

# EROSION OF JUSTICE

In February this year the Law Council of Australia released its report entitled "**Erosion of Legal Representation in the Australian Justice System**". The report was largely the product of work undertaken by the Law Council's Access to Justice Committee in collaboration with the Australian Institute of Judicial Administration, National Legal Aid and Aboriginal and Torres Strait Islander Legal Services. It represents the Law Council's most significant commentary to date on the state of legal aid in Australia from the perspective of the practising profession. The report can be accessed on the Law Council's website and it is relevant to all lawyers, whether or not they undertake legal aid work. This article summarises a few relevant points.

## State versus Commonwealth

The Commonwealth Government insists that Commonwealth legal aid funding only be spent on Commonwealth law matters. This has seen a reduction in real terms in the Commonwealth funding of legal aid. The report comments that the artificial barriers created by this rule impede proper delivery of services to individual clients. For example, a woman seeking to pursue DV, child residence, child protection concerns which brings in a child state or territory child welfare authority could conceivably be litigating in two or three different courts. She may be required to qualify for legal aid under possibly three different guidelines.

With the four year Legal Aid Funding Agreement between the Commonwealth and States/Territories due to expire on 30 June 2004, it is conceivable that the Commonwealth could relent on this financing rule in the next round of Funding Agreements. Otherwise the likelihood is that the delivery of legal aid in Australia will continue to be hamstrung by this approach.

## Know Your Bottom Line

To illustrate the change in the economics of the practice of law FMRC Legal Pty Limited was requested to look at the changes to the costs of legal practice. The study looked at five groups of practices:

- mid-sized CBD
- small CBD
- major regional cities
- suburban practices
- country practices

The focus of the FMRC Legal report was **cost per solicitor chargeable hour**. The survey shows the following:

	Mid-CBD Solicitor	Small CBD Solicitor	Regional/city Solicitor	Suburban solicitor	Country solicitor
1994	\$129	\$135	\$109	\$138	\$124
2002	\$155	\$155	\$140	\$153	\$132
Increase	\$26	\$20	\$31	\$15	\$8

The figures for an employed solicitor were based on an average annual income ranging from \$55,000 to \$68,000.

The survey also breaks up the overhead costs between salary cost and other practice costs. It shows that in 2002 the practice costs and salary costs per chargeable hour of an employed solicitor were as follows

	Mid-CBD Solicitor	Small CBD Solicitor	Regional/city Solicitor	Suburban solicitor	Country solicitor
Average salary charged	\$58.57	\$56.18	\$49.79	\$53.37	\$53.19
Practice costs per chargeable hour	\$96.56	\$98.66	\$89.76	\$101.19	\$78.83
Cost per employed solicitor per chargeable hour	\$155.02	\$154.84	\$139.55	\$152.54	\$132.02

The table shows that in a mid-sized CBD firm costs of a salaried solicitor are approximately \$155 per chargeable hour of which the salary component is \$58.57. Other overhead costs are relatively fixed whereas salary overheads fluctuate depending on the seniority of the lawyer doing the work.

### **Juniorisation of Legal Aid**

In 1994 the Law Council submitted to Government that the remuneration to the private profession for legal aid work was too low. At that time the Law Council acknowledged that about one third of professional fees were profit, suggesting that a legal aid fee based on 80% of a reasonable fee meant covering costs with a very small profit

In 1994 the Labor Government issued its *Justice Statement* which indicated an intention to take steps to expand the availability of legal aid.

The Labor Government lost office at the next election in early 1996. The new Liberal Government did not maintain legal aid funding in real terms and decreased it markedly. In 1999 the then Attorney-General, Daryl Williams QC, announced that the Government would examine measures to make legal aid more attractive to experienced lawyers, a statement which he repeated the following year.

No concrete steps have been made taken by the Government to implement this intention. In March 2001 the Government issued a discussion paper "National Fee Scale for Commonwealth Legal Aid Matters" which evoked a number of responses from the practising profession including the Law Council. More recently the Attorney-General's Department has sought a report on the participation of private legal practitioners in the legal aid market and has engaged the Centre for Labour Market Research at the University of Canberra for this purpose. Professor Don Fleming of the University has had the major carriage of this work and I understand his report will be with Government within the next few weeks.

The fact remains that if it costs a midsized CBD firm \$155 per chargeable hour to undertake work, then legal aid is a losing proposition for that firm. If a legal aid fee of \$120 per hour is assumed of which \$96.46 is consumed in non-salary overheads, only \$23.54 is left to cover the solicitor's salary overhead before the firm starts to lose money. Even assuming a solicitor renders 1350 chargeable hours per annum (which is more than the figures disclosed in the FMRC Legal analysis) the break-even point for firms is at a solicitor's salary \$31,779 (\$23.54 per hour x 1350 hours per annum). In reality salary rates for even the most junior solicitors generally commence well above that figure. Legal aid is a losing proposition unless the solicitor doing the work is paid at a very low rate. As a result "juniorisation" occurs of those private practitioners who undertake legal work.

### **Result of Underfunding**

The report finds that:

- there is a rise in the number of self-represented litigants for a variety of reasons, one of which is a significant lack of available publicly funded representation;
- there is an inequity in access to representation
- Courts are disadvantaged by the increased number of self-represented litigants
- There are pressures to plead guilty or abandon cases due to a lack of representation
- Increases in the number of self-represented litigants cause delays in Court proceedings, prolong cases, increase demands placed on judicial officers, increase costs to Courts, increase costs for represented parties and potentially cause an increase in frustration and violence from clients in the Courts

### **Whither/Wither Legal Aid**

The solicitors who work in Legal Aid offices are, across the board, extremely experienced, efficient and professional. Over the last 20 years we have seen a "seniorisation" of salaried solicitors within the Legal Aid office. That is because legal aid is being more and more staffed by lawyers who choose to work in that area rather than gain experience and depart for the private profession as was previously the case. However the Legal Aid Office cannot undertake all the work inhouse. The legal aid system in Australia must, by simple force of the number of cases, be a partnership between the private profession and the salaried profession.

From the perspective of the private profession the rules of that partnership have to change. Private firms must be amply remunerated to halt the withdrawal of experienced lawyers undertaking legal aid work. The Law Council report recommends a greater investment in public funding of legal representation which will result in cost savings to the Court system and the justice system as a whole, by diminishing the number of self-represented litigants.

It is also recommends that a national task force be established from representatives of bodies providing publicly funded legal services to develop national guidelines and priorities for the delivery of those services. Most importantly it recommends that the Commonwealth Government modify the Commonwealth/State jurisdiction demarcation for Federal legal aid funding to facilitate a more clientcentred approach.

It remains to be seen whether governments, particularly the Federal Government, will heed the report.