AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
alhr@alhr.asn.au
www.alhr.asn.au

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Commissioner Warren Mundy
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

Dear Commissioner,

Costs of Accessing Justice

The ALHR contends that there is, at least anecdotally, a rise in the number of unrepresented litigants and those defending themselves in criminal matters, that this is reflective of an increase in the costs of accessing justice, and for many, the costs of legal services are simply too great.

In matters of those who are restricted financially from access to justice, in particular those accused of serious crimes, review and reform is required in order to ensure Australia's obligations to the International Covenant on Civil and Political Rights are maintained.

The traditional source of legal representation for the disadvantaged; Legal Aid and Community Legal Services, are arguably no longer able to cope with the rise in litigants unable to afford legal representation at their current funding levels, and funding to these sources has not kept up with the demand for their services.

1. Introduction

1.1. Australian Lawyers for Human Rights (ALHR) thanks the Productivity Commission for the opportunity to comment on the Costs of Accessing Justice.

1.2. ALHR was established in 1993. ALHR is a network of Australian law students and lawyers active in practising and promoting awareness of international human rights. ALHR has a national membership of almost 2500 people, with active National, State and Territory committees. Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia.

2. ALHR Contentions

1.1. The basis for the notion of access to justice is internationally recognised and derived from Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

1.2. The Human Rights Committee, in its Nineteenth Session communicated in General Comment 32 on the interpretation of Article 14. While the Human Rights Committee did not specifically comment on the issue of litigants unable to fund representation, paragraphs 30-34 imply a right of access to competent legal advice and counsel. Insofar as it is the accused's right to be granted an adjournment and further time to prepare in serious criminal trials.

1.3. On this basis, it is the position of the ALHR that there is a lack of information with respect of the relationship between the costs of access to justice in civil matters particularly, but anecdotally justice is acutely becoming the preserve of the funded litigant.

1.4. For Australia to meet its obligations pursuant to the ICCPR, there needs to be comprehensive reform for the funding of legal services, especially those target at those financially disadvantaged or from minority groups.

1.5. In the absence of significant reform that there is a risk of widening of the gap, and that the costs of accessing justice will continue to rise. In this matter, provisions for courts to adjourn in order for those accused to prepare for trials should be re-examined and reformed if necessary.

1.6. There needs to be comprehensive review of the funding for community legal services and legal aid to ensure that there is a safety net to reduce the number of unrepresented litigants.

3. Level of Demand for Legal Services

1.1. In 2012, the Law and Justice Foundation of New South Wales published a report on Access to Justice and Legal Needs (A2JLN) in Australia, outlining the findings of a national survey of legal needs, 'the LAW Survey'.[1] In 2008 as part of the survey 20,716 interviews were conducted on the existence of legal problems, the nature of those legal problems, strategies used in response to legal problems, as well as the finalisation and the outcome of legal problems.[2]

1.2. The major findings of the survey were similar across all states. In most jurisdictions, the top four legal problem groups were consumer, crime, housing and government.[3] It was found legal problems are widespread and have adverse consequences on people's lives. It was also found disadvantaged people are particularly vulnerable to legal problems,

[1] Coumarelos, Christine, Deborah Macourt, Julie People, Hugh M.McDonald, Zhigang Wei, Reiny Iriana, and Ramsey, Stephanie, Access to Justice and Legal Needs, Volume 7, *Legal Australia-Wide Survey Legal Need in Australia*, Law and Justice Foundation of New South Wales, August 2012, iii

[2] Ibid, xiv.

[3] Ibid, xiv.

including that their legal issues were complex and that they have multiple, intersecting needs.[4]

1.3. Respondents to the survey reported having a legal problem in the 12 months prior to the survey interview, with 22% of respondents experiencing three or more legal problems over that timeframe.[5]

1.4. How are legal services currently placed to meet this need? The Australian Community Sector Survey[6] (the only national survey collecting data about non-government, not-for-profit community services and the welfare sector) reported that from 1 July 2011 to 30 June 2012, legal services turned away one fifth of all clients in need.

1.5. The survey concluded that 63% of legal service providers reported not being able to meet demand for services, and legal services ranked second highest (of community services) on inability to meet demand. Turn away for legal services was higher than any other service type surveyed at 20% of clients. Fifty-nine percent of legal service providers said they had increased waiting time for services and 76% of services asked staff and volunteers to work additional hours in an attempt to meet demand.

4. Whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute

1.1. ALHR notes that there is no available research within the Australian context relating to this issue.

5. The impacts of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services

[4] Ibid, xiv.

[5] An overview of findings for Australia, Law and Justice Foundation of New South Wales, Access to Justice and Legal Needs, Volume 7, Legal Australia-Wide Survey Legal Need in Australia, August 2012, 1.

[6] Australian Community Sector Survey 2013, *National Report*, ACOSS Paper 202, Australian Council of Social Services.

1.1. In delivering a service that endeavours to be both cost effective and time efficient Community Legal Centres and similar programs naturally gravitate towards the role of 'advice giver' or 'information provider'. Although beneficial, these services rarely provide the same level of on-going care afforded by legal representation. For those that cannot afford or secure legal representation and will go on to appear before a court or tribunal, self representation is the only option. What impact this is having on civil justice in the context of our adversarial system is uncertain at best.

1.2. The Human Rights Committee has, at paragraph 32 of General Comment 32, provided that adequate time be given to those accused in serious trials. The Human Rights Committee did note that 'adequate time' depends on the circumstances of each individual case but further noted that should the accused's case lack significant preparation, or the accused is unrepresented, the court should grant adjournment when requested.

1.3. The Australian Centre for Justice Innovations in their 2012 report to the Commonwealth Attorney General found a concerning lack of data relating to Self Represented Litigants ("SRLs"). Courts, tribunals and justice services do not purposeful collect data on SRLs. In light of the establishment of the Queensland Civil and Administrative Tribunal and its position on SRLs this is troubling. We cannot accurately assess the effectiveness justice services until more quantitative and qualitative data is collected.

6. Impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes

1.1. "Access to justice" has assumed significance in terms of legislative amendments in the federal jurisdiction in recent years; for example, the new Federal Court Rules came into force in 2011 and a suite of legislative amendments have been enacted which are directed at improving access to justice (for instance, the *Access to Justice (Federal Jurisdiction) Amendment Act* 2011 (Cth) and the *Access to Justice (Civil Litigation Reforms) Amendment Act* 2009 (Cth)). The latter Act, inter alia, introduced ss 37M and 37N into the *Federal Court Act 1974* (Cth) which:

- Specify the "overarching purpose of the civil practice and procedure provisions [which includes the Federal Court Rules 2011]…" (s 37M(1));
- Set out the "objectives" of the "overarching purpose" (s 37M(2)) which, relevantly, include "the efficient use of the judicial and administrative resources available for the purposes of the Court" (s 37M(2)(b)) and "the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute" (s 37M(2)(e)); and,
- Impose obligations on parties and their legal representatives to "conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose" (s 37N).

1.2. The significance of the above amendments is their recognition of the role various court processes play in impeding access to justice, particularly in terms of significantly increasing the costs incurred by litigants. By way of example, the Access to Justice (Federal Jurisdiction) Amendment Act 2011 (Cth) and the new Federal Court Rules 2011 (Cth) substantially altered the process of discovery. Recognising that discovery can cause substantial delay and costs to parties to proceedings and significantly curtail access to justice, the new Rules provide that discovery must not be given without an order of the Court, otherwise "the party [who gives discovery without an order] is not entitled to any costs or disbursements for the discovery" (r 20.12). Rule 20.12 complements rule 20.11, which restricts discovery to only where it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible. These amendments illustrate both the role processes such as discovery play in terms of access to justice and, perhaps more importantly, demonstrate that the Legislature and the Courts are cognisant of this and are taking steps to minimise the effect of court processes such as discovery on access to justice.

1.3. The new Rules also complement the Civil Dispute Resolution Act 2011 (Cth) ("CDRA"); r 8.02 requires applicants who are covered by Part 2 of the CDRA to file a genuine steps statement, when filing their originating application and r 5.03 requires a respondent to file a genuine steps statement in return. The object of the CDRA and the "genuine steps statement" is to "ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted" (s 3, CDRA). The need to file a genuine steps statement supports the "overarching purpose" of civil practice and

procedure and case management specified in s 37M of the *Federal Court of Australia Act 1976* (Cth), that is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible.

7. Alternative Mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these.

1.1. Our fundamental contention is that without sufficient funding and access to additional financial resources for community based legal services and legal aid, that the gap will continue to expand, that well-funded litigants will have access to the court systems which are unavailable to the unrepresented.

1.2. The removal of funding for civil matters from legal aid, has created a pool of unrepresented litigants, and that the courts would be well served by having some legal aid allocation for civil matters to reduce the number of unrepresented litigants.

1.3. User friendly court documentation and simpler guides would assist those unrepresented litigants to prepare court documents in a manner acceptable to the court. The Courts could make an approach to tertiary institutions for assistance in drafting these guides.

1.4. As a component of their continuing legal education ('CLE'), solicitors in all regions, should be directed to provide a minimum of twenty hours per annum to community legal organisations to assist in bridging the gap in accessing the court systems.

1.5. Government organisations, such as State and Federal Government, Centrelink, the Australian Tax Office, Australian Securities and Investment Commission and Australian Consumer and Competition Commission should not espouse but should actually practice model litigation practices, and not use the Court system unreasonably. Using the example of *The Commissioner of Taxation v ANTIS* [2010] HCA 40 where the Commissioner was criticised for running an irrational argument. Further that the misuse of Court process should be actively avoided, especially for disadvantaged litigants, the Government, with

arguably unlimited resources should not be requesting delays, which cost a litigant additional legal fees, due to being unprepared or disorganised.

1.6. Tribunals should be made available on a circuit basis, not only to large regional communities but also to smaller regional and isolated communities, and sufficient resources should be provided to these communities to prepare adequately for these hearings.

1.7. Use of technology platforms should be encouraged to assist isolated litigants and participants access community legal services.

1.8. The judiciary must be willing to adopt technological platforms in civil matters and should demand that the parties to litigant prepare paperless submissions wherever possible to reduce costs.

8. Conclusion

1.1. The ALHR proposes that significant research needs to be undertaken to address the widening gap in the access of cost effective legal services. That recommendations need to also address the increase in self represented litigants.

1.2. That the barriers to accessing community legal resources and legal aid are increasing, and arguably worthy recipients are being unable to obtain legal representation.

1.3. That courts, counsel and solicitors alike be made sensitive to the issues of self representation in order for Australia to meet its obligations under the ICCPR.

1.4. The absence of comprehensive reform that there is an increasing risk of continuing to widen the gap to legal services.

1.5. We would like to make this submission available through our website. This is a standard practice for all our work, wherever possible. If you do not want this submission to be made publicly available, please can you advise us within 10 business days of receipt of this letter.

1.6. If you have any questions in relation to this submission, please contact Chantal McNaught, Queensland Convener by e-mail: chantal.mcnaught@gmail.com.

Yours faithfully,

Nathan Kennedy
President
Australian Lawyers for Human Rights

Contributors:
Stevie Martin, Jack Scott, Imogen Coates-Marnane, Craig Danger and Chantal McNaught (Co-Ordinator)