Productivity Commission Draft Report
Access to Justice Arrangements

1. Public purpose funds

Information request 7.4 – How should money from 'public purpose' funds be most effectively used?

The New South Wales Public Purpose Fund (NSW PPF) is established under the *Legal Profession Act 2004* (NSW) (LPA NSW). The NSW PPF is managed and controlled by four Trustees: three are appointed by the Attorney General (two from the Law Society of New South Wales Council; one with appropriate qualifications and experience to act as a trustee); and the fourth is the Director-General of the NSW Department of Police and Justice.

The Trustees must, with the approval of the Director-General, make payments from the NSW PPF to the Law Society Council and the Bar Council for the performance of regulatory and disciplinary functions under the LPA NSW. In addition, the Trustees may, with the concurrence of the Attorney General, make discretionary payments for:

- the supplementation of the Legal Aid Fund, Fidelity Fund, and Law and Justice Foundation Fund
- the promotion and furtherance of legal education in New South Wales
- the advancement, improvement and extension of the legal education of members of the community
- the conduct of research into the law, the legal system, law reform and the legal profession and into their impact on the community
- the furtherance of law reform
- the establishment and improvement of law libraries and the expansion of the community's access to legal information
- the collection, assessment and dissemination of information relating to legal education, the law, the legal system, law reform, the legal profession and legal services
- the encouragement, sponsorship or support of projects aimed at facilitating access to legal information and legal services
- the improvement of the access of economically or socially disadvantaged people to the legal system, legal information or legal services.

The Law Society of NSW administers the NSW PPF on behalf of, and in accordance with the directions of, the Trustees. The primary source of PPF NSW revenue is interest received from solicitors' trust accounts kept in NSW.

Funding for regulatory activities

The Law Society of NSW has a statutory obligation to maintain and improve professional standards of the legal profession in NSW. Under its powers found in Chapter 4 and Part 2.2 of the LPA NSW, the Law Society's Professional Standards Department investigates complaints which have been made against solicitors and associates of law practices and investigates allegations of unqualified practice. Many of the complaints dealt with by the Professional Standards Department involve serious or complex conduct issues and necessitate thorough, detailed investigation and reporting to the Professional Conduct Committee. The Department also performs an important litigation role should a solicitor be referred to the Administrative Decisions Tribunal or court.

The work of the Professional Standards Department is much wider than just investigation and litigation of complaints; it also provides advice, assistance and education to the profession through its ethics, costs and regulatory compliance sections. It deals with show cause events, external investigations, the recovery of regulatory costs and has a role in monitoring compliance. Under the co-regulatory scheme, the Department also works closely with the NSW Office of the Legal Services Commissioner on complaints, reviews, policy development and streamlining the internal administrative processes of both offices to ensure compatibility.

It is essential that the NSW PPF continues to fund the performance of regulatory and disciplinary functions as required by the NSW LPA. These activities are undertaken to ensure the integrity of the profession and the preservation of public confidence in professional standards. Ultimately, regulation funding provided to the Law Society from the NSW PPF protects members of the public who are consumers of legal services. It must also be recognised that the NSW PPF draws its revenue from clients who pay money into solicitors' trust accounts. It is therefore appropriate that this money is used to fund regulatory activities which are for the protection of, and directly benefit, those consumers.

Viability of the NSW PPF

The Law Society of NSW is concerned that there has recently been a significant decline in the NSW PPF's capital reserves. Its accounts show it has been operating in deficit since 2009. This is primarily due to decreased investment returns as a result of the downturn in the global economic market combined with an increase in payments being made from the fund on a discretionary basis. In the last accounting year, more than 75% of payments made from the NSW PPF were discretionary payments to the NSW Legal Aid Office. Other significant beneficiaries include Community Legal Centres, the Law & Justice Foundation of NSW and LawAccess.

The Law Society of NSW has called upon the NSW Attorney General to review the way in which distributions are made from the NSW PPF in light of the diminution of its capital reserves and the need to ensure the long term viability of the fund. The Law Society has consistently maintained that Treasury should fund Legal Aid as a core priority of government. There should be an acceptance by Governments, both State and Federal, that additional legal aid funding is urgently required. The PPF should not be used as a default funding mechanism for legal aid.

2. Professional indemnity insurance

Draft recommendation 7.3 – State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority (APRA).

In NSW, solicitors are required to have the benefit of a professional indemnity insurance policy approved by the Attorney General. There is currently only one approved professional indemnity provider in NSW. However, there is nothing to prevent the Attorney General from approving other insurance policies.

The approved insurance policy is available from LawCover, an APRA-regulated insurance company. LawCover underwrites compulsory professional indemnity insurance for solicitors, underwrites additional top-up insurance in addition to the

compulsory layer, handles claims and potential claims against insured solicitors and helps solicitors to minimise the risk of claims being made against them. Although the Law Society of NSW is responsible for appointing the members of LawCover's Board, the activities of LawCover are not controlled by the Law Society. It operates independently to provide a fully confidential service to solicitors.

There is a significant public interest in legal practitioners holding adequate professional indemnity insurance to ensure that all users of legal services are compensated for losses they suffer as a result of a breach of a legal practitioner's professional duty. The Law Society has serious concerns that a deregulated insurance market would not offer adequate protection to the public, particularly in circumstances where a solicitors' insurer collapsed or ceased to operate. The Law Society is also concerned that premiums set by commercial insurers in a deregulated market could be expected to exclude solicitors from the market as insurers will pick and choose firms with the lowest risk profiles. This would disproportionately impact on sole practitioners and small law firms and deter solicitors from practicing in high risk areas of practice.

The benefits of LawCover's policy include cover against almost all civil liability, cover for an unlimited number of claims (but subject to a ceiling on the total cost of claims), cover provided for whole firms including non-solicitor employees, the absence of a disclosure requirement as a condition of indemnity and protection for innocent partners. LawCover indemnifies practitioners after they have stopped practising without the need for them to continue to hold insurance (known as "run off" cover). LawCover has built its capital reserves to meet regulatory requirements and to provide a buffer that can be used to soften the impact on the profession of future premium increases resulting in spikes in claim costs or hardening of the reinsurance market. Average premiums paid by firms have remained relatively stable since 2004.

The Law Society submits that the market should only be deregulated if cheaper premiums could be provided by insurers who provide the same conditions as LawCover. In particular, arrangements would have to be made in the event that an insurer ceased to operate as a claim against a lawyer may not arise until several years after they have stopped practicing. This means that lawyers require insurance that provides cover after a person ceases to practice. However, most insurance policies apply only to claims made during their currency, rather than acts which occur while they are in force. Insurers would also need to accept claims even if no disclosure had been made by the solicitor.

3. Practising certificates

Draft recommendation 23.1 – Those jurisdictions that have not already done so should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a CLC or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in QLD. For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the past three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.

As noted on page 732 of the draft report, section 47 of the Uniform Law permits the holder of a practising certificate to engage in legal practice as a volunteer at a community legal service or otherwise on a pro bono basis. For the purposes of the Uniform Law, a practitioner provides legal services on a pro bono basis where:

- the practitioner, without fee, gain or reward or at a reduced fee, advises or represents a client in cases where:
    - the client would not otherwise have access to legal services, or
    - the client's case raises a wider issue of public interest
- the practitioner is involved in free community legal education or law reform, or
- the practitioner is involved in the giving of free legal advice or representation to charitable and community organisations

Section 38 of the Legal Profession Uniform Law Application Bill 2014 (NSW) provides that, in NSW, the fee payable for the grant or renewal of a practising certificate is determined by the Law Society Council and approved by the Attorney General. The Council may determine different practising certificate fees according to different factors and may waive or postpone payment of the fee. Subject to local regulations (if any), the Council is to determine the fee on a cost recovery basis, with the fee being such amount as is required from time to time for the purposes of recovering costs of or associated with the regulatory functions of the Council or the Law Society.

The Law Society of NSW actively promotes and facilitates pro bono services in NSW. The Law Society's Pro Bono Scheme, established in 1992, refers eligible members of the community needing legal assistance to firms willing to provide legal services on a free or substantially reduced fee basis. The Scheme also provides legal assistance on an 'in-house' basis for eligible applicants. The Law Society's Pro Bono Policy encourages members to provide pro bono services as part of their wider professional responsibility. Any holder of a practising certificate in NSW is entitled to engage in legal practice as a volunteer providing pro bono legal services through a law practice or under an arrangement approved by the Law Society Council.

In principle, the Law Society does not oppose the introduction of free practising certificates for retired or career break lawyers, limited to the provision of pro bono services either through Community Legal Centres or a project approved by the National Pro Bono Resource Centre. However, to provide legal services to the public, a solicitor must be covered by professional indemnity insurance, contribute to the fidelity fund scheme and comply with continuing education requirements. Consumers enjoy a level of protection in their dealings with the legal profession though these mechanisms. Consideration would need to be given as to whether or not lawyers holding a free voluntary practising certificate should comply with these regulatory obligations as well.

Extract from page 231 of the draft report – While the Commission appreciates the importance of an independent legal profession, the role of some professional associations in granting (and restricting) practising certificates, in the first instance, appears to duplicate elements of the admission process (such as 'fit and proper person' tests), creating burdens upon applicants as well as those administering the duplicate tests. The Commission considers that it is worth exploring whether other jurisdictions should adopt the consolidated model of administering admission and practising certificates (as in WA), or if regulatory oversight of a professional association (as in Victoria) is an appropriate balance.

To be eligible for admission as a solicitor in NSW, an individual must be over 18 years of age, have completed the required academic and Practical Legal Training requirements. An individual must also be a 'fit and proper person'. The admission process is administered by the Legal Profession Admission Board. Having met the eligibility and suitability requirements for admission, in order to be eligible to practice as a solicitor in NSW, an individual must be admitted to the profession in the

Supreme Court of NSW. This is a one-time only application. Upon gaining admission as a solicitor, a person is then eligible to apply for a practising certificate from the Law Society of NSW. This needs to be renewed annually.

The allocation of these functions was considered in detail during the development of the Legal Profession Uniform Law Application Bill 2014 (NSW) and the existing allocation of these activities was considered appropriate. The value derived from the integration within the Law Society of licensing and compliance functions should not be under-estimated. The continuous monitoring of licensing requirements, such as insurance and continuing legal education, allows the exercise of compliance functions to be informed by licensing data as appropriate.

4. Legal profession regulation

Information request 7.1 – Which aspects of legal profession regulation present the greatest obstacles to the profession? Are there 'best practice' jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

The Law Society of NSW and the legal profession in NSW has been involved in a long and extensive process of negotiation associated with the development of the Legal Profession Uniform Law Bill 2014, that has come about as a result of recommendations stemming from COAG's National Legal Profession Reform Taskforce in 2011.

The Law Society of NSW has consistently supported regulation of the profession which is effective and affordable from the perspectives of legal service providers, consumers and regulators. In particular, the Law Society is of the view that there should be a national regulatory framework for regulation, with common standards applied consistently by State and Territory regulatory bodies operating locally. We believe that this is the most effective and efficient model for delivering a truly national system for legal services regulation. Work is underway on implementation of the Uniform Law in NSW and we are keen to see this progress and extend to other states and territories.

Some of the issues covered by the work of that Taskforce and the subsequent development of the legislation have been revisited by the Productivity Commission, such as the model of administering admission and practising certificates. While the Law Society welcomes recommendations contained in the draft report which support the introduction of Uniform Law provisions in other states and territories, we are concerned to avoid any amendments to the new regulatory regime at this late stage.

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CHAPTER 8: ALTERNATIVE DISPUTE RESOLUTION

Draft recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.

The Law Society's Dispute Resolution Committee supports this recommendation.

Information request 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to $50,000). What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions? The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

The Law Society's Dispute Resolution Committee is of the view that there is merit in courts and tribunals making mediation mandatory, but does not support a system which is rigidly mandatory. The Committee considers that the best approach is to make mediation the default position in all matters, with judicial discretion to vary this position in appropriate circumstances, for example, if neither party wants to attend mediation or there is a risk of harm or undue cost. This would encourage parties to consider alternative dispute resolution at an early stage and is more or less the approach taken in the Administrative Appeals Tribunal. The Committee notes that if such an approach were adopted, practitioners, court staff and the judiciary would require appropriate education and training.

The Committee submits that the amount in dispute is an arbitrary and artificial indicator of suitability for alternative dispute resolution. Some low value cases are very complex, some high value cases are very simple. The savings are more in more complex than less complex cases. The Committee suggests that a better approach would be to have experts in alternative dispute resolution triage cases that get to court to identifying the best alternative dispute resolution option. This has been trialed by the Federal Court in Sydney with a settlement Registrar sitting one day per week. Other examples of targeted models are the Farm Debt Mediation, Retail Leasing and Workers Compensation. The Committee notes that consideration is being given to the using these models in other areas including debt recovery (for example, where banks seek to enforce securities), small business disputes, partnership and stakeholder disputes, defamation, estate disputes and personal injury disputes (so long as there is appropriate pre-suit information). In the Supreme Court of NSW, all proceedings involving family provision applications must be mediated unless the court orders otherwise.

Draft recommendation 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publically reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

The Law Society's Dispute Resolution Committee supports this recommendation.

Draft recommendation 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

The Law Society's Dispute Resolution Committee supports this recommendation and notes that NADRAC's Guide to Dispute Resolution is a useful model. The Committee considers that education is an essential requirement to facilitate the more widespread use of alternative dispute resolution.

Draft recommendation 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

The Law Society's Dispute Resolution Committee supports this recommendation and notes that before such a recommendation is adopted, appropriate training would need to be provided to the staff within the relevant organisations and courts, including the judiciary. In the Committee' view, a facilitated and collaborative approach to the process of dispute resolution can have enormous benefits as is the experience of the Administrative Appeals Tribunal.

Draft recommendation 8.5

Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics. Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

The Law Society's Dispute Resolution Committee supports this recommendation. A copy of the Committee's recent letter to the Council of Australian Law Deans is attached.

Draft recommendation 8.6

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

The Law Society's Dispute Resolution Committee supports this recommendation and notes that the Mediator Standards Board is progressing this issue.

CHAPTER 9: OMBUDSMEN AND OTHER COMPLAINT MECHANISMS

Draft recommendation 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

- **more prominent publishing of which ombudsmen are available and what matters they deal with**
- **the requirement on service providers to inform consumers about avenues for dispute resolution**
- **information being made available to providers of referral and legal assistance services.**

Draft recommendation 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

Draft recommendation 9.3

In order to promote the effectiveness of government ombudsmen:

- **government agencies should be required to contribute to the cost of complaints lodged against them**
- **ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded**
- **government ombudsmen should be subject to performance benchmarking.**

Although this falls outside the area of expertise of the Dispute Resolution Committee, the Committee is of the view that the number of complaints handled by government ombudsman demonstrates that these services are useful.

CHAPTER 11: COURT PROCESSES

Draft recommendation 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- **the abolition of formal pleadings**
- **a focus on early identification of the real issues in dispute**
- **more tightly controlling the number of pre-trial appearances**
- **requiring strict observance of time limits**

The Law Society's Litigation Law and Practice Committee agrees that courts should focus on the early identification of the real issues in dispute, more tightly control the number of pre-trial appearances and require strict observance of time limits.

However, the Committee cautions against the abolition of formal pleadings. The primary function of pleadings is to:

- state the facts the parties intend to allege at the hearing to allow the other party a fair opportunity to meet the claim(s); and
- define the issues in the litigation, enabling the relevance and admissibility of evidence to be determined.[1]

In the Committee's view, pleadings assist in the early identification of the real issues in dispute which in turn helps to minimise costs.

The Law Society's Dispute Resolution Committee supports the views of the Litigation Law and Practice Committee and notes that court staff and the judiciary would need to be appropriately trained.

Draft recommendation 11.2

There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction. The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).

The Law Society's Dispute Resolution Committee supports this recommendation.

Draft recommendation 11.3

The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.

The Law Society's Dispute Resolution Committee supports this recommendation.

Draft recommendation 11.4

Courts that do not currently utilise an individual docket system for civil matters should more to this model unless reasons to do contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

The Law Society's Litigation Law and Practice Committee supports the recommendation that courts should adopt an individual docket system for civil matters. However, the Committee notes that this would be subject to the resources of the courts to do so.

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[1] The Practitioner's Guide to Civil Litigation, 3rd Edition, The Law Society of New South Wales (New South Wales Young Lawyers Civil Litigation Committee) 2010, p. 111

The Law Society's Dispute Resolution Committee also supports this recommendation and notes that court staff and the judiciary would need to be appropriately trained.

CHAPTER 12: DUTIES ON PARTIES

Draft recommendation 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

The Law Society's Dispute Resolution Committee considers that specific pre-action protocols may be appropriate for particular types of cases but notes that a one size fits all model would neither be useful nor acceptable to the legal profession or judiciary.

CHAPTER 23: PRO BONO SERVICES

The Law Society's Dispute Resolution Committee notes that pro bono services can and should be supported by pro bono alternative dispute resolution programs.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: DisputeResolution:RE:mv:825437

18 March 2014

Professor Stephen Graw
Chair, Council of Australian Law Deans
School of Law, James Cook University
Townsville QLD 4811

Dear Professor Graw,

Teaching Alternative Dispute Resolution in Australian Law Schools

I write to you on behalf of the Dispute Resolution Committee ("Committee) of the Law Society of New South Wales. The Committee is comprised of practising solicitors and nationally accredited mediators, and represents the Law Society on Alternative Dispute Resolution ("ADR") issues as they relate to the legal profession.

The Committee recognises that there has been ongoing discussion in many Australian Law Schools about the inclusion of ADR in law curricula. The Committee notes that eight out of twenty seven Australian Law Schools that responded to the recent National Alternative Dispute Resolution Advisory Council ("NADRAC") survey reported the inclusion of a mandatory ADR component in their law curriculum (either as a stand alone subject or as part of a core civil procedure subject where 50% or more of the subject content focuses on ADR), and twenty five Australian Law Schools reported that they offer ADR electives.[1]

The Committee commends these Law Schools for recognising the need for law students to undertake education in ADR during their undergraduate or JD law degrees. However, the Committee has concerns with the identified inconsistencies in teaching ADR amongst Law Schools which it believes should be uniform across Australia. In particular, the Committee is concerned that there are still some Law Schools that do not teach ADR as part of their undergraduate or JD programs. The Committee would like to encourage greater consistency in the provision of ADR subjects across all Australian Law Schools, and provides the following views in support of teaching ADR as a mandatory component of legal education:

1. There is a constantly increasing volume of legislation, court rules and regulations that require parties to actively try to resolve their disputes, either prior to going to court, or during court proceedings (eg *Civil Dispute Resolution Act 2011* (Cth)). Also, many government agencies, such as the Australian Taxation Office, have their own internal dispute resolution procedures which must be complied with by claimants.

[1] National Alternative Dispute Resolution Advisory Council, 'Teaching Alternative Dispute Resolution in Australian Law Schools', 2012.

2. With the advent of the National Legal Profession, there now arises a need for Law Schools, wherever they are situated, to provide ADR education and training to law students that will meet the requirements in all state and federal systems.

3. ADR is now in mainstream use in most civil jurisdictions and areas of legal practice. The Law Society supports this trend with the maintenance of its arbitrator and mediator panels. The Law Society also offers National Mediator Accreditation for lawyers trained in mediation, and Specialist Accreditation in Dispute Resolution for lawyers who have devoted more than 25% of their practice to representing clients in dispute resolution processes. The Law Society also offers the Family Law Settlement Service for family law property matters.

4. Specialisations in ADR confirm the need for legal practitioners to acquire specialist skills and experience in ADR to augment their relevant education in Law School. Research indicates there is a demand both from the profession and from students to gain ADR competencies.[2]

5. The Committee is of the view that the teaching of ADR in Law schools falls within the requirements of the Priestley 11, in that ADR is now an acknowledged part of civil practice and litigation, and is also a key element in case management, for matters for disposition either with or without court proceedings.

Given these developments in legal practice, it is important that ADR is adequately covered in the core civil procedure subject or is offered as a stand alone mandatory subject for all law students. Integration of ADR topics into other subjects, where appropriate (eg dispute resolution clauses in Contracts, and legally assisted family dispute resolution in Family Law) is optimal, and where students are seeking specialisation, advanced stand alone ADR electives are also recommended. The Committee would like to encourage all Law Schools to adopt this as a minimum standard.

Such steps would do much to address the issues identified in the NADRAC survey. At present it still remains likely that a considerable number of Australian law graduates are completing their law degree without any introduction to this essential part of legal practice, and the Committee believes that this should be rectified as soon as possible.

If you have any questions or comments in relation to this letter, please feel free to contact Menaka Venkata, Policy Lawyer for the Committee

Yours sincerely,

Ros Everett
President

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[2] Ibid.