

Funding and Reform Processes

By Tim Game SC

Since the last edition of Bar News the Bar Association has held its annual election for Bar Council. A number of members have been re-elected and I would like to thank them for their continuing support. In addition, there are a number of new members elected to Bar Council and I welcome them and look forward to working with them.

In this column I would like to discuss some pressing issues for the profession and to update you on some developments.

Personal injury

For some time the Bar Council has been communicating to members its concerns about the CTP scheme. Of particular concern is the width of the definition of 'minor injury' which can result in people with significant and permanent injuries being entitled to only limited weekly and statutory benefits. Close to 60% of claims are being disposed of as minor injuries.

Another troubling development is looming. The State Government is considering a recommendation of the 2018 Standing Committee on Law and Justice Review of the Workers Compensation Scheme to "consolidate the workers compensation scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise".

This is not an occasion to review all aspects of this recommendation as we are awaiting a full proposal from the government. However, there is an overriding and significant aspect of this recommendation which appears to be integral to it.

Under the current system, in respect of unresolved work injury damages claims under the Workers Compensation Act 1987 and unresolved claims for damages under the *Motor Accidents Compensation Act 1999* (NSW) and the *Motor Accident Injuries Act*



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2017 (NSW), there is a process by which there can be a hearing on the merits before the Supreme or District Court together with the normal and appropriate rights of appeal to the Court of Appeal.

Matters that are determined by the Workers Compensation Commission are final. Any judicial review is limited to error of law on the face of the record or jurisdictional error or an appeal confined to a question of law.

The recommendation under consideration would apply to both CTP and work injury damages claims. Such a development on both of these fronts would be significant and adverse; eroding the entitlement to curial determination of important issues of liability and quantum. Further, the existing system whereby claims are heard in the Supreme

or District Court (after unsuccessful mediation) works well.

Given the significant rule of law implications from this recommendation this should be a matter of concern not just for the Minister concerned but also for the Attorney General.

Legal aid

As members know, the Association has consistently raised concerns about the adverse impacts of underfunding legal aid on access to justice and the quality of justice in NSW.

In November, the NSW Government announced an \$88 million injection into the state's chronically underfunded legal aid system. The funding increase will be delivered over four years. However, the \$88 million is only about one third of what Legal Aid NSW advised was urgently needed and it is not clear how this injection of funding will translate into legal aid fees.

While we welcome the funding announcement we will continue our statutory discussions with Legal Aid NSW under section 39 of the *Legal Aid Commission Act 1979* (NSW).

In the meantime, as I said earlier in the year, the current rates for legal aid work are parlously inadequate and members should not feel that they have any obligation to take on Legal Aid briefs when they will not receive anything like adequate payment for work done.

The other dimension to this whole problem is Commonwealth funding. The deeper problems with legal aid funding nationwide cannot be properly addressed unless the Commonwealth Government accepts its share of responsibility and restores its 50:50 funding arrangement with State Governments. The Commonwealth contribution is now down to approximately 30% and slated to further diminish in coming years.

Legal Assistance Referral Scheme and Duty Barristers Scheme

In November the Association celebrated the 25th anniversary of the Legal Assistance Referral Scheme (LARS) and Duty Barristers Scheme. During those 25 years LARS has processed over 6000 applications. The occasion was marked by a small ceremony at the Bar Association where Heather Sare, who has managed LARS for its entire 25 years, announced her retirement. I would like to thank Heather for all her work over those years as well as the many barristers who have given their time to this work.

This is important work and it allows members to help underprivileged members of our community. However, it is not, and cannot be, a replacement for a properly funded legal aid system and, importantly, LARS does not take cases unless legal aid has been refused.

The work of LARS has grown over the years. In addition to handing LARS referrals, the Bar Association also manages the Duty Barrister Scheme which operates at the Downing Centre and John Maddison Tower to assist the Local and District Courts. Members also support pro bono schemes operating in the Federal Court, the Full Bench of the Family Court of Australia, Federal Circuit Court, Land and Environment Court, the District Court of NSW and NCAT in its Anti-Discrimination list, as well as the Court of Appeal.

We hope to soon announce Heather's replacement. In recruiting for that position we have taken into account the growth in LARS referrals and Heather's feedback on the future of LARS and determined that it is now appropriate to recruit a practicing solicitor to the role who can brief counsel and appear as the solicitor on the record when required.

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Family law merger

Members will be aware of the Government's proposals in this area. Last year, the Federal Government introduced the Federal Circuit and Family Court of Australia Bill 2018 (Cth) and an accompanying transitional amendments bill into the 45th Parliament to seek to legislate its merger proposal. After opposition from the legal profession and key stakeholders, the Senate's Legal and Constitutional Affairs Committee inquired into the Merger Bills and recommended substantial amendment. The Merger Bills were not brought on for a vote in the Senate in April. The Merger Bills lapsed when Parliament was prorogued for the May Election.

In March the ALRC made recommendations in its Review of the Family Law System. Put very broadly these proposals include increasing collaboration, coordination and integration between Commonwealth family law jurisdiction and state and territory family support services, family violence and child protection systems. These recommendations have not been acted upon yet. The position of the NSW Bar Association has been that these long awaited recommendations must be given proper consideration and we maintain that position.

After re-election and re-appointment to the Ministry, Attorney-General Porter

indicated that structural reform of the family courts would be his "highest priority". The Attorney-General subsequently committed to reintroducing the Merger Bills before the end of 2019.

In the meantime a Joint Select Committee has been appointed to report on Australia's Family Law System, which is due to report in October 2020.

The Association's long-standing position has been to oppose the Government's merger proposal and this continues to be our position. Our position has been to maintain a specialist stand-alone Family Court and to bring into that court the Federal Circuit Court's family law jurisdiction and judicial officers as a separate division. The Association recently joined with more than 60 organisations in calling for the Government to abandon the flawed Family Court merger proposal and focus on strengthening the existing system and addressing important issues such as family violence. Other organisations signing that letter included the Law Council of Australia, the Women's Legal Services Australia, Community Legal Centres Australia and the National Aboriginal and Torres Strait Islander Legal Services.

We will continue to advocate our position in 2020.

Finally, may I take this opportunity to wish you and your families a restful break and a happy new year. I look forward to working with you in 2020. **BN**



NEW SOUTH WALES
BAR ASSOCIATION