Challenges for practice at the NSW Bar

By Tim Game SC

In this column I would like to concentrate on two major issues currently facing practice at the Bar, namely the parlous state of legal aid funding and the effect of the Government's restrictive compulsory third party regime on the rights of injured people, and also mention major initiatives in the area of advocacy training.

Legal Aid

In June I made a statement to the Bar in which I said that members should not feel that they have any obligation to take on legal aid briefs when they will not receive anything approaching adequate payment for work done. This involves not just wholly inadequate rates, but an entrenched failure to make proper allowance for work actually done, particularly in relation to preparation. These two features of the current system have a compounding negative effect.

The circumstances that led to that statement are well known to those who have regularly undertaken legal aid work. There has been no increase in the amount paid to private practitioners by Legal Aid since 2007 – there has not even been indexation for CPI increases over those twelve years, and in fact in 2012 (the last time there was a formal consultation regarding fees) there was actually a modest reduction in rates due to a reclassification of fee levels undertaken by Legal Aid NSW. Barristers undertaking legal aid work have seen at least a 20 per cent reduction in fees in real terms over the twelve year period from 2007. Accordingly, it is simply financially unsustainable for many barristers to spend the time and do all that is necessary to undertake legal aid work and properly prepare their clients' cases and satisfy their professional obligations in this regard.

The Association's position has received ongoing coverage in the media, and I have been gratified to receive many messages of support from members, which indicates the degree of concern about, and the seriousness of, this issue.

The impact of the issue on the administration of justice was exemplified by

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the judgment of Fagan J in *R v Munshizada; R v Danishyar; R v Baines* (No 2) [2019] NSWSC 834, which was handed down on 3 July.

In that matter his Honour vacated the date for a four month murder trial as a direct result of the inability of the accused to obtain defence counsel in a trial where Legal Aid fee scales would apply. In the course of the judgment his Honour said that the 'inability to secure the services of trial counsel at legal aid rates on reasonable notice for a long trial is a problem that requires urgent attention to enable this Court to do its work'.

His Honour noted that the Legal Aid Senior Criminal Law Solicitor in the Grants Division of Legal Aid NSW had 'provided a straightforward economic explanation' for the inability to secure counsel. This included that while barristers 'take on larger and longer legally-aided matters because of their commitment to justice', they 'cannot base their practice exclusively on legally-aided briefs otherwise they will not generate sufficient income to meet their overheads, chambers fees and generate sufficient income for their personal commitments…'. His Honour summarised the evidence of the solicitor that 'counsel's fees payable by Legal Aid are insufficient to secure representation for accused persons by professionals of the required standing and ability'. His Honour accepted that this 'systemic explanation' corroborated the evidence of the solicitors in the trial that the lack of representation was beyond the control of the accused.

This is not the only serious trial date that has had to be vacated because of the difficulty in securing counsel or securing a sufficient grant of legal aid. The Association is very concerned that these circumstances have become more frequent and will continue to have long term implications for the delivery of justice in this State. Without an urgent and substantive increase in legal aid rates for counsel, important criminal trials may proceed with either no representation or inadequate representation. Alternatively, they may be delayed with negative effects for parties and victims of crime.

More recently I have written to the Government and Legal Aid NSW urging them to approve an immediate increase in legal aid rates in order to address the current crisis in our criminal justice system.

I have also initiated a formal consultation process with Legal Aid NSW pursuant to section 39 of the *Legal Aid Commission Act 1979*. Under the Act, Legal Aid NSW is required to consult with and take account of the views of the Bar Association in respect of fees to be paid to barristers.

Briefly put, our position is that Legal Aid NSW is obliged to pay fair and equitable rates for work actually done, not, as is currently the

case, to maintain unsustainably low rates based on false assumptions about some kind of de minimis engagement by counsel in the case at hand.

The Association will continue to advocate strongly for a fair and equitable system of legal aid rates and I will keep members informed of developments regarding this crucial issue. I would urge members who have been involved in matters adversely affected by inadequate legal aid rates to bring them to the Association's attention.

Advocacy Training

The Bar Association is strongly committed to providing specialised ongoing training to support and hone the skills necessary for a successful practice at the bar. As part of this commitment, the Association has subsidised two new training programs aimed at promoting excellence in advocacy. The Association is the first independent state bar to offer its members the Vulnerable Witness Advocacy Program, which provides practical training in the sensitivities involved in dealing with vulnerable witnesses in Court.

The second program, the Advocacy Skills for Trial Advocates Workshop, is specifically aimed at barristers with 3-5 years' experience. This workshop will provide participants with the opportunity to hone their in-Court (criminal trial) advocacy skills.

The new programs will be held in October and November respectively.

CTP

Next I would like to say something about the Government's 2017 compulsory third party scheme. For some time, the Association has been advocating the need for change to the 2017 CTP scheme. Regulations made under the *Motor Accident Injuries Act 2017* operate on the basis of an excessively broad definition of 'minor injury', which means that people who are permanently injured in motor accidents can be denied access to common law rights and receive only a limited amount of statutory benefits. That may occur even in circumstances where their injuries mean that they are unable to resume their chosen occupation.

Data provided to the Association regarding the scheme indicates that claim levels are far lower than originally estimated and could justify a reduction in CTP premiums. To date, however, the Government does not appear to be prepared to consider an increase in benefits for the injured despite the low level of claims. Contrary to earlier suggestions by the Minister that if the scheme targets were exceeded the response would be an improvement in benefits, it appears that this is no longer the preferred option.

The Common Law Committee has been monitoring the situation as closely as it can, although the dearth of information (sought from government but not forthcoming) has meant that we have had to undertake our own work as to the underlying picture and future projections. On the basis of what we have seen, compared with earlier projections about uptake an excessive number of claims have been disposed of as minor injuries at an early stage (close to 60%). This means that far fewer cases will progress as damages claims even though injured motorists may have suffered what, in ordinary parlance, might be described as quite serious injuries. Depending on how one looks at it, this either leads to wildly inadequate benefits for injured motorists or excessive profits for insurers. The last comment is not an idle one given that information available to us going back to 2000 shows insurer profits running year after year in excess of 20%.

Although it is early days in the life of the 2017 CTP scheme, it appears to us that the lack of provision for proper legal advice at an early stage is one reason why claims are not being made, and determinations are not being challenged, after insurers have assessed particular injuries as minor.

A related issue involves the Government's proposal to establish a merged personal injury jurisdiction, which would involve a single tribunal to deal with matters currently heard by the Workers Compensation Commission and the Claims Assessment and Resolution Service. The Association is concerned to ensure that the proposal does not limit the current level of access of parties to the Courts. We are not aware of any particular problems regarding the number of matters involving work related accidents and motor accident schemes that proceed to Court, or of any disproportionate impact on the Courts in this regard. Nor are we aware of any significant delays in the District Court where most of these matters are heard. In those circumstances, we do not believe that it is necessary to place any part of the current jurisdiction of the Courts under the schemes within the proposed tribunal.

Together with senior members of the Common Law Committee, I have met with the Minister for Customer Service to pursue the Association's concerns regarding the 2017 CTP scheme and the merger proposal, and I will keep members informed regarding progress on these crucial issues affecting practice at the NSW Bar.

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