

PRODUCTIVITY COMMISSION
INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

A Submission from
CENTRE FOR RURAL REGIONAL LAW AND JUSTICE
SCHOOL OF LAW, DEAKIN UNIVERSITY

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1. About the Centre

The Centre for Rural Regional Law and Justice (CRRLJ) sits within the Law School of Deakin University. Through its activities in research, community engagement and advocacy, the CRRLJ seeks to advance access to justice for regional and rural Australians, with a particular focus on the experiences of people in regional and rural Victoria.

As a research centre within an academic institution, it is unique. It engages in research both with and for regional and rural communities and in that way works not only to further academic and professional understanding of regional and rural justice issues, but also to address those issues and make a difference.

In 2011, the CRRLJ published *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (Coverdale 2011). Founded on the precept ‘that all Australians have a right to a fair and equitable system of justice’ (Coverdale 2011, p. 15), the report highlights a number of areas in which that right is being compromised for people in regional and rural Victoria. The report’s findings have played a significant role in setting the CRRLJ’s research and action agenda over the past few years, which has included further examination of issues conflicts of interest arising in regional and rural law practices (Kyle, Coverdale and Power, 2014), identification of changes needed in legal practices to better service small business in regional and rural Victoria (Coverdale, Jordan and du Plessis, 2012), and an examination of the experiences in the Geelong Magistrates’ Court of women surviving family violence (Jordan and Phillips, 2013), itself the first phase of a larger project, currently nearing completion, exploring these issues on a statewide basis.

The CRRLJ is also engaged in the presentation of a series of monthly forums on a large range of issues relevant to accessing justice in regional and rural Victoria. These forums are presented through video conferencing facilities to 14 regional locations throughout Victoria and have so far been attended by over 900 people from a diversity of community, industry and government sectors.

The CRRLJ is also a regular commentator on areas of public policy that impact upon access to justice in rural and regional Australia, particularly through preparing submissions to inquiries such as is currently being undertaken by the Productivity Commission.

The CRRLJ is about to commence further research and community engagement projects, including in relation to the legal needs of offenders with mental impairment in regional communities.

2. Broad comments about the Commission's Inquiry

The CRRLJ is pleased to be offering comment on the Productivity Commission's expansive Draft Report on Access to Justice Arrangements. We note that the Report made several references to the needs of regional and rural communities, such as in relation to: the lack of incentive for private practitioners to provide services in those areas (Productivity Commission 2014, p. 135); recognising the problems of too great a reliance on technology as a means of delivering legal services to regional and rural areas (Productivity Commission 2014, p. 502); the potential benefits of some consolidation of legal services, such as tribunals, in terms of capacity to visit regional and rural areas (Productivity Commission 2014, p. 320); that 12.8% of lawyers are located in regional areas (Productivity Commission 2014, p. 218) and yet 30% of Victoria Legal Aid clients and 43% of Legal Aid NSW clients live in regional areas (Productivity Commission 2014, pp. 582-583); difficulties recruiting volunteers in regional and rural areas (Productivity Commission 2014, p. 589); limited professional development opportunities for regional and rural lawyers (Productivity Commission 2014, p. 650); and the double disadvantage of living in an area where there is poor service infrastructure and also a concentration of social disadvantage, such as in some rural indigenous communities and the legal issues that arise from this (Productivity Commission 2014, p. 675 ff).

Collectively, these observations provide an important picture of the experience of people living in rural and regional Australia in their access to law and justice. However, they are observations that tend to be spread throughout the report, often made more or less in passing, and so the CRRLJ feels it is important to bring them together to help inform a more consolidated understanding of how the issues with which the Commission is concerned relate to regional and rural Australia more fully.

According to the Australian Bureau of Statistics (2014), just under 30 per cent of Australians were living in regional or remote areas in 2013. The communities in which they live are incredibly diverse. They share the same range of legal needs with the big cities, as well as sometimes additional legal needs that can arise by virtue of living in communities that are dislocated from services, employment and transport, remoteness or because of characteristics peculiar to particular rural and regional communities, such as farming or mining towns, towns with a high indigenous population, or towns dealing with cross-jurisdictional challenges because of being located close to state borders.

Despite the breadth of legal issues for rural and regional Australians, their access to the services which enable them to deal with those issues is often very poor, as noted from time to time throughout the Commission's Draft Report. The CRRLJ therefore regrets that there was not a greater focus on the needs of these communities throughout the Report, where rural and regional issues seem generally to be mentioned in passing, as a part of another point.

Regional and rural Australia plays a critical role in the life, wealth and health of the nation, providing a large proportion of the nation's food, as well as generating many of its chief export resources (Brett 2011, pp. 4-5). But for it to continue to thrive in this role, it is vital that the people who live in those communities and rural and regional industry have access to the legal services they need, particularly in relation to civil justice, where matters concerning business and intra- and inter-community relationships are often played out. In this sense, then, ensuring effective and accessible civil justice services in regional and rural Australia is important for all Australians and the national economy. City and country Australia are inextricably mixed. Fair provision and application of services, resources and the application and administration of compliance obligations across all communities is essential to an equitable Australia.

This perspective of seeing the justice needs of regional and rural communities as part of the needs of everyone is one that we would have liked to have seen given more emphasis in the Commission's Draft Report. It's a perspective that enables us to see these issues not only as being about people getting access to services they don't yet have (although that is in itself enough to warrant their attention) but also about building a healthier, more just Australian society overall.

3. Key issues in access to civil justice for regional and rural Australia

There are five main areas that the CRRLJ would like to highlight as crucial to better addressing the civil justice legal needs of regional and rural Australia, many of which are consistent with themes raised in the Draft Report, but all of which could benefit from close consideration from a rural and regional perspective.

These five issues are:

- The development of more alternative approaches to meeting people's legal needs
- Better access to the services of courts, tribunals and complaints-handling mechanisms
- Better access to legal advice and legal assistance
- More regionally refined data sets
- Greater scrutiny of the impacts of new legislation upon regional and rural communities

We will now address each of these issues separately.

3.1 Alternative approaches to meeting people's legal needs

The CRRLJ notes that the Commission canvassed a number of options for developing alternative approaches to meeting people's legal needs, beyond the more traditional lawyer/client model that currently dominates the civil justice system. The approaches mentioned by the Commission included: legal health checks (Information request 5.1); greater use of paralegals and other non-legal workers in helping people to identify legal problems earlier (Information request 5.2); more use of Alternative Dispute Resolution (Chapter 8); broader use of unbundled legal services enabling a bigger role of non-lawyers (Information request 7.5) as well as greater support for self-represented litigants (Information request 14.2).

3.1.1 Supporting and resourcing a greater role for paralegals

The CRRLJ supports a greater role for paralegals and other non-lawyers in the resolution of people's legal needs. This can include many of the areas already identified by the Commission, particularly in relation to providing information in the early stages of the person's problem, or assisting in the facilitation of Alternative Dispute Resolution approaches. Rurally-based paralegals could also play a very valuable role in supporting the administration of legal health checks – a concept supported by the CRRLJ, although we stress the importance of ensuring that workers administering those checks are effectively trained and resourced. While it is an approach that has great potential to identify legal problems earlier, and to save on expensive and conflict-driven legal services later, it will not work if it is simply an extra task for existing community-based workers to do within their current workload.

3.1.2 Enabling greater use of Alternative Dispute Resolution

The CRRLJ stresses the importance of alternative dispute resolution, especially in regional and rural communities. The smaller a community is, the more likely it is that the connections between its members will be multi-faceted. A service provider or business operator might also be a neighbour; the local doctor or nurse might also be on the school council where their patients' children attend; police officers are likely to personally know the people with whom they deal. The conflicts and fracturing that can arise through litigation can therefore have very profound impacts on the local community infrastructure. This makes it important to explore, arguably even more than in the cities, non-litigious resolutions to legal disputes. And yet, typically, the services that are needed to enable this are largely inaccessible to regional and rural Australians, or are at best located a very long way away. This means problems are likely to escalate to the point where they can only be resolved through litigation, at great monetary cost to the parties and at great social cost to the community. Greater investment in Alternative Dispute Resolution Services in regional and rural Australia should therefore be recognised as a critical element in more equitable, effective and efficient access to civil justice in regional and rural Australia.

3.1.3 Initiating a focus on collaborative lawyering

Closely connected with the use of Alternative Dispute Resolution is the relatively new practice of collaborative lawyering. It is not the same as mediation, but reflects some of the same philosophies while drawing on the 'traditional expertise and skills of lawyers to foster creative and comprehensive solutions' as well as bringing 'facilitative negotiation skills. Training and philosophy squarely within legal practice and proposes a multi-disciplinary approach to legal dispute resolution by acknowledging and incorporating the skills and expertise of psychologists, accountants, financial and business advisers, and any other professionals whose expertise may assist the clients in reaching their own agreement' (Scott 2008, pp 214-215). In this way, the model still provides a critical role for legal practitioners – something which mediation does not typically do – while doing so in a non-adversarial environment. While recognising the general lack of access to professional expertise in rural and regional areas, the CRRLJ nevertheless stresses the importance of further exploring the opportunities for collaborative lawyering for civil dispute resolution generally, and in rural and regional areas in particular. Part of the process of exploring the viability of collaborative lawyering options in the resolution of a particular disputes would include considering what range of professional expertise might need to be called upon, and how available this is.

3.1.4 Promoting broader approaches through legal training

Nevertheless, the CRRLJ notes that the adoption of any Alternative Dispute Resolution practices can be, and is, met with a degree of cynicism by some members of the legal profession, who mistrust a process that appears to replace the need for lawyers. This can even happen with respect to collaborative lawyering, which, although not replacing lawyers, certainly requires them to come to the table with other non-lawyer professionals. We believe that this is a systemic issue within the legal profession that needs to be addressed as a component of law training, both in universities and through professional development. This training needs to work towards enabling lawyers to understand the need for, and to develop the skills in seeking out, locally available non-legal professional services that can contribute to effective dispute resolution.

3.1.5 Investigating opportunities for unbundling

The CRRLJ supports the Commission's interest in unbundling. As the Commission notes in the Draft Report, unbundling is not new and has in fact been practised in Legal Aid Commissions and Community Legal Centres for some time as a way of rationalising resources (Productivity Commission 2014, p. 554). We also note that it is a practice that has been in place overseas for at least two decades, too, in response to the needs of consumers for more user-friendly, lower cost services (Mosten 1994, p. 449). The range of services that might typically be 'unbundled' are likely to be: gathering facts, advising the client, discovering facts of the opposing party, researching the law, drafting correspondence and documents, negotiating, and representing the client in court (Mosten 1994, p.423). To this list we would also suggest adding 'assisting the client to prepare for court', a service that can be particularly important for clients appearing without legal representation. Clearly, not all of these tasks can be undertaken by non-lawyers, but some of them can, particularly where a paralegal or other professional has been appropriately trained. Just which services need to be provided by a lawyer and which ones can be provided by another professional, or even which ones the client can be resourced to carry out themselves, will vary from case to case. Because of its potential to offer more affordable legal services, as well as freeing up lawyers' time, the CRRLJ sees unbundling as a potentially valuable option for regional and rural clients. The CRRLJ therefore supports further exploration of ways in which unbundling can be encouraged and facilitated more broadly throughout the legal profession. We note, however, a number of issues that need to be kept in mind when such exploration is being undertaken. These include: examining the implications of involving a larger number of professionals in the management of a particular matter in terms of potential conflicts of interest, particularly in small towns where services are limited and so the potential for conflicts increase (already noted in relation to lawyers in particular in Kyle, Coverdale and Powers, 2014) and the lack of access to other services in regional and rural towns for the provision of various components of the unbundled service. While not suggesting that the Commission is necessarily contemplating a unit-cost approach to an unbundled legal service system, the CRRLJ would nevertheless urge caution about proceeding down that path without a very thorough examination of its capacity to accommodate the diverse needs of regional and rural Australians. It can be extremely difficult, indeed dangerous, to predict the resource implications of different components of a legal problem, particularly for a litigant whose situation may be atypical. This will often be the case for regional and rural litigants. Matters that might be quite inexpensively dealt with in the cities – such as accessing documents or other materials necessary for dealing with a matter – can take a lot longer, and be more costly, in more remote areas, for example. It is important that systems for costing, and therefore resourcing, services components are able flexible enough to reflect this diversity.

3.2 Access to the services of courts, tribunals and complaints-handling mechanisms

The CRRLJ notes that the Commission makes some limited reference to issues regarding access to courts, tribunals and complaints-handling bodies for regional and rural Australians, primarily in the context of the potential that great rationalising of tribunals might create in terms of capacity to visit the regions (Productivity Commission 2014, p. 320).

The CRRLJ draws the Commission's attention to the lack of access to court and tribunal services, and to complaints-handling mechanisms in regional and rural Australia. This is a point that has been noted in considerable detail in Coverdale 2011, particularly in Chapter 3, and particularly in relation

to Victoria. The report notes the steady loss of regional and rural courts in Victoria over the years (Coverdale 2011, p 33), and the impact that this has had, especially in lower jurisdiction courts where most cases are heard and that often provide multi-jurisdictional venues and administration for hearing the matters of specialist courts and tribunals (Coverdale 2011, p. 34). We assume that similar problems arise across Australia.

There are some additional and more specific issues related to the services of courts, tribunals and complaints-handling mechanisms that the CRRLJ would like to draw to the Commission's attention:

3.2.1 Tribunal matters

Typically, at least in regional Victoria, Tribunal matters are heard in Magistrates' courts. This has been a matter of considerable concern for people taking civil matters, such as guardianship application (Victorian Law Reform Commission, p. 478) to a Tribunal, particularly in closely-knit towns, where friends, neighbours and colleagues see them attending the local court building and inevitably assume they are involved in a criminal matter.

Delays in having Tribunal matters heard can be inordinate in regional towns and urgent hearings can be very difficult to organise, even with the availability of teleconferencing facilities. Typically Tribunals wait for their case load to reach a certain level before beginning to schedule hearings in a particular regional location (Coverdale, 2011, pp. 58-59).

3.2.2 Court matters

As noted in Coverdale 2011, pp. 49-53, Country Court hearing dates in regional Victoria can be extremely elusive. Usually, the period over which the Court will be sitting in the region is known, but more specific details about when a particular hearing will be can be very difficult to know. This creates enormous problems for regional litigants in planning their matter, retaining barristers and so on. The CRRLJ suggests that issues such as this be fed into the Commission's proposed empirical analysis and evaluation of case management approaches and techniques adopted by jurisdictions (Draft recommendation 11.2)

Further, as noted below, many of the access to justice problems in regional and rural Australia could, at least to some extent, be reduced through more collegiate and collaborative approaches to lawyering. Likewise, a greater use of inquisitorial practices in courts, especially in Magistrates' Courts could reduce the need for legal representation and provide greater and easier access to justice for litigants. This would involve the Magistrate playing a greater role in determining the facts, calling witnesses and asking questions.

3.2.3 Complaints-handling mechanisms

The CRRLJ comments here on complaints-handling mechanisms in their broader sense as addressed in Chapter 9 of the Commission's Draft Report. Complaints-handling mechanisms in relation to legal practice are address in section 3.3 below.

The CRRLJ notes that, in general, there is very little information about complaints-handling mechanisms, such as the roles of various Ombudsmen's offices, delivered in regional and rural areas. In Victoria, this matter was to a small degree addressed some years ago when Victoria Legal Aid would provide a regular regional legal education programs, which typically included presentations by a variety of Ombudsman offices, explaining their roles to regional audiences. This program no longer

continues and, where Ombudsman offices do travel to regional and rural areas to provide this information, it happens only when a local organisation has thought to request it and only when the particular Ombudsman office has the resources to do it. As a result of this, people in regional and rural areas are become increasingly unaware of their rights to complain about matters, such as in relation to various consumer issues, or will make complaints inappropriately or through the wrong channels. Clearly this is neither an efficient nor a fair way of enabling regional and rural Australians to access justice.

The CRRLJ therefore recommends a much more locally visibly presence of complaints-handling agencies throughout rural and regional Australia. There are many cost-efficient ways of doing this, such as through relatively inexpensive but frequent regional education programs, through printed materials being made available as a matter of course in rural and regional locations and even though including information about such agencies when relevant commercial and consumer transactions take place, such as when utility bills are issued.

3.3 Access to lawyers and legal services

The difficulties experienced in accessing legal services rural and regional areas have been extensively researched and documented by the CRRLJ. The broad issues are outlined in considerable detail in Coverdale 2011 (Chapter 6), and specifically in relation to conflicts of interest for regional and rural legal practitioners in Kyle, Coverdale and Powers 2014. We would urge the Commission to acquaint itself with both of these publications representing, as they do, two of the most comprehensive surveys of legal practice issues in the regional and rural context so far available.

Some of the matters that we would in particular like to highlight to the Commission include:

3.3.1 Access to lawyers

Clearly the lack of access to lawyers in rural and regional Australia is a major issue for the people who live there. As noted above, the Commission draws attention to this in its Draft Report, particularly in terms of the apparent lack of incentive for private lawyers to practice in regional areas (Productivity Commission 2014, p. 135).

The CRRLJ stresses the need for greater efforts in this area. This can in part be helped through the role played by regional universities in their law schools and in providing a curriculum that encourages students to engage with regional and rural legal issues. Many of the civil justice issues mentioned throughout the Draft Report play out in interesting and challenging ways in regional and rural contexts, and these can present new lawyers with exciting professional opportunities.

However, beyond the need to explore these and other strategies for encouraging lawyers to work in regional and rural areas. The CRRLJ argues that government has a responsibility to provide those services too, and only all the more so when the private sector is failing to do so. Legal Aid Commissions and Community Legal Centres do not have a presence in the regional and rural areas in a way that even remotely reflects the need there, as is apparent in the Commission's data regarding the Legal Aid Commissions' allocation of solicitors in regional and rural New South Wales and Victoria (Productivity Commission 2014, p. 218 and pp. 582-3). The CRRLJ therefore urges the Commission to recommend a greater public investment in legal services in regional and rural Australia.

3.3.2 Legal training

The CRRLJ stresses the need for a legal training curriculum that acknowledges different types of legal practice, including the differences between metropolitan and regional/rural practice. Some of the matters already noted in this submission, such as the role of alternative dispute resolution, collaborative lawyering and paralegal services are of particular relevance to regional and rural areas and need to be given a more prominent profile in the training of lawyers. It is also important to note that typically lawyers working in regional and rural practices are required to work across a larger range of areas of law, and therefore to take on a wider range of matters, than their metropolitan counterparts (Kyle, Coverdale and Powers 2014, p. 97). This can be even further exacerbated for lawyers working close to state and territory borders, where matters can sometimes engage with more than one jurisdiction, or where the appropriate jurisdiction for pursuing the matter is unclear.

As well as having important ongoing training implications for those lawyers, the range of legal areas in which regional and rural lawyers are asked to act also raises a larger store of conflict of interest issues, as discussed below.

We draw the Commission's attention to the Curriculum Package developed for regional and rural law practice by a network of six Australian Universities (Deakin University et al).

3.3.3 Conflict of interest

As noted in Kyle, Coverdale and Powers (2014), there are a variety of factors that contribute to a greater incidence of conflicts of interest for lawyers in regional and rural areas. These include the smaller numbers of solicitors practising in those communities, the greater likelihood that parties will be known to each other and that there will be histories of past dealings between practitioners and the parties involved in the dispute (Kyle, Coverdale and Powers 2014, p. 11), and the greater range of legal matters in which a lawyer in a regional or rural area is likely to be required to be involved (Kyle, Coverdale and Powers 2014, p. 15).

The ways in which conflict of interest issues can best be confronted in the rural and regional context requires further examination, enabling further exploration of ways of drawing more professional judgement, and more considered application of conflict of interest ethical issues than appears currently to be the case (Kyle, Coverdale and Powers 2014, p. 85).

Closely aligned with this is the need to promote more models for collaborative and responsible lawyering. Responsible lawyering is an approach that recognises a broader community and public component, beyond the narrow private relationship of lawyer and client, to law practice. This is an approach that allows for more proactively, and in ways that look to problem-solve and prevent problems escalating (Parker 2004, pp. 60-64), rather than a sole emphasis on the adversarial approaches more conventionally associated with law practice in civil matters.

The CRRLJ also suggests that some of these problems could be mitigated through the development of a formal referral system for recording and monitoring referrals between legal practices, particularly in regional and rural areas. Such a system would enable lawyers to keep track of where referrals are being made – such as which practices are referring to whom, and what types of matters are being referred. This could enable always to adopt a culture of reciprocity in their referrals practices, as well as to keep track of the areas in which there is a mismatch between local legal need and the expertise of local practitioners (Kyle, Coverdale and Powers 2014, pp. 97-8)

Despite the relatively high potential for conflict of interest issues to arise in regional and rural legal practices, the number of complaints made about conflicts of interest is extremely small, suggesting a need for further investigation of the visibility and effectiveness of legal service complaints-handling mechanisms and regulators on this issue. (Kyle, Coverdale and Powers 2014, p. 91)

3.4 Collection of data

As the Commission notes in its Draft Report, data across the civil justice system is, in the main, seriously deficient (Productivity Commission 2014, p. 749). While agreeing with the overall thrust of the Commission's observations and recommendations in relation to data collection, the CRRLJ would particularly ask that reforms to data collection and reporting also take on board the issue of rurality and regionality of litigants and matters. While unsure of the nature of data collection in other jurisdictions, we note that in Victoria most matters do not record where the litigant is from or where their matter has arisen. This information is vital to enable address of the policy and systemic issues that arise through people's engagement with the legal system, including the civil justice legal system, where often issues of rurality and regionality are extremely significant.

3.5 Regional and rural legislative impacts

The CRRLJ suggests that, in an environment where the needs of regional and rural communities are still easily overlooked when legislation is being developed, it is useful to put in place procedures for ensuring the addressing of those issues. As noted in Coverdale (2011), there are a number of approaches for addressing this, which have, over time and in different jurisdictions, been met with varying degrees of success (pp. 97-101). These have included: Regulatory Impact Statements, consultative protocols, requirements for Rural Communities Impact Statements (as established by the NSW Government in 1996) or even the establishment of an independent Commission for Rural Communities, as in the UK in 2006 and the subsequent development of a 'Rural Proofing Toolkit' to guide government in the policy development process. Presumably a similar approach could also be applied to legislative development.

The CRRLJ would therefore ask the Commission to consider how these or other mechanisms can be adopted, modified and improved to ensure a better scrutiny of legislation in terms of its impacts upon regional and rural Australia. The stronger systemic engagement of government with regional and rural communities in the policy development process is obviously a crucial ingredient in the success of any of these mechanisms.

4. Conclusion

This submission has only briefly outlined some of the major issues that the CRRLJ sees as critical for improving access to civil justice in regional and rural Australia. There are many more issues than we have been able to canvass here and even the ones we have covered, we have covered only briefly. This is in part because of the size of the Commission's Draft Report, in part because of the limitations of our own time and resources in preparing this submission, but it is also largely because the issues themselves are all-pervasive and are always growing and changing. It can never be possible to outline a blueprint for genuine equity of access to justice in regional and rural areas. Instead, governments must engage more fully, in an ongoing way, with regional and rural Australia so that its

voices can become, and can continue to be, central in the shaping of law, policy and service planning in relation to the nation's civil justice system.

Regional and rural Australia is a critical life organ to the health, wealth and vitality of the nation. An accessible and relevant civil justice system will be a crucial component in the ongoing viability of regional and rural Australia – a system, that is, that allows communities and the people who form them to understand and pursue their rights, and to resolve their disputes in ways that strengthen rather than fracture the infrastructure so essential to the life of any community.

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