

Access to Justice Arrangements

Productivity Commission Act 1998

Inquiry Submission, from Kev Rothery.

To The Productivity Commission.

I would first like to say thank you for providing this opportunity for stakeholders to submit to an inquiry that has laudable aims. This inquiry is relevant to myself as an individual who has had first hand experience in dealing with the Tasmanian Justice System, where I observed numerous deficiencies as a self-represented litigant (SRL).

My individual scenario concerned incidents of workplace bullying, where my complaint was referred via the Tasmanian Anti-Discrimination Commission to the Anti-Discrimination Tribunal (a division of the Tasmanian Magistrates Court). Because the Tribunal dismissed part of my complaint at an early stage against the respondent whom I considered most culpable for these incidents, I found myself having to take an appeal into the Tasmanian Supreme Court where the decision of the Tribunal was unfortunately upheld. The experience was stressful for myself and my family, and resulted in very significant costs.

As you can imagine, to progress through a legal process after suffering incidents of workplace bullying only to end up being significantly out of pocket and with no justice outcome was unsatisfactory in the extreme. I therefore hope that the Commission may pick up some of my views about the inadequacies of the civil justice system to better support its future users.

I would like to input to this inquiry by submitting two major suggestions for improvement, followed by a summary of bulleted responses to several of the issues covered by the inquiry's Issues Paper.

1. Need for Expedited Procedure in Civil Tribunals of an Inquisitorial Nature

Civil Tribunals, such as the Tasmanian Anti-Discrimination Tribunal, conduct an adversarial system of justice with only limited powers of judicial investigation that fall within the constraints of what is deemed "procedural fairness". I believe that a much better alternative would be for a Tribunal comprising a minimum of two trained judges as members who would conduct the proceedings as an investigation, with the aim of seeking out the truth. If these two members could not agree on any matter, then a third member should be enlisted to the Tribunal to facilitate majority decision-making. Parties to the complaint should have little or no recourse to challenge the procedural conduct of such an investigation. An inquisitorial process is far more likely to be conducted expeditiously, providing cost benefits as well as delivering better outcomes.

I would like to refer the Commission to the entirety of Evan Whitton's book "Our Corrupt Legal System" which explains the inadequacies of the adversarial system very well, and is available for free online at <http://netk.net.au/Whitton/OCLS.pdf>.

Here are two quotes from this reference that articulate the point I'm making as to why an investigative system of justice would be hugely better than the adversarial one:-
[from Page 222] *"As the non-lawyer public and Judge Fox know, everything turns on the search for truth: justice, fairness, reality, morality but, as the foregoing shows, a system which has six ways of concealing evidence and 18 other mechanisms which obscure or defeat the truth is not trying to find the truth."*
[from Page 242] *"...the investigative system, which seeks the truth and trained judges control evidence must be better than a system which does not seek the truth and trained liars control the evidence."*

2. Parties to a Civil complaint should have a Right of Response to Decisions within the Court, to supplement their Right of Appeal to a higher Court.

I believe that parties to a Civil complaint should be able to submit a response to appeal a decision directly to the deciding judge within a short time-frame, such as 5 working days (so as not to unduly delay proceedings). Otherwise, the only recourse available is to bring an appeal of the decision to a higher court. This inevitably involves months of delay, significant extra work for all parties, and vastly increased costs which may very well be unaffordable to most individuals. Similar to a consumer "cooling off" period, this practice would allow cool-headed thinking to be applied to the decision in case important factors have been over-looked and to ensure such factors have been properly considered and responded to by the judge. This provision would be particularly relevant for Self Represented Litigants (SRLs) who aren't so capable of reacting to events in the courtroom as trained lawyers, and is especially justified for civil Tribunals (such as the Tasmanian Anti-Discrimination Tribunal) whose pamphlets suggest that parties might effectively represent themselves. Such a provision might have helped with my own complaint on two occasions:-

- For a complaint dismissal against one of the parties which I strongly opposed, but where I needed time to consider the grounds I had to challenge the decision. If I could have submitted my grounds for consideration and a response at the next directions hearing of the Tribunal, it might potentially have avoided over \$19,000 of legal costs I subsequently incurred in bringing an appeal to the Supreme Court, as well as a stressful 10 month delay added to the complaint proceedings for all parties.
- For a decision by the Tribunal member to not dismiss herself from hearing my complaint without (in my strong opinion) sufficiently responding to the points raised in the dismissal application, where my only recourse was to face the delays and costs of pursuing a second Supreme Court appeal. (Note: I subsequently abandoned my complaint, having entirely lost faith in the legal system).

Having summarised my two major suggestions for improvement above, I would also like to comment against some of the specific issues outlined on your Issues Paper for this inquiry:-

Issue 2: *The Commission invites comment and evidence on the main strengths and weaknesses of the civil justice system. What should the objectives of the civil justice system be, and are they being achieved?*

- The fundamental objective of the civil justice system should be a search for truth, and this is not being achieved due to the use of an adversarial system (see details of my first suggestion above).
- A secondary objective should be to mitigate the impacts of a civil complaint upon the lives of the parties, by expediting the process in order to reach a just decision in the shortest possible timeframe. This would also be achieved by adopting an investigative system.

Issue 4: *The Commission invites comments on the financial costs of civil dispute resolution and the extent to which these costs dissuade disputants from pursuing resolution. Data are sought — from parties, lawyers, the courts and other institutions — on these financial costs, including the costs of advisory services, alternative dispute resolution and litigation.*

- Costs within civil disputes are primarily incurred due to engaging legal representation, which would be unaffordable to many as such costs quickly run into tens of thousands of dollars. Once again, adopting an investigative process instead of an adversarial one is beneficial as it reduces the need for legal representation.
- Whilst costs can sometimes be avoided within civil Tribunals by self-representation, they are certainly going to be incurred if the dispute gets escalated to a higher court via an appeal. This supports the need to provide a first level appeal process within the Tribunal itself to avoid costs by reducing the incidence of appeals that get taken to a higher court (see details of my second suggestion above).

Issue 5: *Why do individuals or organisations choose to represent themselves in courts? What has driven the apparent growth in SRLs? What data are available on the numbers of SRLs and the reasons for self-representation?*

- I can only speak personally to these questions. In my case, I felt that legal representation should not be necessary in the Tasmanian Anti-Discrimination Tribunal because their pamphlet stated that representation shouldn't be required due to the guidance that could be provided by the Tribunal itself during proceedings.
- When I brought an appeal to the Supreme Court I remained self-represented as I felt I was unlikely to succeed with the odds already stacked against me as a result of the lower court's decision. I was already faced with the threat of having to settle the respondent's legal fees if I lost the appeal, and couldn't contemplate doubling my costs by also engaging my own representation. In the end I took a compromise approach by obtaining some limited legal advice and engaging a legal expert as a "support person" to help me to prepare my case and to be with me in court for moral support (known in legal circles as a "McKenzie's friend").

Issue 5: *What is the impact of self-representation on opposing parties, courts and tribunals and the parties themselves?*

- I can only speak personally to this question. I found the main impact was the massive investment of personal time, which consequently also impacted upon my family.

Issue 5: *How does the legal system accommodate SRLs and does this take into account the attributes of SRLs themselves? How can parties best be assisted to self-represent?*

- Speaking from my personal experience as an SRL within the Tasmanian Anti-Discrimination Tribunal, I would say that SRLs are not supported in a manner appropriate to their ignorance of the legal system. I believe that parties could much more effectively represent themselves in the context of an investigative legal system, rather than in an adversarial one.

Issue 10: *Should scope for having legal representation within the context of tribunals be more or less limited and why? What mechanisms could be used to help ensure that the benefits of simplicity and informality of tribunals are not undermined by lawyers acting as if they are appearing before a court?*

- Scope for having legal representation should be more limited as a matter of fairness, otherwise the more wealthy party is likely to have an unjust advantage within the proceedings.
- There is obviously a highly significant cost benefit for the parties if legal representation is avoided.
- Conducting an investigative legal process instead of an adversarial one would remove a large part of the need for legal representation.

Thank you for conducting this inquiry.

Best regards,
Kev Rothery