

Your ref: Access to Justice Arrangements

Our ref: 328 – 15 – Access to Justice; Litigation Rules

4 November 2013

Commissioner Angela MacRae
Access to Justice
Productivity Commission
PO Box 1428
Canberra City ACT 2601

By email: access.justice@pc.gov.au

Dear Commissioner

ACCESS TO JUSTICE ARRANGEMENTS

This letter is written with the assistance of the Queensland Law Society's Access to Justice/Pro Bono and Litigation Rules Committees.

We acknowledge the policy objectives to further enhance access to justice and support any advancements to improve access to justice.

About QLS

QLS believes everyone, without exception, should have access to legal services and that access to justice is a fundamental right for all.

Promoting access to justice is a constant feature of QLS's advocacy and education to the profession. Our recent advocacy work has included:

- Sustainable legal assistance for disadvantaged persons;
- Queensland state election platform from 2012, which sets out general positions from QLS on access to justice (**attached**);
- Involvement with both state (LPITAF) and federal (NPA) reviews of legal assistance sector funding; and
- Advocating for Queensland to retain the right to access common law compensation schemes (such as with regard to disability care and workers compensation schemes).

We will now address key aspects of the inquiry.

In what areas can the commission most add value?

The Society considers there should be significant focus on examining the adequacy of legal assistance funding, and to that end, "what should the scope of the government's responsibility be to provide legal assistance (or funding for legal assistance) to individuals?"

The Commonwealth legal aid system was established with the notion of “the Commonwealth person” and legal aid offices taking on a broad range of legal work for people who require special assistance, namely social security beneficiaries, Indigenous Australians, and Veterans. The areas of law included crime, family and civil law. Unfortunately this was proved unsustainable and coverage was curtailed. Then there was a focus on states and commonwealth funding matters that arose under state or commonwealth law respectively.

The strategic framework for access to justice was revised by the Commonwealth, and a new emphasis was given to early intervention and prevention services.

Advocates for additional funding for legal assistance services have pointed to the economic benefits of funding legal assistance and the human rights foundation for funding legal assistance. We have identified legal needs and gaps in meeting those needs.

However, the Society is not aware of any single, clear statement by government, about what the appropriate scope of funding for legal assistance should be.

The Productivity Commission would be well placed to analyse these issues and assist with answering the question about what legal services should be regarded as a public good or social good. The Commission could also address the issue of what services should be provided subject to a means test, and what criteria should be used in setting the means test. For example, is it based on an individual’s ability to afford the service privately, or is it to ration a service for which there is more demand than supply?

Pro bono work provided by the profession

Queensland legal practitioners provide a significant amount of pro bono and reduced fee services. There is no mandatory reporting of the provision of these services, so there are difficulties in quantifying these numbers, however feedback we have received from our members are that they are undertaking significant amounts of pro bono and reduced fee work. These services come in a variety of forms from free education talks to the community to volunteering in community legal centres (CLCs), to reduced fee arrangements for clients (for example, long term clients, clients with special circumstances or clients with limited financial resources) to a dedicated pro bono service within the legal firm. However the capacity of the private profession to provide pro bono services is not infinite and it can never be a substitute for the legal assistance sector.

Pro bono services rely, to an extent, on the CLC sector to coordinate and support firms’ pro bono practices. It is therefore important that the Commission consider this type of work performed by CLCs, which should be properly and effectively funded.

An assessment of the level of demand for legal services should not only include an analysis of the number of people who cannot afford legal services and do not qualify for legal assistance services but also the kind of people and the kind of matters that most often fall through the gaps.

Growth in civil and family law case lists

The Society notes that civil case court lists are growing, particularly in the area of family law. The experience from our members is that it is not uncommon for family law matters to have decisions reserved for more than three months.

To cope with demand, we strongly advocate for increases in the number of judicial officers in the Magistrates, District, Supreme, Family and Federal Courts in order to deal with these lists. The Society considers there should be adequate resourcing of all courts, including regional circuits and all support services and that this issue be specifically considered by the Commission.

Costs generally

We note the Access to Justice Arrangements Issues paper states:

Others may not be informed about the costs involved, or may be unable to properly evaluate the potential expenses associated with pursuing dispute resolution.

This observation appears to be in conflict with practitioners' obligations under the respective *Legal Profession Act* and *Australian Solicitor Conduct Rules*. Indeed in Queensland, practitioners are required to provide cost disclosure to clients seeking legal services¹ and have an ongoing obligation of disclosure.²

Courts processes and structures

Jurisdictions across Australia have divergent systems of law and administrative regimes, which in turn has an impact on costs. Consideration should be given to instituting uniform practices and resourcing to function effectively as well as encouraging technology use in the courts.

The Society also considers that there should be examination of the litigation process and the types of barriers that are encountered in resolving disputes. Empirical evidence from our members is that the two most common delays in litigation are:

- Disputes about pleadings; and
- Disputes about discovery/disclosure.

The Society notes that timeframes can blow out when there are continual amendments and further amendments to pleadings and the correlating obligations for disclosure for revised pleadings. Whilst it is paramount that justice is afforded to both parties in that there are opportunities to undertake these steps, the Society also considers that there should also be a balance in that matters are not unduly held up and proceed to trial. The Society therefore suggests there be examination of these processes and the timeframes that attach to them and the opportunities available to progress matters (particularly at the third and fourth amendment stages).

Quality legal services

The Society is a strong advocate for access to justice but is concerned that a purely economic analysis of access to justice may lead to a devaluing of the special role of the legal professional, as advisor, fiduciary and advocate. From a purely economic perspective, increases in supply of services will increase competition. In Queensland, for example, we already have very low price conveyancing services compared to other states and price

¹ Part 3.4 of the *Legal Profession Act 2007* (QLD).

² Part 3.4 of the *Legal Profession Act 2007* (QLD).

competition is heightened. With strong price competition, the likelihood of corners being cut to deliver a product/service, will likely result in a diminution of quality, particularly if those services are proposed to be permitted to be offered by those with no or limited legal experience. This reduced quality is not of benefit to the client and ultimately will likely involve increased cost to remedy mistakes made or in enforcing insurance claims for loss occasioned by the negligence of service providers who are insured (Note: solicitors are required to have insurance coverage in order to be able to practice and this provides a safeguard to the community). The Society therefore urges that this issue be considered with close examination of all the factors that impact on access to justice, not purely on cost alone.

Thank you for the opportunity to provide feedback on this issue. Representatives of our committees would be pleased to discuss these issues in further detail, should you require.

Yours faithfully

Annette Bradfield
President