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Freehills

30 September 2003

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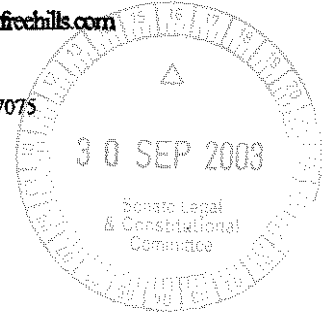
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Ms Louise Gell
Secretary of the Committee
Senate Legal and Constitutional Committee
Suite S1
61 Parliament House
CANBERRA ACT 2600



Dear Louise

Submission for Inquiry Into Legal Aid and Access to Justice

Please find attached the submission for Inquiry into Legal Aid and Access to Justice.

Should you have any inquiries, please do not hesitate to contact me on 9225 5634.

Yours faithfully

Freehills

per:

Annette Bain

Enc.

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Submission to the Senate Legal and Constitutional References Committee

Senate Inquiry into Legal Aid and Access to Justice

September 2003

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1 Executive Summary and Recommendations

1.1 Summary

Freehills acknowledges the valuable contribution of Legal Aid and community legal centres in providing access to justice to people in the community who are least able to assert their legal rights.

It is from this position that we have prepared our submission. We have highlighted a few general issues, which have a wide impact and adversely affect the delivery of legal services to the community. Our knowledge of these issues has been gained through our pro bono program, and in particular the first-hand experience of our staff at the Shopfront Youth Legal Centre [the Shopfront].

1.2 Recommendations

Recommendation 1 – *that increased resources are made available to Legal Aid and community legal centres to enable their solicitors to provide legal advice, in person and by telephone, to more people and in more areas of law, and to widely advertise this service.*

Recommendation 2 - *that increased resources are made available to Legal Aid and community legal centres to expand the number of clients whom they can represent.*

Recommendation 3 – *that in allocating financial resources there is recognition of the need to fund hearings, as well as mediations.*

Recommendation 4 - *that increased resources be made available to Legal Aid to enable an increase in fees for private solicitors to facilitate greater participation.*

Recommendation 5 – *that the legal needs of people facing imprisonment and the legal needs of people experiencing violence be given equal priority in the distribution of government funding.*

Recommendation 6 – *that court systems should be made easier and cheaper to reduce confusion and to improve access.*

Recommendation 7 – *that resources be allocated to developing and implementing sustainable models of legal service delivery in rural and remote areas, for example the Walgett model.*

Recommendation 8 – *that more resources be allocated to the provision of telephone legal advice for suspects in police custody.*

Recommendation 9 – *that the system of imposing compulsory financial contributions on Legal Aid applicants be reviewed.*

2 Introduction

We note that the Terms of Reference for the Committee are:

The capacity of current legal aid and access to justice arrangements to meet the community need for legal assistance, including:

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- (a) the performance of current arrangements in achieving national equity and uniform access to justice across Australia, including in outer-metropolitan, regional, rural and remote areas;
- (b) the implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters, and
- (c) the impact of current arrangements on the wider community, including community legal services, pro bono legal services, court and tribunal services and levels of self-representation.

In this submission we will provide an overview of the Freehills Pro Bono Program, to provide the context within which we are involved in the delivery of legal services to those least likely to access justice. We draw on our Pro Bono Program experience to raise some General Issues, followed by Issues Raised by the Shopfront Youth Legal Centre. Most of the issues that we raise fall within all of the Terms of Reference.

Our three headings are:

Freehills Pro Bono Program - this provides an overview of Freehills pro bono program. The purpose of doing so is to show the perspective from which we write, and to explain that in more than three-quarters of the cases we assist, we are responding to legal needs that fall outside the Legal Aid guidelines;

General Issues – in this section we address five threshold issues that adversely affect access to justice; and

Issues Raised by the Shopfront Youth Legal Centre – here we report three matters that have been identified by our staff at the Shopfront as being key issues to report to the Senate Inquiry.

3 Freehills pro bono program

3.1 What we do

(a) Freehills

Freehills is a large multi-national, commercial law firm. Our national practice group structure consists of Banking & Finance; Corporate; Employee Relations; Litigation; and Projects groups.

For many years Freehills have provided legal services on a pro bono basis for matters that are in the public interest.

Over a decade ago the firm established a pro bono program, guided by Pro Bono Committees. In 2001, the first National Pro Bono Coordinator was appointed, a lawyer and teacher from the community legal centre sector, with experience in working with disadvantaged women and children with little access to justice, for example because they were from a rural or remote area, had a disability, were from a non-English speaking background, were indigenous, or were experiencing domestic violence.

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(b) Pro bono guideline

Freehills guiding principle in taking on pro bono work is that we are committed to providing legal services without fee for matters that promote the public interest.

We do not assist if the client has an alternative, practicable source of legal assistance available.

In addition to our pro bono guideline, we take into account merit, conflicts, expertise, capacity and budget, when we consider a new application for pro bono assistance. We will only accept matters where we have the relevant expertise.

(c) Rationale

Freehills considers that the provision of pro bono legal services is an integral part of our legal professionalism. We actively promote the pro bono program within the firm. For example, the core training for graduates and vacation clerks includes a pro bono presentation.

3.2 In house pro bono program

The essence of our pro bono program is the in-house transactional work, and some litigious matters, undertaken by partners and solicitors across the firm. Assistance is provided in all our practice group areas, and recent matters have included corporate governance, contract review, leasing, copyright, taxation, defamation, employee relations, privacy, insurance, director's duties and establishing a charity. In Melbourne we have a three-person focus group dedicated to charity law. Around 70% of its work is delivered on a pro bono basis.

We know from our pro bono clients, such as community legal centres and charitable entities, that the work we offer them has a flow on effect to many thousands of people in the community. By assisting charitable organisations, both large and small, with their legal needs the organisations are able to stay focussed on their core roles and responsibilities. While the largest of these organisations might have the resources to pay for legal services, this would be at the expense of their service delivery.

In the financial year ending 2003, the in-house program delivered legal services to 311 clients for 549 matters. Freehills lawyers performed 16,564 hours of pro bono work. (This figure does not include our secondment positions, ad hoc secondments, non-billable time spent on such items as legal education, attendance at pro bono meetings, or the hours of work of five staff employed at the Shopfront.)

Further information regarding our program can be found at our website: <http://www.freehills.com>. Also, please find attached a copy of our Pro Bono Report 2001 – 2002.

3.3 External pro bono program

Our external pro bono program consists of:

(a) The Shopfront Youth Legal Centre

Freehills operates the Shopfront, located in Darlinghurst, Sydney, in conjunction with Mission Australia and the Salvation Army. The Shopfront offers legal

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services to homeless young people aged 25 and under. The Shopfront also provides community legal education for young people and youth workers. It is staffed by three solicitor positions: a principal solicitor, two job sharing solicitors and one solicitor on a six month secondment from the firm. We provide one paralegal and an administrative assistant, also on secondment.

In the past financial year, the Shopfront took on 596 new matters, more than three-quarters of which were for criminal matters.

(b) Working with community legal centres

Freehills provides one solicitor position at Kingsford Legal Centre in Sydney in two, six monthly secondments. In Perth, we provide one solicitor position at Sussex Street Community Law Service and in addition, all Freehills solicitors in their first post admission year spend a fortnight on secondment there. This is, in effect, equivalent to one extra solicitor position. In addition, we have provided, and will continue to do so, ad hoc secondments. Recent secondments have been at the Women's Legal Centre, Melbourne and the Public Interest Advocacy Centre in Sydney.

(c) Public Interest Law Clearing Houses [PILCH]

Freehills contributes to PILCH in Victoria, New South Wales and Queensland through membership subscriptions, secondments, and by supporting the *Practising in the Public Interest* educational program. We also receive referrals to our pro bono scheme from the clearing houses each year.

3.4 In-kind services

(a) Continuing legal education

Freehills runs information and legal seminars for our pro bono clients, sometimes at the client's premises, and at other times in-house. This year at our Sydney office we have held a Pro Bono Seminar Series, which comprised four seminars on Directors Risks for Not for Profit Organisations, Employment Law, Taxation and Structuring, Contract Law and Privacy. We also hosted a workshop on law reform proposals for the *Corporations Act* as it relates to not for profit entities.

(b) National Pro Bono Resource Centre

Freehills provides support to the National Pro Bono Resource Centre including legal advice, contributions to articles, surveys and financial support for its annual conference.

(c) Mentoring

Freehills mentors solicitors from Legal Aid and community legal centres on request.

(d) Vacation Clerks Pro Bono Research Program

In two offices, so far, vacation clerks have been given the opportunity to undertake research projects – from drafting submissions to doing an audit of websites on a given legal subject.

(e) In-kind assistance

Freehills also provides in kind support, such as providing meeting rooms, secretarial support, printing and design work.

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4 General Issues

4.1 Legal information v legal advice

In recent years a number of legal information centres have been established, such as call centres and websites, which do not always include access to a solicitor who can provide legal advice. These information services should not be counted when assessing the aggregate of legal services available, as they do not deliver a legal service, such as advice or casework. They offer a very useful function in providing general legal information but they cannot replace proper legal advice.

People who are least able to access justice, will similarly be least able to apply legal information to their own set of facts, assess the merits of their case, review the courses of action open to them, and then be able to initiate proceedings, and understand the implications of pursuing, or not pursuing, a particular course of action.

These are the skills that practising solicitors acquire through training and experience. It is preposterous to assume that an information line will equip such a person to perform "D-I-Y" justice.

Each person who contacts our pro bono program is asked who referred them, or how they heard about us. We do not recall anyone saying that they heard about our program, or were referred to it, by an information line or website, other than those few cases which came via our own website.

Where do the callers go for legal advice and representation, once they have exhausted the information services? If people who are seeking legal advice are stonewalled by an information service, then information services themselves become another barrier to accessing justice.

Initial legal advice should be available for all people and in most areas of law. It is our observation that a far-reaching barrier to accessing justice is the unavailability of early legal advice. In too many cases what starts as a small legal "molehill" grows into the "mountain" due to ignorance caused by a lack of access to legal advice and representation.

The importance of good quality legal advice at an early stage cannot be overestimated. It means that a client can decide which course to pursue. In some cases the best decision may be to end it right there, and even if it is an unappealing option, it is better than dragging on a case which has little merit, fuelled by false hope, in the absence of clear appropriate legal advice.

Recommendation 1 – *that increased resources are made available to Legal Aid and community legal centres to enable their solicitors to provide legal advice, in person and by telephone, to more people and in more areas of law, and to widely advertise this service.*

4.2 Legal representation

In addition to early legal advice, Legal Aid and community legal centres' solicitors should have the resources to either represent the client or explain how a Legal Aid matter can be assigned, for example where Legal Aid itself has a conflict, to those clients who qualify under merit and means tests.

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For those clients who fall outside the Legal Aid guidelines some assistance needs to be given in explaining how and where to find an appropriate private solicitor.

We understand that there has been a decline in the number of private solicitors undertaking Legal Aid work in non-criminal cases and that common reasons given are that the fees paid do not cover costs and that the paperwork required is unreasonable. Funding and policies require review to ensure that they do not hinder a client obtaining legal representation when it is most needed. For example, in family law cases there is a policy to divert funds to mediation, which can result in a difficult matter exhausting its Legal Aid allocation before the hearing is reached, leaving a party/parties without legal representation at a time when legal representation is critical. Given that many of the cases that reach the hearing stage in the Family Court involve violence issues, it is more vital than in most other areas of law that adequate legal representation is available.

Early representation, like early advice, may reduce protracted, and sometimes unnecessary proceedings, and the eventual logjam in the courts.

To cope with an increase in litigants-in-person, in recent times there has been a growth in pro bono panels or schemes attached to different Courts. Freehills has been asked to participate in panels by Local, Federal, Federal Magistrates and Supreme Courts. We are unable to assist with these panels because most of the requests for assistance fall outside our pro bono guideline. The firm's guideline is that we will consider a matter for pro bono assistance if it is in the public interest.

We are also concerned that for the Court to play a direct role in obtaining legal representation for one party in a civil dispute, albeit pro bono, may create a perception of bias.

Recommendation 2 - *that increased resources are made available to Legal Aid and community legal centres to expand the number of clients whom they can represent.*

Recommendation 3 - *that in allocating financial resources there is recognition of the need to fund hearings, as well as mediations.*

Recommendation 4 - *that increased resources be made available to Legal Aid to enable an increase in fees for private solicitors to facilitate greater participation.*

4.3 Prioritising legal needs

The shortcomings of Legal Aid are largely due to a lack of funds and the competing demands of different sectors of the community, in particular in the ongoing tension between funding for criminal law and funding for all other areas of law.

Most will agree that it is essential that a person is provided with legal representation when his, or her, liberty is at stake. We would agree and add that it is just as important that someone who is a victim of violence, for example, a child living in a domestic violence situation, is provided with legal representation. There is a perception that government funding prioritises the legal needs of people accused of crime, most of whom are men, above the legal needs of all other groups within the community. We note with concern that funding may no longer be available for children to have separate legal representatives in family law matters. Children in criminal and child protection matters will be eligible for legal assistance, but not in family law matters.

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It is also clear that Legal Aid is unable to assist in many areas of civil law where there is an unmet need. Pro bono programs like ours fill some of the gaps such as assisting not for profit community organisations, who tell us that there is no other source of free legal advice and representation available to them.

We are also aware that there is no Legal Aid assistance available in commercial matters for small or micro business people even when they fall within the means test.

While we endorse the reasons why criminal matters are a priority of Legal Aid, it is important that in the distribution of Legal Aid resources the legal needs of all disadvantaged people are considered, and allocated accordingly. Priorities should be reviewed and include consideration of how the provision of Legal Aid will best benefit the individual and the community.

Recommendation 5 – *that the legal needs of people facing imprisonment and the legal needs of people experiencing violence be given equal priority in the distribution of government funding.*

4.4 Systemic barriers

Access to justice is often barred by a lack of access to the system. At the highest level this may be because of filing costs, and the confusion caused by diverse court rules, limitation periods, and complicated forms. At the local level, the bar could be that there is no local court in town, or that there is no public transport to that court, or money for the fare where public transport is available, or disability access, for an individual to reach the system.

Work has started on addressing some of these issues, such as plain English documents and ramps at courthouses, but these do not go far enough. There should be a closer examination of the ways in which access to our courts can be made easier.

Recommendation 6 – *that court systems should be made easier and cheaper to reduce confusion and to improve access.*

4.5 Rural and remote

We are very familiar with the difficulties experienced by people who live in rural and remote areas in obtaining Legal Aid and accessing justice. Freehills pro bono clients include people and organisations from rural and remote areas.

We are also aware of the difficulties experienced by community legal centres and private firms in recruiting solicitors to rural and remote areas.

In delivering legal advice and representation in rural and remote areas it is important to establish a relationship with the community, to demonstrate that you can provide a continuing, sustainable service. In our discussions about improving service delivery to rural and remote areas the feasibility of a "Flying Lawyer" service, not unlike that of the Royal Flying Doctor Service model, has been considered but discussion has not progressed very far mainly because of the cost and logistics.

One model of legal service delivery that is effective is that of Women's Legal Services, New South Wales, [WLS] service Walaanbaa Yinarr Wharoo, a Violence Prevention Unit funded by ATSIC at Walgett, in Western New South

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Wales. WLS is a generalist community legal centre providing legal services to disadvantaged women and children throughout New South Wales from its base in Western Sydney.

The following is a brief description of the model. At Walgett there is one Principal Solicitor (non indigenous), and three indigenous staff - manager, court assistant worker and receptionist/administrative assistant. From its office in Sydney, WLS provides legal, financial and administrative supervision and mentoring. Two other Walgett solicitors are based in Sydney. Each of these solicitors spend one week a month in Walgett (to coincide with the fortnightly Local Court sittings).

The work carried out for Walgett, in both the Walgett and Sydney offices is directed by an Advisory Group of Aboriginal Elders from Walgett. The Walgett model facilitates community development and skill-building in a rural town, it increases the aggregate of available local legal services and establishes strong links to the network of city based legal services and law firm pro bono programs.

Another model that is at the planning and development stage is for Legal Aid to partner with a law firm in delivering legal services to a rural region.

Recommendation 7 - that resources be allocated to developing and implementing sustainable models of legal service delivery in rural and remote areas, for example the Walgett model.

5 Issues Raised by the Shopfront Youth Legal Centre

Freehills operates the Shopfront in conjunction with Mission Australia and the Salvation Army. The Shopfront offers legal services to homeless young people aged 25 and under. The Shopfront also provides community legal education for young people and youth workers.

The Shopfront works with homeless and disadvantaged young people, many of whom would otherwise rely on the Legal Aid system. However, the Shopfront has never aimed to be a substitute for Legal Aid. Instead, it aims to offer a holistic service to the most disadvantaged young people who may find it difficult to access (or have all their needs met by) the Legal Aid system.

Staff at the Shopfront are in a frontline position to observe the strengths and weaknesses of the Legal Aid system in New South Wales. We consider that the Children's Legal Service of the NSW Legal Aid Commission is an example of how effective the Legal Aid system can be when it is adequately resourced and structured. The Children's Legal Service provides, as much as possible, continuity of representation for young people appearing before the Children's Court in metropolitan Sydney. It also has a panel of private practitioners to whom it assigns matters when the in-house Legal Aid Commission solicitors are unable to act. It also provides a free legal advice hotline (open 9am - midnight weekdays and 24 hours weekends and public holidays) to advise young people who are under arrest or otherwise in contact with the police.

In contrast, Legal Aid services for adult criminal and non-criminal matters are more restricted and the eligibility criteria are not as flexible. Although children (especially those involved with the juvenile justice system) are one of the most disadvantaged groups in society, and should be assisted accordingly, there are

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disadvantaged adults who are not being adequately served by the Legal Aid system.

The Shopfront is seeing an increasing number of clients who ought to be able to access Legal Aid, but find it difficult due to restrictive criteria, merit tests or obligations which they find difficult to meet. One example of this is the compulsory financial contribution for adult criminal matters (discussed further below).

5.1 Legal advice for adults under arrest at police stations

A major deficiency in the Legal Aid system in NSW is the lack of a hotline or telephone advice service for adults who are under arrest at police stations. We commend the NSW Legal Aid Commission on the establishment of the Legal Aid Hotline for under 18s (and the funding bodies that made this possible). It is an excellent service which not only helps young people exercise their fundamental rights, but saves Legal Aid time and money later on by ensuring young people get access to timely and competent advice and make appropriate choices. Although the needs of children and adults differ in some respects, we believe that a similar hotline for adults is of fundamental importance. Again, we believe that it would result in an ultimate cost saving to Legal Aid by providing appropriate advice at an early stage.

Recommendation 8 – *that more resources be allocated to the provision of telephone legal advice for suspects in police custody.*

5.2 Compulsory financial contributions

Adult defendants in certain criminal matters are required to pay a contribution (either \$75.00 or \$150.00 depending on which court and the type of matter) towards the cost of their legal representation. This contribution must generally be paid up front or the client will not be represented. While \$75.00 (or even \$150.00) may not appear to be a substantial sum of money, it is a very large sum for someone on Centrelink benefits, and often cannot be paid up front. Although there is discretion to waive or postpone this contribution, this discretion is not always exercised, and its existence is not always made known to the client. As a result, the Shopfront sees many young adults whose Legal Aid representation is refused or withdrawn for failure to pay the contribution. Many of these people have disabilities or mental health problems which make it difficult for them not only to pay the contribution but to understand their obligation.

Generally, the Shopfront staff are able to negotiate with Legal Aid for the contribution to be waived or postponed: however we suggest that it should be made clear to applicants how it might be waived. We suggest that the concept of a financial contribution be reconsidered, given the economic disadvantage experienced by most Legal Aid clients.

Recommendation 9 – *that the system of imposing compulsory financial contributions on Legal Aid applicants be reviewed.*

5.3 Family Law

The Shopfront has been contacted by a number of parties to family law disputes who cannot be represented by the Legal Aid Commission due to a conflict of interest (i.e. the Legal Aid Commission is representing, or has represented, the

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opposing party either in the family law proceedings or, as is often the case, in previous criminal matters). Although the Commission will generally pay for a private solicitor to represent the "conflicted out" party, in many cases this is not communicated very well to the applicant, resulting in a perception that they are unable to obtain representation at all. Even if the applicant understands that they are eligible to be represented by a private solicitor funded by Legal Aid, the Commission currently provides no assistance for applicants in finding an appropriate solicitor. We would suggest that an appropriately structured panel system would be of great assistance to Legal Aid applicants and would alleviate any concerns about favouritism. We understand that this is currently being explored. The current system causes a lot of hardship as it is often difficult to find a private solicitor to take on family law matters at Legal Aid rates. For socially and economically disadvantaged people, making the necessary enquiries can be an extremely difficult or impossible task.