

Justice Action Submission regarding Access to Justice

Introduction

Justice Action is an organisation that targets abuse of authority, especially within both the criminal justice and health systems. The organisation is mainly campaign-based whilst maintaining a connection with the people that it attempts to help. It is made up of many groups of people, such as victims of crime, prisoners, academics, students, ex-prisoners and mental health consumers, and acts independent of the government. Predominantly, these people Justice Action attempts to help are disenfranchised and have poor access to justice.

Access to justice extends beyond mere access to the court systems; it encompasses the ability to access information as well as recognition of the right to be treated without bias. We have a keen interest in the concept of access to justice and the way in which access to justice should be embodied within the criminal justice system.

The people we support can be characterised as detainees, characterised as a person held in custody. As detained persons, involuntary patients and prisoners are among Australia's most vulnerable people, access to justice is especially important. Detained persons have rights, and it is unacceptable for Australia to regard prisoners and involuntary patients with an 'out of sight, out of mind' mentality. This mentality condemns some of the most vulnerable and unpopular members of the system to being ignored and potentially abused. It is our submission that this inquiry should be focused on providing services that facilitate improved access to justice for both prisoners and involuntary patients in Australia, so as to provide them with a standing within the system and be better able to assert and enjoy their rights.

People in Deention – What about their Access to Justice?

Justice Action recently asserted the right to enrol vote for the 36,000 people in the prison community, who face geographical, individual and systemic restrictions. Our role to argue and present this was unchallenged. Such individuals are often unaware of their legal rights, overwhelmed, and unable to communicate their needs and concerns effectively. Furthermore, in some instances within the prison culture, issues regarding a prisoner's personal capacities may prevent them from using those resources available to them.¹ Reasons for this may be due to a lack of awareness of the pathways available to them, or lack of education about their rights.

Access to justice within prisons and hospitals is structured and dependent upon state control. The responsibility and impetus should come from the prisoners themselves, but their ability to do this is blocked. Furthermore, accessibility, availability and institutional attitudes to those with mental illness severely inhibits involuntary patients' access to justice. The profile of people in prison indicates that they fall under the vulnerable litigants category.

¹ Anne Grunseit, Suzie Forell & Emily McCarron, 'Taking Justice Into Custody: the legal needs of prisoners' (2008) 5 *Access to Justice and Legal Needs*.

The classification of a person having a physical or mental disability within the system can cause injustice for the person in a variety of ways. For example, where someone has had an emotional breakdown following a marriage breakdown. When it comes to dissolution of assets or deciding who takes care of any children, there is already an inequality in bargaining power between the couple, with the person with the supposed disability trying to assert their rights from a compromised position. The right of being a parent should be separate from whether a person is within the system for treatment of a physical disability. However, they are seen as having less standing or sway within the process as opposed to the other spouse outside of the criminal justice and health systems.

It has been suggested that the use of Legal Aid would be beneficial here in addressing the above issues. However, an increase of support and funding to Legal Aid would not be an appropriate remedy to these issues. Rather than acting as a representative to the person who has been disenfranchised through being a part of the system, the focus needs to be on empowering the person to be able to assert their own rights despite being part of the system, rather than empowering someone to do it for them. The underlying issue of an inequality of bargaining power and understanding are the predominant points that need to be addressed, rather than any expansion of representation by Legal Aid.

Access to Justice for detainees

Cost of Accessing Justice and Securing Legal Representation

Cost of litigation is a major factor that prevents access to the legal justice system, especially for vulnerable litigants. In our submission, we are particularly aiming to highlight the problems of access to justice for:

- a. Prisoners;
- b. Involuntary patients; and
- c. Not-for-profit organisations like Justice Action, and the effect of costs orders on our ability to represent those in need.

Not-for-profit organisations that represent involuntary patients in Mental Health Review Tribunals and subsequent appeal courts with the intent of representing the interests of the public are faced with significant challenges in meeting legal costs. We believe that it is vital that not-for-profit parties representing vulnerable litigants are able to receive special consideration in regard to court costs. Justice Action is currently seeking leave in the High Court on appeal on costs totalling \$52,000 for litigation arising out of representation on behalf of an involuntary patient, Saeed Dezfouli. This highlights the high risk that costs orders pose for not-for-profit organisations that are upholding civil justice rights for vulnerable, legally incapacitated litigants. This risk of cost may deter other not-for-profit organisations from pursuing cases for vulnerable litigants, subsequently acting as a significant barrier for access to justice.

Avenues for dispute resolution and the importance of access to justice

In our submission we support the view that, in cases where there is a public interest implication, the main strength of the civil justice system is the availability of appeal

avenues. Where there are “public interest implications” (particularly which challenge established law and create new precedents), this avenue for appeal is vital to ensuring that involuntary patients are heard.² However, the Mental Health Review Tribunal as an auxiliary to the formal court system, undermines the civil justice system. The Tribunal commands a level of discretion, determined by state legislation that can hold involuntary patients indefinitely and mandate community treatment orders.³ The weakness then of the civil justice system is its clear failure to regulate or curtail the activities of the Tribunal.

Detainee’s restricted access to justice

Access to justice is a central concept of the legal system and the rule of law. Failure to provide access to resources concerning justice eliminates opportunities for the individual to pursue justice, and by extension undermines the integrity of the legal system of Australia, and disillusionment with the law. This is particularly prominent for detainees, as they are often denied the ability to properly access justice. However, there are several ways that this can be addressed.

Peer Support Programs

The application of a form of peer support program would be beneficial in addressing the disproportionate access to justice among detainees. This entails providing a process whereby prisoners who have previous experience in a specific area (such as going through litigation) is followed to assist detainees going through similar issues. This would allow for both increased knowledge of the process involved while addressing some of the inequity of the positions of detainees within the system at a small cost. This already happens informally within the system. It should be properly recognised as to allow jobs and status for the detainees.

Paralegals (or McKenzie Advisors)

The use of what are known as McKenzie advisors is an expansion of the peer support ideas. It involves others acting as paralegals in certain situations to which they have experience. Fostering this area of assistance within the system would have beneficial consequences, such as allowing for mutual support among detainees and prisoners and allowing for the development of meaningful jobs. This will allow for greater support of prisoner and detainee rights and attempting to address the inequality extant within the system.

In our submission, we strongly endorse the notion that access to justice is integral to the function of society and the legal system. Such a system would promote the ability of vulnerable litigants to assure they can obtain legal representation. If the law cannot command respect, it cannot be followed. Moreover, if individuals and communities cannot access justice, then they will never be able to receive it.

² Australian Government Productivity Commission, *Access to Justice Arrangement- Productivity Commission Issues Paper*, 21 June 2013, 3.

³ *Mental Health Act 2007* (NSW).

Exploring Legal Need- Is unmet need concentrated among particular groups?

Constraints on access to justice operating against all prisoners are particularly exacerbated in the case of involuntary patients. This limit on their ability to access justice, coupled with being deemed incapable by the legal system, directly correlates with the dire position of their legal needs. Again, it is an ‘out of sight, out of mind’ mentality.

The fact that a not-for-profit organisation was required to adopt a role in Saeed’s case as his primary carer clearly demonstrates this, and reflects a broader reality for involuntary patients; specifically their minimal access to justice and heavy dependence upon others to pursue their legal needs.

Access to legal tools for detainees

Australian literature and commentary have identified a number of barriers to prisoners’ ability to access resources necessary to understand and prepare for legal matters. These include lack of access to computers, research databases, telephones and difficulties in reaching and obtaining information from Legal Aid. Regarding the computers issue. Justice Action has been advocating a shift from the nondescript television within prison cells and a movement towards allowing prisoners the placement and use of computers within their cells. The rationale for this proposal is that it would have several benefits, including deterrence of recidivism through allowing prisoners the opportunity for education and self improvement. In addition, there is the more obvious benefit of helping prisoners, detainees and involuntary patients greater access to legal information, so as to be better informed as to their rights and abilities under the law. More about our proposal can be found here: <http://www.justiceaction.org.au/cms/component/k2/item/392-computers-in-cells>

Often, the access of information by prisoners is limited to prison libraries or advice from their legal council. Moreover, those resources they are able to access can be out of date, or prisoners may be physically prevented from accessing information due to protection, segregation and even lack of reliable information regarding both the existence and opening hours of the prison library. The limited Legal Aid funding in this sector further inhibits prisoners in accessing accurate information or legal advice.

Case Study: Saeed Dezfouli

Saeed Dezfouli is currently detained in Long Bay Prison Hospital for manslaughter. During his time there, he has continually been forcefully medicated against his will, despite the substantial negative side effects caused by the medication. Although multiple psychiatrists are in agreement that medication is unnecessary, treatment continues to be administered. Detained individuals are perfect examples of vulnerable litigants, as basic information essential in progressing through legal channels is limited, and in some instances, absent altogether. Brett Collins, the coordinator of Justice Action, acts as Saeed Dezfouli’s primary carer. In taking on this role, Mr Collins has provided Mr Dezfouli with legal support that he otherwise would be unable to access. Consequently, Mr Collins has since been billed with the cost order of over \$36, 000 for doing nothing more than attempting to support Mr Dezfouli’s right to basic dignity and humanity.

We submit that the denial of Saeed's right to access to justice has allowed for the continued violation of his rights, and the policy surrounding this needs to change. This is supported by the blatant discouragement of any help in gaining access to justice as shown by the cost order being awarded against Mr Collins. Cases such as this one illustrate issues regarding access to justice within the criminal justice system, namely that there is a large disproportion of access to justice between the disenfranchised and the other members of society. Upheaval and improvement of aspects of access to justice, including consideration of court costs for not-for-profit organisations, would allow for this seminal case and others like it to run far more efficiently. This will coherently inform the community that as a nation, we are willing to uphold the values inherent to justice on which society is built, no matter who the litigant or issue is.

Our Recommendations

Justice Action urges the Productivity Commissioner to support access to justice for people in detention, both for regular prisoners and involuntary patients. The changes advocated in this submission will facilitate and improve access to justice for vulnerable litigants.

In summary, Justice Action advocates:

1. People in prisons require better access to information and need access to resources, including our advocated 'computers in cells' and legal databases so as to be better informed as to their rights and abilities under the law.
2. People in prisons should have access to up to date law books and materials within the prison library, as this is often their only means of obtaining reliable legal information.
3. Not-for-profit organisations representing vulnerable litigants should be provided with special considerations in relation to court costs. This will promote access to justice and equality before the law by ensuring that vulnerable litigants are able to secure legal representation.