

Aboriginal Legal Service of Western Australia (Inc)

Submission to the Productivity Commission

Inquiry into Access to Justice Arrangements

November 2013



1. About the Aboriginal Legal Service of Western Australia (Inc)

The Aboriginal Legal Service of Western Australia (ALSWA) is a community-based organisation that was established in 1973 and delivers a comprehensive range of culturally matched and quality legal services to Aboriginal people throughout Western Australia (WA). We provide legal advice and representation to Aboriginal people in civil and human rights law, family law and criminal law matters. ALSWA's legal services are available via 14 regional and remote offices and the head office in Perth. With almost four decades' experience of working with Aboriginal people within the justice system, ALSWA is uniquely placed to provide frontline feedback about Aboriginal people's interaction with the law. ALSWA's submissions are informed by the feedback and experience of ALSWA staff and clients.

2. Introduction

ALSWA is grateful for the opportunity to participate in the Productivity Commission's Inquiry into Access to Justice Arrangements. The scope of the inquiry is very broad, so this submission will focus on the specific civil and family law needs of Aboriginal people in WA, key barriers to participation, and issues with legal assistance services funding. It is intended to complement the submission prepared by the National Aboriginal and Torres Strait Islander Legal Service (NATSILS).

3. Civil and family law needs of Aboriginal people in Western Australia

3.1 Areas of need

It is indisputable that WA's Aboriginal and Torres Strait Islander people do not enjoy the same access to justice in civil and family law matters as the non-Aboriginal population. The key barriers to participation are canvassed below; however, with regard to the actual level of demand in Aboriginal communities throughout the State, ALSWA has observed that there is an urgent need for culturally appropriate legal assistance in the following areas:

- Housing matters
- Discrimination on grounds other than race (for example, disability, sex, age)
- Drivers licences (applications for extraordinary drivers licence and applications to remove lifetime disqualifications of drivers licences)
- Guardianship and Administration matters
- Issues in relation to fines
- Advising respondents in civil matters
- Representation in Courts and Tribunals (most community legal centres will advocate or advise, but very few have lawyers who will appear as counsel in court)
- Mental health matters
- Employment law
- Consumer law issues
- Respondents to applications for Violence Restraining Orders
- Property, financial issues between marital/de facto partners
- Child support issues

- Parentage/paternity disputes

Unfortunately, ALSWA is prevented from providing legal assistance in almost all of these areas by the restrictions imposed by the Attorney General's Department (AGD) Service Delivery Directions, as well as severe funding constraints. In ALSWA's view, there is poor coordination between the Federal and State governments, as well as Legal Aid commissions, community legal centres and Indigenous legal services, in identifying areas of legal need and ensuring that legal service providers provide complementary services. Currently, the AGD chairs jurisdictional forums, which provide an opportunity for federally funded legal services to discuss where gaps and duplication in legal services exist in each jurisdiction; however, these forums are ad hoc and, in ALSWA's view, a rather clunky mechanism to coordinate service delivery. ALSWA believes there is an urgent need for greater independent oversight and coordination of the provision of legal services by Legal Aid, community legal centres, and ALSWA.

3.2 Areas of growing unmet need

ALSWA has recently experienced increased demand for civil law services in regional and remote areas of WA in relation to the following:

- Issues pertaining to the telecommunications industry, particularly scams involving the sale of mobile phones and internet access, and exorbitant bills rendered by some telecommunications companies;
- **Tenancy issues:** there is a very substantial demand for legal assistance in tenancy law, especially with respect to representation in courts in relation to eviction matters involving the WA public housing authority, Homeswest. As far as ALSWA is aware, very few Aboriginal clients are provided with actual representation in court in relation to these sorts of disputes. Further, through no fault of their own, community legal centres are only located in larger regional towns across WA. This means that many Aboriginal clients living in remote communities or smaller regional towns have little or no access to legal advice and assistance with disputes involving Homeswest. ALSWA is aware of a very large number of instances where Aboriginal families have been evicted from Homeswest housing without having access to legal advice or representation and have become homeless. Homelessness increases the risk of criminal offending and, in turn, incarceration.
- **Centrelink matters:** Aboriginal clients are routinely adversely affected by decisions made by Centrelink in relation to entitlements for Centrelink payments. Such decisions can adversely impact upon the financial circumstances of Aboriginal families. ALSWA currently has no capacity to act for Aboriginal clients in relation to Centrelink matters. Further, ALSWA is unaware of any other legal service provider which provides services in this area. This means, in particular, that there is a huge unmet legal need in this area in regional and remote parts of WA.
- **Parole issues in relation to Aboriginal prisoners:** it is a matter of notoriety that Aboriginal prisoners are grossly overrepresented in WA jails. The overwhelming majority of Aboriginal prisoners serving sentences of imprisonment have been made eligible for parole by sentencing courts; however, in order to apply for parole, an application must be made in writing. Many Aboriginal prisoners lack the literacy skills and contacts within the community to do themselves justice in written applications for parole. The same reasoning applies with respect to appeals against decisions to refuse parole. Further, complaints about treatment in WA jails must also be

made in writing. ALSWA was previously provided with funding to assist WA prisoners in this regard; however, this funding was terminated approximately two years ago. ALSWA has no capacity to provide assistance to Aboriginal prisoners with parole matters and to agitate complaints about their treatment in jails. As far as ALSWA is aware, no other legal service provider is in a position to provide assistance in this respect.

3.3 ALSWA priority areas

ALSWA's priority areas in civil and family law are developed internally, taking into account funding constraints, feedback from Aboriginal communities about areas of legal need, as well as the range of legal services provided by other organisations around the State.

The priority areas for ALSWA's Perth-based Civil Law unit include:

- Coronial inquests and inquiries relating to deaths in custody
- Discrimination matters
- Equal opportunity matters
- Complaints (police, transit/security guards, hospitals, prisons)
- Unlawful detention/imprisonment matters
- Simple wills

The priority areas for ALSWA's predominantly Perth-based Family Law unit include:

- Parenting orders
- Child protection orders
- Limited assistance in property/financial issues where concurrent with parenting issues
- Limited assistance in other family law areas where person is illiterate, disabled or has some other impediment to self representation

4. Barriers to justice

4.1 Geographic isolation

WA is not only enormous, occupying one-third of Australia's total landmass, but as at June 2012, 78 per cent of WA's population of 2.43 million people lived in Perth.¹ As a result, greater Perth has a population density of 300 people per square kilometre, while the remainder of WA has a density of just 0.2 people per square kilometre.²

The challenges of providing efficient, quality services to such vast and sparsely populated regional and remote areas are nothing new; however, the failure of successive State and Federal governments to find innovative solutions to these challenges disproportionately disadvantages WA's

¹ Australian Bureau of Statistics, 2013, *Regional Population Growth, Australia, 2011-12*, viewed 30 October 2013, <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/3218.0~2011-12~Main+Features~Western+Australia?OpenDocument>>

² Ibid.

Aboriginal people, as two-thirds of WA's Aboriginal population lives in remote or regional areas.³ This includes some of the most geographically isolated communities in the country.

Throughout regional and remote areas, access to basic legal services and infrastructure is either limited or non-existent. For example, the Family Court only conducts regional circuits three times per year in Albany, Geraldton, Kalgoorlie and Broome. Litigants either have to file relevant applications and associated court documents at their local Magistrates Court and appear before Magistrates who may not have specialist family law knowledge, or file in the Family Court in Perth and either wait for the next regional circuit or participate in proceedings by phone. In addition, Aboriginal people from more remote areas tend to have a poor understanding of Family Court and Child Protection issues, as these are matters have historically been resolved within the family or community, rather than through the court process.

In civil law, the situation is equally as serious. Litigants can commence proceedings in local Magistrates Courts in regional areas; however, civil law litigants in regional and remote areas have very limited access to legal advice and representation. Although the Magistrates Court, particularly the Minor Case Division, caters for self-represented litigants, the legal procedure for initiating, or responding to a claim, is complex and many Aboriginal people do not possess the literacy skills and confidence to navigate the system. They are also less likely to have ready access to technology, such as computers, to find information and prepare documents.

In addition, it is very difficult for Perth-based lawyers to provide legal advice and representation to clients living in regional and remote areas. In particular, the provision and collection of documents that need to be sworn before a lawyer or Justice of the Peace can be very challenging, which can make legal proceedings more protracted. It is very difficult to take detailed instructions and ensure clients understand legal advice when provided over the telephone or via videolink. This challenge is compounded with clients whose first language is not English and/or who have low levels of literacy. It is also a problem for people in custody.

In ALSWA's experience, many clients from regional and remote areas have discontinued civil matters after the initial stages because it has been so difficult to pursue the matter through a lawyer who does not live in the same town. For example, the process of applying to have a driver's licence life disqualification removed is very onerous and requires a detailed affidavit from the client. A client in a remote town, such as Meekatharra, will have to engage a civil lawyer in Perth to prepare the affidavit, a process which involves sourcing detailed reports and letters of reference. In even more complex civil matters, a lawyer is effectively obligated to meet with their client face-to-face or risk breaching their professional ethical standards. Further, as noted above, it can be almost impossible to prepare documents in a professional manner without regular engagement. Given the sheer size of WA and the extraordinary cost of living in 'mining boom' towns, travel costs from Perth to regional and remote areas – which include flights, vehicles, petrol, accommodation and food – are exorbitant and often prohibitive for an organisation like ALSWA.

³ Australian Bureau of Statistics, 2006, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006*, viewed 30 October 2013, < <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4705.0>>

4.2 Education and awareness of legal rights and remedies

A threshold barrier preventing Aboriginal people from engaging fully in the civil justice system is a lack of awareness about legal rights and remedies. This is another outcome of geographic isolation, which disproportionately disadvantages WA's Aboriginal population, as well as a consequence of poverty, low levels of literacy, poor educational attainment, English language difficulties and disengagement from the Western justice system. In ALSWA's experience, there is an extraordinarily high level of unidentified legal need for civil and family law assistance among Aboriginal communities in WA, particularly in regional and remote areas.

ALSWA continues to experience a strong demand for legal education, particularly in regional and remote areas. ALSWA runs a small community legal education program; however, it is grossly under resourced with just one Perth-based community legal education (CLE) officer to service the entire State. At the current funding levels, ALSWA's regional lawyers and court officers do not have the capacity to deliver education in addition to their existing legal workload, so the function regrettably falls to a central CLE coordinator.

Various community legal centres, government agencies and community organisations also offer (typically small-scale) community legal education programs around WA; however, these programs are also under resourced, often poorly tailored to the needs of an Aboriginal audience, and – perhaps most importantly for the purpose of this inquiry – collectively suffer from a lack of central oversight and coordination between programs. Ultimately, it is ALSWA's view that the current funding and delivery of CLE programs in regional and remote areas is both inefficient and inadequate to deliver meaningful, long term outcomes for local communities.

There is an urgent need in WA for targeted and coordinated community legal education programs for Aboriginal communities in remote and regional areas. This could best be facilitated by ALSWA being provided with appropriate funding and resources to employ CLE staff in ALSWA's regional offices to deliver CLE on the ground in local communities in a culturally appropriate fashion. This would help manage duplication and gaps in the provision of CLE programs throughout the State, as well as ensure that CLE programs are tailored as far as possible for each local community.

4.3 Cultural and language barriers

There are serious cultural and language barriers which impede the effective provision of legal services. For example, English is a second language for many Aboriginal people in remote areas. Indeed, it is not uncommon to meet Aboriginal people in these areas who have a limited or no comprehension of written English. However, Civil and Family Court documents must be prepared in English. NATSILS has already filed a submission with the Productivity Commission, which includes a commentary on the lack of interpreters in Aboriginal languages. It is a deplorable state of affairs that in WA there is no State-wide, properly qualified and adequately resourced interpreter service in Aboriginal languages available to assist Aboriginal people receive advice about civil and family law matters or to help them participate in court processes.

There is a desperate need for a properly funded and resourced Aboriginal interpreter service in WA. The Kimberley Interpreting Service is the only interpreter service in Aboriginal languages in WA. The irony and injustice is that interpreters are always provided to non-English speaking individuals

participating in the justice system; for example, an Indonesian speaking accused charged with people smuggling offences will always be provided with access to an Indonesian interpreter, but a Martu speaking Aboriginal accused from Jigalong will never have access to a properly accredited and experienced Martu interpreter.

5. Pro bono assistance

Pro bono assistance in WA is under-resourced and underused. Ideally, a clearinghouse would be a first point of reference for community members seeking pro bono assistance and legal lawyers making referrals. A clearinghouse would have an invaluable knowledge of the profession and, by virtue of its strengths, would foster a pro-bono culture among lawyers in the State. Currently in WA, a clearing house, *Law Access*, is operated by the Law Society and is funded through the Law Society Public Purpose Trust; however, *Law Access* is desperately underfunded and limited in its capacity to meet legal needs across WA. It is limited on a number of levels:

- **financial resources of the scheme:** without sufficient capital, the scheme cannot employ enough staff. Without dedicated lawyers, fundraisers and administrators, the scheme cannot be run properly;
- **lack of awareness:** few people (both members of the community and lawyers) know about the scheme, and therefore not enough referrals are made;
- **no fundraising capacity:** funding of the scheme generally comes through a Law Society fund. An effective clearing house would rely on multiple funding sources, and given the fundraising opportunities in a resource rich State, it is imperative that there exist a dedicated fundraiser;
- **co-ordination:** currently the scheme does not capitalise on the tremendous knowledge base of the profession and accordingly is not co-ordinated effectively. A dedicated clearing house requires networking throughout the profession so as to maximise pro-bono interest;
- **pro-bono culture:** while many lawyers undertake pro bono work, it is not as entrenched in the culture of the profession as it is in other States such as Victoria. While many large and medium-scale law firms have well established and highly efficient pro bono assistance schemes (and regularly assist ALSWA in civil law matters), pro bono work is otherwise not a strong feature of the WA legal profession. This is particularly the case with respect to the WA Bar, in contrast to some other State Bars, such as Victoria.

Legal professions in each State and Territory have developed different approaches to responding to requests for pro bono assistance. The most successful approach has been that of Victoria, which formerly operated an incorporated clearinghouse, and has recently amalgamated with New South Wales to form a multistate incorporated clearinghouse, *Justice Connect*. The success of Victoria's pro bono schemes is due to a number of factors: dedicated financial support from the State government, a variety of funding sources, and an historic dedication to pro bono services. In ALSWA's view, there is a need for Federal and State government support for the introduction of a more dedicated clearinghouse in WA. This may be either in the form of a push to join a multi-state model with appropriate checks to ensure that regional and remote areas will be better off, or alternatively a dedicated clearinghouse for the State. The key aspects of such a clearinghouse would

be the retention of persons with proven capacities in fundraising, and with sufficient networks so as to help foster a better pro bono culture in the Western Australian legal profession.

6. Legal assistance services and funding

6.1 The balance between the provision of criminal and civil law services

The pressure on ALSWA to appear for Aboriginal people facing terms of imprisonment in criminal courts is enormous. This means that in ALSWA's regional and remote offices, all of ALSWA's resources are devoted to criminal law services. As a result, Aboriginal people in these areas with civil and family law matters are chronically under serviced. It also a key reason why awareness and understanding of the civil and family law needs of Aboriginal people is very limited, to the point of being virtually non-existent.

6.2 Funding focus

ALSWA is deeply concerned that the debate about legal assistance service funding at the national level is far too narrowly focused on issues surrounding adequacy of funding for legal aid commissions. ALSWA is fearful that in the process, the chronic underfunding of Indigenous legal services around the nation has and will continue to be overlooked.

6.3 Eligibility criteria for legal assistance

There are enormous differences and inequities across jurisdictions in the way that each State and Territories' legal aid commission and Indigenous legal service support one another's legal practices. In particular, in WA there are significant discrepancies between Legal Aid WA and ALSWA with regard to the eligibility criteria for legal assistance. ALSWA's eligibility criteria are governed by the AGD Service Delivery Directions, which are much broader than Legal Aid's eligibility criteria. Generally speaking, a broader range of clients are eligible for assistance from ALSWA as opposed to Legal Aid WA. This presents a particular problem for ALSWA clients where ALSWA has a conflict of interest.

For example, ALSWA is regularly confronted with a situation where an Aboriginal man is charged with an assault upon his Aboriginal female partner, but ALSWA has acted or is acting for the Aboriginal woman in a custody dispute involving the Aboriginal man. ALSWA's practice is to refer the Aboriginal man to Legal Aid WA, requesting that it assist him in the criminal matter. If the man wishes to plead not guilty to his criminal matter, he will be refused a grant of aid from Legal Aid WA unless he can demonstrate that he has a mental illness, an intellectual disability or is on parole, and that a conviction would mean that his parole is cancelled. This means that nearly all Aboriginal people in this situation are refused a grant of aid from Legal Aid WA. The criminal matter then returns to ALSWA and ALSWA is then required to make a decision as to whether it will brief a private lawyer to act for the Aboriginal man. Brief-outs to private lawyers are paid by ALSWA at slightly less than Legal Aid WA rates; however, the financial impost upon ALSWA of brief-outs to private lawyers in these circumstances is considerable, especially with respect to matters which are listed in regional and remote areas, as most lawyers who are prepared to accept these briefs are based in Perth. If ALSWA decides not to brief the private lawyer, the client will invariably appear in court

unrepresented and will be forced to run a contested hearing on their own. The risk of injustice in this circumstance is manifest. Unrepresented Aboriginal defendants are also at a greater risk of being imprisoned.

6.4 Attraction and retention of staff

An ongoing challenge for ALSWA is the attraction and retention of highly qualified legal staff. Quite simply, ALSWA salaries are extremely uncompetitive with Legal Aid WA, the Office of the Director of Public Prosecutions and the State Solicitor's Office – the main employers with whom ALSWA competes for legal staff. ALSWA's salaries are also extremely uncompetitive with those paid in the resource sector; for example, ALSWA was recently advised that a secretary employed by a major company on an offshore oil rig was receiving an annual salary of \$160,000 a year. For mining and resource companies implementing Aboriginal employment programs, ALSWA has no chance of competing with them to attract qualified Aboriginal staff in regional and remote areas.

The situation is compounded in regional areas where issues with geography and the impact of the resources boom, especially in the Pilbara and the Kimberley regions, mean that the cost of living is prohibitively high. In particular, there is a serious shortage of private rental accommodation and rents are therefore exorbitantly high. This has a significant flow on effect for ALSWA because we are unable to ask individual staff to pay for housing out of their own pockets when, in many instances, the weekly rent would outstrip their weekly salary. Instead, ALSWA requires regional staff to make a modest contribution to their rent and ALSWA makes up the shortfall. In the Pilbara, this means that ALSWA has to fund approximately \$2,000 a week – or \$100,000 a year – in rental assistance for a single lawyer to live in a one bedroom unit. In towns like Newman, there is no rental housing available at all. By contrast, Legal Aid WA lawyers in regional areas are allowed to participate in a State government housing scheme, which involves the provision of housing at very modest rates, something in the order of a contribution of \$90 a week. It is undeniable that there needs to be a recognition and accommodation of the fact that the exigencies of legal service delivery in regional and remote WA are profoundly more complex, expensive and difficult than in major capital cities and surrounding regional areas on the eastern seaboard.

7. Conclusion

There are two tiers of civil justice in WA: that afforded to mainstream society, and that afforded to Aboriginal people. The unique geography of WA, combined with the population distribution, make this State a particularly complex, expensive and challenging jurisdiction in which to provide civil and family law services, especially for WA's Aboriginal population. The current governance, funding and resourcing arrangements around legal service delivery do not sufficiently recognise this and, in failing to do so, can be attributed much of the blame for subjecting WA's Aboriginal people to second-class justice.