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THE SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Inquiry into **access to justice** with particular reference to:

(a) the ability of people to access legal representation;
(b) the adequacy of legal aid;
(c) the cost of delivering justice;
(d) measures to reduce the length and complexity of litigation and improve efficiency;
(e) alternative means of delivering justice;
(f) the adequacy of funding and resource arrangements for community legal centres;and
(g) the ability of Indigenous people to access justice.

Introduction

These questions are complicated.[1] The work of courts in enforcing obligations, and the availability of ADR services, is not a closed system. Rationing access to courts affects the divide between court determination of disputes and ADR outside the courts. It may also affect whether citizens conduct themselves in ways that give rise to disputes. Some rationing is both inevitable and desirable and the question becomes how rationing should be effected.

It would be impossible, extremely expensive and undesirable for all disputes to be decided by courts. As they are made cheaper and more efficient they will attract more work. Quality must also be assured and because it makes court decisions more predictable will encourage alternative settlements, The view that rationing is necessary has been expressed by Professor Erhard Blankenberg in comparative studies in a European context. The

1 The following is drawn from the conclusions in my article Cannon, "Designing cost Policies to provide sufficient access to lower courts" (July 2002) Volume 23 Civil Justice Quarterly, p.198 Sweet & Maxwell, London, which is attached to this submission.

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German experience suggests that too great an efficiency coupled with certain and full cost recovery can lead to excessive litigation. This causes a substantial expense to the community in Germany both in publicly funded judicial expenses and in legal resources generally, which are much higher per capita than is the norm in Europe.

This point is made in another way by Anthony Ogus in commenting on the Woolf report in the United Kingdom[2]:

"There is an equilibrium level of court case loads and costs. If the cost of proceedings in a particular court is high because, for example, hearings are subject to considerable delay, the effective stakes of the litigation to the parties are reduced and at the margin this will deter some from litigating. Conversely, if the costs are reduced that will encourage more to litigate. The obvious but depressing implication of this for the Woolf proposals is that if they are successful in reducing court costs that very fact may induce more parties to avoid settlement and ADR and resort instead to the courts."

The ease of access to courts can affect behaviour in other ways. An expectation of prompt and effective action through courts may encourage more risky advances of credit and greater compliance with civil obligations and better risk management by potential defendants; a belief that legal action is likely to be expensive, slow and uncertain can encourage more prudent credit management but discourage people from enforcing important legal right and encourage disregard of legal obligations.

Today rationing is primarily by high costs and delay. If parties' legal costs are paid, under the traditional common law adversary model, all that will happen is that the effort put into dispute resolution is likely to increase to the extent of the funds available. This would increase rationing by delay. For example, Fenn and Rickman[3] identified that legally aided or union funded plaintiff's lawyers in England dragged cases out.

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2 Ogus, Anthony, "Anthony Ogus and reflections on the Woolf interim report", Web journal of current legal issues, in association with Blackstone Press Limited Webb JLCI, 1995. This article in the internet version does not have page numbers.

3 Fenn, P and Rickman, N., "Delay and Settlement in Litigation", paper delivered to the *American Law and Economics Association*, Toronto, 1997, cited Main, B.G.M., "An Economic Perspective on the Costs of Civil Justice", in *The Reform of Civil Justice*, 5(4) Hume Papers on Public Policy 1, 1997..

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hospitals, demand for them is liable to increase to fill the increased supply. Indeed in an internet economy where the nature of intellectual property in particular and business generally is changing rapidly, and parties can more readily choose their legal forum, delay may become a more important factor in rationing the use of legal systems than cost.

Accepting that it inevitable to have some rationing of access to courts, how is it best achieved? It is necessary to answer that by reference to the whole system. We should encourage dispute resolution outside courts and within courts improve efficiency by a two pronged change of greater control by judges rather than lawyers over the fact finding process in combination with a change in the costing culture to discourage over servicing. ~~In short:~~

- It is desirable to have a diverse system of dispute resolution. This offers a culture of dispute resolution outside courts, which must tend to reduce use of them.
- Courts can encourage parties to settle outside the court process by prelodgment procedures, and within it by the provision and use of ADR by the court.
- Case flow management should be better tailored to the needs of each file and seek to reduce both cost and delay. It should apply in criminal as well as civil cases.
- Court management of fact finding in appropriate cases should improve efficiency, reduce delay and reduce costs.
- Fixed rate cost shifting (as opposed to the present activity based court scales) would make costs predictable, which allows the parties to make realistic assessments of their cost risk and gives them a basis upon which to negotiate with their lawyers the basis of actual costs charged. This should encourage cost efficient use of court processes.

The role of courts is to enforce obligations prescribed by law and, where the existence and extent of them is contested, to publicly determine their extent in accordance with the established facts and legal principles. This is an appropriate approach to encourage people to resolve disputes outside the court system but, where they cannot, it will provide a court system which gives realistic expectations and an effective method to enforce obligations and determine their extent where that is contested.

Similar considerations apply to both civil and criminal matters, despite some intrinsic

differences. It is noteworthy that mediation and case flow management was introduced in civil matters more than a decade ago. They are now being introduced in criminal matters, especially in lower courts, under the guise of restorative justice and therapeutic jurisprudence. Thus my general comments may have application to both criminal and civil matters, but I shall make some comments specific to each.

Reference (a) the ability of people to access legal representation; and
(b) the adequacy of legal aid

There is a detailed discussion of these topics in my article Cannon, "Designing cost Policies to provide sufficient access to lower courts" [5] which is attached to this submission. In civil matters, apart from family disputes, legal aid is presently inadequate and often non existent. However, for reasons discussed in the attached article it is not realistic, nor desirable, to widely fund representation in civil disputes through legal aid. Most civil litigation can be funded through a mixture of contingency fees, conditional fee uplifts, commercial litigation funders of class actions and legal cost insurance. You will see I identify that none of the strategies discussed in that article can provide adequate assistance to the indigent defendant in civil actions. Since writing that article I have been convinced that this and other gaps can, to a significant extent, be filled by strategic subsidies to probono and discount legal advice assisted by law students and law graduates taking legal practice courses. Around Australia, experiential learning as part of legal studies is increasing and could be leveraged to provide greatly increased services, sometimes in conjunction with community legal centres.

Legal aid in criminal cases remains stretched and is essential. Courts function much more effectively and justice is more likely to be done if both prosecution and defence have competent legal advice. It also follows that prosecution needs better access to legal advice. Although police officers in many cases deliver excellent service to courts they are not legally trained and prosecution would be improved by placing all criminal cases under the umbrella of the DPP. A pilot scheme to this effect in NSW about five years ago showed this can be done without a substantial increase in cost. Improved legal advice to prosecution would improve fairness to defendants by reducing the laying of charges that are overly ambitious and providing more timely response to defence requests for information. The other great clog in the criminal jurisdiction is the delay in police providing disclosure of evidence.

5 Op. cit. footnote 1

Streamlining this process and giving it higher priority would save all parties and the court great time and expense.

Reference (c) the cost of delivering justice

Access to good legal advice saves money in the long run. If people have realistic expectations they are more likely to make sensible decisions about their litigation, be it criminal or civil. The attached article "Designing cost Policies to provide sufficient access to lower courts" discusses this.

In both civil and criminal cases it is desirable that costs be shifted to the party vindicated by the court process in accordance with a scale that gives a realistic reward for expenses that are incurred, without encouraging legal work just to increase costs. To this end cost shifting should be on a scale that reflects the stage of the process reached and not the activity actually undertaken. If a scale rewards activity then activity will increase to take advantage of the scale. Most court scales in civil cases in Australian are activity based and their origins are very old. Most lawyers no longer charge on the basis of court scales, but now charge on a time basis calculated in 6 minute increments, or 10 billable units per hour. Because court scales no longer reflect actual charging practice, but still retain the vice of encouraging activity for activity's sake, they should be replaced with a fixed rate scale that is proportionate to the amount in dispute. The above article discusses such scales and a later article Cannon, Venning and Cogan, "Alternatives to Activity Based Costing", (February 2008) 17 *JJA* 1-19 discusses the New Zealand and updated German scales which provide examples of different approaches to fixed rate costing. This is attached.

The United Kingdom currently has a review of costs being undertaken by Lord Justice Sir Rupert Jackson. I have prepared a cost scale to assist discussions in that process and I attach it to this submission. Leaving aside for now the appropriate percentages and dollar amounts, I explain the principles behind that cost scale. The first is that the amount of costs refers to the stage of process reached and not to the amount of activity undertaken. This removes an incentive to over service. The second is that the amount of costs is predictable so that any litigant before commencing the litigation journey can have a reasonably accurate prediction of the costs that will be recovered in the event of success. This should then act as a reference point to discuss actual costs with their lawyers. The present activity based party-party cost

scales give an unpredictable total of costs. There is also now a total disconnect between the cost scales which are calculated on an activity basis and the actual costs, since most lawyers now calculate costs on a time charge basis. This puts litigants in the position of not knowing how much they will recover and having no fixed cost basis with which to negotiate with their lawyers. They are left in the position as if they were building a house on a cost plus contract rather than a fixed price contract, which most prudent people would not dream of doing.

Thirdly, the formula does away with cost offers. The problem with cost offers is that they trigger a right to indemnity costs with the result that litigation is sometimes continued on the gamble that the party will achieve a judgment better than the filed offer and thereby recover indemnity costs. The judge does not see the filed offers. It may be that there will be filed offers from each side, leaving little remaining in dispute, but litigation may run for many days over a difference between the parties that is a matter of a few thousand dollars whilst the judge has to arrive at a figure without any accurate indication of what the parties really think their case is worth.

The proposed scale will of course disadvantage parties who do not realistically quantify damages claimed. In this day and age when pre action protocols require careful consideration of the matter before commencing litigation, it is realistic to expect parties to realistically quantify their ambitions in a claim. A prudent plaintiff might still aim a little high at the outset of the case, and would suffer no great loss for that, and can lower its sights if the information revealed down the litigation path makes that sensible. Likewise a prudent defendant who thinks it might lose will admit a part of the claim according to the risk.

Another benefit of fixed rate cost shifting scale is that insurers will be better able to calculate the actuarial risk of litigation which should lead to an increased availability of legal cost insurance, making legal services more readily available to people of average means.

There should also be cost shifting in more criminal matters. There is in some Magistrates Court matters and I attach the South Australian Magistrates cost scale for criminal matters. A person who is acquitted should generally recover a predictable amount of the costs incurred and a person with financial means who is found guilty should pay a predictable contribution to the costs of prosecution. At the moment just to be charged with an offence in a major indictable matter is financially extremely expensive. It is inconsistent with the presumption

of innocence that a person who is acquitted is left with a legal bill which may be tens of thousands of dollars. There will of course be matters where a cost order in favour of an acquitted defendant would be inappropriate so a residual discretion in the judge not to award costs should remain.

Reference (d) measures to reduce the length and complexity of litigation and improveefficiency

About fifteen years ago in this country courts wrested control over pre trial processes from the legal profession by adopting case flow management. The intellectual underpinning of this change was that courts had a responsibility to ensure that once litigation was commenced it was brought to settlement or verdict in a timely way. The same logic demands that courts accept responsibility to ensure that trials are disposed of in a timely and affordable way.

To achieve this there must be a shift in control over the fact finding process from the present lawyer controlled process to the court so key issues are identified and fact finding occurs on a more co-operative basis. I attach an article discussing this topic: Cannon, "Effective Fact Finding", (July 2006) 25 *Civil Justice Quarterly* 327-348. A related topic is the problem of party appointed duelling experts. Courts should be willing to take control of this process and one way is to appoint their own experts in appropriate matters to provide independent advice and to manage the expert evidence. I attach an article about this: Cannon, "Courts using their own experts" (2004) 13(3) *JJA* 182-194

There were some useful strategies to bring improvements discussed at an Australasian Institute of Judicial Administration (AIJA) seminar on discovery recorded in the note: Cannon, "Notes on the AIJA Discovery Reform Seminar", (August 2007) circulated to AIJA members and on the www.aija.org.au. This is also attached. I also recommend that courts consider using the conferencing process in more complex cases to narrow factual issues to enable the use of oral evidence to be confined to key issues.

In focussing on high profile, high value, complex cases the committee should not lose sight of the small claims. The overwhelming number of cases before courts and tribunals in this country are claims for less than $20,000 and how these are handled has a much more

profound affect on access to justice than the difficulties with a relatively few high value cases. Most States have been relatively successful in providing adequate access to determine low value cases by limiting the right of appearance by lawyers (or totally excluding them) and providing specialist tribunals or divisions of magistrates courts to deal with these matters.

A discussion of best practice in this area is important. I have not commented further as it appears to be outside your terms of reference.

In criminal cases there needs to be more case management, including pretrial conferences and sentence indications. Careful protocols will need to be developed to ensure these proceed on a principled basis and do not become an expedient means of bargaining adopted by courts to keep up with lists which they are not well enough resourced to keep up with by other means. I attach an article soon to be published discussing these topics: Cannon, "Pretrial conferences and sentence indications in the Magistrates Court", accepted for publication in the April edition of the *Journal of Judicial Administration (JJA).*

Reference (e) alternative means of delivering justice

Courts provide the rule of law to which people can have recourse if alternatives fail. Citizens are entitled to have access to that and ADR should not be an obstacle to accessing the enforcement of legal rights. Accordingly ADR should not be a compulsory precondition to litigation. However, a diverse system of ADR should be encouraged. The control that ADR gives people over their own destiny, its potential to repair damaged relationships and the ability to manage sensitive matters in private all offer incentives and good reasons for using ADR rather than courts, without the necessity of it being compulsory. Court prelodgment schemes can encourage this. In the South Australian Magistrates Court we have a long standing scheme where for a nominal sum (which pays the administrative cost of the scheme) parties can access a court final notice before filing a claim which offers free mediation which is provided pro bono by a team of qualified mediators. I attach an article about this: Cannon, "Electronic Pre-lodgement Notices" (2001) 4 *UTS Law Review* 91-104 and an evaluation of the scheme: Cannon, "An internet court pre-lodgement system evaluated" (April 2004) 7(1) *Internet Law Bulletin* 7-9. I also highlight in the former article the research on the change of policy by the compulsory third party insurer in this State, where they decided to settle claims before court process, which reduced court filings by 75% and saved about $17m. costs per annum (when a dollar was worth considerably more than currently). This demonstrates the importance of attitudes of potential litigants to the way a dispute resolution system operates.

Education of potential court users and lawyers as to alternatives to court proceedings is central to improving the whole system.

Some ADR schemes, such as industry ombudsmen, use determinative dispute resolution as well as facilitating negotiations. When they do this they have the potential to become alternative court systems. I predict that they will. It is important that structures be put in place such as sharing of precedents and an appeal back to the State courts to prevent a plurality of legal principles developing. Issues of privacy that hides wrong doing and adequate protection of judicial independence need to be carefully managed. I attach an article that discusses these issues: Cannon, "A Pluralism of Private Courts", (October 2004) 23 *Civil Justice Quarterly* 309-23.

For those cases that remain in the court process it is clear that the judicial role is incompatible with facilitatory ADR. I attach an article on that: Cannon "What is the Proper Role of Judicial Officers in ADR?" (November 2002) 13(4) *Australasian Dispute Resolution Journal* 253-262. Courts should provide their own mediation services, at low or no cost to litigants but not provided by the judiciary. The judiciary should be trained in ADR techniques but conduct processes to encourage settlement as conciliation, recognising the judicial role necessarily has an element of ensuring that settlements should bear a relationship to legal entitlements, should observe basic rules of due process and generally should be conducted in open court.

Within the criminal justice system there are parallel developments. I have already mentioned pre trial conferences and sentence indications. Other developments include the Therapeutic Jurisprudence movement where courts manage treatment programs to address the underlying causes of crime. There is ample evidence that the authority of a magistrate or judge can be an important element in the effectiveness of these programs. I attach these articles: Cannon, "Smoke and mirrors or meaningful change: the way forward for Therapeutic Jurisprudence", (May 2008) 17 *JJA* 217-222 and Cannon, "Therapeutic Jurisprudence in courts: some issues of practice and principle", (May 2007) 16 *JJA* 256-261. If the committee is interested in this area it should seek advice from Dr Michael King, Australia's leading expert in this area.

Restorative justice conferencing can be a powerful tool to assist victims and to ensure defendants understand the consequences of their crime. In South Australia we have

conducted restorative justice as part of the sentencing process with great success. I attach an article about that: Cannon, "Sorting out conflict and repairing harm: Using victim offender conferences in court processes to deal with adult crime" (September 2008) 18 *JJA* 85-100. Our program was independently assessed by Flinders University School of Law and I can provide that report to the committee is it wishes.

Reference (f) the adequacy of funding and resource arrangements for communitylegal centres

These centres provide important advice and mediation services in South Australia and should be better funded. There is no doubt that providing early accurate legal advice and ADR can save much expense and heartache.

Reference (g) the ability of Indigenous people to access justice

Court processes can be particularly alienating for Indigenous people. The Nunga Court addressed this by the Magistrate coming down from the bench and sitting with Elders. This concept has spread to other States with the Koori, Murri and other courts. In South Australia we have developed a new model in the Port Lincoln circuit court which combines aspects of the Nunga Court with the restorative justice sentencing. I attach a review of that process by OCSAR. It has been very well received by the Indigenous and broader community in the court where it operates. It has shown itself to be effective in a circuit court where different magistrates visit, whereas Nunga court is generally conducted by the same magistrate. Organising the conferencing process has been effective in making effective links into the community to provide services and support to ensure that the undertakings given in the conferences are effectively carried out.

It also maintains the important principle that although the court has good advice from the community the actual sentencing remains the duty and responsibility of the Magistrate and not the Elders.

Other comments.

There are of course related matters not specifically raised by the terms of reference. As noted above, small claims under $20,000 represent a very large volume of the work of courts and are very important for public access to justice, but are not addressed by the specific terms of reference of this inquiry.

Another area of importance is debt collecting. In numerical terms nearly ninety per cent of the work of civil courts is enforcing uncontested debt. This is done by methods little changed from a century ago and with regional differences that burden debtors and creditors with unnecessary expense so that their funds are spent on collection agents rather than each other. Consideration to this area could achieve benefits equal to the present terms of reference and might be considered at an appropriated time in the future.

All this emphasises the importance of a high quality and diverse judiciary and education programs to ensure they are well equipped to deal with their changing tasks.

It will always be important to support policy recommendations with sound research to ensure changes are evidence based. The AIJA, of which I am a board and council member, has an ongoing role in this, as should ongoing funding to support independent research by University academics and researchers

Thank you for the opportunity to comment on these important matters.

Yours faithfully,

ANDREW CANNON

Attachments:

Cannon, "Designing cost Policies to provide sufficient access to lower courts" (July 2002) Volume 23 Civil Justice Quarterly, p.198

Cannon, Venning and Cogan, "Alternatives to Activity Based Costing", (February 2008) 17 *JJA* 1-19

Draft Cost Scale for higher court civil matters.

Cannon, "Effective Fact Finding", (July 2006) 25 *Civil Justice Quarterly* 327-348
Cannon, "Courts using their own experts" (2004) 13(3) *JJA* 182-194
Cannon, "Notes on the AIJA Discovery Reform Seminar", (August 2007)
Cannon, "Pretrial conferences and sentence indications in the Magistrates Court", accepted for publication in the April edition of the *Journal of Judicial Administration (JJA).*
Cannon, "Electronic Pre-lodgement Notices" (2001) 4 *UTS Law Review* 91-104
Cannon, "An internet court pre-lodgement system evaluated" (April 2004) 7(1) *Internet Law Bulletin* 7-9.
Cannon, "A Pluralism of Private Courts", (October 2004) 23 *Civil Justice Quarterly* 309-23
Cannon "What is the Proper Role of Judicial Officers in ADR?" (November 2002) 13(4) *Australasian Dispute Resolution Journal* 253-262.
Cannon, "Smoke and mirrors or meaningful change: the way forward for Therapeutic Jurisprudence", (May 2008) 17 *JJA* 217-222
Cannon, "Therapeutic Jurisprudence in courts: some issues of practice and principle", (May 2007) 16 *JJA* 256-261
Cannon, "Sorting out conflict and repairing harm: Using victim offender conferences in court processes to deal with adult crime" (September 2008) 18 *JJA* 85-100
Marshall, J, "Port Lincoln Aboriginal Conference Pilot, Review Report", (June 2008) Office of Crime Statistics and Research