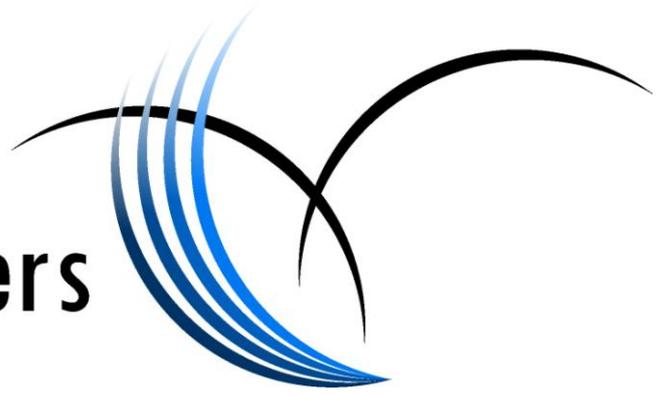


WestSide Lawyers



Response to the Productivity Commission Inquiry into Access to (Civil) Justice Arrangements

Attached is the response of WestSide Lawyers to the draft Productivity Commission Inquiry into Access to (Civil) Justice Arrangements (“the report”). We confine our response to Chapter 21 of the report because it is the most relevant to our knowledge and experience.

We strongly agree that there is a current un-met need for civil litigation services for many Australians. WestSide Lawyers has specifically addressed this need for nearly twenty years in our provision of legal services. Our methods are successful and establish that CLCs are capable of using resources efficiently to provide advocacy services, especially in the area of civil litigation.

We challenge the view that civil law matters should be solely funded through legal aid commissions (LACs) rather than community legal centres (CLCs).

In the light of the Productivity Commission’s Inquiry, we recommend that:

- Funding should be provided to CLCs specifically for civil litigation matters.
- CLCs should continue to provide full legal representation in conjunction with advice, appear in court and conduct litigation.
- CLCs should be encouraged to pursue methods to extend funding and increase service levels.
- Funding for CLCs should be managed separately from LACs.

The following is an outline of our response.

Civil Litigation assistance is a necessity

Pages 1 – 2

- Little assistance is currently available in civil litigation matters, leaving a considerable gap in legal assistance services;
- Family and criminal law is seen as more urgent and largely covered by legal aid, but unresolved civil law problems can affect essential human needs, and should therefore not be overlooked;
- Funding for civil law should be managed separately to other areas of law to ensure the proper use of funding.

Advocacy must be available in conjunction with advice

Pages 2 – 5

- Representation and litigation must be core activities of both CLCs and LACs;
- Advisory services are a relatively inexpensive way to reduce legal costs through early intervention and public education;
- Litigation services, in many cases, are essential to proper legal assistance;
- Well-managed CLCs provide quality legal assistance by providing both litigation and advice services in conjunction.

CLCs should continue to provide civil litigation services

Pages 6 – 8

- WestSide Lawyers has received specific funding for civil matters since 1995 and has successfully conducted civil litigation since that time;
- We strongly disagree with the assumption that CLCs focus on advice because they do not have the relevant expertise and resources are too limited for advocacy;
- In South Australia, WestSide Lawyers is the only funded provider of representation and advocacy in civil matters;

- CLCs offer an alternative source of assistance to those who have been excluded from LAC assistance, and is a service that is independent of the government;
- No evidence is provided to support the idea that LACs are better able to provide services efficiently due to their size and resources.

CLCs have the capacity to extend government funding

Pages 8 – 11

- The flexibility and independence of CLCs means that they are better able to operate in a commercial and competitive manner, thus making a better use of resources;
- WestSide Lawyers successfully operates a model client contributions scheme which has increased income and quantity of services provided;
- We are effective in recovering legal costs both in criminal and civil matters and use such extra income to fund other litigation files;
- CLCs are able to harness the energy of the private sector to increase service levels through volunteers, as well as extend services in individual matters through pro-bono assistance.

Funding for CLCs should be managed separately to LACs

Pages 12 – 13

- Funding for CLCs should be managed independently of LACs;
- WestSide Lawyers prefers the approach that provides management of funding to the NPA;
- Reporting arrangements to funders are outdated and should be updated to reflect the importance of providing civil litigation and advocacy services;
- Such reporting is likely to be better managed at the state level.

Response to Chapter 21: Reforming Legal Assistance Services

Civil Litigation

WestSide Lawyers wholly agrees with the proposition that civil litigation has been a neglected area in funding for legal assistance. The gap in legal assistance provided is obvious when considering that in the year ending 30 June 2013, the Legal Services Commission in South Australia spent approximately \$561,840 of its \$40 million income (around 1%) on civil litigation services.¹ As expected, the bulk of the spending was on family and criminal matters, as well as advice services.

Other than a few isolated programs such as JusticeNet and the Law Society's Litigation Assistance Fund, financially disadvantaged members of the public have little access to legal assistance for civil litigation. Yet the demand for such services remains high, and the importance of meeting such demand is becoming more apparent. The Draft report raises an important point in relation to the overall and immediate effects of civil law problems impacting on "essential human needs"². WestSide is well aware of the ongoing effects that such matters have, in terms of housing, health, associated criminal activity and employment.

The gap is particularly clear when considering defendants in civil matters. Plaintiffs, on occasion, obtain assistance from the private sector on a contingency basis, however there is no incentive to private firms to provide assistance to a defendant. Once served with a claim, defendants have no reasonable choice but to participate in the legal system and with the limited assistance currently available to them, many become self-represented. With limited prospects of successfully navigating a complex legal process, such people are at risk of financial ruin.

¹ Legal Services Commission Annual Report 2013, p 15

² Draft Productivity Commission Inquiry into Access to (Civil) Justice Arrangements, p 627

The current Legal Services Commission of South Australia (“LSC”) model for clients seeking assistance with civil litigation matters is restricted to the provision of advice. The fact that 35,713 people sought civil law assistance, more than half of all enquires, indicates the level of demand. As the LSC provides little by way of ongoing representation, it reflects the number of people being denied ongoing assistance.³

WestSide Lawyers is persuaded that not providing such assistance is a “false economy”.⁴ The public expense of self-representation include extra court costs as matters progress inefficiently, both through the extra time spent by the judiciary in prolonged matters, and the time spent by court staff in assisting people through the administrative processes. The cost of appeals and the likelihood that at least some matters could have resolved earlier with legal assistance add to the already heavy burden of the courts. Additionally, social costs are likely to increase where successful legal outcomes are not available, as rightly set out in the report.

In response to Recommendation 21.1, it is preferable that civil litigation be kept separate from other legal assistance funding. This ensures proper transparency so that spending can be accounted for and funders can be assured that grants are spent in the way intended. In order to properly ensure that resources are being directed to civil matters, an accounting system isolating the different areas of income and expenditure is required.

Advice v Advocacy Services

Funding for advice services is money well spent for a number of reasons. Sound legal advice on the merits of a matter can prevent disputes from escalating as clients’ rights and duties are identified and a clear course of action set. Increasing public knowledge empowers people to assist themselves where possible, and advice on preventative measures can have long-term benefits and reduce the burden on the legal system. In South Australia, where legal representation is not an automatic right in disputes relating to claims under \$25,000, advice services are becoming increasingly important in light of the recent changes to the minor civil claims jurisdiction.

³ Legal Services Commission Annual report, p 52

⁴ Draft Productivity Commission Inquiry p 631

WestSide Lawyers resists any suggestion that advisory services are an adequate replacement for representation, or that funding will go further if spent in advisory services. Disadvantaged members of the public for which legal assistance services are most important are often unlikely to deal with disputes on their own, even with advice. Our clientele routinely have language barriers, low literacy skills and mental health problems all of which contribute to their inability to assist themselves in legal matters. For such people, advice is not sufficient and representation is key to accessing legal justice. Provision of legal representation, while admittedly more expensive at the outset, often reduces social costs.⁵

In some cases, advice is sufficient to clarify rights and provide a course of action outside the legal system. However, providing advice in isolation is an inefficient use of resources in many cases where advice is not enough. Consider for example the practice of legal advice services which assist clients to draft a letter of demand and provide advice on how to lodge a claim. This approach leaves clients to proceed unrepresented through court processes, including drafting affidavits, dealing with discovery processes and adducing evidence. It is clear that the production of a letter or claim is the tip of the iceberg in terms of their need for assistance. Availability of representation through court processes is important to access to justice, especially where the other party to the dispute is represented. Where legal representation is not allowed in court, sidelines assistance should be provided.

Particularly pertinent is the concept of strategic litigation, which sets precedents, has the potential to change policy and practice and ultimately benefit a large number of people beyond the individual client. An example of such litigation conducted by WestSide Lawyers, albeit a criminal law matter, was an appeal to the Supreme Court of a Magistrate's decision under s 12(1)(a) of the *Criminal Law (Clamping, Impounding and Forfeiture of Vehicles) Act 2007 (SA)* as to whether the forfeiture of a motor vehicle for traffic offences would cause the client "severe financial or physical hardship". The Court allowed the appeal and broadened the definition of hardship.⁶

⁵ Draft Productivity Commission Inquiry pp 619-621

⁶ *Perovic v Police* [2011] SASC 174

It is our view that a service provider should be able to provide both advice and representation when required in conjunction. There are a number of benefits to this model, including:

1. The higher quality of advice provided by lawyers who regularly conduct litigation; are familiar with the practical aspects of attending court, assessing evidence and presenting submissions before the Court as compared with advice from lawyers with little practical experience;
2. The efficiency in having the same person or department taking instructions and giving initial advice, as providing ongoing representation; thus reducing double-handling of files as well as inspiring confidence in the service;
3. The improvement of merits assessment when the person making the decision has met with the client and is likely to be involved in the matter.

WestSide Lawyers disagrees with the notion that CLCs are not equipped to handle casework and focus on advice and information sessions.⁷ We note that NLA submission 123 provides no data to support the supposition that LACs are able to be more efficient in service delivery, and further note that no statistical evidence is provided in the draft report to support such an allegation.⁸ Our data, though somewhat limited in scope, challenged this theory. Based on income and funding reporting as set out below, we consider that WestSide Lawyers operates on an annual income that is 2% that of the LSC. WestSide Lawyers opened 494 new cases for ongoing representation in 2012/2013, which is 3.2% of the 15,351 grants of aid provided by the LSC. Given the scale of the two enterprises, comparison is not easy. However, by dividing the total annual funding by the number of new representation cases, we can obtain a notional figure of \$1,720 per case at WestSide Lawyers compared to \$2,669 per case at the LSC. It is obvious that the amount of casework is proportionate to the amount of funding provided, and that CLCs are able to effectively use the resources available for advocacy work.

⁷ Draft Productivity Commission Inquiry p 619

⁸ Draft Productivity Commission Inquiry p 633

2012/2013 Income Comparison				
	State Funding	Commonwealth Funding	Other Income	Total Income
LSC ⁹	\$19,589,600	\$15,781,510	\$5,556,660	\$40,972,770
WestSide Lawyers ¹⁰	\$149,766	\$556,554	\$143,439	\$849,759

In the 2012/2013 financial year, WestSide Lawyers assisted 2039 clients, and provided 7814 client information and advice activities. Of the 2039 clients assisted, WestSide Lawyers offered casework assistance to 494 clients, being 24% of all new clients. Clients who did not receive ongoing assistance were not eligible due to lack of legal merit, did not meet the means test or did not require any further assistance. These statistics have remained consistent for the previous three financial years.

WestSide Lawyers Client Statistics			
	12/13	11/12	10/11
Number of clients assisted	2039	1796	2003
Information & Advice Activities	7814		
Ongoing representation matters at start of year	276	394	203
New matters	494	498	453
Closed matters	627	494	550
Ongoing representation matters at end of year	143	196	106
New clients eligible for casework assistance	24%	28%	23%

In relation to the distribution of funding between advisory services and representation services, the report correctly identifies that while both are necessary to facilitate access to justice, advocacy should be a core activity of legal assistance services. WestSide Lawyers proposes that efficiency and quality of service is best reached when the two services are provided in conjunction with one another, and that CLCs are capable of achieving this balance successfully.

⁹ Legal Services Commission Annual Report 2013, p 15

¹⁰ WestSide Lawyers Annual Report 2013

CLCs should be funded for Civil Litigation

WestSide Lawyers has received specific funding for civil matters since 1995 and has successfully conducted civil litigation since that time, with such currently accounting for 54% of our casework. With the approval of our funders and the sanction of the Law Society, we have taken steps to drive this funding further through our innovative client contributions scheme, outlined at page nine. WestSide Lawyers is at the forefront of the change required to meet the demand for civil litigation services with the limited funding available.

We strongly dispute the notion that CLCs are able to assist only with early advice and do not have the expertise to undertake civil matters.¹¹ There are a number of reasons that CLCs should continue to be funded for advocacy in civil litigation:

1. Simply put, CLCs are capable of conducting advocacy and ought to be providers of a quality advocacy service. The current and historical situation in South Australia is that the LSC provides advice only in relation to civil litigation and refers matters to pro bono providers and CLCs for representation and advocacy. WestSide Lawyers currently has 81 civil files open for ongoing casework (about 54% of all cases open) and two dedicated civil litigation practitioners in its Adelaide office. To date, no client who met the merits and means eligibility tests have been turned away from our service for lack of resources. While we agree that more resources should be allocated to meet the level of demand for civil litigation, it is obvious that such resources should be available to CLCs;
2. Providing an alternative to the main service provider is an important feature of CLCs which often take on matters which do not meet the eligibility criteria of the main service provider. We note for example, that the LSC refused 3207 applications for legal aid in 2012/2013.¹² The report correctly identifies that current eligibility tests often exclude people who are unable to afford private representation but are not quite within the means or merits test. If CLCs did not conduct advocacy such people would be left without assistance or required to take financially unsafe steps to pay for private assistance.

¹¹ Draft Productivity Commission Inquiry p 632

¹² Legal Services Commission Annual Report 2013, p 74

3. The report acknowledges these gaps in eligibility need to be addressed, however in our experience there will always be people denied aid without realistic alternatives.
4. There are a number of reasons an alternative to the main service provider is necessary. Where conflicts arise from parties seeking assistance from the same provider, it is essential to have an alternative so that parties are on equal footing. Where there is a breakdown of the lawyer-client relationship, clients must have the option to seek assistance elsewhere. As privately assisted clients have more than one option available to them, so should publicly funded clients. This is not to encourage forum shopping, which is an obvious misuse of resources, but acknowledging the many cases where having an alternative source of assistance is essential for justice equality.
5. As smaller, independent organisations, CLCs can provide more flexibility in service provision than larger bodies, as management is closer to ground level and there is less bureaucracy in decision-making. While consistency is undoubtedly important in the provision of services, given the broad and changeable nature of the civil litigation practice, a certain flexibility is required. Flexibility is also important given the changing need for legal assistance. For example, WestSide Lawyers recently has expanded its services to take on estate matters, due to an increase of people approaching the service with probate and contested estate disputes, in situations where the equity in the estate does not permit the services of private lawyers without significant depletion of the value of the estate. The ability of an operation to efficiently change its services to meet the needs of the community is an important requirement in the provision of legal services. Imaginative solutions to newly emerging dilemmas should be encouraged.
6. The ability to provide advisory services and representation in conjunction, as discussed above, is particularly important in civil litigation where good advice is based around the practical aspects of litigation and court processes. Providing practical and useful assistance in the „vacuum“ of an advice only service is neither efficient nor effective in civil litigation, where even matters pertaining to small values can be complicated.

7. WestSide Lawyers is of the view that advice in all areas, but particularly in civil litigation, should only be provided by lawyers who are experienced in representing clients in such matters, preparing casework, attending court and going to trial. In the current climate, it is not uncommon for advice to be provided to clients about going to court, by lawyers who have in fact not appeared in court due to their advisory only role.
8. Independence from government is an important feature of CLCs. While funded, it is important for the public to have the option to obtain assistance from a service that is not managed by government, particularly in matters where other departments are in conflict and represented by the Crown Solicitor.
9. Finally, the nature of CLCs is such that they have the ability, unlike the large government-run bodies, to operate in a commercial and competitive manner. By operating in a way that is more akin to a small private firm rather than a government-funded body, public resources can be stretched further and value for money is obtained. With progressive and innovative systems, such as the client contributions scheme addressed below, the effectiveness and quality of service provided improves as well as quantity of services to the public. CLCs have the ability to operate in such a way, and should be encouraged to do so.

Stretching the Government dollar further

While the above gives an indication of the substantial benefits of funding CLCs for litigation, we now address the implication of the report that such use of funding is an inefficient use of resources.

CLCs should continue to be funded for civil litigation because they have the potential and capability to use resources in a way that maximises the output of services. While the LACs benefit from the efficiencies of a large-scale operation, CLCs can be an efficient use of resources in a number of ways.

WestSide Lawyers agrees that in the provision of services it is important that overall “benefits of advocacy outweighs costs of advocacy services” and utilises a number of strategies to ensure that this occurs.¹³

Client Contributions Scheme

The client contribution scheme utilised by WestSide Lawyers has been in place for over three years and functions in a way similar to that proposed in the report.¹⁴ The scheme was implemented after it became clear that people who were ineligible under the original means testing due to a modest income would be unable to meet the costs of private representation. They were, however, able to afford to make a contribution towards their legal expenses. However, the ability of clients to make a contribution to their legal fees should not be mistaken for an ability to afford private legal representation. Where litigation is on foot, private representation quickly becomes a costly option requiring the preparation of court documents, multiple court attendances and significant expense, especially where the services of counsel are required.

Where clients have an income and are otherwise eligible, WestSide Lawyers acts for them on the basis that they pay a proportion of their legal fees. A Contribution Calculator determines eligibility for assistance. The lawyer responsible for the file estimates the number of hours the file will take to reach its logical conclusion. The Calculator takes into account the household income, dependant children, and the likely duration of the matter in assessing client eligibility. If eligible, a client is assessed at 10%, 25%, 50% or 75% of Westside Lawyers’ ordinary professional rate which is based on the Supreme Court Scale.

Clients who receive Centrelink payments as their sole income source are not required to pay a contribution. WestSide Lawyers does not refuse to act for a client because they cannot afford to make a contribution and if a financial assessment highlights that a client does not have the capacity to pay, that client will be entitled to the same representation without paying a contribution.

¹³ Draft Productivity Inquiry p 625

¹⁴ Draft Productivity Inquiry p 648

The client contributions scheme stretches government funding further in a number of ways. Firstly, the client base is extended to those who have an income but cannot afford private assistance, without reducing assistance to those who are impecunious. Secondly, the additional income from the scheme allows for more services to be provided. Since the implementation of the contributions scheme in 2011, WestSide Lawyers has increased its legal staff by employing two additional full-time lawyers, two additional research clerks and a consultant. Put simply, more services are provided to more people.

Recovering costs

CLCs have the potential to seek costs orders to extend income beyond funding. As independent organisations, CLCs have an ability to be aggressive in pursuing costs in all jurisdictions, further extending the income provided by funding. In the year ending 2013, WestSide Lawyers received \$21,488 in costs recovered largely from criminal matters. This is approximately 13% of the amount the LSC recovered in the same year, despite receiving over 100 times the funding, or 2.5% of all government funding compared to the LSC's 0.4% of funding.

In conducting civil litigation, the possibility of recovering costs increases substantially and WestSide Lawyers has taken steps to ensure that where government money is required to be spent on litigation, it is recouped from the unsuccessful party where possible. An example of the extent to which CLCs can pursue costs to maximise resources can be found in a recent case, where Westside Lawyers represented a vulnerable person who had sold her home and transferred the proceeds to an opportunistic sect that promised a cure for her debilitating disability. In addition to the judgment sum of \$420,000 and interest ordered in the District Court, WestSide Lawyers successfully obtained an order for over \$115,000 in costs.

The matter remains before the District Court to enforce the judgment. In anticipation of the receipt of these funds, the Management Board of WestSide Lawyers has already resolved to use the funds in our civil litigation program to subsidise other civil matters.

Use of Pro-Bono Services

CLCs are better placed to harness the energy of the private sector to increase the quantity and the quality of services provided. The combination of pro-bono work and independent government funding has the capacity to increase service output as well as improve the capabilities of publicly funded service. While WestSide Lawyers usually briefs senior staff as counsel, where necessary and available pro-bono services are utilised. This has the effect of making the valuable expertise of private sector available to the disadvantaged public as well as freeing public resources to continue with other work. For example, WestSide Lawyers acted in a ten-day trial in the District Court relating to a purchase of a property and a counter-claim relating to cooling-off rights. Judgment was handed down in 2013 and WestSide Lawyers received pro bono assistance of a leading silk in order to appeal against the District Court decision to the Full Court of the Supreme Court of South Australia on a point of law.

The current model in LAC is that counsel is fully funded by government, either through in-house counsel or through grants to private counsel. The practical issues arising with this were addressed in the report.¹⁵

WestSide also utilises pro bono services on a weekly basis at the after-hours advice service. This service provides after-hours appointments for new clients in a range of areas, including criminal, civil, employment and estate law. At each appointment, pro bono solicitors take initial instructions, provide advice and referrals and assess clients for ongoing representation by WestSide Lawyers. The service is managed by a senior staff member to reduce double handling of the files and to maintain efficiency. The service is very popular with clients and continues to be fully booked each week. The net result is that in 2013 over 350 new clients received legal assistance at the clinic at very little cost to the public.

¹⁵ Draft Productivity Inquiry pp 650 - 653

Funding models

WestSide Lawyers is of the firm view that CLCs should continue to be funded independently of LACs. Such view is inherent in the finding that CLCs should be funded for advocacy and civil litigation, as the LACs would be in direct competition for such funding. If funding was handled by LACs then a number of the benefits to having CLCs could be lost, including independence, the availability of an alternative and flexibility in approach and the ability to be progressive and innovative in using resources.

WestSide Lawyers prefers the approach that transfers the management of funding to the National Partnership Agreement. The proximity of the funders has the potential to increase accountability, and to ensure that funding is being properly utilised. However, better reporting requirements should be put into place so that services are properly monitored and CLCs are operating at maximum capacity.

The current reporting system is outdated as it only shows direct client contact in a reflection of the outdated advisory service model of CLCs. In conducting litigation, a significant proportion of vital work occurs outside of contact with the client. For example, negotiations with the other parties, drafting pleadings and applications and attending at court are all necessary to litigation, but are not recognised in the current reporting system. The direct client contacts counted by the funding bodies are a small portion of the work conducted on behalf of the client.

A localised management program at state level could also be used to facilitate better collaboration between CLCs to identify areas in which litigation is increasing, and gaps in service provision.

The distribution within the state was reviewed about 15 years ago, as described in the report to create four centres placed strategically in four different jurisdictions.¹⁶ In our view, this model has operated well to ensure that members of the public are able to access a CLC service in their area.

¹⁶ Draft Productivity Commission Inquiry p 658

Conclusion

WestSide Lawyers supports the findings of the draft report in relation to the need for civil litigation funding, as this gap in services has been long over-looked. We also welcome the views about advocacy services being of paramount importance to people seeking legal assistance.

WestSide has endeavoured to provide services along these principles for some years now and looks forward to a legal assistance system where such principles are implemented. For this to be successful, independently run CLCs will be a vital component. Advocacy services are central to the provision of legal services to the individual and the community, and CLCs have the potential to provide such services in an efficient and effective manner. Historically, CLCs have conducted civil litigation in a system where few other services did so, and in our view there is little reason to discontinue this service. Rather, it ought to be expanded to meet the levels of demand and to ensure that members of the public seeking assistance with such matters have sufficient access to justice.