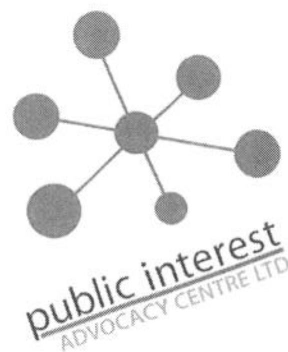

12 September 2012

Paul McKnight
Executive Director
NSW Law Reform Commission
Department of Attorney general and Justice
By email: paul_mcknight@agd.nsw.gov.au

Dear Mr McKnight

Public interest costs orders

We refer to your email dated 8 August 2012 and our previous submission, *A public interest approach to costs*, dated 19 August 2011. We welcome the opportunity to provide further submissions in relation to your questions, which we address below.

1. *Can you provide examples of public interest law cases that have arisen in NSW courts, apart from environmental matters in the Land and Environment Court, where the potential for costs orders and/or security for costs were significant issues that may have prevented the litigation?*

   The Public Interest Advocacy Centre (PIAC) is currently running a number of false imprisonment matters in the District and Supreme Courts against the NSW Police (State of NSW). Some relate to the police arresting and detaining young people for breach of bail in circumstances where those young people were no longer on bail, or where the bail condition, which formed the basis of their arrest, was no longer current. The public interest in these cases lies in ensuring that young people are not arrested or detained unlawfully due to systemic problems such as unreliable police computer information systems.

   Other PIAC matters relate to the police exceeding their statutory powers in a variety of circumstances. For these, there is a public interest in testing the powers of police pursuant to bail and other legislation, so that it is clear what the limits of police powers are. The public interest is considerably strengthened by the focus on children and young people, for whom detention should be a last resort.

   We consider that some of these cases would be eligible for the grant of a public interest costs order along the lines suggested by our previous submission.

   We have been fortunate to date that Legal Aid NSW has granted aid in many of these matters. However, legal aid is increasingly difficult to obtain and PIAC considers that, without a grant of aid or access to a public interest costs order, it would be very hard to proceed. Further, PIAC considers that

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public interest costs orders should be available in matters funded by Legal Aid.

One of the bail-related matters is a class action, which is not funded by Legal Aid. The lead applicant is a disadvantaged and vulnerable young person who has taken on significant personal risk in order to pursue not only his own claim, but that of the entire class. The costs risk in this class action very nearly prevented the litigation from going ahead.

In judicial review before the Supreme Court, we are unable to give specific examples due to client confidentiality. However, such matters are certainly threatened by the existence of significant costs risk. Seeking review of government decisions beyond tribunals where each party generally bears their own costs, is an option often ruled out by PIAC's clients at the outset, due to fear of an adverse costs order.

Appeals in state discrimination matters also face the same obstacle. Applicants with limited financial resources are often prevented from taking appeals beyond the Administrative Decisions Tribunal because of the risk of an adverse costs order.

2. *Is the existing case law in relation to costs and security for costs in public interest cases deficient or otherwise in need of clarification? Please provide examples from your experience.*

As stated in PIAC's previous submission, existing case law provides little protection for public interest applicants. The common law does not go far enough to ensure that applicants in public interest litigation are protected from the risk of adverse costs. Statutory provisions are required in order to establish a new public interests costs regime.

For example, PIAC's client, Mr Reynolds, brought a claim in 1999 seeking to establish negligence against the Katoomba RSL for breaching its duty of care to him as a known 'problem gambler'. The club cashed cheques for him despite him disclosing his gambling addiction and requesting that they not cash his cheques in future. Mr Reynold's claim failed, the Supreme Court finding that the club did not owe him a duty of care. Mr Reynolds was ordered to pay the costs of the club.

PIAC considers that this case may have been an appropriate one for a public interest costs order of the kind proposed in our previous submission. The case determined and clarified the duty of care (or lack thereof) between a provider of gambling services and 'problem gambler', albeit not in the way sought by Mr Reynolds. It had the character of test case proceedings. Absent a statutory public interest costs order regime, however, Mr Reynolds was ordered to pay costs.

Another example is PIAC's Stolen Generations litigation. PIAC filed a claim in the Supreme Court in the late 1990s on behalf of a member of the Stolen Generations, seeking compensation against the NSW Government for breach of fiduciary duties, negligence and breach of statutory duties arising from her removal and treatment in state care. The matter never made it to hearing, in part because of the costs risk associated with pursuing the claim.

Certainly this claim would have had a strong chance of obtaining a public interest costs order pursuant to the kind of statutory provisions supported in our previous submission. It involved the resolution of an important question of law – ie, the content and standard of the duty of care, if any, owed by the State of NSW to Aboriginal wards of the state like the applicant. It would also have determined, enforced or clarified an important right or

obligation affecting a significant sector of the community. The Joy Williams case, which ultimately tested the issue of compensation for members of the Stolen Generations in NSW, was decided by the Supreme Court in 1999. Ms Williams was unsuccessful and was ordered to pay costs.[1]

In the case of PIAC's Stolen Generations client, the risk of costs contributed to her decision to discontinue the proceedings. For other Stolen Generations clients, the risk of an adverse costs order meant that they never even considered proceeding.

Another example is a client of PIAC who, some years ago, sought to challenge the lawfulness of her detention for two weeks under the *Mental Health Act 2007* (NSW) as an involuntary patient. PIAC obtained advice from Senior Counsel, who advised that she had reasonable prospects of success in an action in unlawful imprisonment in the Supreme Court. The case would have tested the meaning of the term "protection from serious harm", which is part of the test for involuntary detention, and would have likely had an impact beyond just the applicant's case. The sole reason that the client did not proceed was on the basis of the costs risk involved.

These cases expose the deficiencies in the common law, which simply does not go far enough in recognising that departure from the usual costs rule is the preferred course in public interest cases.

3. *If litigation in the public interest were made a relevant factor in decisions about cost capping, could the costs capping provision in 42.4 of the UCPR provide satisfactorily for costs in public interest cases?*

Costs capping provisions are important to reduce the barriers for litigants bringing matters in the public interest. However, the way in which they are often currently utilised does not take into account where there is a wide disparity in the resources of opposing parties. Where there is a significant disparity, courts should be able to take into account the effect of a costs award on each party. Thus PIAC considers that courts should be able to make a wide range of orders, including that a different costs cap may apply to each party or that only the costs of one party be capped. This may be appropriate in certain cases where, for example, the applicant can prove, in addition to public interest, that it has a meritorious case but cannot afford to pay costs, and the respondent is a government agency or corporation with deep pockets. It is not clear whether Rule 42.4 of the Uniform Civil Procedure Rules provides for such flexibility.

Further, we consider that the provisions relating to public interest costs orders and cost capping should be located in legislation, with an objects clause that clearly states that the intention of the legislation is to assist the initiation and conduct of litigation that affects the community or a significant section of the community or that will develop the law.

We did not attend the consultation meeting hosted by you today in relation to security for costs, as our submissions have been limited to public interest costs orders and costs capping, however we are aware that the following question was raised, which we would also like to comment on.

4. *If courts could make costs orders in cases where a lawyer is acting pro bono, would you approve of the proceeds of pro bono costs orders being directed to a public interest legal*

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1 *Williams v The Minister, Aboriginal Land Rights Act 1983 and Anor* [1999] NSWSC 843 (26 August 1999).

agency such as PILCH, or a similar organisation, to be applied to further pro bono litigation?

PIAC would support such an approach, however we consider that this would complement rather than replace a public interest fund, of the kind raised in the NSW Law Reform Commission's Consultation Paper 13 and supported in PIAC's previous submission. While one focuses on facilitating *pro bono* representation, the other focuses on removing barriers to public interest litigation.

Please do not hesitate to contact me regarding the above.

Yours sincerely

Alexis Goodstone
Principal Solicitor