



Consumer voices: Sustaining advocacy and research in Australia's new consumer policy framework

Submission by the NSW Legal Assistance Forum

Introduction

The NSW Legal Assistance Forum (NLAf) is a CEO-level Forum comprising:

- Legal Aid NSW;
- the Law Society of NSW;
- the NSW Bar Association;
- Community Legal Centres (NSW);
- the Aboriginal Legal Service (NSW/ACT);
- the Law and Justice Foundation of NSW;
- the Public Interest Law Clearing House NSW;
- the NSW Attorney General's Department;
- LawAccess NSW

The aim of NLAf is to continuously improve service delivery to socially and economically disadvantaged people through improved alignment of planning, program design and service delivery by providers of legal assistance services.

These aims are achieved through:

- collaboration;
- identifying and incorporating the best available research;
- promotion of dialogue and debate;
- consultation;
- recognising and responding to emerging issues, policy and law reform;
- promotion of co-operative arrangements for effective service delivery; and
- coordination with other State Legal Assistance Forums.

Further information on NLAf and its work is available at www.nlaf.org.au.

NLAf thanks the Australian Treasury for the opportunity to make the following submission in response to the Issues Paper: *Consumer voices: Sustaining advocacy and research in Australia's new consumer policy framework*.

Overview

NLAF welcomes the emphasis which the Productivity Commission Report places on the needs of disadvantaged consumers, reflected in the following Ministerial Council on Consumer Affairs operation objective for consumer policy

“to meet the needs of those consumers who are most vulnerable or who are at the greatest disadvantage”. (MCCA: 2008)

NLAF notes the disproportionate impact that practices such as predatory lending, consumer scams, unfair business practices, reverse mortgages, and debt agreements have on socially and economically disadvantaged consumers including people from culturally and linguistically diverse communities, people with disabilities, young people, Aboriginal and Torres Strait Islander people and older people.

The purpose of this submission is to comment on the following points raised in the Issues Paper, keeping in mind the Government’s stated emphasis on finding medium- to long-term solutions:

- A representative national peak consumer body;
- Support for consumer advocacy research; and
- Support for legal advocacy on consumer issues.

As will be outlined in the submission, NLAF is particularly concerned that the impact of the changes to consumer legislation for disadvantaged consumers will be significantly diluted if public legal assistance agencies do not have the capacity to meet legal need, undertake preventative work or support research projects.

A representative national peak consumer body

NLAF members support the recommendation made in the 2007 Productivity Commission Report that the Australian Government should support a national peak consumer body. This could be achieved by providing funding to the Consumer Federation of Australia (CFA), which already provides a forum for consumer organisations to share information and work collaboratively on submissions.

NLAF considers that a peak consumer body could play a valuable role in:

- collating the experience of frontline agencies;
- comparing that experience nationally and internationally;
- undertaking pro-active, independent research; and
- providing informed consumer input into the development and operation of the broader consumer protection framework.

A national body can be an important conduit to ensure that the ongoing concerns of consumers and the findings of research are effectively targeted to government. It can also be an effective mechanism for identifying emerging issues through its work with front-line consumer advocacy groups including financial counsellors and community legal centres. By linking the experience of those working with consumers to resolve individual consumer problems to a national peak body, there is a greatly enhanced

capacity to ensure that the experiences of front-line organisations are not lost due to their limited capacity to work at a systemic or national level.

Support for consumer advocacy research

NLAF membership includes all public legal assistance providers in NSW. These organisations are repositories of extensive information about current and emerging consumer law issues and trends relating to socially and economically disadvantaged people. They are able to analyse the nature of legal problems being presented by clients, and determine whether there are trends or patterns in those legal problems that indicate a systemic issue – whether substantive or procedural.

Legal Aid NSW has the largest civil law practice of all Legal Aid Commissions in Australia. In the financial year 2007-2008, Legal Aid NSW provided services to more than 184,800 clients with civil law matters including information, advice and representation (with a strong emphasis on consumer law). Over the same period, Legal Aid NSW funded approximately 300 consumer law litigation cases. Legal Aid NSW has recognised expertise in the area of consumer credit law and has made numerous submissions relating to the new consumer policy framework.

Legal Aid NSW co-ordinates the Co-operative Legal Service Delivery (CLSD) Program which is a partnership of regional legal service providers and community organisations operating across eight regions of NSW (South Coast, Central Coast, Central West, Broken Hill, Northern Rivers, Albury/Wagga, Central Tablelands and Hunter). Credit/debt issues have been identified as a growing area of legal need by CLSD partners.

Community Legal Centres NSW is the peak body for 39 community legal centres (CLCs) across NSW. All deal with consumer issues as part of their work. NSW, unlike Victoria, does not have a dedicated consumer law centre, although the Consumer Credit Legal Centre (CCLC) is a specialist in credit law including personal credit, debt and banking law and practice. The CCLC's Credit and Debt Hotline is often the first port of call for NSW consumers experiencing financial difficulties. CCLC provides legal advice, financial counselling, information and strategies, and referral to face-to-face financial counselling services and limited direct financial counselling. In 2008 CCLC took over 15,000 calls from consumers, an increase of 2,000 calls over 2007.

Another member of Community Legal Centres NSW, Redfern Legal Centre (RLC), has a Credit and Debt Service that has been active in a number of local, statewide and national networks, including the Consumer's Federation of Australia; the Financial Counsellors Association of NSW; and the Australian Financial Counsellors Credit Reform Association. In 2008/09 RLC provided services to over 1000 clients relating to credit/debt issues.

The Public Interest Advocacy Centre (PIAC) maintains a focus on consumer protection, in particular in the area of energy and water utilities, and for Aboriginal communities. It participates at a national level on the Consumer Consultative Committee to the Australian Competition and Consumer Commission.

The interaction that these service providers and other NLA members have with consumers facing legal issues provides a goldmine of information concerning consumer need and the impact of consumer legislation. There are however constraints on the ability of service providers to capture this information.

This issue could be addressed by additional funding targeted to information collection to better capture data and qualitative evidence from service providers about consumer needs and trends. The information collated by these organisations could then be provided to a national peak consumer body, thus providing an evidence-base for its work.

There is also the need to have a capacity for the national peak consumer body to work in partnership with front-line and specialist organisations to conduct research and public policy development projects. This linking of front-line and specialist organisations with a national peak body would greatly enhance the capacity of the proposed reforms to achieve improved public policy outcomes in the area of consumer law and to contribute to the work of government in this area.

Specialist community legal centres, such as PIAC and the CCLC are also able to conduct intensive legal research and policy development work on consumer law issues, if funded to do so. The benefit of having specialist services involved in this work is that they have an understanding of the characteristics and circumstances of their client community and have already-established relationships within that client community that they can utilise to ensure consumer input into the research.

An issue raised by the CCLC is that funding for research is usually project specific, rather than recurrent. The consequence of this is an increased administrative load, due to the application process, reporting requirements and the need to recruit new staff for each project. This in turn leads to a lack of flexibility to shift the focus of research to meet new consumer needs. It also works against the development of staff expertise and networks. The potential of CLCs to provide informed input into the policy debate is not being fully utilised for this reason.

NLA suggests that there is a particular need for research into areas such as:

- the behavioural economics of disadvantaged people;
- the high number of undefended claims in local courts;
- the unmet consumer law needs of disadvantaged people;
- whether particular suppliers and/or credit providers are disproportionately engaged in litigation against disadvantaged people;
- social cost-shifting issues associated with irresponsible lending practices;
- exclusion of social and economically disadvantaged people from the benefits of competition in markets; and
- the impacts of the increasing size of the internet-based market place on consumers and consumer protection across jurisdictional boundaries.

Support for Legal Advocacy on Consumer Issues

Consumer advocacy encompasses both advocacy relating to the interests of individual consumers as well as advocacy on systemic consumer issues.

In terms of both types of advocacy, there are issues relating to both the capacity of legal service providers, as well as access to their services.

Capacity of Legal Service Providers

On one level it can be said that the ability of people to access legal assistance is dependant on whether they can afford to pay for private legal assistance or are eligible to receive assistance from a government-funded public legal assistance service provider and able to access that assistance.

Public legal assistance services do not have the capacity to meet the current level of demand for services to address consumer issues.

Legal Aid NSW does not have sufficient funding to provide assistance to all people who meet eligibility requirements.

While Aboriginal-specific legal services are best placed to provide culturally appropriate legal services to Aboriginal people, they have never had sufficient funding to establish a civil law practice that could meet the needs of Aboriginal people. There is effectively only one Indigenous-specific consumer service in Australia, the Indigenous Consumer Advocacy Network (ICAN) based in north Queensland. Many of the issues it is dealing with are common across Aboriginal and Torres Strait Islander communities and ICAN has no internal legal capacity.

Community Legal Centres are operating under significant financial difficulties that impact on their capacity to retain staff and ability to perform core functions.

The National Children's and Youth Law Centre provides services across Australia and, as a member of the Consumer Consultative Committee to the Australian Competition and Consumer Commission, has some capacity to raise consumer law issues facing younger Australians. However, it is service with extremely limited capacity due to funding constraints.

It is also difficult to secure *pro bono* assistance for clients in credit and debt matters and other key consumer issues due to conflict of interest for large law firms, which often have financial institutions and major utility and service (including telecommunications, energy, water and insurance) providers as part of their client base. Some sole practitioners and medium firms provide *pro bono* assistance in these cases.

The reforms being introduced by the Commonwealth—while supported—will place even greater pressure on the demand for services. This is a result of factors including: the increase in the number of financial counsellors; legal aid grants under the new consumer credit regulation falling under Commonwealth Guidelines; and jurisdictional issues. These factors are further explained in the following section.

(i) Financial Counsellors

The Commonwealth Government has announced a doubling of funding for the Commonwealth Financial Counselling Program.

While this is a welcome development, the advice provided by additional financial counsellors will in turn increase the demand for low-cost legal advocacy services. This is because when informal negotiations with lenders stall or fail, financial counsellors need to work in partnership with those legal services to respond to repossession and other enforcement actions.

(ii) Legal Aid

From mid-2009, there will be a phased transfer of credit regulation and legislation from the states and territories to the Commonwealth. Under existing legal aid funding arrangements, this will mean that responsibility for funding legal aid in these matters would shift to the Commonwealth but at this stage it is not clear whether the Commonwealth will allocate additional funding for these matters.

(iii) Jurisdictional Issues

The transfer of consumer credit regulation to the Commonwealth has raised concerns about the need to use forums such as the Federal Court or a state or territory court to resolve disputes, without the option of recourse to a Tribunal. This will in turn lead to increased costs and reduce the numbers of people that public legal assistance providers are able to assist.

Impact of the Global Financial Crisis

The level of demand for advice on credit/debt issues in particular is also increasing as a result of unemployment resulting from the global financial crisis. An increase in demand for these services has been reported in all eight regions of NSW covered by the CLSD program. This is consistent with the results of a survey of regional NSW CLCs conducted by NLA in April 2009 which found that there had been an increase in credit/debt related matters in all CLCs. The North and Northwest CLC for example reported a 59 percent increase in credit debt matters between July 2008 and March 2009 compared to the same period the previous year.

Repossession proceedings in NSW have dramatically risen. Rates of mortgage defaults and repossessions are expected to rise with the expected increase in unemployment, as people with mortgages face sudden cuts in income and a lack of certainty about their ability to find further employment. As a consequence a greater number of people will fall within means test eligibility guidelines for legal aid and also turn to CLCs for advice.

Service providers are also reporting that advice is being sought for more complex matters. Without increased funding, these services will have to prioritise applications in some way, thus further limiting the proportion of people who can be assisted. It will also impact on their capacity to carry out other activities such as community legal education work and the preparation of submissions on policy issues.

Unmet Legal Need

The above also does not take into account levels of unmet legal need. For example there is evidence of significant levels of unmet legal need in Aboriginal communities. In a 2008 survey of Aboriginal people conducted by Professor Chris Cunneen, 19.9

percent of participants indicated that they that had experienced a consumer issue and 34.9 percent of participants identified debt-related problems. (Cunneen: 2008)

While some of these issues will be handled by Legal Aid (in 2007, 10.7 percent of applications by Aboriginal people to Legal Aid NSW related to consumer issues) or CLCs, Professor Cunneen's study found that many issues were also left unresolved due to a range of factors, including:

- a reluctance by Aboriginal people to use non-Aboriginal specific legal services;
- literacy issues and complexity of Legal Aid forms;
- issues involving conflict of interest by public legal service providers;
- issues around flexibility of service delivery.

In the course of its 2009 consultations with Aboriginal Communities in the Northern Rivers areas of NSW, NLAf's Working Group on the Civil Law Needs of Aboriginal People also identified significant unmet legal need in consumer law issues.

Leaving legal need unaddressed can of course lead to additional legal problems, such as criminal penalties for non-payment of fines. UK research has also established a link between legal and health (including mental health) issues (Pleasence 2009) leading to increased pressure on public services and cost to government. A survey conducted by Wesley Mission in 2006 reported the impacts of financial stress and/or indebtedness as including relationship breakdown, substance abuse, increased or frequent gambling and violence. (Wesley 2006)

Access to Legal Assistance

NLAf recognises that the capacity to provide legal assistance needs to be accompanied by strategies to ensure that people in need of that assistance are able to access the services. This is particularly the case in regional areas where issues of distance, transport and socio-economic factors can prevent persons accessing assistance. There is also strong evidence that many disadvantaged people seek to access legal assistance through non-legal service providers. (LJF 2006)

NLAf notes that the Law and Justice Foundation of NSW Access to Justice and Legal Needs research program includes an identification of barriers that impede or prevent access to justice for socially and economically disadvantaged people, including by legal representation. Once completed, this research will assist Legal Aid NSW, and other service providers, to develop innovative and flexible service delivery strategies aimed at maximising capacity to respond to their legal issues, including consumer law needs.

How can these issues be addressed?

There is a need for the Commonwealth Government to allocate increased funding to public legal assistance services to ensure that they are able to assist people who are economically and socially disadvantaged, including those living in rural, regional and remote areas, to access legal services to protect and enforce their legal rights and interest under the future consumer law framework.

Without this, the positive legislative changes to the consumer law framework will fail to deliver outcomes to many socially and economically disadvantaged people as they will not have access to legal services to address their needs.

This analysis in turn highlights a broader policy need for Government to consult with Legal Aid Commissions and CLCs when introducing legislation that may increase demand for legal assistance, with corresponding increases in funding where increased demand is identified.

Advocacy on consumer issues.

The funding constraints on public legal assistance agencies, together with their focus on individual advocacy, necessarily impinge on the capacity to advocate on wider consumer issues or to provide preventative advice to consumers.

That said, within the context of these restraints, NLA members have been active in preparing submissions on the new consumer framework, as well as in providing community legal education and information resources on consumer law issues. For example, Legal Aid NSW has developed a wide range of community legal education initiatives to complement case work and advice services, including mortgage stress forums, held in locations where there are high rates of mortgage delinquencies and repossessions. In 2009, Legal Aid NSW also released the *Mortgage Stress Handbook*, and will soon release an educational DVD, both of which are designed to assist people facing mortgage stress to become aware of their options and access help in order to deal with their situation. The focus of these resources is on early intervention in order to prevent home repossessions.

The CCLC is also active in providing face-to-face community legal education to financial counsellors and lawyers from other CLCs. It also has developed fact sheets, guides and sample letters on credit issues and has undertaken education campaigns through the media, conferences as well as provided input to policy through numerous submissions.

Advocacy on broader consumer issues is also achieved through test case-litigation and it is important that public legal assistance providers such as Legal Aid NSW, and specialist CLCs such as PIAC, have capacity to run these cases.

Again, consumer assistance organisations need the capacity to participate in policy debates and to both expand their community legal education programs and better target information to the needs of socially and economically disadvantaged people. The participation of casework services in conjunction with a national consumer peak body will ensure that the full range of views within the consumer landscape is heard in policy and law reform debates.

Conclusion

The Australian Government is undertaking far-reaching reform of the consumer law framework based in the recommendations made by the Productivity Commission's Report in 2008. The Commission has stated that many of the proposals have been

designed to benefit vulnerable and disadvantaged consumers, with some being primarily designed to assist these groups.

The positive potential of the reforms will however be undermined considerably if public legal assistance agencies cannot assist those who the reforms are designed to assist—or provide them with preventative advice—due to under-resourcing.

These agencies are in an excellent position to support the Government's efforts to identify and address the consumer law needs of disadvantaged persons as they are repositories of information on consumer issues and trends. They also have a valuable research capacity that can draw on the voice of the disadvantaged consumer. No one else is as well-placed to do this. This work however will remain ad hoc in the absence of recurrent funding.

NLAF thanks the Australian Treasury for raising these issues and looks forward to providing support and advice in relation to initiatives to support disadvantaged consumers.

Based on this NLAF recommends that the Australian Government:

- support a national peak consumer body;
- make better use of the expertise on consumer issues held by public legal service providers by providing recurrent core funding for policy work (such as data collection and research); and
- increase funding to Legal Aid NSW, CLCs and the Aboriginal Legal Service NSW/ACT to enable them to provide legal assistance in relation to the new consumer credit law.

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