

The Law Society of New South Wales

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Our Ref: RB:MAP/SRC/Family:Criminal 2003
(PLEASE QUOTE OUR REFERENCE ON ALL CORRESPONDENCE)



24 September 2003

Ms Louise Gill
Secretary
Senate Legal and Constitutional References Committee
Parliament House
CANBERRA ACT 2600



Dear Ms Gill

Re: Inquiry into Legal Aid and Access to Justice

I refer to your letter of 30 June 2003 inviting the Law Society of New South Wales to make a submission to the References Committee's inquiry on current legal aid and justice matters.

The Law Society's Family Law and Criminal Law Committees have considered the Terms of Reference to the Reference Committee's Inquiry and their joint submission is attached. The Committees have taken this opportunity to provide information about the extent to which legal service providers are able to meet the needs of the community, particularly in rural areas of New South Wales.

Thank you for the opportunity to contribute to this Inquiry.

Yours sincerely

Robert Benjamin
President

The Law Society
of New South Wales



Inquiry into Legal Aid and Access to Justice

**Criminal Law Committee
Family Law Committee**

**Submission to Australian Senate Legal and
Constitutional References Committee**

22 September 2003

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INTRODUCTION

Legal Aid is a core responsibility of Governments. The Commonwealth and State Governments share the obligation to make available sufficient funds to enable legal aid services to be provided to meet the demand for information, advice and representation for those members of the community who are unable to pay for legal services.

In general terms, there is grave concern at the erosion of Commonwealth funding for legally aided matters over recent years. The Law Society and the Law Council of Australia have consistently raised the issue with the Commonwealth Government about the need to restore and maintain funding to Legal Aid Commissions. There is also particular concern that Aboriginal Legal Services are chronically under-funded.

The Law Society Committees support recommendation 5 made by the Senate Legal and Constitutional References Committee's 3rd Report on Legal Aid:

"The Committee recommends that:

the rates of payment to practitioners be set by the legal aid commissions at sufficiently high rates to ensure that competent representation continues to be provided to those receiving legal aid;

the Commonwealth provide sufficient funding to the commissions to enable them to do this; and

greater efforts be made to continuously monitor the quality of representation provided under legal aid funding."¹

In the Law Society Committees' view, there is an urgent necessity for the level of legal aid funding provided by the Commonwealth to be increased so that Legal Aid Commissions and Aboriginal Legal Services are able to meet the demands of their client base with respect to proper legal representation. The funding provided should enable legal service providers to acknowledge the costs of practice and the market cost of legal services. To do otherwise may damage the clients' perception of the quality of legal aid services and the fairness of the justice system in general.

Where budgetary constraints restrict the availability of legal aid, the impact may be seen in a greater call upon pro bono services and increases in the number of self-represented parties appearing in court.

Work done on a pro bono basis – for free or for substantially reduced rates for somebody who cannot afford full market rates or for an organisation working for disadvantaged groups for the public good – is an important part of the professional life of the legal profession. However, pro bono should not be regarded as an alternative to the adequate provision of legal aid by

¹ Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System: Legal Aid Report 3 25 June 1998 (para 3.107)

Governments. Pro bono properly supplements legal aid services by providing assistance to needy people who fail to qualify for legal aid.

There has been an increase in almost all jurisdictions of people who represent themselves before the courts. Over 46 per cent of litigants in the Local Courts of the New South Wales are now unrepresented, and 41 per cent of parties appearing before the Family Court are without legal advisors. A significant part of the increase can be attributed to restrictions that have been imposed on legal aid.

The Law Society has a number of publications that may be useful to the References Committee:

- ❑ Access to Justice – Final Report December 1998
http://www.lawsociety.com.au/uploads/filelibrary/1020390459401_0.5342752566616238.pdf
- ❑ Pro Bono Work Promoting Change: Discussion Paper on the Review of Pro Bono Services by the NSW Legal Profession. (March 2001)
http://www.lawsociety.com.au/uploads/filelibrary/1019111109666_0.9519704632023032.pdf
- ❑ Self-Represented Litigants - Law Society position paper May 2002
www.lawsociety.com.au/page.asp?PartID=938#anchor12435

TERMS OF REFERENCE

The Terms of Reference of the References Committee requires comment on the capacity of current legal aid and access to justice arrangements to meet with community need for legal assistance, including:

1. the performance of current arrangements in achieving national equity and uniform access to justice across Australia, including in outer-metropolitan, regional, rural and remote areas;
2. the implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters; and
3. 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 addressing these Terms of Reference, the Law Society Committees will highlight the experience of practitioners in rural New South Wales. While the experience in rural and particularly North West New South Wales is drawn upon, the Committees emphasise that the issues outlined pertain generally to the provision of legally aided services throughout the State.

THE NORTHWEST NSW EXPERIENCE

Legal Aid Commission

The north western area of the State has relatively low levels of income and parallel high levels of unemployment. In some townships there are large Aboriginal populations which suffer particularly from the impact of unemployment and social disintegration brought on by poverty, alcohol, drug abuse and domestic violence.

Since the establishment of the NSW Legal Aid Commission there has been a local Legal Aid office in Tamworth. The office has been staffed, until recently, by two experienced practitioners who have serviced the community's needs in an area which is both large and diverse.

The Tamworth office is situated in the regional centre of Tamworth (population: 33,000). There is no other Legal Aid office to the south-east until Newcastle (3.5 hours by road). The township of Murrundi (1.25 hrs by road from Tamworth) in the Liverpool Range defines the geographic boundary to the south.

The Tamworth office also services the area north as far as the NSW/Qld border (4 hours by road). The northern sector includes the major centres of Armidale (population: 22,000), Glen Innes, Guyra and Tenterfield.

To the west, there are no Legal Aid offices until Broken Hill. In the past, solicitors from Tamworth Legal Aid office have serviced the communities in Bourke and Walgett (4 and 5 hours by road) and other townships on route including Gunnedah (population: 10,000) and Narrabri (population: 5,000).

Aboriginal Legal Service

Within the same geographic area serviced by the Legal Aid Commission's Tamworth office, the Kamilaroi Aboriginal Legal Service provides legal services to the community. Services provided by the Kamilaroi Aboriginal Legal Service are principally based in three centres:

- Armidale: where two senior practitioners service the needs of the aboriginal community north of Armidale and west in the regions of Inverell and Wyallda. This office also provides legal services in the Tablelands region at Walcha.

Given the amount of time that they have worked there, the level of experience of the two practitioners at Armidale is exceptional.

- Tamworth: including south to Quirindi, Scone and Muswellbrook (157km from Tamworth). This office also services Gunnedah (77km from Tamworth).

The Tamworth office is now staffed by one experienced solicitor and two young, relatively inexperienced practitioners. One practitioner has been employed less than 2

years and the other less than 6 months. Before commencing employment with the Service neither practitioner had any significant experience in the practice of criminal law.

- Moree: which has, over recent years, had a turbulent employment history. Previously the solicitor employed at this office refused to live in the township of Moree and travelled from Gunnedah (2 to 2.5 hours by road). Recently, new staff have been employed at this office.

Anecdotally, the general pattern of employment of lawyers by the Kamilaroi Aboriginal Legal Service in the north west has involved the employment of either relatively or totally inexperienced young practitioners who remain for, at best, 2 or 3 years before moving on.

The provision of legal services by the Kamilaroi Aboriginal Legal Service, in common with all Aboriginal Legal Services, is compounded by the significant amount of crime which relates to assaults and similar crimes of violence.

As a large percentage of the alleged victims are members of the Aboriginal community, the Kamilaroi Aboriginal Legal Service is obliged to refuse to act for the accused person. In these circumstances, representation of the accused person falls to either the Tamworth Legal Aid office (which is thinly stretched) or the private legal profession.

The Duty Solicitor Scheme

A Duty Solicitor Scheme operates in each Local Court operating in north west New South Wales.

In Tamworth the Duty Solicitor Scheme provides only a back-up to the Legal Aid office, particularly in circumstances where there is a conflict of interest for the Legal Aid officers. For instance, a practitioner in the Legal Aid office may have acted for the victim of an accused person or there may be multiple co-accused.

In other centres throughout the north west the provision of Legal Aid services frequently falls upon members of the private legal profession because Legal Aid solicitors are physically absent.

The Duty Solicitor Scheme gives, at best, a second class service in the provision of legal services for the following reasons.

(a) Rates of Remuneration

In Tamworth, private legal representation by a practitioner with reasonable experience for a plea would generally cost an hourly rate of between approximately \$200 and \$275 per hour (including GST). Generally a plea of guilty in the Local Court would result in a charge of between \$500 and \$550.

By comparison, for a legally aided matter, one would expect to recover a total fee in the vicinity of \$120 to \$180.

A practitioner of reasonable years' experience, appearing in the Local Court, would expect to expend, on average, 2 to 3 hours on a matter.

The client could reasonably expect an initial conference at the office, perhaps a second conference shortly before the plea, a letter of advice, the practitioner's attendance at Court for the plea and a letter reporting at the conclusion of the matter. In addition to these services there may be one or two adjournments while Reports are obtained.

The current rate for acting in a Legally Aided matter is \$120 per hour being payment only for time spent appearing in Court as an advocate. There is no payment for letters, reporting, enquiries made on behalf of the client or conferences with the client.

(b) Experience of Practitioners

The net effect of the rate of pay recoverable from the Legal Aid Commission is a reduction in the number of practitioners prepared to undertake matters at Legal Aid rates. Consequently, the vast majority of practitioners providing the services are junior employed solicitors.

The nature of legally-aided matters undertaken is no less demanding than those accepted by practitioners who are retained privately. The effect, however, is that relatively inexperienced members of the profession are asked to learn their craft often "on the run" as they service the needs of Legal Aid clients.

(c) Services Provided to the Legally Aided Client

Given the issues below, the Family Law and Criminal Law Committees submit that the level of service provided to legally-aided clients, particularly through the Duty Solicitors Scheme, is generally of inferior quality.

Because a practitioner is remunerated for only a limited range of tasks, it is inevitable that economic factors limit the services available to legally-aided clients as compared with those provided by legal practitioners to their private clients.

For instance, as there is no provision for the payment for a conference, it is not uncommon for a private practitioner to refuse to see their client until the day of the hearing. Once instructions are taken (often while standing on the steps of the Court) an adjournment has to be sought to allow various matters to be attended to, such as the collection of references or background reports in the case of a plea of guilty.

In addition, in many cases, where there are a number of solicitors on a Duty Solicitor Roster, it is not unusual for the client to pass through the hands of two or three different practitioners before the matter comes to an end. From that perspective, clients often have

to provide instructions on each occasion, sometimes receiving conflicting advices as to the appropriate course of action.

ASSIGNED CRIMINAL MATTERS

In addition to undertaking work on behalf of the Legal Aid Commission through the Duty Solicitor Scheme, where a practitioner employed by the Commission is unavailable, various matters are assigned to members of the private legal profession.

Rates of pay for assigned matters have much in common with the Legal Aid rates under the Duty Solicitor Scheme. Current rates are as follows:

Court Appearances

- **Attendance at Court (excluding Mentions)**
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|---|----------|
| Per hour at Court (to the nearest 1/2 hour) | \$120.00 |
| Per half hour at Court (or part thereof) | \$60.00 |

- **Mentions**
- | | |
|---|---------|
| Per half hour at Court to a maximum of 1 hour | \$60.00 |
|---|---------|
- Waiting time is payable except:
- If a Solicitor has other private work to attend to whilst waiting for Legal Aid matters to be reached; or
 - In defended matters.

In defended matters Solicitors should obtain a marking from the Court to reduce waiting time. If a marking is obtained, the Solicitor will be paid at the mention rate, ie \$60.00 per half hour at a court to a maximum of one hour.

- **Defended Hearings**
- | | |
|------------------------------------|----------|
| Initial conference and preparation | \$200.00 |
|------------------------------------|----------|

- **Conferences**
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|--|---------|
| Initial conference with client (other than defended hearings) | \$77.00 |
| Subsequent conference with client (where prior approval has been obtained) | \$77.00 |
| Conference with witness (where prior approval has been obtained) | \$77.00 |
| Visit to Gaol/shelter | \$69.00 |

- **Travel**
- A travel allowance is paid where the total distance travelled from the Solicitor's office to Court and return exceeds 70km. **Prior approval** must be obtained from the Commission.
- | | |
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| | \$0.50/km |
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A flat rate travel fee of \$100.00 for professional costs is allowed in circumstances where the travel allowance condition (as above) is met.

	\$100.00
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➤ **View**

Fees for views are paid as follows:

- \$120.00 per hour while at the site of the view.
- travel allowance to and for the view is \$0.50/km provided that the distance from the Solicitor's office to the site of the view and return exceeds 70km.
- **Prior approval** for the view must be obtained from the Commission.

➤ **Disbursements**

The following classes of disbursements are pre-approved up to \$150.00

- Filing fees for subpoenas
- Conduct money
- Agent Fees
- Travelling expenses (payable where travel has been previously approved)
- Interpreter fees
- Legal notices
- Medical reports
- Psychologist/Psychiatrist reports
- Witness expenses
- Photocopying and telephone calls (to a pre-approved maximum of \$30.00)

(Payment of claimed disbursements will be made upon rendering of final account)

Further disbursements will require prior approval.

No other fee or allowance will be paid unless prior approval has been obtained.

As with a simple plea, the rates of remuneration are well below those generally charged by a private legal practitioner. In addition, because of the limited range of tasks compensated by the Legal Aid Commission, the level of attention shown to a matter cannot be of the same standard as that for a private client.

The limited opportunity to incur disbursements without referring the matter back to the Legal Aid Commission for approval often results in the need to provide lengthy reports and justifications to the Legal Aid Commission for basic activities, such as issuing subpoenas. This is a time-consuming and costly exercise for which the solicitor is not paid.

Practitioners are often the ones to explain to legally-aided clients that certain things are or are not being done simply because of difficulties in obtaining approvals from the Legal Aid Commission. As a consequence, legally-aided clients may gain the impression that they are not receiving appropriate attention.

Another insight into the mechanical difficulties practitioners face when accepting legally-aided matters can be gleaned from the process of preparing to instruct in a trial in the District Court.

The Legal Aid Commission provides a grant of aid based on an estimate of the time the trial will run, an amount for preparation, a conference or two with the client and, perhaps, a conference with Counsel.

The actual time needed to properly prepare for and run a trial means that legal practitioners are only remunerated for a fraction of the time allowed in the grant. Without detailing each step prior to trial, practitioners usually schedule a number of conferences with their clients, far more than one or two allowed for by the Legal Aid Commission.

In preparing for trial, practitioners have not only an initial conference with their client and Counsel, but also at least one further conference with Counsel, separate from the client. In the days leading up to the trial, a further conference is held with the client and Counsel and, perhaps another, although relatively brief, conference on the day of the trial. At the conclusion of each day of the trial, it is normal practice for solicitors to have a brief conference with the client, perhaps no longer than 30 minutes, and a conference of similar length with Counsel. The reason for these short conferences with the client is to ensure that they know what has occurred during the day and what to expect on the following day. Conferences between the solicitor and Counsel ensure that notes taken during the day are accurate and allow Counsel to give further directions on matters that may need to be attended to for the next day.

While most of the conferences referred to above are essential elements of preparing and running a trial, the majority are not paid for by the Legal Aid Commission.

In addition, to the conferences outlined above, legal practitioners expect to have two or three conferences with any witness to be called for the defence. For example, a preliminary conference to take a proof of evidence may be scheduled, another shortly prior to trial to ensure that witnesses remain true to their proof of evidence and that neither the Solicitor nor Barrister will be surprised by a change in the evidence at Trial. It may well be that immediately prior to the trial other matters that need clarification with the witness arise and the proof of evidence subsequently has to be amended.

The day before, or the day of, giving evidence the witness would normally meet with Counsel so that Counsel is satisfied the witness will come up to proof and also to assist the witness relax in the presence of the barrister who will be adducing their evidence.

It is anticipated that, if a grant were obtained to interview witnesses, the Legal Aid Commission would allow only one conference.

The Family Law and Criminal Law Committees submit that it is not simply the rate of remuneration which is inadequate. The items to which the rate of remuneration applies does not properly remunerate practitioners for the time spent and costs incurred in undertaking the steps reasonably necessary to prepare a matter for trial.

It is also submitted that in a modern and civilised community it is an essential component of the justice system that justice is provided equitably to all members of the community.

The provision of justice not only involves the proper administration of justice by judicial officers, but also the proper and efficient administration of matters by the legal practitioners involved.

The failure to adequately compensate practitioners for the work performed brings with it the inherent risk that the community will lose faith and trust in the justice system as a whole.

When dealing with socially disadvantaged groups, whether they be the unemployed, members of the indigenous community, immigrants or the disabled, there must be incentives to ensure that their interests are protected.

FAMILY LAW ASSIGNMENTS

There is a separate and distinct set of issues for assignments in family law matters.

Grants by the Legal Aid Commission in family law matters are made on a stage-by-stage basis and are generally at rates well below those applied by practitioners acting privately for clients. As a consequence many firms choose not to undertake legally-aided family law matters.

For example, one firm recently acting in a matter where disbursements and costs paid by the Legal Aid Commission totalled \$2,725.85.

The matter proceeded to a hearing in the Family Court with a practitioner appearing for a approximately one day. Preparation for the hearing included conferences with the client and other practitioners involved, appearances before the Family Court, correspondence and the preparation and filing of documents and affidavits. The firm's expectation, on a privately funded basis, was that fees in the vicinity of \$5,500 to \$7,500 plus disbursements would be payable.

The low level of remuneration provided by the Legal Aid Commission means that firms cross subsidise (to a degree) matters between private paying clients and legally-aided clients. In addition the expenses of acting in a legally-aided matter, exceed the fees recovered. Accepting legally-aided matters often involves running them at a loss to the firm.

Firms' motivations for acting in legally-aided matters are not based on a profit motive, especially where a party's circumstances are such that they need expert assistance to properly represent their case. For example, the matter outlined above involved a murder. However, where exceptional circumstances such as these do not apply it is becoming increasingly common for firms in both regional and suburban New South Wales to take the view that they cannot afford to carry the additional costs burden the acceptance of instructions in legally-aided family law matters entails. In particular, the financial imperatives facing country firms which undertake legally-aided family law matters is demonstrated by what has occurred in the north west region of New South Wales.

Over the past decade, the number of private practitioners in the region prepared to accept legally-aided matters has diminished dramatically. In Tamworth, for example, there are seven sole practitioners and eight firms consisting of two or more partners and employed solicitors. Of the seven sole practitioners, only one is prepared to undertake legally-aided family law and child care work. Of the eight larger firms, only two will accept legally-aided family law work.

In Gunnedah, solicitors will accept legally-aided family law work only while the matter remains in the Local Court. Once a matter is transferred to the Family Court, firms no longer continue to act.

Based on the experience in the north west region, there is a gradual withdrawal by the private legal profession from providing services in legally-aided family law matters.

The Family Law and Criminal Law Committees submit that a significant reason for the increase in self-represented litigants before the Family Court is the unavailability of representation due to the poor levels of remuneration available to private legal practitioners.

While the Family Court has attempted to cater for the circumstances where parties are self-represented, it is submitted that self-represented litigants often leave the Family Court process disillusioned and embittered with the justice system. The series of tasks that a self-represented litigant has to undertake (such as the preparation of Affidavits and the like), and for which they may have limited skills and no past experience, is daunting. In preparing these documents self-represented litigants can become aware of their shortcomings and be gripped by self-doubt and feelings of impotence. In addition to these administrative tasks, self-represented litigants have to make a variety of appearances before the Court where they often have little understanding of what is being said to them, or indeed the implications of what they are saying to the Court.

Even with the most caring and tolerant judicial officers on the Bench, self-represented litigants can be expected to feel confused, frightened and that the experience is overwhelming.

The Committees submit that, because of the volatile and emotionally-charged nature of family law proceedings, many litigants, whether represented or not, have difficulty separating their emotions from the practical realities of their situation, and that of their children.

Where parties choose or can afford to be represented or are eligible for legal aid, it is often the role of the solicitor to focus their client's mind upon the practical realities of their circumstances, rather than their emotions. In the absence of legal representation, this important filter, or potentially calming factor upon proceedings, is removed from the judicial process.

The Committees submit that the absence of a properly funded legally-aided Family Law Scheme is a significant contributor to the growth in self-represented litigants throughout the Court system, particularly in the Family Court, as well as disaffection with the Court process.

In addition to any general embitterment with the Court process, the actions of some self-represented litigants have involved not only attacks upon the judicial system (and on some rare occasions on judicial officers), but also, more frequently, attacks on the other party involved in the proceedings and, increasingly, attacks on legal representatives.

SUMMARY

The Family Law and Criminal Law Committees submit that the provision of legal services, either directly or by assignment by the legal aid system, is increasingly in crisis.

There is a justifiable expectation in the community that citizens of limited means or from disadvantaged sectors of the community will be provided with an appropriate standard of legal services.

Attempts to provide these services at such poor rates of remuneration must inevitably lead to a third-rate service.

There is a clear potential, if underfunding continues, for levels of disaffection with the system to increase.

Should citizens in our community lose faith with the judicial system, there is potential for increasing attacks which will have an obvious and immediate impact upon other parties to the litigation, the legal practitioners involved and the judicial officers.

A loss of faith in the Australian justice system strikes at one of the fundamental pillars of our community: that disputes within our community are resolved by a fair and readily accessible judicial system, which prevents the need to resort to self help, retribution or revenge.