

Transpiration

New life in rural law

PUBLIC SUBMISSION ON APPEARANCE
Productivity Commission Public Inquiry Melbourne Hearing
Access to Justice Arrangements

To: Productivity Commission

From: Helen McGowan,
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Date: 3 June 2014 (for appearance on 10 June 2014)

Re: Focus on regional, rural and remote legal service delivery.

Disclosure: *Helen has a financial interest in ensuring continued public funding to support the delivery of legal services in regional, rural and remote Australia. This interest arises from her professional work as a consultant to the National Association of Community Legal Centres on regional, rural and remote legal practice, and as a consultant to the NSW Legal Aid Commission facilitating the development of regional justice plans for the Co-Operative Legal Service Delivery project.*

INTRODUCTION

As we haltingly move towards a national legal profession (with the adoption of national rules in Queensland, South Australia, NSW and Victoria and the promulgation of Legal Profession Uniform Law in NSW and Victoria) we have opportunities to collaborate on a national approach to access to justice.

This paper suggests four proposals which foster the endeavor of a coordinated national approach to strengthening access to justice;

1. A public private partnership 'Law for Australia'
2. An exemption for limited legal services from the 'conflict of interest' rules.
3. The inclusion of geographical areas in data collection
4. The development of national aspirational justice goals.

OPENING STATEMENT

This submission is based on experience and insights gained from 32 years in legal practice in regional, rural and remote Australia. This experience includes lawyering in the public and private sectors, and teaching law in academia. My PhD research examines how geographical remoteness affects the way lawyers identify and respond to conflicting interests. One day a week I work with the National Association of Community Legal Services as the national regional, rural and remote coordinator.

1. Proposal: Public private partnership "Law for Australia"

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To foster a 'public private partnership' as a national project based on the model of 'Teach for Australia'¹ called 'Law for Australia'. This project could cross-pollinate resources within the legal profession; from private to public, from city to country. The concept is to provide a national secretariat (perhaps under the auspice of the Law Council of Australia, the Australian Academy of Law, or the National Pro Bono resource Centre) to work across the legal profession, from undergraduate law students to retired lawyers, and match workers to legal services experiencing high legal need in regional, rural and remote communities.

Terms of Reference

Reference 8.d Different models of legal aid assistance

Status Quo

The Australian legal profession has 70,000 lawyers, yet only 7,000 practice in the 98% of the continent outside the capital cities. We have 145 public legal assistance services providing legal help to these regional, rural and remote communities.² Supplementing these stand alone legal assistance services, are the private legal practices which offer legal aid and pro bono to their communities.

Australia is characterized by population sparsity, yet we expect equality of service delivery, regardless of geographical location. However some remote areas have one lawyer to 3,000 people compared to one lawyer to 300 people in the cities.³ Typically, the more geographically remote communities are serviced by under-resourced and overwhelmed public legal services. There are few private lawyers in these communities. Legal assistance services experience volatility in both funding and staffing which threatens their sustainability. Law for Australia seeks to 'smoothe' the short term staffing needs by drawing on the profession's commitment to justice and to provide supported work experience, internships, clerkships, secondments and locums.

Although we are one profession, characterized by diversity (of employment sector, areas of practice, post admission experience and jurisdictional idiosyncrasies) yet we are united under the paramount commitment to the administration of justice.⁴ The legal profession's commitment to justice is manifest in its pro bono effort. An example of the pro-bono redistribution of resources is the secondments of lawyers from capital city based multinational legal practices to Aboriginal Legal Services in very remote Australia.⁵

¹ See <http://www.teachforaustralia.org>

² See Appendix A: According to my research there are 8 Aboriginal and Torres Strait Islander Legal Services, 13 Family Violence Prevention Legal Services, 8 Legal Aid Commissions and 116 Community Legal Centres working in the ASGS remoteness areas coded as inner regional, outer regional, remote and very remote

³ Kevin McDougall and Reid Mortensen, 'Bush Lawyers in New South Wales and Queensland: A Spatial Analysis' (2011) 16(1) *Deakin Law Review* 75

⁴ Australian Solicitors Conduct Rules R3

⁵ See the relationship between Ashurst and NAAJA.

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Law schools, largely based in the southeast of the continent, foster the social justice consciousness of thousands of students eager to experience 'real law with real people'.⁶ If these students have 'connections' they may find legal practices willing to give them work experience. However these opportunities for undergraduates to undertake legal internships and vacation clerkships are oversubscribed. There is no co-ordination of either the interest or the opportunity, and we have difficulty matching people to places. There is a need for an 'introduction agency' to establish these connections.

Two examples of this introduction agency role are funded by the Australian Attorney General's department although due to conclude this year. Both roles have been successful in exposing lawyers to careers outside the cities, providing much needed resources to struggling legal services, and as a pipe line to recruit workers to the sector. They are;

- the National Association of Community Legal Centres Regional Rural Remote Practical Legal Training (NACLCLC RRR PLT) project which matches law graduates to voluntary positions in the regional, rural and remote legal assistance sector.⁷
- The clinical law program which matches undergraduate law students studying family law, to community legal centres offering a 'clinical legal education'. This pilot project includes three regional community legal centres; Hume Riverina CLS, Loddon Campaspe CLC, TASC Townsville. The students learn through practice. The legal services gain valuable resources.

Occasionally, mature solicitors seek refreshment to their practice through sabbaticals, secondments and look for 'legal tourism' opportunities where they can experience another type of practice. This interest may lie dormant or be frustrated with the lack of knowledge about how to go about making the connection.

Rationale for the reform

We have learned valuable lessons from the many pilot projects which have sought to bolster the number of lawyers in regional, rural and remote Australia.⁸ These lessons include;

- The need to present the idea of regional legal practice within the undergraduate curriculum. (see the Regional, Rural Legal Education Network⁹)
- the importance of induction and orientation so that the lawyers in transition are fully appraised of the practice circumstances in regional, rural and remote Australia (see the WA Country Lawyers program)
- the importance of a local point of contact to assist lawyers with access to accommodation, health services, social introductions (see the 5R project)

⁶ 'Real Law. Real People' is a promotional activity of the Western NSW RRRLaw project which tells the stories of lawyers working in challenging conditions.

⁷ See more about the NACLCLC RRR PLT project here <http://placements.naclc.org.au/index.php>

This project is referred to in the NACLCLC response (21 May 2014) p12.

⁸ See Appendix B for list of the various initiatives

⁹ <http://www.rrlen.net.au>

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- the fundamental role of regular supervision to foster the professional development of early career lawyers (see the WA Country lawyers program and the RRR PLT program)
- the need for an integrated public – private partnership so that lawyers in the public sector are supported by their private colleagues. This is best done at the level of a regional law society (see the 5R project)

A national secretariat would include this learning in the design of Law for Australia. The project would work as an introduction agency to facilitate the osmosis, or flow, of resources to areas with high need.

2. Proposal: Allow limited legal representation without breaching the conflict of interest' rule.

Law reform: Allow lawyers within a legal assistance service to provide 'limited legal representation' to multiple, possibly adverse clients, without breaching the 'conflict' rule provided they have no actual knowledge which would place them in to conflict eg

A lawyer may provide limited legal services notwithstanding that another lawyer in the same legal assistance service has provide limited legal services to another client whose interests are adverse, provided that no confidential information about either client is shared within that legal service

Terms of Reference

Reference 3.e Factors contributing to the cost of legal representation including legal professional rules and practices.

Reference 9 reform... effective in securing legal representation

Information request 19.3 The Commission seeks feedback on whether there are any policy barriers that unnecessarily obstruct not for profit provision of legal services.

Status Quo

The professional conduct rules prohibit a lawyer acting when there is a 'conflict of interest'.¹⁰ The rule is designed to protect the fiduciary relationship (of trust and loyalty) between the lawyer and her client. The rule seeks to protect the clients' best interests, and to avoid conflicting professional duties.

This rule means many legal services 'turn away' clients because of a perceived conflict of interest.¹¹ Some legal services have a low threshold tolerance for the possibility of a perception of a 'conflict'. This low threshold may be fostered by specific policies and procedures used to 'manage risk'. Rather than falling foul of the professional conduct rule, the legal services are risk adverse and decline

¹⁰ See the Australian Solicitors Conduct Rules 10 and 11. Rule 9 on confidentiality also influences this issue with the rule in Bolkiah [1999] 2AC 222 about assumed knowledge and 'effective information barriers'.

¹¹ National Association of Community Legal Centres, 'National Census of Community Legal Centres. 2013 Report' (2014) 11

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to act where there is the possibility of a conflict of interest.¹² In contrast to this cautious approach, other legal services ‘work around’ the proscriptive rule in an endeavor to provide legal services to as many people as possible. Their approach is, provided a lawyer has no actual knowledge which places them into conflict, the lawyer is not disqualified from acting in ‘limited legal assistance’ matters. A ‘limited legal assistance’ is a discrete legal service such as a duty lawyer in the Magistrates Court, or generalist legal advice through a drop in clinic, when there is no expectation of an ongoing matter.

The expansion of legal assistance services into regional, rural and remote Australia as a result of the Keating Government’s Justice Statement in the late 1990s, means that although there are more legal services, these services may be the only legal practice serving a large geographical community. If this legal service has a low threshold for conflicts, their ability to serve their community’s needs is compromised. However, the nature of these services is that there is a high turn over of lawyers and most matters are ‘limited’. Research by Deakin University reveals that 70% of country lawyers turn away clients due to ‘conflict of interest’.¹³

Rationale for the reform

Several North American jurisdictions have a specific regulatory exemption to allow not for profit legal assistance services to provide ‘limited legal assistance’ in the absence of actual conflict. A statutory, or regulatory, exemption from the conflict rule provides comfort for lawyers working in public legal assistance services. The exemption states that provided the lawyer has no actual knowledge of a disqualifying conflict, they can provide legal help. Without this exemption, lawyers may fear their behaviour could be viewed as professional misconduct. The exemption does not change the lawyer’s professional duty to avoid conflicting interests.

The suggestion that professional conduct rules should exempt limited legal services from the conflict rules, has been promoted by the NSW Legal Aid Commission. Between 2008 and 2013 the Commission has made submissions to the Law Society of NSW, the National Legal Assistance Advisory Body and the Law Council of Australia regarding the new Australian Solicitors Conduct Rules and accompanying Commentary. Despite these representations, the rules have not been changed.

In the absence of an exemption, lawyers are ethically compromised. Some Legal Profession Acts, including the national law, state that a breach of a conduct rule is a strict liability offence of professional misconduct.¹⁴ An exemption provides protection.

3. Proposal: Gather data on geographical location

¹² National Association of Community Legal Centres, *Risk Management and CLC Practice* (NACLC, 2011)

¹³ Louise Kyle, Richard Coverdale and Tim Powers, *Conflicts of Interest in Victorian Rural and Regional Legal Practice* (Deakin University, 2014)

¹⁴ Legal Profession Uniform Law (Vic) s 298 (b)

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In reviewing current data collection systems, consider including the Australian Bureau of Statistics remoteness areas as established by the Australian Statistical Geography Standard (ASGS). These areas enable coding of results according to geographical areas. This knowledge can assist in both the design of, and delivery of, legal services.

Terms of Reference

Reference 10 data collection across the justice system

Data and Evidence:

Recommendation 24.1 *Co-ordinate data collection and use.*

Status Quo

There is no coding of legal data according to geographical remoteness areas. Law societies, regulatory authorities and courts have an idiosyncratic approach which, if it does consider geographical location, confines coding to 'capital city' and 'non capital city'. Similarly in the CLSIS, IRIS data collection systems, and URBIS surveys no attention has been paid to geographic analysis of the data. Without capturing geographical location, it is difficult to disaggregate this data to identify any trends, or equity issues based on population sparsity.

Rationale for the reform

By contrast, the provision of Australian health care services are coded according to the ABS remoteness areas; inner regional, outer regional, remote and very remote. This geographical coding facilitates an analysis of the workforce and occasions of medicare services to provide a deeper understanding of both workers and community needs according to geography.

The proposed review of data systems should consider the inclusion of geographical 'remoteness areas' as defined by the Australian Bureau of Statistics in the Australian Statistical Geography Standard (ASGS). Remoteness areas are identifiable through postcode. This analysis should not create extra work. The remoteness areas are defined by the ABS using the Accessibility Remoteness Index of Australia (ARIA) after each Population and Housing Census. This Standard is the preferred tool for research and policy, yet is lacking in the legal profession.

In releasing the Standard in 2013, the Australian Bureau of Statistics Chief Statistician Brian Pink said: 'the ABS encourages the use of the ASGS by other organisations to improve the comparability and usefulness of statistics generally'.¹⁵

4. Proposal: Set national justice goals and measure progress towards achieving those goals

¹⁵ Australian Bureau of Statistics, 'Australian Statistical Geography Standard (ASGS): Volume 5 - Remoteness Structure.' (July 2011) 1270.0.55.055 pvii.

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Define national aspirational justice goals which can measure success. In the private profession, success is frequently measured on billable hours or personal promotion. The inclusion of extrinsic justice goals in our framework of success indicators may serve to remind lawyers of our professional role as administrators of justice. As well as setting national aspirational justice goals, we can report on progress towards achieving these goals through data collection and feedback to the profession, the public and service providers

Terms of Reference

Reforming the legal assistance landscape:

Recommendation 21.5 *Renegotiate the NPA on legal assistance services*

Status quo

The National Partnership Agreement on Legal Assistance Services has brought the public sector together, to develop strategic agendas, and to collaborate on delivering that agenda. The NPA agenda has the potential to target areas of high need by setting a motivational goal, and working collaboratively, towards achieving these goals. Similar collaboration, setting strategic goals and measuring progress towards achieving those goals, occurs throughout regional, rural and remote New South Wales. The NSW Co-Operative Legal Service Delivery project, under the auspice of the NSW Legal Aid Commission, fosters the creation of 'regional justice plans'.¹⁶ Local CLSD partners are supported by a paid worker, together they collaborate on designing their plan, they work together to achieve defined goals, receive quarterly updates from the NSW Legal Aid Commission on what the data is showing, and provide input to the NSW Legal Assistance Forum (a jurisdictional forum under the National Partnership Agreement on Legal Assistance Services). Curiously though, neither of these two endeavors involves the private legal profession.

There is no national forum which brings the public and private legal profession together to strategically work towards setting justice goals, and allocating resources to achieving those goals. There are four examples of platforms which **could** be used to collaborate for a national justice purpose. One platform is the biannual National Pro Bono and Access to Justice Conference, however apart from sharing papers and listening to people talk, no goals are set at this conference. Another platform is the aspirational pro bono targets which are promoted and monitored by the National Pro Bono Resource Centre. This pro bono effort is fragmented and not strategically aligned to a national purpose. A third platform is the Australian Academy of Law which was established in 2007 in response to the Australian Law Reform Commission's report into Managing Justice.¹⁷ One aim of this Academy is to 'promote a more

¹⁶ Australian Government Productivity Commission, *Access to Justice Arrangements. Draft Report* (April 2014) Box 21.9 p 635

¹⁷ Australian Law Reform Commission, 'Managing Justice. Review of the adversarial system of litigation. ALRC 89' (2000) Recommendation 6. See 2.77, 2.115.

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collegial relationship' between the various branches of the profession. At this time, the Academy does not have a strategic plan beyond hosting social events for its Fellows, Lastly, the Law Council of Australia has an Access to Justice Committee which could take leadership of this issue. Unfortunately, the public sector is not represented as a 'constituent body' on the Law Council, although some member Law Societies work hard to include the public sector in their decision making.¹⁸

Currently, there are two measures of justice which have little, if any relevance to the everyday practice of law. These measures are;

1. Court clearance rates reported in the Report on Government Services
2. Time on remand for un-sentenced prisoners which is the one 'justice' measure used in the '*Measures of Australia's Progress*'.¹⁹

In my view, there are more appropriate measures which better fit our work in the legal profession. (For example fewer Aboriginal people in prison, the elimination of violence against women and children, and the reduction of the number of children being removed from unsafe homes.)

Rationale for the reform

The development of national aspirational justice goals could have the effect of galvanizing the profession to strategically harness our effort to make a difference in specific areas. The fragmentation of effort and the centralization of decision making, which in my view currently characterizes our profession, could be overcome. When a goal is set, each lawyer can work towards achieving that goal in their own way. Each legal practice can consider the national justice goals in their strategic planning. The 'subsidiarity principle' – the principle of professional autonomy where decision-making is devolved to each actor – can be promoted to encourage each Australian lawyer to take action. With 70,000 lawyers in Australia, each working to achieve justice in their own way, would make a difference.

Three examples of national and international issues, with aspirational justice goals, which could be aligned within everyday legal practice are;

- the UN Guiding Principles on Business and Human Rights
- the eight UN Millennium Development Goals
- the six Closing the Gap initiatives designed to measure progress to redress Aboriginal disadvantage.

Aspirational justice goals could be a trigger for increasing collegiality within our profession, and a means to work across geographical location, and across the public and private divide. As educated, privileged and creative professionals skilled in problem solving, an opportunity to turn our minds to the 'wicked problems' which prevail in our community, is a challenge worthy of our public serving professional commitment.

CONCLUSION

¹⁸ The Law Institute of Victoria has dedicated public sector 'seats' on its governing Council, and offers free practicing certificates to lawyers working as volunteers in CLCs.

¹⁹ Australian Bureau of Statistics, '1370.0 Measures of Australia's Progress' (2013)

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This submission offers four proposals in response to the public inquiry into Access to Justice Arrangements. The first proposal suggests the development of a public private partnership, Law for Australia, which uses a national secretariat to match lawyers to areas of legal need. This proposal leverages off the rich resources available to the profession, including our shared commitment to pro bono, and similar legal systems of law, to redress disadvantage and injustice. The second proposal encourages the inclusion of an exemption which protects lawyers offering limited legal services, from the prohibition within the conflict of interest rule. Although the professional duty to avoid conflicting interests is accepted, when the lawyer has no actual knowledge of a conflict, they should be able to act in specific circumstances. Next is a request that in the design of data collection systems, we include coding of geographical remoteness areas. This inclusion allows for a more nuanced understanding of the factors affecting service delivery, beyond the binary of city and country. Finally, I propose that the profession collaborate on the development of national aspirational justice goals. These goals would provide a focus for lawyer's efforts, and with regular measures to provide timely accurate feedback, our professional commitment to the administration of justice can be incrementally actualised.

Ends

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