



## Submission to the Senate Legal and Constitutional Affairs Committee

### Introduction

The Employment Law Centre of WA (**ELC**) is a community legal centre (**CLC**) that has provided free, confidential employment law advice, education, representation and referrals to many thousands of vulnerable, non unionised employees in Western Australia since 2001. ELC focuses on issues such as unfair dismissal, unlawful termination, underpayment of entitlements, breach of contract, equal opportunity and occupational safety and health.

The Senate Legal and Constitutional Affairs Committee is inquiring into Australia's judicial system, the role of judges and access to justice. ELC largely directs this submission in relation to the issue of access to justice. This submission will deal with particular reference to:

- the ability of people to access legal representation;
- the adequacy of legal aid;
- alternative means of delivering justice;
- the adequacy of funding and resource arrangements for community legal centres; and
- the ability of Indigenous people to access justice.

### 1 Access to legal representation

For the majority of ELC's clients, legal representation is largely inaccessible. In ELC's experience, legal costs remain the main barrier to access to legal representation for our clients.

As the only provider of free employment law services in Western Australia, ELC experiences high demand for our legal representation services, particularly from employees who genuinely cannot afford to pay for such services. Due to limited resources, ELC prioritises clients who:

- live in rural, regional and remote (**RRR**) areas who require further assistance in recognition of the additional barriers faced by employees in RRR areas accessing the services and support necessary;
- are in identifiable groups of disadvantage such as young people, people with disabilities or persons of ATSI background;
- are of low income and/or are the sole income provider in their household and/or have dependants;
- have a diminished command of English (either educationally or because English is their second language); and
- have little or no understanding of the Australian industrial relations systems.

In this way, the ELC attempts to provide its scarce resources to the most vulnerable amongst our clients.

Despite ELC's efforts to represent or organise for pro bono solicitors to represent clients in their claims, we are aware that there remains an unacceptable amount of people who need but can not afford and thus can not access legal representation.

Within the constraints of its funding arrangements, ELC assists around 4000 clients each year. In 2008, ELC was not able to respond to 4235 calls made to its advice line. ELC currently turns away approximately 5 people each week seeking walk in legal assistance. ELC's funding allows it to employ one principal solicitor and 1.76 full-time equivalent paralegals to provide its legal services. Obviously, with such a limited staffing profile, it is not possible for ELC to offer further assistance and/or representation to all the vulnerable clients with a meritorious claim. It is for this reason that ELC provides extensive community legal education materials and workshops, including those outlined below under heading 2.

Fortunately, ELC receives and coordinates an enormous amount of support from volunteer law students, lawyers and pro bono practices within private law firms. In February 2009, the in-house volunteer hours alone exceeded 200 for the month. Without this valuable and significant contribution, ELC would not be able to come close to meeting the demand for employment law advice by vulnerable employees. Even with thousands of hours of volunteer and pro bono assistance each year, ELC still misses over 4000 calls per year to its advice line.

## **2 Adequacy of legal aid**

The term 'legal aid' is often associated with the Legal Aid Commissions. Though the client base is often the same, CLCs differ vastly from Legal Aid Commission services in relation to funding arrangements and resources. ELC interprets 'legal aid' in the context of this submission as referring to the free legal support and assistance arrangements available to people who can not afford private legal services, including CLCs and Legal Aid.

In relation to this topic, ELC will only comment on the adequacy of legal aid in providing legal services on employment law in Western Australia. Outside of union bodies providing legal services to their members, ELC is the only legal service providing free legal advice on employment law in Western Australia. Legal Aid WA and all other CLCs in WA refer their clients to ELC for employment law advice.

ELC's services include the following:

- **Advice line** – clients receive comprehensive advice from trained paralegals (supervised by the Principal Solicitor) in relation to their employment law issues.
- **Legal representation** and further assistance;
- **Evening Legal Service (ELS)** – ELC coordinates a weekly evening legal service on its premises where qualified lawyers can meet with and provide legal advice to clients on a pro bono basis;
- **RRR Community Legal Education (CLE)** program – this program involves the Principal Solicitor giving an intensive course over 2 days on an overview of employment law to generalist CLCs including those in Kalgoorlie, Kununurra, Geraldton and Albany;
- **Self Help Information Sessions (SHIS)** – during these sessions clients receive assistance in filling out court forms and preparing to self-represent; and
- **Website and free resources** - [www.elcwa.org.au](http://www.elcwa.org.au) provides comprehensive free employment law fact sheets and information kits on a wide range of issues including:
  - unlawful dismissal;
  - employee versus independent contractor;

- permanent versus casual employment status;
- unfair dismissal - WAIRC;
- unfair dismissal – AIRC;
- long service leave;
- minimum entitlements;
- redundancy; and
- constructive dismissal.

ELC has calculated the 2008 'real' costs should ELC's services be directly provided by the government.

| <b>Cost Centre</b>               | <b>Amount</b> | <b>Calculation</b>                          | <b>TOTAL<br/>(Real Cost)</b> |
|----------------------------------|---------------|---|------------------------------|
| Pro Bono<br>Solicitor<br>Support | 1,378 hours   | \$380p/h (blended top tier rate)<br>x1,378h | \$523,640                    |
| Volunteer<br>Support             | 1,263 hours   | \$40 p/h x 1,263h                           | \$50,520                     |
| ELC Service<br>Costs             | 1 year        | 2007/2008 Budget                            | \$327,727.13                 |
| <b>TOTAL</b>                     |               |   | <b>\$901,887.13</b>          |

Given the statistics above, ELC is proud to be able to provide this level of quality service provision, either directly or by organising solicitor and volunteer support. Whilst ELC does its best to attend to as many clients directly and indirectly, its ability to do so is severely limited due to the inadequacy of funding arrangements. In 2008, ELC was able to answer calls from and provide a much needed service to 3,174 clients. However, our statistics show that we were not able to respond to or receive 4,235 calls. Even allowing for some of these calls as calls from existing clients who ELC was assisting at the time, the statistics demonstrate that ELC's resources allow it to meet roughly half of the demand for ELC's preliminary services.

As previously highlighted, ELC is the only organisation providing free legal services on employment law, education and further assistance to non-union employees. For the 4,000 people who are not able to access ELC's services, they have no equivalent alternative to the ELC to turn to. These clients are then left with the unsatisfactory option of either abandoning their claim for lawful entitlements or pursuing their claim without assistance, often against their legally represented employers. In view of this gap which exists between the level of demand and the ability of ELC to fully meet this demand, ELC considers there to be inadequate free legal advice for people seeking employment law services.

Further, it is important to note that these statistics are from 2007-2008. It is significant that during that time, Western Australia was experiencing the peak of an economic boom. Though there was a constant stream of employment disputes during the boom period, we consider that the ease of employees finding alternative employment meant that many were not willing to pursue claims against their current or past employers.

Australia is currently experiencing changes in its economic and political landscape. With the global economic crisis and the resulting increase in redundancies, there is a corresponding increase in demand for employment law services. Both the federal

and state government are also currently implementing major reforms in their industrial relations legislative regime. This has also had the effect of increasing demand for employment law related services. As a result, based on the current level of employment law related services available, ELC has serious concerns that the gap between people seeking assistance and the ability for legal aid to meet this need will widen.

### **3 Alternative means of delivering justice**

Pursuant to the *Employment Dispute Resolution Act 2008* (WA), the Western Australian Industrial Relations Commission (**WAIRC**) now offers a free mediation service. This service allows employers and employees in Western Australia to voluntarily bring their employment-related disputes for mediation by an Industrial Relations Commissioner.

ELC supports the introduction of the WAIRC mediation service and consider it to be an effective alternative means of delivering justice. Where mediation is appropriate, in ELC's experience, mediation is a preferable forum for our clients to deal with their dispute as opposed to a formal hearing. This is because ELC's clients are generally individuals with little knowledge of and experience with formal court procedures. Further, court proceedings can be expensive and not necessarily within the means of individual employees.

The WAIRC mediation service is ideal because it offers the parties an informal forum to discuss their dispute with the assistance of an independent mediator with specialist skills in mediation as well as legal expertise in employment law. And as there is no charge to the service, it is a service which is accessible to anyone regardless of their financial means. It should be noted, however, that this service is only available where the parties agree to voluntarily submit to the jurisdiction. For many of ELC's clients, their employers would not agree to such an arrangement.

ELC applauds the efforts of the WAIRC and Western Australian State Government in this initiative and looks forward to the introduction of other initiatives that are effective alternative means of delivering justice.

### **4 The adequacy of funding and resource arrangements for community legal centres**

ELC considers that the funding and resource arrangements for CLCs are currently inadequate. ELC is part of the National Association of Community Legal Centres (**NACLC**) and, through this and the national Employment Law Network, ELC is aware of the general funding arrangements of various CLCs. To ELC's knowledge, the majority of CLCs continue to struggle with securing funding from year to year.

ELC's funding and resource arrangements demonstrate the precarious funding situation of CLCs.

In 2006, the federal Liberal government ceased ELC's funding when it cut the Office of Employment Advocate (OEA) funding to 22 employment advisory services around Australia. ELC was one of these centres. It was at this point that then state Labor government provided emergency funding to ELC in 2006/2007 and then continued its two yearly funding commitment to ELC via the Department of Consumer and

Employment Protection. However, until mid April this year, ELC had yet to obtain a commitment from the state government to continue funding ELC beyond 30 June 2009. Similarly, the current federal government has not committed to funding ELC (via either the Attorney-General’s Commonwealth Community Legal Service Program (CCLSP) funding stream or the Department of Education, Employment and Workplace Relations). This lack of funding commitment is in circumstances where both the federal and WA governments intend to dramatically overhaul the state and national industrial relations regime. Moreover, the worsening economic climate has led to increased employment instability, resulting in an even greater need for free employment law advisory services.

At part 2 of this submission, ELC calculated the 2008 'real' costs should ELC's services be directly provided by the government.

The 2009 estimates are below:

| <b>Cost Centre</b>      | <b>Amount</b>       | <b>Calculation</b>              | <b>TOTAL (Real Cost)</b> | <b>Current cost to ELC</b> |
|-------------------------|---------------------|---------------------------------|--------------------------|----------------------------|
| Pro Bono Support        | 1,400 hours         | \$380p/h (blended rate) x 1,400 | \$532,000                | \$0                        |
| Volunteer Support       | 2,000 hours         | \$40 p/h x 2,000                | \$80,000                 | \$0                        |
| ELC Service Costs       | 1 year              | 2008/2009 budget                | \$380,000                | \$380,000                  |
| ELC Service Relocation* | 1 relocation/set up | \$200,000**                     | \$250,000                | \$250,000                  |
| <b>TOTAL</b>            |                     |                                 | <b>\$1,242,000.00</b>    | <b>\$630,000</b>           |

\*ELC is relocating in 2009 due to an unsustainable rent increase in our current location. We would foresee the WA government incurring a similar 'set up' cost should ELC cease to exist.

\*\* Estimate as in the process of receiving quotes. ELC is seeking other grants to fund the relocation

If ELC ceased to provide its services, the government would need to absorb the services provided by ELC. It would cost the government approximately \$1.2 million to set up and continue providing equivalent ELC services in 2009. We estimate that it would cost the government approximately \$1 million each year after.

ELC is a prime example of the way in which CLCs are often in the best position to provide a desperately needed service at a fraction of what it would cost the government to offer equivalent services. However, ELC, along with most CLCs, experiences recurring problems in securing long term and short term funding commitments.

In view of this, we submit that funding and financial arrangements for CLCs are currently inadequate.

**5 The ability of Indigenous people to access justice**

In 2008, ELC assisted 64 Indigenous Australians. Of those, a large percentage live in rural, regional or remote (RRR) areas. ELC understands from its Indigenous

clients that it is particularly difficult in RRR areas to access legal advice, information and representation. There far fewer legal practitioners, a greater potential for conflicts and, for those without ready internet access, a reduced ability to access legal education and self help resources.

ELC recently assisted an Indigenous client in relation to an unlawful termination claim. As the client lived in a remote area in the Kimberley region, she found it difficult to obtain legal advice. She could not afford to pay a private solicitor and it took her several days to obtain transport into Kununurra in order to attend the Kimberly Community Legal Service (**KCLS**). This client eventually did receive assistance, however KCLS is a generalist service, without expertise in employment law. Consequently, KCLS referred the client to ELC for employment law advice.

It took the client several days to successfully contact ELC (as the telephone lines are frequently engaged due to demand for the service). Eventually the client did manage to get through to ELC's advice line and received advice in relation to her unlawful termination claim. This cause of action has a 21 day limitation period. By this stage, the client was already outside of that timeframe. ELC offered the client further assistance with filling in the relevant Commission forms, however it took the client 14 days to receive the forms in the mail and another 14 days to post the forms to the Commission because she lived in a remote community. This necessitated the client having to complete additional forms in order to file an out of time application. The client saw this as yet another barrier to her accessing justice.

ELC finds that this is a common experience for Indigenous clients, particularly for those who live in RRR areas.

## **Conclusion**

The overarching theme of this submission is that there remain severe issues in access to justice in the context of employment law.

As a CLC (and the only CLC providing free employment legal services in Western Australia and one of two specialist employment law CLCs in Australia), ELC assists the most vulnerable members of the community with the resolution of employment related issues. In our experience, paid legal representation is beyond the means of most of the people seeking our services. Despite this, current funding levels for ELC mean that its ability to meet the needs of these vulnerable employees is severely limited. The practical reality is that many of these vulnerable people are left without assistance, and in many cases, without real access to justice. These people essentially fall through the cracks in our legal system. With the current economic outlook, there is a real concern that the number of people unable to access legal services will increase significantly.

Though there has been some government initiative to address this issue, more action is required. Amongst other things, the current funding and financial arrangements for CLCs urgently needs to be reviewed. To ensure that the CLCs are able to continue to provide their invaluable service to the community, funding security to CLCs is vital.