



Australian Government
Attorney-General's Department

Access to Justice Division



09/5837

19 May 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

Inquiry into Access to Justice

I refer to the Committee's current inquiry into access to justice. The Attorney-General's Department's submission to this inquiry is enclosed.

The Department is able to provide further information to the Committee as required, either by appearing at a hearing or responding in writing. Should you require further information, please do not hesitate to contact me.

Yours sincerely

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ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO ACCESS TO JUSTICE

In January 2009 an Access to Justice Taskforce was established within the Attorney-General's Department to develop a strategic framework for the Government's approach to justice. The Attorney-General has indicated that his aim in doing so is:

- to identify priorities for reform that will increase the capacity of individuals to understand the laws that affect them
- to empower people to find their own solutions to disputes
- to ensure that the use of public resources is proportionate to the issues in dispute, and
- to improve the scope for resolving disputes, quickly, simply and cost-effectively.

(Speech delivered at the Queensland Law Society Symposium, 28 March 2009)

2. The Attorney-General's Department is also responsible for a number of new and ongoing initiatives and programs aimed at improving access to justice. Many of these initiatives and programs are relevant to the terms of reference of this inquiry. This submission seeks to briefly outline these initiatives.

Responses to the terms of reference

a) the ability of people to access legal representation

3. There are a variety of different avenues that disadvantaged Australians can pursue in order to access legal advice and representation:

- Legal aid commissions, which provide services to eligible people within the general population, focus on more entrenched and complex problems that may require legal representation. There are 91 legal aid commission offices nationally with each State and Territory having a commission head office in the capital city and branch offices in the regions.
- Community legal centres assist people who may not meet legal aid eligibility requirements but cannot afford a private solicitor. Under the Commonwealth Community Legal Services Program, the Australian Government provides recurrent funding to 128 community legal centres located in urban, regional and remote locations throughout Australia. The Governments of NSW, Victoria, Queensland, South Australia and Western Australia also provide funding under State-based community legal services programs. Tasmania, the ACT and the NT do not have specific funding programs for community legal services although they do provide funding to some centres outside the program.
- Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services provide high quality and culturally sensitive, Indigenous-specific services to meet the complex legal needs of eligible Indigenous people. Indigenous-specific legal services are provided through 115 metropolitan, regional and remote offices and various regional and

remote court circuits throughout Australia: 84 Aboriginal and Torres Strait Islander Legal Services offices and 31 Family Violence Prevention Legal Services units.

- Direct financial assistance services through statutory and non statutory financial assistance schemes are administered by the Attorney-General's Department to provide financial assistance in cases where legal aid is not available from legal aid commissions or other legal service providers, and where the circumstances constitute special cases of Commonwealth interest.

4. To improve access to legal services for communities in regional, rural and remote Australia, in June 2008 the Australian Government announced the allocation of \$5.8 million over four years for the Regional Innovations Program for Legal Services (RIPLS). Under RIPLS, legal aid commissions in New South Wales, Queensland, Western Australia and Tasmania are implementing initiatives that will help with the recruitment and retention of lawyers in the regions. The National Association of Community Legal Centres also is also receiving funding over four years under RIPLS to encourage law graduates to work in regional community legal centres. The Commonwealth has also provided support to enable legal aid commissions to open a number of new regional legal aid offices, including the Tennant Creek Legal Resource Centre in the Northern Territory, the legal aid office at Kununurra in Western Australia and the Mount Barker and Port Augusta offices in South Australia.

b) the adequacy of legal aid

5. As part of the Australian Government's commitment to access to justice, the Attorney-General's Department administers funding for a range of legal aid and related services. The Australian Government has provided a total of \$278 million in funding for legal assistance in 2008-09 allocated across the programs as follows:

- mainstream legal aid (provided through legal aid commissions) - \$164.8 million
- Indigenous legal services - \$52 million
- community legal services - \$26 million
- family violence legal services - \$19 million, and
- Commonwealth legal financial assistance schemes - \$17 million.

6. In 2007-08 the Government provided a total of \$27.9 million in additional one-off funding to legal assistance services. COAG has determined that under the federal financial framework reforms introduced from 1 January 2009 legal aid funding will be categorised as a National Partnership. Future legal aid commission funding needs will be discussed as the Government negotiates new National Partnership agreements with the States and Territories during 2009, with new agreements expected to commence on 1 January 2010.

Legal aid

7. State and Territory legal aid commissions provide a comprehensive range of legal assistance services, including information and advice, family dispute resolution, duty lawyer services and grants of aid for litigation in Commonwealth law matters. The Commonwealth Legal Aid Priorities and Guidelines which set out the provision of legal services for Commonwealth law matters are available at

<http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_CommonwealthLegalAidPrioritiesandGuidelines>.

8. Legal aid program funding includes specific funding for the Regional Innovations Program for Legal Services (see above), the Expensive Commonwealth Criminal Cases Fund and the Illegal Fishing Fund. The Expensive Commonwealth Criminal Cases Fund was established by the Australian Government in 1999 to ensure that legal aid commissions could meet the costs of providing assistance in expensive Commonwealth criminal trials, such as national security matters and people smuggling. The Illegal Fishing Fund reimburses commissions for costs incurred representing people accused of illegal fishing offences.

Community legal centres

9. Community legal centres provide a range of assistance on legal and related matters to people on low incomes and those with special needs, with a focus on early intervention and prevention. They are a key component of Australia’s legal aid system and provide a distinctive form of service that complements services provided by legal aid commissions and the private legal profession. In addition to providing legal advice, community legal centres can refer clients to other specialist service providers through their extensive networks.

Financial assistance services

10. The Attorney-General’s Department administers a number of statutory and non statutory schemes for the provision of financial assistance for legal and related costs. The schemes exist to provide legal or financial assistance to organisations and individuals in cases where legal aid is not available from State and Territory legal aid commissions or pro bono legal services are not available and where the circumstances give rise to a special Commonwealth interest. A full list of financial assistance schemes is included at **Attachment A**.

11. Indigenous-specific legal assistance services are discussed below.

c) the cost of delivering justice

12. The total cost of the federal court system in 2008-2009 is estimated at \$314,047,542.86. This figure comprises:

Item	Amount
Total Court Appropriations 2008-2009	\$291,140,000.00
Cost of Pensions (as at 20 April 2009)	\$19,301,542.86
Appropriation for High Court Remuneration and Allowances	\$3,050,000.00
Additional Funding to Family Court of Western Australia	\$556,000.00
Total	\$314,047,542.86

13. The Commonwealth provided one-off additional funding for the Family Court of Western Australia, to appoint an acting Family Law Magistrate and associated support staff for 12 months.

14. Ensuring the courts are restructured and administered to deliver an efficient and cost-effective service to the Australian community is a key element in improving access to justice. On 5 May 2009, the Attorney-General announced that the federal courts would be restructured by ‘merging the Federal Magistrates Court into the Family Court and Federal Court’ (media release **Attachment B**). The Attorney-General has also said that restructuring the federal courts will result in ‘a more co-ordinated and cohesive structure ... better able to more effectively and cheaply give justice to the 40 per cent of people who come into contact with the family law system’ (*Australian* 8/5/09).

15. A single Family Court and a single Federal Court, each with upper and lower tiers of judicial officers, will be created. Federal Magistrates will be offered appointment to the lower tiers, which will deal with a high volume of less complex cases. There will be a one stop shop for family law disputes - and a one stop shop for workplace relations disputes and other federal disputes.

16. The restructure is a key recommendation made by the Review of the delivery by the federal courts of family law services, which was commissioned by the Attorney-General in 2008. The Review found that the existence of two federal courts delivering family law services created confusion for litigants, conflicts over resources and inefficiencies in administration which have impeded the delivery of these services to the Australian community. The Report of the Review, *Future Governance Options for Federal Family Law Courts in Australia - Striking the Right Balance* and further background is available on the Department's website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_AbetterframeworkforFederalCourts-Consultation_AbetterframeworkforFederalCourts-Consultation#consultation.

17. With respect to the federal court system, large scale litigation or 'mega-litigation' can also place an increased burden on finite judicial and court resources. Such litigation is often characterised by complex issues, exhaustive evidence, lengthy hearings and multiple parties. Mega-litigation has also been the subject of media reports following large scale commercial disputes such as the *Seven Network Ltd v News Ltd [2007] FCA 1062 (C7 litigation)* and the *Bell Group Ltd (in liquidation) v Westpac Banking Corporation [No 9] [2008] WASC 239 (Bell litigation)*.¹

18. Ministers agreed at the 6-7 November 2008 SCAG Meeting that one option to be considered to address these concerns is for courts to recover costs from parties engaged in civil litigation. The SCAG reference does not specifically limit this consideration to the mega-litigation context.

19. For cost recovery to be effective in Australia, a harmonised approach across the Commonwealth, States and Territories would be preferable, to dissuade forum shopping by litigants.

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

20. The Attorney-General is considering a range of options to make the courts more flexible and accessible, and litigation less costly, including enhanced case management powers. This may include introducing a legislative requirement that disputes be resolved as quickly, inexpensively and efficiently as possible and strengthening powers to permit judges to control the amount and means of adducing evidence. Another example is measures to assist in facilitating effective dispute resolution in the context of the resolution of native title claims. The Government has recently introduced legislation into the Parliament to effect institutional change to the native title system.

21. The Native Title Amendment Bill 2009 will encourage negotiated settlements by making mediation more effective. The Federal Court will be given a central role in the management of all native title claims, including deciding who will mediate in a native title proceeding. These amendments would also allow the Court to engage people who have special knowledge in relation to Aboriginal or Torres Strait Islander societies or Indigenous dispute resolution methods.

¹ The Seven Network Ltd Case ran at first instance for 120 hearing days, contained over 600,000 pages of evidence and is estimated to have cost \$200 million in legal fees -the case has since been appealed. In the Bell Group Ltd case, the trial judge sat through 404 hearing days, and took over 2 years to write the 2643 page decision. It is possible that this decision could be appealed.

e) alternative means of delivering justice

Alternative dispute resolution (ADR)

22. The Attorney-General is currently considering a range of measures aimed at increasing accessibility to justice in civil disputes including through ADR, tribunals and courts. On 13 June 2008, the Attorney-General issued a reference to the National Alternative Dispute Resolution Advisory Council (NADRAC), asking it to inquire into and identify strategies for litigants, the legal profession, tribunals and courts to remove barriers from, and provide incentives to ensure, greater use of ADR as an alternative to civil proceedings and during the court and tribunal process. A copy of the reference is attached (**Attachment C**). In particular, NADRAC has been asked to advise on initiatives government might take to support the recommended strategies. This includes possible legislative action.

23. Areas which the Attorney-General has asked NADRAC to specifically consider include:

- whether mandatory ADR requirements to use ADR should be introduced
- changes to cost structures to provide incentives to use ADR or remove barriers to the use of ADR
- changes to civil procedures to provide incentives to use ADR or remove barriers to the use of ADR
- the provision and quality of ADR services and whether they should be provided inside or outside the courts or both, and
- the use of techniques derived from ADR to enhance adjudication in the courts - including judicial dispute resolution.

24. The reference asks NADRAC to consult closely with appropriate agencies and organisations, particularly the Attorney-General's Department in view of its current work on access to justice issues. On 24 March 2009, NADRAC released an Issues Paper seeking input from a broad range of stakeholders on the matters raised by the reference. Meetings have been held, or are planned, with key stakeholders including relevant areas of the Department.

25. NADRAC is due to report to the Attorney-General on 30 September 2009. It is understood that NADRAC has prepared a separate submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice.

26. The Department also funds legal aid commissions to operate alternative dispute resolution schemes. Legal aid commissions' family dispute resolution services are a timely and low cost option to family law litigation that allows parties to narrow their issues in dispute and focus on the best interests of their children.

27. Indigenous dispute resolution and conflict management is an important aspect of alternate dispute resolution. In 2006 NADRAC published a report titled 'Indigenous Dispute Resolution and Conflict Management'. Since then, the Federal Court, with the support of a number of project sponsors, has been working on an Indigenous Dispute Resolution and Conflict Management Case Study Project. It is understood that the Case Study Project was recently completed and submitted to NADRAC for consideration.

Restorative justice

28. The Attorney-General's Department provides funding for a diverse range of programs through the Prevention, Diversion, Rehabilitation and Restorative Justice Program, and through Aboriginal and Torres Strait Islander Legal Services. Restorative justice refers to a range of justice practices which actively involve offenders, victims and community in the criminal justice process. The aim of restorative justice programs is to repair the harm caused by crime, divert offenders from the court process and reduce recidivism. Restorative justice has been used widely in the context of Indigenous justice.

f) the adequacy of funding and resource arrangements for community legal centres

29. The Commonwealth Community Legal Services Program funds 128 community legal centres nationally. The total appropriation for the Program in 2008-09 was \$26,219,000 and \$25,519,746 in 2007-08. In addition, in 2007-08 one-off funding of \$10 million was provided to the Program to assist in meeting demand for services. Many community legal centres also receive funding from the States, with total State funding under the Community Legal Services Program of \$26,266,396 in 2008-09 and \$20,152,354 in 2007-08.

g) the ability of Indigenous people to access justice

30. The Attorney-General's Department provides funding through the Legal Aid to Indigenous Australians Program to improve the access of Indigenous Australians to high-quality and culturally sensitive legal aid services. The Department has contracted the following Aboriginal and Torres Strait Islander Legal Services (ATSILS) until 30 June 2011 to deliver legal aid services to Indigenous Australians:

- New South Wales (including the Australian Capital Territory and Jervis Bay Territory) – Aboriginal Legal Service (NSW/ACT) Limited
- Victoria – Victorian Aboriginal Legal Service Co-operative Limited
- Queensland North and South Zone – Aboriginal and Torres Strait Islander Legal Service (Qld) Limited
- Western Australia – Aboriginal Legal Service of Western Australia Incorporated
- South Australia – Aboriginal Legal Rights Movement Incorporated
- Tasmania – Tasmanian Aboriginal Centre Incorporated
- Northern Territory North Zone – North Australian Aboriginal Justice Agency Limited
- Northern Territory South Zone – Central Australian Aboriginal Legal Aid Service Incorporated.

31. The ATSILS are contracted to provide the following range of services:

- advice matters – legal advice or information that is not provided as part of Casework Matter or Duty Matter services. This includes the provision of a free-call telephone advice service, referrals, preliminary assistance, the writing of short letters and the completing of forms
- duty matters – attendance at court and receipt of initial instructions by a lawyer. This includes all mentions, guilty pleas, applications including for bail, or adjournments performed on a duty lawyer basis, or where the matter is completed on the same day, and

- casework matters – ongoing legal services in relation to a particular legal problem, such as conducting a defended hearing. It is not necessary that the matter involve litigation; a Casework Matter may also be the provision of detailed legal advice or the negotiation of a claim for or against the client.

32. The Department provides test and expensive case funding under the Legal Aid to Indigenous Australians Program. It also provides funding through the Law and Justice Advocacy Development Program to provide community legal education initiatives and advocate the advancement of the legal rights of Indigenous Australians.

33. The Standing Committee of Attorneys-General is developing a national Indigenous law and justice framework through a Commonwealth led Working Group. The draft Framework focuses on the development of an holistic approach that addresses the underlying causes and ongoing consequences of crime in Indigenous communities, including the associated disproportionately high rates of incarceration of Indigenous Australians.

34. A new national Indigenous law and justice advisory body will provide expert high level policy advice on Indigenous law and justice issues. It will address broad issues affecting Indigenous peoples' contact with the justice system, such as legal and support services, police, corrections, education, health and employment. The inaugural meeting of the advisory body is expected to be held in mid 2009.

35. Community legal centres funded under the Commonwealth Community Legal Services Program also serve Indigenous clients. Total funding for community legal centres in the Northern Territory is \$1.027 million in 2008-09. Part of the direct funding allocation under the Program is provided to nine organisations across Australia specifically to operate Indigenous Women's Projects. These Projects provide assistance to Indigenous women across a wide range of legal issues including family law, tenancy, domestic and sexual violence and consumer rights law.

36. Total recurrent funding allocated to the Indigenous Women's Projects in 2008-09 was \$1,071,073. In addition, non-recurrent funding of \$574,500 was provided in 2008-09 and 2007-08, under the Northern Territory Emergency Response, to three organisations in the NT to operate Indigenous Women's Projects. Centres operating Indigenous Women's Projects were also recipients of the Government's one-off funding of \$10 million to community legal centres in 2007-08.

37. The Department received a further \$20.5 million in continued support for Northern Territory Emergency Response related measures in 2008-09.

- A total of \$17.7 million has been allocated to enable the continued operation of night patrol services.
- A total of \$2 million has been allocated to enable legal assistance service providers in the NT to meet the increased demand for legal services from Indigenous Australians as a result of the NTER.
- A total of \$0.8 million has been allocated to enable the Northern Territory Aboriginal Interpreter Services to continue meeting the increased demand for its services.

38. The Department provided funding of \$800,794 to the North Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service to undertake a Welfare Rights Outreach Project in 2007-08. The project addresses some of the additional demand placed on NT

legal assistance service providers as a result of the introduction of NTER specific measures including income management.

Other matters

Access to Justice and Human Rights: International obligations

39. Australia is party to a number of international instruments that contain obligations relating to equality before the law and access to justice, including:
- the *International Covenant on Civil and Political Rights* (Articles 14 and 26)
 - the *Convention on the Elimination of All Forms of Racial Discrimination* (Articles 5)
 - the *Convention on the Elimination of All Forms of Discrimination Against Women* (Articles 2 and 15)
 - the *Convention on the Rights of the Child* (Articles 9, 12, 16, 37 and 40)
 - the *Convention on the Rights of Persons with Disabilities* (Articles 12 and 13), and
 - the *Convention Against Torture* (articles 13 and 14).
40. Compliance with these obligations is integrally related to, and delivered through, the practices and procedures of the courts, criminal law and a range of other laws and practices such as Australia's anti-discrimination framework.

Australia's anti-discrimination framework

41. Australia's framework of anti-discrimination legislation includes Commonwealth, State and Territory legislation prohibiting discrimination on a number of grounds. These laws generally seek to have complaints of unlawful discrimination resolved in the first instance through investigation and conciliation by human rights institutions; with resort to the justice system if these procedures do not resolve the matter.

Remedies to unlawful discrimination and other human rights abuses at the Commonwealth level

42. The Australian Human Rights Commission (the Commission) has the power to investigate and conciliate complaints of unlawful discrimination under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). The HREOC Act is an exclusive regime. A complainant cannot bring an action for unlawful discrimination to the Federal Court or the Federal Magistrates Court unless the complaint had first been lodged with the Commission.²

National Human Rights Consultation

43. The Australian Government believes that the protection of human rights, including access to justice, is an important aspect of Australia's democracy. The Attorney-General has appointed a Committee of eminent Australians to conduct the National Human Rights Consultation and report to Government by 31 August 2009. In public forums held by the Committee to end-April 2009, a number of access to justice issues were raised by the Australian community, including the cost of

² *Re East; Ex parte Nguyen* (1998) 196 CLR 354; see sections 46O, 46PE and 46PH.

accessing an effective and efficient system of addressing human rights complaints, especially for the most vulnerable and marginalised in the Australian community.