9 May, 2013.

Senator Penny Wright, Chairperson

Legal & Constitutional Affairs Committee (References Sub Committee)

Parliament House, Canberra ACT 2600

Dear Senator Wright,

1. I have just become aware of an article in The Australian of Fri 8.03.13 by Michael Pelly, "Justice 'a constitutional right'" with an associated comment by the Legal editor Chris Merritt – "Greens, Coalition to dominate court fee inquiry"; and I note that the closing date for submissions to the Inquiry which you chair has already passed *viz.*12.04.13, with a report date of 6.06.13 . But I have sought an extension of that closing date in the circumstances by an e-mail of 8.05.13 .

2 .The Inquiry members will doubtless be aware of (as well as the authorities collected below for your convenience) some of the population having already been given assistance with regard to fees for Federal courts and tribunals *viz.* holders of various income support entitlement cards, including a pensioner's concession card, who are granted an automatic fee remission. Thus see the Regulations for the HCoA, FCoA and FAAT respectively at : 2005(Fees) at 9(1)(b)(ii) to (v); 2004 Schedule 3 at 1(c)(i); and 1976 at 19(6)(b)(i) . These provisions contrast with State legislation including SA's SCA s.130 where any concession partial or otherwise is a matter within the discretion of the court administration involved *eg* the Supreme Court Registrar's staff. An obvious question might seem to be why a similar automatic fee remission does not apply outside the Federal sphere; and a positive comment by the Inquiry might help to draw the attention of our State and territory politicians to this aspect of the larger issue, if I may most respectfully suggest this ?

3. Of course the English Court of Appeal through Lord Steyn (see R v Secretary of State; ex p Leech [1993] 4 All ER 539,548) and a dictum of Lord Diplock from the House of Lords in Bremer Vulkan [1981] AC 909, have characterised the right to court access as "constitutional". Thus Steyn LJ said "It is a principle of our law that every citizen has a right of unimpeded access to a court. In Raymond v Henry[1981] 1 All ER 756,760 ; [1983] 1AC 1,13 Lord Wilberforce described it as a 'basic right' . Even in our unwritten constitution it must rank as a constitutional right ... "; and Lord Diplock said- "The means provided for the just and peaceful settlement of disputes] are courts of justice to which every citizen has a constitutional right of access ...". [Also see Gummow J in Unity Insurance [1998] 19 CLR 603,623

where before quoting Lord Diplock's words above he says "[The] right of access to curial determination is deeply rooted in constitutional principle".] Now further the new Chief Justice of the Federal Court James Allsop has declared "If you set a court up as a Chapter III (of the Constitution) court you have to recognise that the entitlement to approach it is a constitutional right,"

4. Part of the right of access is the common law right to be heard and to act in person eg Barwick CJ of the High Court of Australia has described the position thus in Twist v Randwick MC (1976) 136 CLR 106 at 109-10

"The common law rule that a statutory authority having power to affect the right s of a person is bound to hear him before exercising the power is both fundamental and universal. But the legislature may displace the rule ...However if that is the legislative intent it must be made unambiguously clear. ...the statutory power."

[See Campbell, Rules of Court LBC 1985 at pp.92 *et seq* in "The Right to be Heard and Representation of Parties".]Thus s.78 of the Judiciary Act preserves that right for all Federal Courts *inter alia* in Australia.

5. As to the role of court fees (as opposed to legal costs if legal aid is available) in blocking that court access, the QBD decision in R v Lord Chancellor; ex p Witham (1997) 2 All ER 779 may seem particularly relevant to your Committee. It held in the context of this "constitutional " right of access that in the absence of specific statutory provisions fees could not be prescribed so as to totally exclude some citizens.

6. You may conclude that a related issue arises here with regard to people who elect or feel forced to act in person; and affects the overall viability of their court access. This is the question of whether if successful a litigant in person(lip) should be awarded his/r costs or some major percentage of the standard rate for them. This is understood to be the practice in the UK and elsewhere, at least where the lip has shown his/r basic documents and legal understanding to have been of an acceptable standard. This matter has possibly been considered in the past by the various State and Territory Attorneys-General.

7(1) These two issues (5. and 6. above) touch if I may say so , with great respect , on some of the important ideas expressed by the former Chief justice of S.A. (previously it's A-G) the Hon. L.J. King AC,QC in his paper "The Attorney-General, Politics and the Judiciary" (2000) 74 ALJ 447" in which he quotes for relevant support the then Liberal Federal A-G [Darryl Williams AM,QC].
(2) It is my main point here that both these issues are arguably political questions . Of course they may affect the legal profession indirectly, but they essentially relate to this fundamental (or constitutional) right of personal access to the courts and should be, in my most respectful submission, for the Cabinet of the day(as a whole) to rule on.

8(1) In his paper , the most distinguished former A-G (and then Chief Justice) gives two examples from his own Cabinet experience where his personal opinion on the political aspects of a matter held sway over the complete Cabinet (in accordance with the then prevailing 'Shawcross principles'). But he had later come to believe that this had not been procedurally correct regardless of the later

apparent correctness of his judgements, because they should have been matters for the Cabinet as a whole, with all its diverse wisdom and experience to decide. [These examples were the Defence of Government Schools (DOGS) questioning of the Constitutional validity of Commonwealth aid to non-Government schools; and whether the stage review 'Oh Calcutta' should have been restrained.] (2) As to the width of political support for his general proposition, King states at p.450 of his paper that "The present [then Liberal] Commonwelath Attorney-General has gone so far as to say "it ought to be concluded that the perception that the Attorney-General exercises important functions independently of politics and in the public interest is either erroneous or at least eroded." [Williams, "Who Speaks for the Judges? (Paper delivered at the Courts in A Representative Democracy Conference", 11-13 November 1994)]

9. I should acknowledge in conclusion that there are serious decisions by an A-G or DPP, of a Crown prerogative prosecutorial or law enforcement nature, on the legal merits of which the A-G's opinion would be unquestionable in Cabinet. But when purely political aspects are present, as persuasively argued by the distinguished paper, these would or should be for the whole Cabinet including the A-G to rule on.

I remain,

Yours faithfully,

(P.D. Burke)