Legal Aid
NEW SOUTH WALES

21 July 2014

Mr Bryan Doyle
Chairperson
Legal Affairs Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Doyle,

Debt Recovery Inquiry – response to supplementary questions

Thank you for the opportunity to participate in the public hearing and give further consideration to a number of supplementary questions raised by the Legal Affairs Committee in the course of the public hearing. Our response to the supplementary questions are outlined below.

1. **A number of submissions have called for greater use of external dispute resolution schemes.**
    a. **Could you share your views on this?**

Legal Aid NSW supports the continued, and where appropriate, expanded use of external dispute resolution schemes. In our experience, external dispute resolution schemes are an informal, accessible and effective forum for self-represented individuals to resolve a dispute with a financial service provider. In our view, EDR schemes are a particularly effective way to deal with low cost disputes, particularly where the cost of having a matter dealt with in court are prohibitive. EDR schemes offer parties an opportunity to ventilate a dispute without the formality, legalities and costs involved in court proceedings. Arguably, EDR schemes also provide cost savings for Government where disputes are resolved outside the formal legal system.

We refer the Committee to the *2013 Independent Review* of the Financial Ombudsman's Service which is available on their website.[1] This review found 'significant improvements in key aspects of FOS's performance – including':[2]

1. Professionalisation of FOS's operations
2. The clarity and quality of decisions
3. Stronger, more transparent measurement of performance
4. Systematic approach to engagement with stakeholders

[1] Financial Ombudsman Service, *2013 Independent Review,* online: www.fos.org.au
[2] Financial Ombudsman Service, *2013 Independent Review,* online: http://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf

Tel: 9219 5000 • Fax: 9219 5935 • NRS: 133 677 • LawAccess NSW: 1300 888 529
Address: 323 Castlereagh Street, Sydney 2000 • PO Box K847, Haymarket NSW 1238 • DX 5 Sydney
Website: www.legalaid.nsw.gov.au • ABN 81 173 463 438
We have accredited specialists in children's law, family law and criminal law

5. Lifting the standard of financial, administration and Human Resource management

The independent review makes the observation that 'these achievements are substantial, especially when considering the volatility and difficulty of the environment that FOS has worked in over the past 5 years. Significant increases in volumes of complaints, changes to the law and FOS's jurisdiction and extensive organisation growth among the challenges.'[3] Although the review does note that these achievements have been 'discounted or diminished in stakeholders' eyes by significant timeliness problems and a view that FOS's 'value add' takes far too long to emerge in the dispute-handling process'.[4]

Similarly, the Independent Review of the Credit Ombudsman Service conducted in 2011 found that 'the Credit Ombudsman Service Ltd (COSL), which was effectively completely re-established in 2006/2007, following the 2006 Independent Review, has developed into a much stronger and more professionally supported scheme. In the past two years, with the new national regulation of the credit industry, it has grown significantly in numbers of members and volumes and types of complaints.'[5]

b. Do you think that some debtors misuse such services to delay repayment of their debts?

There may be a perception that debtors misuse external dispute resolution schemes to delay repayments of their debts, but this is not consistent with our experience. The Financial Ombudsman Service (FOS), for example, has a set process with clear timeframes and systems to deal with complaints that are frivolous, vexatious or lacking in substance. FOS has developed a practice note about the 'Dismissal of complaints as Frivolous, Vexatious or Lacking in Substance' which prevents this scheme from being misused by debtors. The 'Dispute Handling Processes and Information Exchange' Practice Note also outlines the steps involved in the dispute handling process and the binding timeframes which further curtail any ability for debtors to misuse the process to delay repayment of their debts. Certainly, the dispute resolution process does take time, which may be seen by some as 'delay'. Although, in our view, the time spent in EDR often means that disputes can be effectively resolved to the satisfaction of both parties without needing to commence lengthy legal proceedings at significant expense to both parties.

2. Should it be mandatory for all types of credit to be covered by an external dispute resolution scheme?

Yes. The benefits of EDR which we outline above are applicable to all types of credit and we consider that businesses and individuals providing all types of credit should be members of an

---

[3] Financial Ombudsman Service, *2013 Independent Review,* http://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf, p.7

[4] Financial Ombudsman Service, *2013 Independent Review,* http://www.fos.org.au/custom/files/docs/independent-review-final-report-2014.pdf, p.7

[5] Credit Ombudsman Service Ltd, 2011 Independent Review, online: http://www.cosl.com.au/cosl/assets/File/Independently%20Review%202012%20(The%20Navigator%20Group).pdf , p.4

EDR scheme. This would provide consumers with access to EDR regardless of the type of credit provided. It would also provide consistency across the credit industry. Currently, people providing credit under section 6 of the National Credit Code (schedule 1 of the *National Consumer Credit Act* 2009) are not required to hold a credit license. This inconsistency means that consumers who access credit that is not covered by the National Credit Code also do not have the option of resolving disputes through EDR. This is a significant gap in consumer protection. Certainly, there are strong arguments for the inclusion of short term credit and pawnbrokers to be covered by an external dispute resolution scheme given that their business models often intersect with the margins of the mainstream financial system and are invariably engaged in providing financial services to vulnerable and financially excluded consumers who are in particular need of protection offered by legislation and regulation.

3. **Can you give your views on a proposal to allow the recovery of non-professional collection costs from debtors (that is, the reasonable costs of a debt collector)?**

We do not support the proposal to allow the recovery of non-professional collection costs from debtors. Lawyers are bound by strict professional rules and legal costs can be assessed if disputed. Debt collectors are not bound by the same standard of rules or costs assessment procedures. In this context, charging collection costs is very difficult to validate and regulate, and is arguably open to abuse. The accumulation of costs for travel time, phone calls and other 'disbursements' could amount to a very large sum, which could present particular concerns for vulnerable consumers facing financial hardship. This proposal could also result in a most unsatisfactory situation where the types of unwanted threatening or harassing phone calls or conduct we refer to in response to question 4 are expected to be paid for by the consumer.

4. **In your experience do debt collection agencies follow the guidelines set out by the ACCC/ASIC?**
    a. **Are you able to provide examples of any unfair or improper practices that are occurring in the industry?**

Our lawyers have observed an overall improvement in the conduct and compliance of debt collectors with the ACCC/ASIC Guidelines. However, our lawyers do continue to encounter debt collectors who engage in improper practices with clients, and with the lawyers themselves.

Example 1

A senior Legal Aid NSW solicitor assisted a client after they received a number of threatening phone calls from a debt collector. The client has recently arrived in Australia and speaks limited English. The client did not know what the alleged debt related to. Not only did the debt collector refuse to give her any information about the debt, he threatened to visit her at home the next day to seize property if she did not agree to pay the debt. The client was so worried that she went straight to her TAFE English teacher who contacted Legal Aid NSW immediately for urgent advice. It became evident that the credit card was applied for and used by her violent ex-husband without her knowledge.

Example 2

A specialist consumer lawyer from Legal Aid NSW was assisting a client who was receiving rude, threatening phone calls from a debt collector which involved swearing, yelling and threats to take her home if she does not pay her debt. The client gave the Legal Aid lawyer's contact details to the debt collector and they had a number of phone conversations. The debt collector was very rude and antagonistic when speaking to the lawyer. On request, the lawyer resent a previous written request for documentation about the alleged debt to the debt collector, and asked him for time to provide appropriate advice to the client once documentation is received. The debt collector stated that he would ignore her requests because he had already referred the matter to the legal team. When the lawyer asked to speak to the legal team to discuss the matter, the request was rudely refused. The debt collector also refused to inform their legal team about the legal aid lawyers request for documents, and stated that he would be instructing the legal team to file a statement of claim immediately. The lawyer lodged an urgent complaint on behalf of her client to Financial Ombudsman Service.

5. **Why do you believe that the ACCC/ASIC guidelines on debt collection should be a mandatory code of practice for the industry?**

There is little value in having a code of practice that does not apply to all debt collectors and is largely unenforceable. At the moment, not all debt collectors are covered by the code of practice and it is difficult for individual consumers to assert any rights that might arise following a breach of the code. A mandatory code of practice would enhance the accountability of debt collectors and better regulate the practices and standards of the industry.

6. **Could you share your views on a proposal to allow licensed commercial agents and private inquiry agents to receive information about the location of debtors in matters that are before a court?**
    a. **What controls would be required to ensure that personal information is used only for appropriate purposes, if such an arrangement was in place?**

We appreciate that it may be frustrating in some circumstances for debt collectors to locate a debtor. In many circumstances it may also be in a consumer or debtors interests to be made aware of proceedings against them so that they can avoid having a default judgment being entered against them, particularly in situations where they have a viable defence. However, we are opposed to this proposal, both in principle and practice.

This proposal arguably gives some parties greater access to information than others. Licensed agents will be afforded greater access to information than other types of debt collectors, such as private individuals or businesses. It is difficult to identify a policy rationale for treating licensed commercial agents differently to other 'debt collectors'. We are also concerned that this proposal is susceptible to abuse as outlined by Ms Elizabeth Morley from Redfern Legal Centre during the public hearing. It would be very difficult to regulate who was accessing this information and

whether they were using the information appropriately and ethically, particularly in light of the fact that not all licensed agents fall within an external dispute resolution scheme.

We also have concerns that this proposal may offend various provisions of the *Privacy Act 1988* (Cth) which would require the Committee's further, detailed attention before recommending any reform to this effect.

7. Is there an application for work and development orders to address 'private debt' (as opposed to a debt owed to a government agency)?

While debt (consumer and non-consumer) is the most common civil law problem for Legal Aid NSW clients, we do not recommend or support the application of Work and Development Orders (WDOs) to private debt. The current scheme was designed to mitigate the individual and social impact of fine default, including licence suspension, secondary offending and the futility and cost to government of chasing unrecoverable debt. A WDO is a regulated "exchange" between the state and the individual that serves mutual interests. An individual can clear debt, get their licence back and avoid further enforcement action. In return, social capital is enhanced through increased volunteering, participation in education and training, compliance with treatment programs for mental health or serious addiction and reduced offending. The benefits flow directly to the community, hence the widespread support for the scheme in the NGO and health sectors[6].

Commercial business enterprises are not permitted to sponsor WDOs. Activities can only be supervised by not for profit organisations, government services or registered health practitioners. There are three reasons for this:

1. It means that WDO activities (such as unpaid work) are not driven by commercial interests, thus protecting vulnerable clients from potential exploitation;
2. It ensures that WDO's are professionally supervised by community and government services and health practitioners (such as doctors, nurses and psychologists) with experience in supporting vulnerable clients with complex needs;
3. It enables "in kind" service to be given back to the community rather than to the private sector. This is a key reason for uptake of the WDOs by NGOs, who are not funded to participate in the program. In our view, expansion of WDOs to the private sector as a means of "working off" private debt could risk the good will and support that underpins the current scheme – particularly if the debt arose in the first place from dubious or improper lending practices.

In addition, we believe that broader application of the WDO scheme is impractical and would be difficult to operationalise. Despite impressive growth in the number of sponsors, meeting the high demand for WDO placements from clients with complex needs (including people who are homeless and those with mental health issues, intellectual disability or cognitive impairment) is still a challenge. Opening the door to other types of debts would place an enormous burden on

[6] An evaluation of the WDO pilot identified near unanimous support for the scheme, with 96% of respondents saying that it should continue. Department of Attorney General and Justice, *A fairer fine system for disadvantaged people. An evaluation of time to pay, cautions, internal review and the work and development order scheme*, May 2011, p40.

organisations that are already stretched and who are meeting supervision, reporting and compliance obligations within existing resources.

If Legal Aid NSW can provide any further assistance to the Legal Affairs Committee in relation to the Debt Recovery Inquiry, please do not hesitate to contact me.

[redacted]

Monique Hitter
Executive Director, Civil Law
Legal Aid NSW