

SECURITY FOR COSTS AND ASSOCIATED COSTS ORDERS

**Submission on behalf of Legal Aid NSW
to the NSW Law Reform Commission in response to Consultation Paper No.13**

25 August 2011

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 economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres.

Our civil law program provides legal advice, minor assistance, duty and casework services through its Central Sydney office and 13 smaller practices in regional offices. During the financial year 2009-2010, the civil law program provided legal representation in 1,727 cases (of which 1,197 cases were conducted in-house and 530 cases were assigned to private legal practitioners).

Background

The NSW Law Reform Commission is inquiring into and reporting on whether the law and practice relating to security for costs and to associated costs orders (such as protective costs orders and public interest orders) strikes an appropriate balance between protecting a plaintiff's right to pursue a legitimate claim (regardless of their means) against ensuring that a defendant is not unduly exposed to the costs of defending that litigation.

In addition to other issues, the Commission is to consider whether the law and practice operates appropriately in the case of plaintiffs who are supported by legal aid.

The NSW Law Reform Commission Consultation Paper No.13 introduces the relevant issues in Chapter 1 and elaborates them in Chapters 2 to 5; the Consultation Paper also sets out a number of questions for consideration, grouped under each chapter and numbered from Question number 2.1 to Question number 5.11.

Submission by Legal Aid NSW

Legal Aid NSW will be setting out below comments and submissions in relation to particular paragraphs or questions only and it can be assumed that we have no comments or particular viewpoints in relation to the other paragraphs or questions.

Chapter 1: Introduction

Paragraph 1.13

Legal Aid NSW supports the importance of access to justice, and the public interest in allowing everyone, including those with limited financial resources, access to the courts. Legal Aid NSW particularly supports the legal rights of those who are financially or socially disadvantaged. It is important to ensure that orders for security for costs do not unduly restrict the access to justice of those with limited financial means.

Paragraph 1.44

While it is correct that legal aid is available **for all applicants** only in the limited types of matters listed, legal aid is also available for a wider range of matters for those applicants who are considered to be at special disadvantage (Legal Aid NSW Policy Online Chapter 6.25).

An applicant is at special disadvantage if the applicant is a child or acting on behalf of a child; or they are a person who has substantial difficulty in dealing with the legal system because of a substantial psychiatric condition, developmental disability, intellectual disability, or physical disability.

In addition, legal aid is also available for a range of matters under Commonwealth law (Legal Aid NSW Policy Online Chapter 6.19 to 6.24).

Furthermore, Legal Aid NSW provides advice and minor assistance services to many persons who may not qualify for a grant of legal aid, in order to assist them in dealing with their legal problems; however, such advice and minor assistance services do not provide the protection from adverse costs orders that arises under a grant of legal aid.

Paragraph 1.45

The imposition of an initial contribution on any particular applicant would depend on the application of the Legal Aid NSW means test to the applicant's circumstances. The imposition of a final contribution would be determined by an assessment of the applicant's financial circumstances at the conclusion of the legal proceedings, including whether the legally aided person recovered any property or money as a result of the legally aided proceedings (Legal Aid NSW Policy Online Chapter 10.5).

The objectives of Legal Aid NSW in requiring contributions are:

- to recoup in appropriate circumstances monies towards the costs and expenses incurred in providing legal assistance, so as to maximise the amount of legal aid available; and
- to communicate to clients and the general community that the provision of legal aid services involves costs and is not free.

Chapter 2: Jurisdiction to order security for costs

Question 2.2

Legal Aid NSW agrees with the proposal that the UCPR r.42.21 (1) (a) be amended to refer to a plaintiff ordinarily resident outside Australia rather than one outside New South Wales. It is not appropriate for restrictions to be placed on litigants from other states of Australia, given that the legal sector is moving towards a national legal profession and greater uniformity of national legislation in many areas.

Paragraphs 2.74 to 2.77

Please refer to comments made below in relation to Chapter 4, which deals with the issue of 'public interest'.

Chapter 3: Plaintiffs assisted by particular forms of costs agreements

Paragraph 3.86

Please refer to the comments made above in relation to paragraphs 1.44 and 1.45.

Paragraph 3.87

The effect of section 42 of the *Legal Aid Commission Act 1979* is to allow a costs order to be made in favour of a legally assisted person, which would enable the legally assisted person to recover costs; the costs recovered would be used to reimburse Legal Aid NSW for the costs of legal services provided.

It also allows for adverse costs orders to be made against such legally assisted persons as if they were not legally assisted persons. The operation of any such adverse costs order is, however, subject to section 47, as noted below.

Paragraph 3.88

The other party to legally aided proceedings is notified of the existence of a grant of legal aid, as required under section 34(6) of the *Legal Aid Commission Act 1979*; such notice would contain a reference to the effect of section 47.

The description of the operation of section 47 is correct, except that in relation to costs orders made in federal matters, the legally assisted person may be liable to pay any adverse costs orders over the limit of \$15,000 payable by Legal Aid NSW.

Paragraph 3.89

The ruling in *Rajski's* case is noted; however, Legal Aid NSW is not aware of any cases in which an order for security for costs has been made in relation to a legally assisted plaintiff.

Question 3.7

Legal Aid NSW is of the view that the law and practice on security for costs apply satisfactorily in relation to legally assisted plaintiffs.

Paragraphs 3.91 to 3.93

The issues raised in these paragraphs (based on a Preliminary Submission by the NSW Bar Association) are not directly relevant to the terms of reference of this inquiry into security for costs orders. If the Law Reform Commission were to recommend further consideration of these proposals, Legal Aid NSW would appreciate the opportunity to provide some more detailed and considered advice on their implications.

Chapter 4: Public interest and protective costs orders

Paragraph 4.7

The policies and guidelines for eligibility for legal aid contain several references to the term "public interest" particularly in relation to:

- public interest environmental law matters;
- public interest human rights matters; and
- coronial inquests.

In addition, the term "public interest" is also used in guidelines relating to the means test, contributions and specific criminal law matters. There are also guiding principles adopted by Legal Aid NSW for use in interpreting the term "public interest" which are referred to in paragraph 4.48.

Paragraph 4.66

It is not quite correct to state that there are no funding schemes in New South Wales that provide financial assistance to persons who bring public interest proceedings. Legal Aid NSW provides grants of legal aid in public interest environmental law and human rights matters (as noted above). These are, however, very limited funds and any provision to extend the powers of a court or tribunal to make orders for costs to be paid by Legal Aid NSW in relation to matters funded from either of these funds

would have the effect of further restricting the availability of legal assistance in public interest matters.

Paragraph 4.82

An applicant who is granted legal aid would have the benefit of an indemnity against adverse costs orders (under section 47 of the *Legal Aid Commission Act 1979*). In addition the other party to the legal proceedings would be able to recover its costs under any costs orders made in its favour, payable by Legal Aid NSW subject to the limitation of the maximum amount of \$15,000.

The importance of the indemnity against adverse costs orders under section 47 in public interest environmental law matters was noted by Basten JA in the case of *Delta Electricity v Blue Mountains Conservation Society Inc [2010] NSWCA 263* where he said:

"The principle that any person may bring proceedings to prevent a breach or threatened breach of environmental protection laws will be seriously undermined if some protection against large costs bills is not available..... Public – minded citizens may well be able to obtain donations of time and expertise from professional witnesses and lawyers, but will find it less easy to raise funds to meet the costs of the other party."

Conclusion

Thank you for the opportunity to provide comments on the Consultation Paper. Should you have any queries in relation to any aspect of this submission, please contact Lalitha Raman, Solicitor, Legal Policy Branch.

Alan Kirkland
Chief Executive Officer