Legal Aid NSW also worked closely with the regulator, ASIC, to ensure an outcome across the affected market.

Although it would have been open to Legal Aid NSW and our clients to use EDR schemes such as FOS and CIO to resolve these disputes individually, using bulk negotiation enabled us to resolve numerous matters simultaneously in a much more efficient manner. Appropriate legal assistance services for disadvantaged groups can therefore help enable systemic issues to be identified and addressed, in a way that is not always possible with individuals acting unrepresented or engaging private solicitors. We would like to see the

ombudsman schemes be able to respond flexibly to systemic issues and the bulk settlement of matters such as these.

Other innovative ways of resolving civil law problems

Work and Development Order scheme

Legal Aid NSW considers the Work and Development Order (**WDO**) scheme²⁴ to be an innovative and effective way of resolving civil law problems that have a disproportionate impact on vulnerable citizens.

As the Department of Justice would be aware, the WDO scheme provides an alternative way for people experiencing disadvantage, including homelessness, mental illness, addiction or acute financial hardship, to clear unpaid fines while accessing the support services, training and therapeutic programs they need.

Over 2000 service providers (sponsors) have signed up to the scheme, clearing over \$70 million in fines debt. In the most recent evaluation, participating services highlighted the benefits of this 'joined up' approach to a common civil law problem:

- 95% reported that WDOs helped alleviate the stress and anxiety their clients experience from unpaid fines
- 88% said that WDOs helped clients develop new skills and experience
- 87% said that WDOs enable clients to address the factors that made it hard for them to pay or manage their debts in the first place
- 86% stated that WDOs improved client motivation to engaged support service and treatment.²⁵

Furthermore, driving sanctions for fine default are lifted when the WDO commences, which reduces the risk of secondary offending and entry into the criminal justice system.

A world-first, the WDO model will be introduced in Victoria and other states are investigating options to develop similar schemes.

Case Study – Mike

Mike has Hepatitis C and is HIV Positive. He has also been on a methadone program for the past six years. Due to his health status he cannot work and is receiving the DSP. Mike needed his licence to get to medical appointments but with \$5000 in unpaid fines he was suspended from driving. Mike's Legal Aid NSW lawyer explained that he could clear up to \$1000 a month off his debt by following a medical treatment plan. Mike's GP was already a WDO sponsor and with the help of Legal Aid NSW, opened a WDO for Mike at his next appointment. Mike is now debt free and driving.

²⁴ The Work and Development Order scheme is a multi-agency partnership between Legal Aid NSW, Office of State Revenue, Department of Justice and the Aboriginal Legal Service (NSW/ACT) Ltd.

²⁵ *Evaluation of the Work and Development Order Scheme*. Final report prepared for the Department of Justice, Inca Consulting (2015).

Adapting the WDO model in relation to rent arrears

Bridge Housing Limited has established a program, Hand Up, which adopts an innovative early intervention approach to rent arrears that has resulted in arrears below the sector benchmark. Legal Aid NSW assisted Bridge Housing with the design of this project, which is modelled on the WDO scheme. Hand Up targets tenants with very high levels of arrears or repeat incidents of arrears. It is open to those who are at immediate risk of losing their tenancy and entering homelessness because of vulnerabilities such as mental illness, intellectual disability, cognitive impairment, addiction, domestic violence or acute financial hardship.

Hand Up allows eligible tenants to satisfy rental arrears through mandatory financial counselling, and participation in other activities or treatment programs that will assist them to address the underlying causes of their arrears. This may include drug or alcohol treatment, counselling, legal advice, medical or mental health treatment, volunteer work, educational, vocational or life skills courses or formal mentoring programs.

The Hand Up initiative, like the WDO Scheme, is a circuit breaker. It reduces evictions for rent arrears and the associated costs to people, communities, homelessness services and the justice system. Early results from the pilot are very positive and a formal evaluation has commenced.

Other ideas to improve our civil justice system

Improvements to the fine enforcement system

The fine enforcement system imposes heavy sanctions for non-payment, including licence suspension, garnishee orders, property seizure and additional costs. While the enforcement process is an effective way to ensure that most people pay, it can cause unintended hardship for our clients.

Reforms such as the WDO scheme, Centrepay arrangements and the introduction of a protected amount on bank garnishees are welcomed by Legal Aid NSW. Opportunities for further reform include:

- Establishing a vulnerable persons' register. Vulnerable people with acute mental illness, cognitive impairment or intellectual disability often continue to incur penalty notices for minor offences because they cannot control their conduct or understand that it constitutes an offence. Although internal review, WDOs, payment plans (including Centrepay) and write off are available to address the debt, it is pointless and costly to continue to issue and enforce these fines. A vulnerable persons' register should be established by OSR, in partnership with advocacy groups, and made available to issuing authorities.
- Withdraw more fines at the penalty notice stage. OSR reports that only 3% of fines are successfully withdrawn under the internal review process, despite a broad discretion in section 24E of the *Fines Act 1996*. A more expansive approach to

internal review would reduce the number of fine recipients electing to challenge their fine in court.

- There is an implicit tension and potential conflict between OSR's debt collection role for its business partners and its review functions under the *Fines Act 1996*. Consideration should be given to establishing an external independent body to review OSR decision-making without recourse to the courts.
- Increased and more consistent use of cautions by authorised officers, particularly the police, to reduce the volume of fines issued for minor offences.

Addressing the civil law needs of children and young people

Young people make up a significant proportion of the NSW population, with those aged 12 – 25 years making up 18% of the state's population.²⁶ The child and youth population is diverse: 20% of young people in NSW are born overseas, and there are more Aboriginal young people living in NSW than in any other state and territory.

While measures to respond to the legal needs of young people have traditionally been focused on the areas of juvenile justice and child welfare, young people can experience a wide range of legal problems in the civil sphere that are unique to their age demographic. Findings from the *Legal Australia-Wide (LAW) Survey* identified that young people aged 15 – 24 years were least likely to seek advice for their legal problems, but were more likely to experience multiple legal problems than older age groups.

Young people have unique civil law issues, which include:

- problems relating to accessing entitlements and services, particularly for young people in the out of home care system and in the education system
- housing
- infringements of rights by authorities
- victims' compensation, and
- debt, including fines.

The legal issues most commonly experienced by clients of the Legal Aid NSW Children's Civil Law Service are as follows:

- complaints/advocacy around out of home care, including leaving care plans, reviewing placements that affect accommodation, and other administrative decisions
- human rights issues, such as complaints against authorities, particularly police
- fines

²⁶ <http://youth.nsw.gov.au/youth-snapshot/>

- issues relating to identification, including accessing birth certificates and other identification documents, which can act as barriers to accessing other services, such as Centrelink, housing or education
- victims' compensation, and
- social security, such as Centrelink debts and cut offs in payments.

While children and young people's access to legal services has improved greatly in the last 20 years, they have suffered a significant gap in the provision of legal services within the civil justice system. In Legal Aid NSW's experience, this is largely attributable to a lack of awareness of the civil law issues uniquely affecting young people. Young people or their support networks often do not recognise their civil law problems as being 'legal' in nature. This is amplified for young people who experience multiple forms of disadvantage and come from vulnerable backgrounds, such as being homeless or in the out of home care and juvenile justice systems.

Legal Aid NSW considers it essential that the NSW civil justice system provide a range of tailored and targeted responses to address the civil law needs of young people. Strategies around information and self-help education tools to resolve civil law problems are not always realistic for children and young people because of their youth, immaturity and lack of experience navigating commercial and bureaucratic systems. Any improvement in access to civil justice for children and young people must therefore include the provision of legal services, particularly to disadvantaged young people. These legal services must be flexible and adaptable to the young person, and include advocacy and representation services.

Conclusion

Legal Aid NSW strongly supports the development of a NSW Civil Justice Strategy as envisaged by the Consultation Paper. In order for such a strategy to succeed, the legal assistance sector needs to be adequately funded to assist those members of the community who experience difficulties in accessing the civil justice system.

Legal Aid NSW is well placed to provide this assistance through its state-wide network of offices and outreach locations. It is also able to connect people to its other services including crime, domestic violence and family law.

Legal Aid NSW focuses on providing high quality legal services that are tailored to the specific needs of disadvantaged communities in both facilitating access to those services and in responding to the needs of individual clients. Our civil lawyers are orientated to use their legal skills to solve legal problems that impact on people's lives. Legal Aid NSW would very much welcome the opportunity to expand those services as part of the implementation of the NSW Civil Justice Strategy.