

✓ 12/05

Hon Dr Bob Such MP
Member for Fisher



22 April 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Inquiry into Access to Justice

I respond to the invitation to provide a submission to the Inquiry and offer the following comments in relation to the Terms of Reference.

a) The ability of people to access legal representation

- The oft quoted principle of 'equality before the law' is meaningless if obstacles exist that hinder people from enforcing their rights.
- There is no such thing as justice in any objective sense; we have a set of rules and one's 'success' in court will determine whether one believes it to be just.
- For equality to be a *bona fide* characteristic of our society, all obstacles, financial, social and cultural, should be eradicated; one essential component being an adequately funded legal assistance sector¹.
- Research indicates that only 12% of people seek assistance from the legal profession when they have a legal problem. In the main, 51% fall back on advice from family, friends or non-legal professionals². Accordingly, there is substantial unmet demand for legal services.
- Incidence of those using the services of lawyers was highest among those who lived in households whose head held a professional job and lowest in semi-skilled or unskilled households³.
- Even when people do engage with the legal system, especially through legal aid, they encounter a complex web of restrictions and priorities due to inadequate government funding.

¹ Ferguson, Glenn, 'Challenges for Access to Justice and Civil Rights', 2009 Queensland Law Society Symposium, March 2009.

² Parsons, Tony, Victoria Legal Aid, Australasian Institute of Judicial Administration Conference, October 2007.

³ Zander, Michael, *Matter of Justice: the legal system in ferment*, 1989, Oxford University Press, Oxford.

- In light of these statistics, greater effort must be made to raise awareness in the community of legal issues and delineate and simplify pathways to legal assistance. The costs associated with such legal assistance must also be re-assessed, as referred to under c) below

b) The adequacy of legal aid

- Legal aid has suffered chronic funding restrictions for the last decade, hampering people's ability, especially those who are economically disadvantaged, to enforce their rights through access to the justice system⁴.
- Research indicates that private practitioners are withdrawing from legal aid work as it is not commercially viable; at best it is 50% less than commercial rates of remuneration⁵.
- Accordingly, reimbursed fees to lawyers should be increased to make legal aid a sustainable service.
- Given the reduction in numbers of practitioners, especially experienced members of the profession, there should be incentives for lawyers to offer their services in rural, regional and remote areas where low income people face considerable difficulty in obtaining assistance⁶.
- The increasing use of expiation notices, while designed to improve efficiency, actually creates an injustice because most people cannot afford the time and money to challenge them where they believe there is an injustice.
 - There is a need for an independent adjudicator to examine disputed expiation notices.

c) The cost of delivering justice

- The costs associated with access to justice fall into two categories: the problem of delay, as well as the overall costs imposed by the system, not merely the legal costs.
- While I acknowledge that the length of delay has been a focus and, via additional resources and case management techniques⁷, has eased over recent years, the costs arising from delay must still remain a priority.
- The duration of litigation and costs impose a significant burden on middle income earners who do not qualify for legal aid, creating an effective barrier to them pursuing their rights under law.
- The overall costs of litigation encompass the entire range of what is required during civil dispute resolution, ranging from lawyers' billable hours, the rates at which hours are billed, research costs, the number

⁴ Law Council of Australia, 'Legal Aid and Access to Justice Funding: 2009-10 Federal Budget, January 2009.

⁵ Law Council of Australia, 'Legal Aid and Access to Justice Funding: 2009-10 Federal Budget, January 2009.

⁶ Ferguson, Glenn, 'Challenges for Access to Justice and Civil Rights', 2009 Queensland Law Society Symposium, March 2009.

⁷ Spigelman, Hon JJ, Chief Justice of NSW, 'Access to Justice and Access to Lawyers', Australian Legal Convention, 24 March 2007.

of times a matter is brought before the court, often in long lists that incur waiting time⁸.

- Again, the high level of these costs imposes substantial penalties on middle and lower income earners' ability to contest charges and argue their case in court.
- Some charges by lawyers (solicitors and barristers) are excessive and need to be more transparent and tightly regulated – price justification!
- Indeed, the costs and delay of litigation impose a burden on the economy and, thus, a loss to the community. Any improvement in these spheres must be seen as contributing to efficiency in our society.
- The justice system has become, to a large extent, a self-serving, introspective industry.

d) Measures to reduce the length and complexity of litigation and improve efficiency

- The costs and the amount of time required to proceed with litigation, and the inefficiency that surrounds the process, deter people from mounting any challenge under the current structure. This is especially the case for middle and low income earners.
- Consideration must be given to introducing some measure of 'proportionality' where the costs are proportionate to the importance and complexity of that which is in dispute⁹.
- Concomitant with the above, the number of times a case is brought before the court should be reduced. There should be fewer 'artificial' adjournments!
- Sufficient funding should be provided for legal assistance as this not only delivers social justice benefits but also improves the efficiency of the justice system itself¹⁰.
- Many issues could and should be sorted out without the time and cost of the full blown legal/court system, ie via mediation.
- People held on remand and acquitted should be compensated; that would put pressure on the system not to delay unfairly and unnecessarily.

e) Alternative means of delivering justice

- We must build legal knowledge and skills within our community to raise the level of consciousness about legal problems, improve legal literacy and reduce the burden on the court system.
- Effective legal education, especially at school, combined with early information and advice can prevent more expensive casework and reduce the likelihood that a person will end up in court.
- The inclusion of civic education in school curricula would help overcome a lack of awareness that

⁸ Spigelman, Hon JJ, Chief Justice of NSW, 'Access to Justice and Access to Lawyers', Australian Legal Convention, 24 March 2007.

⁹ Spigelman, Hon JJ, Chief Justice of NSW, 'Access to Justice and Access to Lawyers', Australian Legal Convention, 24 March 2007.

¹⁰ Ferguson, Glenn, 'Challenges for Access to Justice and Civil Rights', 2009 Queensland Law Society Symposium, March 2009.

- Problems have a legal component
 - The law or legal system offers real protection
 - Services provide assistance
 - Laws from people's country of origin do not now apply¹¹.
 - The Government should provide subsidised or bonded university places for students who contract to practise in rural and regional areas on completion of their law degrees¹².
 - Alternative service delivery options for remote and rural areas should be investigated: augment telephone access to free legal advice, explore other technological measures of providing assistance, eg telephone conferencing, etc, and expand outreach services¹³.
 - Improve co-ordination between legal and non-legal services to avoid duplication and ensure that funding is employed efficiently¹⁴.
 - Endorse the greater use of mediation services, including compulsory attendance at mediation conferences; mediation cannot work if people are not required to attend.
 - Create an independent adjudicator to examine contested expiation notices, as suggested above.
 - Provide for night and weekend courts.
 - Increase the use of **properly trained** Justices of the Peace.
 - There is no real **individual** accountability or cost imposed when the prosecution plays games and/or drags out cases, or lays charges which are 'wafer thin'. These tactics impose significant costs on a defendant yet the prosecution, as individuals, incur no penalty of any kind!
- f) **The adequacy of funding and resource arrangements for community legal centres**
- Community legal centres are finding it increasingly difficult to meet legal needs due to insufficient funding.
 - Provision of adequate funding for CLCs would improve access to legal services for the most vulnerable, especially in rural, regional and remote areas.
 - Since research indicates that CLCs provide assistance to more than 350,000 people per annum, their funding should be increased¹⁵ to levels that would allow them to continue and expand that assistance.
 - **My concern**, however, is that with the emphasis on assistance to those who are most vulnerable, **middle Australia misses out** since, for many people, it is so expensive to consult a solicitor, it hardly seems worthwhile. The consequence is that many innocent defendants plead guilty!

¹¹ Parsons, Tony, Victoria Legal Aid, Australasian Institute of Judicial Administration Conference, October 2007.

¹² Law Council of Australia, 'Legal Aid and Access to Justice Funding: 2009-10 Federal Budget, January 2009.

¹³ National Legal Aid, 'Policy and Position Statement', July 2008.

¹⁴ National Legal Aid, 'Policy and Position Statement', July 2008.

¹⁵ Law Council of Australia, 'Legal Aid and Access to Justice Funding: 2009-10 Federal Budget, January 2009.

g) The ability of Indigenous and lower socio-economic people to access justice

- Indigenous Australians remain the most socially and economically disadvantaged and experience great legal needs in all areas of the law¹⁶.
- Moreover, the relatively low rates of reported legal needs of Indigenous Australians generally indicate that legal issues are not recognised or a reluctance to seek assistance¹⁷.
- Many Indigenous Australians distrust 'the government' and are reluctant to contact mainstream services due to language barriers and cultural sensitivity.
- Accordingly, appropriate measures should be put in place to support indigenous legal services and promote legal assistance that might be available.
- However, it is important that the safety net, ie guaranteed legal representation, is not perceived as a licence to offend, simply because legal aid is automatically available.
 - Any service that is totally free is not good for the individual or society because it creates a mind set of welfare dependence and a false view of life.
 - There is no free anything – it costs someone, something!
- Government funding to indigenous legal services should therefore be increased to overcome the current shortfall, but based on vigorous evaluation of efficiency and efficacy, with a **modest** financial contribution from customers of the service.
- It should also be recognised that many marginalised members of society, including those from low socio-economic backgrounds and those suffering mental illness, are also disenfranchised in relation to their legal rights.
- It is, therefore, the responsibility of all governments to ensure access to justice for all, especially those who are economically and socially disadvantaged.

In my view, all Australians should be entitled to gain access to justice, be able to mount a case and enforce their legal rights. Failure to do so presents a challenge to the very integrity of the justice system itself and means that it is not a justice system, but merely a label!

Yours sincerely

Bob Such MP JP
Member for Fisher

¹⁶ National Legal Aid, 'Policy and Position Statement', July 2008

¹⁷ Parsons, Tony, Victoria Legal Aid, Australasian Institute of Judicial Administration Conference, October 2007.