

Legal Aid Commission of Western Australia

Response to the Productivity Commission Draft
Report: Access to Justice Arrangements

May 2014

Background

The Legal Aid Commission of Western Australia ("LAWA") welcomes the opportunity to provide this response to the Productivity Commission's draft report of its inquiry into Access to Justice Arrangements ("draft report"). LAWA was a key contributor to the National Legal Aid submission to the inquiry and supports the position presented in that submission.

The main purpose of this response is to provide comment on sections of the draft report which are directly relevant to the delivery of legal assistance services in the jurisdiction of Western Australia. LAWA considers that the size, remoteness and diversity of Western Australia (from a legal assistance perspective) make it appropriate to differentiate the Western Australian experience from the national position presented in the draft report.

On this basis, the areas in which LAWA will be making comment are in relation to:

- (a) funding arrangements for legal aid commissions ("LACs"), with particular reference to the distribution of Commonwealth legal assistance funding;
- (b) the challenges associated with the delivery of legal assistance services in regional and remote areas and the impact this has on access to justice for local populations; and
- (c) the role of community legal centres ("CLCs") in the service delivery mix for legal assistance providers in Western Australia.

Funding arrangements

1. At 604 (Figure 20.10) the draft report provides a graphical summary of the real LACs funding per person by State and Territory, 1997-98 to 2012-13. The data reflects a combination of all funding sources. While this data shows a general increase in real funding over time for all jurisdictions, it also shows very clearly that Western Australia is the lowest funded jurisdiction on a per person basis.
2. At 597 the draft report provides a summary of LACs budgeted income by funding source for 2012-13 (Table 20.1). The low position of Western Australia in terms of per person funding is, in LAWA's view, largely a function of the very low funding Western Australia receives from the Commonwealth. LAWA believes that the comparative Commonwealth funding position of LACs is more transparently presented through the publication of a per person dollar figure for that funding source, within each jurisdiction. LAWA's preferred presentation of Commonwealth funding is provided below, with population data drawn from ABS estimates as at 30 June 2012 (ABS Cat 3235.0).

Table 1: LACs budgeted income per person by funding source 2012-13.

State/ Territory	Cth grants	
	\$ million	\$ per person
NSW	65.0	8.90
Victoria	47.5	8.44
QLD	42.8	9.37
SA	15.7	9.48
WA	20.6	8.47
Tasmania	5.9	11.52
NT	3.9	16.58
ACT	4.4	11.74
TOTAL	205.9	9.06

3. The most telling observation in Table 1 is that Western Australia receives the second lowest per person Commonwealth funding of all the jurisdictions. Given the issues of remoteness, distance and the more intense service delivery needs of a jurisdiction with a higher proportion of Indigenous people in its population, it remains a mystery how the formula for the distribution of Commonwealth legal assistance funding can produce such a result.
4. LAWA notes the comment at 654 of the draft report that New South Wales and Victoria receive the lowest per person Commonwealth funding. Based on the available data LAWA suggests that the Productivity Commission amends this observation to note that Victoria and Western Australia receive the lowest per person Commonwealth funding.
5. LAWA does not agree with the view of the Productivity Commission at 654 of the draft report which states that the Commonwealth funding model "provides a transparent way of attempting to allocate a fixed quantum of funds across the jurisdictions according to legal need and the cost of providing services". While the results of the application of the formula are set out in the National Partnership Agreement for Legal Assistance Services ("NPA"), the detailed workings of the formula itself have never been disclosed to the States and Territories by the Commonwealth. The only disclosure made by the Commonwealth to LAWA has been that the distribution of funds is generally aligned to the formula applied by the Commonwealth Grants Commission as it determines the general distribution of revenue collected by the Commonwealth to the States and Territories.

6. With the principles of horizontal fiscal equalisation being at the heart of the Commonwealth Grants Commission's general mandate (as it allocates funding across the States and Territories), LAWAW observes that the jurisdictions receiving the most generous per person allocation are also those which benefit at a broader level from the effects of horizontal fiscal equalisation.
7. LAWAW has previously alerted the Commonwealth to its concerns that the own-source revenue considerations which the Commonwealth Grants Commission uses *inter alia* to adjust allocations to the States and Territories, should be excluded from the formula. The basis of LAWAW's position in this regard has been that Commonwealth funding is used largely to provide services for matters which fall within the jurisdiction of the Commonwealth. For this reason the capacity of a State or Territory to self-fund a service which is being provided on behalf of the Commonwealth is not a relevant consideration. The Commonwealth has informed LAWAW that it made the Commonwealth Grants Commission aware of this concern. However, with the details of the funding formula remaining confidential, the capacity of the States and Territories to test its veracity is largely non-existent.
8. Another synopsis is that Western Australia's comparatively low Commonwealth funding position reflects historical circumstances. In 1996 the Commonwealth imposed a purchaser-provider model upon LACs for the delivery of legal assistance services. A collateral consequence of these changed arrangements was an overall reduction in funding of approximately 15.6 per cent to the budgets of LACs nationally.¹ For Western Australia the funding cuts were particularly difficult, with Commonwealth funding between 1996-97 and 1997-98 falling by 33.1 per cent.² This was the highest reduction of any jurisdiction and, according to anecdotal accounts, reflected the positions of key political influencers of the day. In the absence of any other reasonable explanation, LAWAW considers that its unusually low Commonwealth funding position under current arrangements may be a function of the funding reduction imposed between 1996-97 and 1997-98. In this regard, funding increases from 1997-98 onwards have been applied to a very low base, from which LAWAW's Commonwealth funding position has never recovered.
9. Noting the variables which are reportedly taken into account in the funding model, LAWAW considers that it ought to be refined to be more reflective of the costs and challenges associated with the delivery of legal assistance services. As it currently stands, the model takes account of a range of economic and demographic factors and on the basis of these factors, assumes a nexus with demand for and cost of legal assistance services.

¹ See F. Regan (1997) 'Rolls Royce or Rundown 1970s Kingswood', 25 *Alternative Law Journal* 5, 225.

² National Legal Aid (2014) 'Income and Expenditure 1996-2001' at <<http://www.nationallegalaid.org/home/finance/income-and-expenditure-1996-2001/>>, 10 May 2014.

10. On this basis, LAWA is suggesting that the funding model be refined to take account of the following factors:

- (i) *The rate of population growth within a jurisdiction* – the rate of growth for Western Australia’s funding under the NPA is lower than its rate of population growth, effectively eroding the per person value of funding on a continuous basis.
- (ii) *The locations at which legal assistance services are provided and the distance and cost factors applicable to those locations* – LAWA provides direct service delivery (that is, face to face with clients) at 94 locations in Western Australia. Many of these locations are extremely remote and difficult to service. On the Kimberley circuit, for example, it will take a LAWA lawyer five days of travel away from their base in Kununurra to provide representation and assistance for clients in Halls Creek, Billiluna and Balgo, in criminal and civil matters (many of which are intertwined).³ The cost differential between many of these locations and the metropolitan area is significant, and often reflective of other cost drivers in local economies. In 2013 the Western Australian Department of Regional Development estimated that the cost of a basket of goods and services in the Pilbara region was 18.6 per cent higher than in the metropolitan area. In 2011, at the height of the so called ‘boom’ in iron ore project construction, the same basket in the Pilbara had a cost index 37.1 per cent higher than the metropolitan area.⁴ The Pilbara is a sparse but high demand area of legal need, with the additional cost factors that are involved in servicing the region serving as an inhibitor to LAWA’s overall capacity to respond as adequately as possible to the demand pressures.
- (iii) *Particular issues of acute legal need within certain regions of a jurisdiction and the distance and cost factors which apply in those regions* – the process of allocating funding on the basis of jurisdiction wide measures, dilutes the disproportionate level of resource allocation which is required in some locations where legal problems are chronic and the need for legal assistance is immense. Child protection and family law issues in the north of the State affect a disproportionately high percentage of the population. This requires an intensive level of service delivery based on the complexity of the legal and cultural issues involved. In this context it is noted that in the metropolitan area there are 0.26 child protection applications per 1,000 of population, compared with 0.69 applications per 1,000 of population in regional Western Australia. The situation is particularly acute in regions such as the East

³ See J. Catanzaro, “Dirt road to justice”, *The West Australian*, 4 September 2010, 50.

⁴ Department of Regional Development (Western Australia), *Regional Price Index 2013* http://www.drd.wa.gov.au/publications/Documents/Regional_Price_Index_2013.pdf at 17 May 2014.

Kimberley, where there are 6.9 applications per 1,000 of population.⁵

On a similar theme, a 2005 study by the Centre for Aboriginal Policy Research at the Australian National University, noted 72 per cent of survey respondents in the Ngarda Ngarda Yarndu area of the Pilbara region perceived that family violence was a problem in the area.⁶ This research is important because it links access to justice with a range of other factors which need to be addressed in order to improve the socio-economic position of Aboriginal people in the Pilbara.

- (iv) *The prevalence of extreme economic and social disadvantage in regional locations* – this point is linked to the two previous points, with areas of extreme disadvantage having very high requirements for legal assistance.
- (v) *Measures of legal need be based on objective survey data, such as the jurisdictional specific reports published by the Law and Justice Foundation of New South Wales as part of its Australia-wide legal needs study⁷ – the reported use of “expressed demand from applications for legal aid”⁸ as a means of considering demand for legal assistance services has a number of fundamental shortcomings:*
 - Firstly, the number of applications received for legal representation represents a suppressed level of demand. Many legal practitioners will simply not submit an application on behalf of a client because, based on their knowledge of the Legal Aid Guidelines and Means Test, the chances of being awarded a grant of aid are remote. In this context, the market for legal assistance services is self-rationing.
 - Secondly, representation through a grant of legal aid is generally the lowest volume service provided by LACs. Demand as represented by the level of growth in other LAC services should also be considered as part of the funding distribution formula.
- (vi) *The prevailing market cost of relevant legal services should be taken into account* – LAWA relies very heavily on private practitioners and associated experts for the delivery of services on behalf of clients, particularly in the area of family law, where LAWA

⁵ Data taken from Department for Child Protection (Western Australia), *Annual Report 2012*.

⁶ J. Taylor and B. Scambury, *Indigenous people and the Pilbara mining boom: a baseline for regional participation*, Centre for Aboriginal Policy Research, Australian National University, Canberra, 2005, 131.

⁷ C. Coumaleros et al, *Legal Australia-wide Survey: Legal Need in Australia*, Law and Justice Foundation of New South Wales, 2012.

⁸ PriceWaterhouseCoopers, above n1, 23.

provides specialist independent children's lawyer services. Under current funding arrangements, LAWA's remuneration of private practitioners is based on a general fee of \$140 per hour. Anecdotally, the private market rate for family lawyers in Western Australia ranges from \$350 to \$750 per hour. Given these cost structures in family law practices, it is simply not feasible for many of them to accept or seek LAWA grants of aid. Those that do, often do so for little or no financial benefit. This effect is acknowledged by the draft report at 652.

- (vii) *The proportion of clients identifying themselves as Aboriginal or Torres Strait Islander* – it has been suggested reported that the Commonwealth Grants Commission includes a measure of "Aboriginal and Torres Strait Islander populations" in determining the allocation of legal assistance funding. LAWA considers that the measure of the general indigenous population of a jurisdiction is not necessarily an indicator of a cost or demand pressure for a LAC. Rather, it is the actual proportion of indigenous clients which changes the cost dynamic due to factors including remote access and the clustering of complex legal problems. It is estimated that approximately 18 per cent of LAWA's existing client base identifies itself as Aboriginal. LAWA notes that ALSWA received total Commonwealth funding of \$11.6 million in 2011⁹ to provide legal assistance services to a population of 88,270 Aboriginal people in Western Australia¹⁰. This equates to per person funding of \$144.84. LAWA believes that the policy basis of this loading, which is applied to the representation and assistance provided to Aboriginal people, is reasonable given the remote location of many points of ALSWA's service delivery and the complexity of issues associated with this client base. LAWA therefore considers that a similar loading ought also be applied to other legal assistance providers in recognition of the complexity of this client base.

11. If these other variables, described under point 10, were taken into account by the Commonwealth Grants Commission, LAWA believes that the allocation of Commonwealth funds to LACs would reflect more adequately the costs and demands of legal assistance service delivery. The existing variables which are taken into account have an abstract linkage to the demand for and cost of legal assistance services and result in an inequitable distribution of legal assistance funding across the States and Territories.

⁹ Aboriginal Legal Service of WA, *Annual Report 2013*, 44.

¹⁰ ABS Cat 3238.0.

The challenges of regional and remote service delivery

12. At 652 the draft report notes that the most sparsely populated jurisdictions – Western Australia and the Northern Territory – are those with the lowest rates of outsourced legal work.
13. In Western Australia there are very few private lawyers with practices north of Geraldton. Aside from four practices in Broome and one in Port Hedland, the burden of community legal representation falls to lawyers employed in the public and community sectors.
14. While attraction and retention of public sector professionals is always a challenge in the north of Western Australia, LAWA has been fortunate in being able to maintain a dedicated and skilled workforce in its offices at South Hedland, Broome and Kununurra. An important factor in this regard is that LAWA is able to offer good conditions of employment allied with the Public Sector Officers Award, which includes a regional allowance, subsidised housing and annual return travel by air to Perth.
15. These same conditions have traditionally not been available to employees of allied legal assistance agencies, including ALSWA, the Family Violence Prevention Legal Services ("FVPLS") and local community legal centres. In March 2008, LAWA gathered data from these agencies which showed that more than one in three legal positions in regional Western Australia (21 out of 59) were vacant.¹¹
16. In response to this problem, LAWA, along with collaboration partners ALSWA, the FVPLS, the CLC Association of Western Australia, and the Law Society of Western Australia, developed a scheme called the Country Lawyers Program ("CLP"). The scheme operated under a "single employer" model, with LAWA operating as the employing entity and providing lawyers with the opportunity to work on a secondment basis ALSWA, the FVPLS and CLCs in regional locations (some lawyers were also placed with LAWA under the CLP). LAWA was reimbursed by each of the agencies for the employment expenses of each of the secondees. The Commonwealth assisted with the funding of the administrative expenses borne by LAWA in managing the CLP.
17. The success of the CLP was noted by former Attorney General McClelland:

The WA Country Lawyers Program, funded by the Australian Government and run through WA Legal Aid, which employs 23 lawyers across Western Australia has been very successful in reducing vacancies in regional and remote service areas, especially in the Indigenous Family Violence Prevention Legal

¹¹ J. Stewart, 'The WA Country Lawyers Program', National Access to Justice Pro-Bono Conference, Sydney, 14-15 November 2008, at <https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/309_Stewart_J.pdf>, 17 May 2014.

Services. Since the introduction of the Program, vacancy levels in publicly funded services have dropped from 24 per cent to 4 per cent in regional areas of WA.¹²

18. Despite this acknowledgement of the success of the CLP, the Commonwealth funding support has declined in recent years, with the CLP now no longer playing a significant role in attracting and retaining lawyers to difficult-to-fill positions in remote areas of the State. The Commonwealth has indicated that one reason for the withdrawal of funding has been that the market failure which previously existed in these areas has now been rectified. The reality is that without the market intervention of the CLP the market failure is beginning to re-emerge, with the FVPLS, for example, now having a number of legal vacancies which it is unable to fill.
19. LAWAA considers that without some form of market intervention by the public sector, there will always be a failure in the employment market for community sector lawyers in remote areas of the State. The reasons for this are relatively simple. The costs of living are extremely high compared to the southern parts of the State and the remuneration relatively low compared with other skilled and semi-skilled workers in the same regions. The work is challenging and time away from regional towns attending to matters in more remote areas can place significant stresses on families.
20. There is perhaps no better example of the application of public value theory than a market intervention to ensure an adequate supply of lawyers at the community level in regional and remote areas, where there is a natural market failure. Professor Mark Moore (of the Harvard Kennedy School) as arguably the leading exponent of public value theory makes the following relevant points:

In general, two different justifications for public intervention carry weight. One is that there is a technical problem in the organisation of a market to supply the goods in question – some reason why free exchanges among producers and consumers will not result in the proper level of production. Government must intervene to correct the defect in the market.

A second justification is that there is some crucial issue of justice or fairness at stake in the provision of the service – some right or claim of an individual against the society that others agree must be honoured. Government must intervene to ensure that the claim is honoured – not only for the current individual who has a claim but generally for all.¹³

¹² Lawyers Weekly, 'Govt hears cooee for more bush lawyers', 23 May 2011, at <<http://www.lawyersweekly.com.au/the-new-lawYer/law-firms/govt-hears-cooee-for-more-bush-lawyers>>, 18 May 2014.

¹³ M.H. Moore, *Creating Public Value: Strategic Management in Government* (1995) 43-44.

21. LAWAW submits that both legs of Moore's proposition on market intervention hold true for legal services in regional and remote areas, particularly the north of Western Australia. Firstly, there is a technical failure in the market because private lawyers are not prepared to provide services based on the high cost structures prevailing in the north and the very limited capacity of local communities to provide the remuneration to make practice in these areas financially viable. Secondly, without public and community sector lawyers in remote areas, there is a major impediment to access to justice and ultimately a denial of justice.

Community legal centres

22. LAWAW notes that the draft report has made a number of comments concerning the efficiency, effectiveness and location of CLCs.
23. LAWAW believes that it is extremely important to differentiate the Western Australian experience from the national position portrayed in the draft report. For the record, LAWAW believes that CLCs are an integral element of the legal assistance landscape. With a relatively small funding base they provide niche services to their local communities. In Western Australia, every CLC, without exception, is located in an area of high legal need.
24. From a case study perspective, the Geraldton Resource Centre stands out as a CLC which is highly valued and relied upon by its local community and the broader mid-west region of Western Australia. This point was affirmed in January 2012 when LAWAW conducted a survey of client contact by the legal assistance sector in Geraldton over a one week period. The survey participants included LAWAW, ALSWA, the FVPLS and the Geraldton Resource Centre. In the survey report, the Geraldton Resource Centre was described in the following terms:

The Geraldton Resource Centre is a multi-faceted assistance agency which had its genesis as the Geraldton Emergency Relief Organisation in 1984. While the GRC can provide legal assistance services in most areas of law, its strengths lie in the areas of family law, civil law, tenancy and financial counseling. The GRC organisation consists of 12 legal and 28 non-legal staff. The legal staff is made up of two lawyers, with the remaining ten staff providing paralegal services in the areas of tenancy and financial counseling. Beyond Geraldton, the GRC provides services through a satellite office in Carnarvon, and on a circuit basis to Onslow/Exmouth, Meekatharra, Wiluna, Sandstone, Mount Magnet, Yalgoo, Mullewa, Jurien Bay and Burringurrah.¹⁴

Over the survey period, the majority of the face to face contact for the GRC, in the area of legal assistance, was in relation to civil

¹⁴ Legal Aid Commission of Western Australia, *Survey of the Geraldton legal assistance sector: 16 to 20 January, 2012* (unpublished) 2.

law matters, accounting for 70.8 per cent of all contacts. This statistic suggests that the GRC has the strongest civil law practice of all the legal assistance sector agencies in Geraldton. Also of note is the fact that 83.3 per cent of contacts were women, and that 83.3 per cent of contacts identified themselves as being Aboriginal. On this basis it is a reasonable suggestion that that the GRC has a specialist civil law practice which responds very strongly to the needs of Aboriginal women.¹⁵

25. The experience of the Geraldton Resource Centre demonstrates that it is well run and responding to the needs of the community with a specialised civil law service. It provides a circuit service to an area almost equal in size to the land mass of New South Wales.
26. More generally, CLCs in Western Australia are subject to stringent governance controls and effectiveness oversight. In 2003, a Joint Commonwealth and State Review was conducted into Community Legal Centres in Western Australia, the WA CLC Review reported in September 2003, and the WA Review Report was signed off by both the Commonwealth and State Attorneys General. The WA CLC Review was a detailed and comprehensive examination of the legal assistance framework in WA, with detailed terms of reference agreed between the Commonwealth and the State.
27. Due to the rigorous and detailed methodology used, the Western Australian CLC Review has important and enduring findings that are applicable to the legal assistance landscape in Western Australia. In particular, the Western Australian CLC Review paid particular attention to the distribution of CLC services in WA, whether services were appropriately located within the State of Western Australia and also whether services were best targeted towards areas of disadvantage and legal need within WA. In this context, a separate study was commissioned to determine the demographic drivers which should influence the location and service delivery priorities of CLCs.¹⁶
28. In 2009, the CLC Stakeholder Consultative Committee commissioned an update of the 2003 WA CLC Review Report. The Review Update report concluded that many of the identified areas of need and gaps in unmet legal need identified in the original Report continue to remain relevant for Western Australia.¹⁷
29. There are significant synergies to be gained in having a legal assistance system with multiple providers. In particular, where there are two or

¹⁵ Ibid, 15.

¹⁶ URS Sustainable Development, *Demographic and socio-economic analysis of Western Australia*, <<http://www.legalaid.wa.gov.au/LegalAidServices/Documents/DemographicAnalysis.pdf>> at 15 May 2014.

¹⁷ Kalico Consulting, 2003 Joint CLC Review Update Report, <<http://www.legalaid.wa.gov.au/LegalAidServices/publications/Documents/2003%20Joint%20CLC%20Review%20Update%20Report%20Sept%202009.pdf>> at 15 May 2014>.

more parties to a dispute to be assisted (as in family and civil matters) multiple providers are essential to avoid legal conflict of interest. As acknowledged in the draft report, the four different providers perform different and complementary roles within the system. The legal assistance landscape in Western Australia, as in other States, demonstrates a high level of co-operation between the existing providers to actively avoid duplication of services and to maximise the services being delivered to disadvantaged clients (this is exemplified by the Geraldton example under point 24).

Conclusion

30. This response to the draft report has a deliberately strong focus on the unique needs of legal assistance service delivery in Western Australia. The need for access to justice in Western Australia is often at its most acute in areas which are sparsely populated, remote, and difficult and expensive to access.
31. The model under which Western Australia receives Commonwealth legal assistance funding produces a result which sees Western Australia receive the second lowest funding of all the states and territories on a person basis. This result is difficult to understand given the issues of distance and remoteness for service delivery in areas of acute need.
32. LAWAW believes that the model for the distribution of Commonwealth funding should be reviewed to have a greater link to factors which are obviously aligned to the demand for and cost of legal assistance services, rather than demographic factors for which there appears to be only a loose nexus.
33. There is a need for ongoing market intervention to ensure that regional and remote areas have access to legal practitioners. Previous models of market intervention, based on Commonwealth funding support have been successful in this regard. Their withdrawal – and the return to pre-market intervention problems of lawyer attraction and retention – only proves that there is an endemic market failure in the north of Western Australia.
34. LAWAW strongly supports the continuation of existing arrangements for CLCs in Western Australia. CLCs play an important part of the broader fabric of legal assistance service delivery and in Western Australia are complementary to the work of LAWAW and ALSWA. They are subject to oversight through very strong governance arrangements and exhibit a level of maturity by self-submitting to regular periodic reviews of effectiveness and efficiency.

Ends.