

The Law  Society
— OF WESTERN AUSTRALIA —



26 September 2003

By Facsimile: 02 6277 5794

Ms Louise Gell
Secretary
Legal and Constitutional
References Committee
Australian Senate
Parliament House
CANBERRA ACT 26000

Dear Ms Gell

Inquiry into Current Legal Aid and Justice Arrangements

I refer to your letter of 27 June 2003, inviting the Society to make a submission on current legal aid and justice arrangements.

The Society's comments are attached.

I apologise for the lateness of this report. Nevertheless, it is hoped that the attached submission is of some assistance to the Legal and Constitutional Committee.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Alison Gaines'.

Alison Gaines
Executive Director

The Law Society

— OF WESTERN AUSTRALIA —

Inquiry into Legal Aid and Access to Justice

A Law Society of Western Australia submission to the Australian Senate Legal and Constitutional Committee

Terms of reference

The capacity of current legal aid and access to justice arrangements to meet the community need for legal assistance, including:

- The performance of current arrangements in achieving national equity and uniform access across Australia, including outer-metropolitan, regional, rural and remote areas;
- The implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters; and
- The impact of current arrangements on the wider community, including community legal services, pro bono legal services, court and tribunal services and levels of self-representation.

Submission

The Law Society of Western Australia endorses the 23 September 2003 submission to the Senate Legal and Constitutional References Committee by the Law Council of Australia, of which the Society is a constituent body.

The performance of current arrangements in achieving national equity and uniform access across Australia, including outer-metropolitan, regional, rural and remote areas.

The Law Society of Western Australia endorses the submission of Legal Aid Western Australia as it relates to this term of reference. The Society has made submissions to the Senate, the federal Attorney General and key Government members of Parliament in Western Australia regarding the injustice of the Commonwealth funding formula, which provides Western Australian citizens with the lowest per capita legal aid funding levels in Australia.

Throughout the period 1997 –2003 the Society has made submissions that emphasise the profession's disappointment that Western Australia received the worst funding offers of any of the state and territories. Submissions have been made to several enquiries by this committee of the Senate during that period. The position of legal aid in Western Australia has not improved since those submissions were put to the Senate.

Following the budget cuts to legal aid by the Commonwealth in 1996/97 falling from \$12.546 to just \$8.25 million in 1998/99 the state of legal aid in WA has been in perpetual crisis.

The 1997 – 2000 funding agreement found Western Australia with lowest or second lowest funding outcome in any of those years. The 2000 – 20004 funding arrangement consolidated WA as the worst funded jurisdiction in Australia during two of these years.

The Commonwealth contribution to legal aid funding of Western Australians causes dismay among the local legal profession. The Legal Aid submission provides evidence that confirms the anecdotal reports of the profession that legal aid funding has fallen considerably in the last decade and fewer clients, as a result, are eligible for legal aid. Over the last few years some priority areas of family law funding have been unfunded.

The rates of refusal of legal aid in Western Australia for Commonwealth funded matters, described by Legal Aid Western Australia as the highest in Australia, are a matter of great concern to the Law Society and its members including lawyers and judicial officers.

Clearly the allocation of Commonwealth monies is not producing equity. The variations in rates of refusal of aid are so marked as to suggest the allocation model and its assumptions about demand for legal aid, is inefficient. Or looked at another way, the Society is concerned to hear that in some other states Legal Aid is unable to expend its Commonwealth monies on grants, leading to the creation of budget surpluses. On its face this is evidence that the current model of allocating monies between states and territories is inefficient.

At the very least all Legal Aid Commissions should be accountable for the expenditure of Commonwealth monies given that it comes from an under-funded pool. We commend the approach of Legal Aid Western Australia to undertake an independent audit of the distribution between Commonwealth and State matters to promote transparency about the use of Commonwealth monies and recommend this practice be adopted elsewhere. Surpluses should be distributed to legal aid systems where demand is not being met.

Western Australia is the largest legal jurisdiction in the world. Many of its population areas are remote. It has in its rural and remote centres relatively large concentrations of at risk groups, including young families, aborigines and people from non-English speaking backgrounds. However Legal Aid offices are only found in four centres representing four regions (Bunbury (South West region), Kalgoorlie (Goldfields region), Port Hedland (Pilbara region) and Broome (Kimberley region) as well as a para legal outpost on Christmas Island. There are no Legal Aid offices in the Great Southern, Mid-West, Gascoyne or Murchison regions. In a number of centres, including Carnarvon where there is a magistrates court, there are no private lawyers. Access to legal services is effectively out of reach of citizens seeking to resolve legal disputes or assert their legal rights.

The implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters

From the experience of practitioners in Western Australia relatively few Commonwealth legal aid funds are available for criminal law matters.

Family law matters – the data provided by Legal Aid Western Australia demonstrates that “more than 41% of persons seeking assistance with a family law matter are refused legal representation in WA.” Family law matters account for the majority of Commonwealth legally aided matters in WA. We are concerned like Legal Aid that the system is in crisis in WA. This position will only deteriorate as a consequence of high population growth among families in WA, unless there is a significant improvement in the Commonwealth’s immediate level of funding for WA and its forward estimates. The prevailing funding model has not dealt sufficiently with the population growth forecasts for Western Australia, which is growing faster than the national average.

Civil law funding – there is no discernible support for civil law matters in WA. Most are undertaken pro bono or subsidised by the private profession and Community Legal Centres. There is considerable pressure on the private profession to represent refugees pro bono. The Federal Court reported that more than fifty matters to date (in 2003) were taken on by the private profession by way of Order 80 of the Federal Court rules. The Law Society considered 116 applications for pro bono assistance for civil matters in 2002/03. The community legal sector reports high levels of requests for assistance for civil law matters.

The impact of current arrangements on the wider community, including community legal services, pro bono legal services, court and tribunal services and levels of self-representation.

In discussions with the judiciary the Society has become aware that levels of self-representation in courts is on the rise and is as high as 40% of litigants in the Family Court of Western Australia. They represent new demands on the courts, including court services, which are required to produce new education services to assist self-represented litigants; and the judicial officers who are placed in the invidious position of determining a matter and actively supervising (sometimes described as coaching) the advocacy of the unrepresented person.

During 2003 a group of country practitioners in the South West of our state foreshadowed to Legal aid Western Australia that they were intending to withdraw their services from legally aided clients because of the high level of subsidisation by their practices of those clients. They directly attributed this subsidisation to the narrow categories of legally aided matters and the low rates of fees for those matters.

Civil law matters are largely dealt with through networks of pro bono lawyers through the Law Society and community legal centre. In a small profession as exists in Western Australia this effort largely falls upon a small band of lawyers. However the Society is concerned by reports that pro bono representation for civil law matters in lower courts is collapsing.



Alison Gaines
Executive Director