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Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
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(by e-mail legcon.sen@aph.gov.au)

Dear Sir / Madam

Impact of federal court fee increases since 2010 on access to justice in Australia

Australian Lawyers for Human Rights (**ALHR**) is pleased to make the following submission on federal court fee increases since 2010 and their effect access to justice in Australia. ALHR supports the removal of fees payable by certain persons (such as legal aid recipients and people on Commonwealth income support) but is concerned about the following issues.

1. Court Fees and Human Rights

1.1 The New Regulation

In a media release dated 10 September 2012, the Hon Nicola Roxon MP, then Attorney-General announced changes to court fees for federal courts (excluding family law matters).¹ The *Federal Court and Federal Magistrate Court Regulation 2012 (Cth)* (2012 Regulation) has increased court fees effective from 1 January 2013. The 2012 Regulation sets the fees that are payable in proceedings in the Federal Court and Federal Magistrates and applies to any document filed or service requested on or after 1 January 2013.²

1.2 Changes to court fees

The *Federal Court Regulation 2004 (Cth)* (2004 Regulation) applied before 1 January 2013. Under the 2004 Regulation to file a document:

- Individuals were required to pay \$894;
- Corporations had to pay \$2142.³

¹ Commonwealth Government, Statement of Compatibility with Human Rights, cl 2.

² Federal Court of Australia, Court Fees.

³ Schedule 1 of the 2004 Regulations, Item 1.

As a result of the 2012 Regulation:

- Individuals (including small businesses) are now required to pay \$1080;
- Corporations will have to \$3145; and
- Listed companies have to pay \$4720.⁴

1.3 Changes to court fees, placed in context

Many Australians find it difficult, if not impossible, to access even the most basic legal services to which they are entitled. In 1995, funding was at 55% and now it has been reduced down to 35% therefore socially disadvantaged Australians are particularly at risk.⁵ Legal Aid budgets are under significant stress, and at the same time, new demands on legal resources have emerged. The National Disability Insurance Scheme, for example, will create demand from people with disability for assistance in determining eligibility and supports.⁶

Substantive equality before the courts is jeopardized by court fees that are set too high or that are not waived for people with below average weekly earnings. As Justice Toohey of the High Court of Australia has observed, “there is little point in opening the doors to the courts if litigants cannot afford to come in”.⁷ A fee of \$1080 represents one week’s income for a person on an average income in Australia.⁸

Increased court fees are a blunt instrument to deter litigation. Such imposts deter cases without merit but they can also deter cases with merit. This is not a preferable approach. The courts have an inherent power to stop proceedings that are frivolous, vexatious, or otherwise an abuse of process. The use of these rules allows the Courts to deter litigation that has no merit, in a way that does not operate as a blunt instrument deterring access to justice to other cases.

2. Submission of ALHR

ALHR applauds the removal of fees payable by certain persons specified in the Federal Court of Australia Regulations 2004 and the Federal Magistrates Regulations 2000 (such as legal aid recipients and people on Commonwealth income support) which produces the result that these people will not pay court fees.

We also welcome the re-introduction of fee waivers for disadvantaged litigants for family law court fee applications. However, ALHR are concerned that these do not apply in all family law matters, such as divorce and nullity and there has in fact been a significant increase in such fees for disadvantaged litigants, in the case of divorce from \$60 to \$265 as of 1 January 2013. We fear the increase in such fees will disproportionately impact upon victims of domestic violence seeking a divorce or nullity to assist them in ending a violent relationship as previously outlined by the National Association of Community Legal Centres⁹ and the cost may be so prohibitive as to deny them access to divorce or nullity. We also note there is no other way to obtain a divorce or nullity except by court application. We therefore recommend that fee waivers for disadvantaged litigants apply to all family law court applications.

⁴ Schedule 1 of the 2012 Regulations, Item No. 101

⁵ National Access to Justice and Pro Bono Conference, Welcome Address given by Mr Joseph Cantanzariti, President, Law Council of Australian in Melbourne.

⁶ Victorian Legal Aid, “Legal help is the missing piece in the NDIS jigsaw puzzle”, 8 February 2013.

⁷ An unpublished address to the National Environmental Law Association in 1989 cited by Justice Stein in *Oshlack v Richmond River Council* (1994) 82 LGERA 236 at 238.

⁸ Australian Bureau of Statistics, No 6032.0, November 2012.

⁹ NACLCLC, *Submission to Attorney-General's Department on federal court fees*, 8 July 2011 accessed on 11 April 2013 at: http://www.womenslegalnsw.asn.au/downloads/law-reform/2011NACLCLC_AGD_FederalCourtFees.pdf

ALHR also notes that the future removal of waivers or rises in fees might inhibit access to justice, which is implied in the right to an effective remedy under Article 2(3) of the ICCPR.¹⁰ In addition, as the United Nations Human Rights Committee observed in 2007,¹¹ “the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under Article 14, paragraph 1”.¹²

3. About ALHR

ALHR was established in 1993, and is a network of Australian lawyers and law students active in practising and promoting awareness of international human rights. ALHR has a national membership of over 2600 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

Yours faithfully

John Southalan

President

Australian Lawyers for Human Rights

¹⁰ Commonwealth Government, Statement of Compatibility with Human Rights, cl 2.

¹¹ United Nations Human Rights Committee, General Comment 32, paragraph 11.

¹² Lindon v Australia No 646/1995, para 6.4.