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# Submission to Senate Inquiry into Access to Justice 2009

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## Contents

## Page

1	Introduction	
		1
A.	The ability of people to access legal representation	
		1
B.	Adequacy of legal aid	
		4
C.	The costs of delivering justice	
		5
E.	Alternative means of delivering justice	
		6
F.	Adequacy of funding of Community Legal Centres	
		6
G.	The ability of Indigenous people of access justice	
		7

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## 1 Introduction

Gilbert + Tobin has long had a strong commitment to social justice and improving access to justice amongst marginalised and disadvantaged people. We make this submission based on this experience and in particular the experience of its pro bono practice.

The firm has had a dedicated pro bono lawyer since 1996 developing the practice into a two person practice in 2000 and a three person practice in 2008. The practice is now headed by a dedicated pro bono partner and supported by the two lawyers. The practice undertakes a substantial amount of pro bono work.<sup>1</sup> The practice has strong ties to the access to justice sector.<sup>2</sup> All members of the pro bono practice have previously worked in Community Legal Centres and maintain strong ties with the Access to Justice sector.

Gilbert + Tobin's pro bono practice aims to assist marginalised and disadvantaged people who are not eligible for legal aid and cannot obtain assistance from Community Legal Centres or other government funded agencies. We have a particular focus on assisting Aboriginal and Torres Strait Islander individuals and organisations and they make up approximately one third of our client base. Approximately half of the matters undertaken in the practice are for organisations requiring corporate governance advice or advice on "commercial" issues such as contractual obligations. These organisations are not able to access assistance from the Legal Aid Commission or Community Legal Centres.

Our services are provided not only to clients in the metropolitan area of Sydney but also in rural and remote regions particularly north western New South Wales, far north Queensland and areas of the Northern Territory.

Gilbert + Tobin's pro bono practice is heavily reliant on Community Legal Centres, Legal Aid Commissions, Aboriginal Legal Services and other government funded access to justice services to receive referrals and to determine the areas of greatest need in which we can assist. We are also reliant on these agencies in many instances when undertaking work from rural and remote regions. The agencies provide us with means of communicating effectively with clients in those areas.

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### A. The ability of people to access legal representation

From the perspective of Gilbert + Tobin's pro bono practice, there are a number of limitations in the ability of people to access justice in the following areas.

#### **General requests for assistance**

We receive many more requests for assistance than we are able to accept. While in the last 12 months we have assisted in over 300 matters we have only been able to accept approximately 30% of the referrals we have received. The majority of matters we reject are due to a lack of capacity to assist at the time. Although we reject matters for which legal aid or community legal centre assistance is available, we very rarely receive such referrals. All matters rejected represent a person who is not able to access justice through our pro bono practice<sup>3</sup>. We work closely with other firm pro bono practices and referral agencies and it seems that a significant

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<sup>1</sup> In the financial year ending 2008 Gilbert + Tobin undertook 11,287 hours of pro bono work and had more than 249 matters on foot during that year. Gilbert + Tobin lawyers average 55 hours of pro bono work per lawyer per year, well in excess of the National Pro Bono Resource Centre's target for pro bono hours which is 35 hours per lawyer. Gilbert + Tobin has undertaken 312 pro bono matters in the last 12 months.

<sup>2</sup> Pro bono partner Michelle Hannon is on the board of the National Pro Bono Resource Centre and the Public Interest Law Clearing House, pro bono lawyer Tamara Sims is on the Intellectual Disability Rights Service Board and the Redfern Legal Centre Board and pro bono lawyer Darren Fittler is on the board of the Disability Discrimination Legal Centre.

<sup>3</sup> Occasionally a matter is rejected because the client's means are assessed too high to warrant pro bono assistance and would therefore not be considered as a person who cannot access justice. This only happens in about 5% of cases.

proportion of these matters are not able to be taken on by the other firms or agencies.

While there is a strong commitment amongst the private sector to provide pro bono services law firm pro bono practices cannot be relied upon to come close to meeting the unmet need for legal services amongst marginalised and disadvantaged people.

### **Community Organisations**

Gilbert + Tobin, like a number of law firm pro bono practices, dedicates almost half of its pro bono resources to assisting organisations representing marginalised and disadvantaged people. Once again, the demand for legal assistance from this sector has increased significantly since the establishment of Gilbert + Tobin's pro bono practice and in particular, in the last two to three years. The assistance sought relates to corporate governance issues, the establishment of a relevant corporate entity and advice on tax status such as deductible gift recipient status or public benevolent institute status. We are unable to meet the demand for assistance in this area and are forced to regularly reject requests for assistance on the ground of capacity. This limits these organisations' ability to provide their often much needed services to their marginalised and disadvantaged client base themselves.

We understand that like Gilbert + Tobin a significant percentage of a number of the other pro bono practices resources are also dedicated to providing services to organisations. When assessing the pro bono work undertaken by the private sector a substantial proportion of it is not provided to individuals and therefore cannot be seen as addressing the unmet need of those the Legal Aid Commission and community legal centres assist, that is, individuals in the community.

Further many community organisations' legal need are not able to be met by law firm practices as the demand outstrips the capacity thus they go unassisted and/or expend resources trying to address legal concerns rather than focussing on their core service provision.

### **Asylum Seekers**

Gilbert + Tobin's pro bono practice has acted for asylum seekers in applications for judicial review to the federal court system since 2002. These clients experience huge barriers to accessing justice and are amongst the most vulnerable client groups seeking justice. In order to improve access to justice for this group they need to be provided with

- Access to free legal representation to present their claims at first instance through to the Federal court system; and
- Access to a simplified administrative review process.

Asylum seekers rarely have funds to pay a migration agent and the government funded services to support them are so limited that only a very small percentage have access to free representation. Of those who engage migration agents, from the applications for review we assess, many seem to receive a very poor service in terms of the accuracy of their grounds for seeking asylum and their applications are then rejected.

The bases on which those who fail to procure protection visas before the Refugee Review Tribunal (RRT) can seek review in the Federal court system are limited and highly technical. Many failed asylum seekers seek review of their matter without understanding whether they have arguable grounds for review. Often they do so because they have not been able to properly put their claim to the RRT either through their own inabilities or the inadequacy of their migration agent. This results in expending much by way of court and lawyer resources to address review claims through the Federal Court system. In our submission it would be both in the interests of justice and economy to provide for legal assistance at the first stage of an asylum seekers application through the greater funding of organisations such as the Refugee Advice and Casework Service.

Over the years the legislation has been repeatedly amended with the intention of restricting asylum seekers' right to seek review of adverse decisions, or narrowing the grounds upon which decisions may be set aside. But this has not had the intended effect of reducing the volume of refugee litigation. Instead, it has made refugee claims in the federal court system significantly more technical and complex, and therefore more difficult to bring without the assistance of highly skilled legal advisers.

A fairer and broader review system would also allow asylum seekers better access to justice. The limitations placed on review by the Migration Act 1958 (C'th) have resulted in extended and technical hearings on the impact of the limitation running all the way to the High Court. Applying the general law of administrative review to these matters would simplify the system to make it more comprehensible to asylum seekers, fairer and markedly reduce the costs incurred in interpreting the intricacies of the current legislation.

### **People with Disabilities**

People with Disabilities is another core client group Gilbert +Tobin focuses its pro bono services on. Again this is often a very disadvantaged client group and we act for them in a range of matters but most often in relation to claims of discrimination and in employment matters. The ability of this client group to access justice in relation to these types of matters is limited in terms of resources and achieving binding outcomes, both of which are discussed further below.

### **Family Law and Criminal Law**

We are aware that most established firm pro bono practices do not act in areas of the highest demand for legal services being family law and criminal law. This is because Gilbert + Tobin and, as we understand it, a number of other firm pro bono practices view these as areas of government responsibility. Firm pro bono practices do not aim to relieve the government of its responsibility to adequately fund these areas at law. Further most of the commercial law firms with established pro bono practices do not have expertise in these areas. While firms are prepared to train lawyers to undertake work outside their core commercial skills where there is an unmet need in an area, this is generally limited to areas that do not have a complex legislative regime or areas where a lawyer in the firm already has expertise in the area, for example human rights or discrimination law.

The family law and criminal law systems are governed by complex legislation and operate within their own litigation framework. Even if firm pro bono practices were to take these matters on, it would be at the cost of other areas of unmet need they are currently working in and would not therefore be reducing the need for assistance but just moving to another a different area of unmet need.

### **Employment Law**

As noted below, employment law is not an area in which legal aid generally provides assistance yet there has always been a high demand for assistance in relation to employment issues in our experience. While our employment law team are extremely strong supporters of the pro bono practice we have often not been able to meet the demand in this area. This has grown significantly in the last six months. We understand that other firm pro bono practices are experiencing a similar increased demand.

### **Small businesses**

To date Gilbert + Tobin's pro bono practice, like many of the other law firm pro bono practices, does not provide assistance to small businesses. However, increasingly we are receiving referrals from small business owners especially in regards to terms of franchise and lease agreements. The owners of these businesses are generally seeking assistance in circumstances where they do not have the funds to afford legal representation as the issue in

dispute is one which is allegedly preventing them earning and any other assets they have are leveraged to support the business.

### **Indigenous Clients**

As stated above, a significant proportion of our pro bono services focus on assisting Aboriginal and Torres Strait Islander people and organisations. A large proportion of referrals from the Indigenous community come from rural and remote regions. While this is addressed in more detail under the topic of the ability of Indigenous people to access justice below, we note that there are particular issues facing Indigenous people in accessing justice and these are often exacerbated by the factors impacting people living in rural and remote regions.

### **Rural and Remote regions**

The ability of people in rural and remote regions to access justice is often limited by their inability to access a legal service to assist them. The ability of the private sector pro bono practices to assist these individuals and organisations is often limited unless there is local support from a Community Legal Centre, Aboriginal Legal Service or Legal Aid Commission or similar organisations in the region. Without such well established support, access to justice for people in these regions is limited.

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## **B. Adequacy of legal aid**

While Gilbert + Tobin takes many referrals from the Legal Aid Commission in relation to clients who fall outside the Commission's guidelines, we rarely take referrals involving a grant of legal aid. We therefore limit our comments to the adequacy of legal aid coverage in terms of areas of practice as opposed to the level of funding provided to lawyers undertaking legal aid work.

As mentioned above, the demand for employment law referrals has always been high and has recently increased. This demand cannot be met by law firm pro bono service providers yet legal aid is rarely available to assist people in this area. Employment supports a person's fundamental ability to participate effectively in society in many ways. With fewer people being members of unions and economic times becoming more difficult, it is envisaged that demand in this area will only increase. Further, we note it is often the most vulnerable of people who need legal assistance in this area, for example people from non English speaking backgrounds, pregnant women, Indigenous people and people with disabilities. The provision of legal aid to people with employment law problems would greatly enhance the ability of a number of people to access justice.

We provide limited advice on family law matters in our monthly outreach work to the Central Coast. Our experience is that legal aid is not available in relation to property settlement issues arising from family law matters. The rationale for this being that many law firms will accept a delayed fee payment in these matters once the property settlement has been agreed or determined. However, our experience has been that there is a significant demand for assistance amongst people whose property is limited. The value of their property would not warrant the payment of legal fees either upfront or on a contingency or delayed fee basis. These are generally the most financially vulnerable of clients so to lose the little that would be entitled to them impacts more than it might in other socio-economic brackets. These clients generally abandon their claims to property when they cannot obtain legal assistance.

Our experience has been that the legal aid budget to assist people with discrimination or human rights matters is insufficient to meet the demand. Once again, people who endure discrimination are often amongst the most vulnerable in our communities (for example people with disabilities and Aboriginal people) yet the legal aid budget to assist them or others who

claim breaches of human rights is a very limited one. An extended budget to assist people in these matters would greatly increase their chances of being able to gain assistance to pursue their claims, rather than them having to rely on accessing assistance from a law firm pro bono practice.

Further, while discrimination matters in the State jurisdiction are conducted in a no costs forum, those in the Federal jurisdiction are heard in the costs jurisdictions of the Federal Court and Federal Magistrate's Court. Although pro bono assistance relieves the client from paying their own legal fees, it cannot protect clients from adverse costs orders. We undertake a significant amount of discrimination work for clients. To date, none of our clients have been prepared to risk an adverse costs order, no matter how remote, by pursuing a matter to hearing in a costs jurisdiction. The extension of legal aid to more discrimination matters would protect these clients from the impact of adverse costs orders, albeit to a limited degree in the Federal jurisdiction. We have had a number of clients whose ability to pursue discrimination matters beyond the Administrative Decisions Tribunal at State level has been limited due to the costs jurisdiction as well.

As mentioned in the costs of delivering justice below, the inability for clients to pursue matters to a final determination beyond conciliation or Tribunal level has a negative impact not only on them personally but on the cost of delivering justice as discussed below.

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## C. The costs of delivering justice

### **Repeat resources dedicated to the same unresolved issues**

As noted above, none of our pro bono clients to date have been prepared to risk an adverse costs order to pursue matters to a final determination if it means facing the risk of an costs order.<sup>4</sup> This impacts particularly in discrimination matters which commence in a "no costs" arena but progress to costs jurisdictions.

We have pursued a number of discrimination matters to conciliation level against the same few respondents in respect of the same or very similar issues. Resources are often wasted obtaining outcomes for individuals, or even small groups, in each case that discrimination arises if the parties are forced to accept a conciliated outcome rather than a precedent setting Court determination for fear of suffering an adverse costs order. In other situations, if a conciliation settlement offer put to a client addresses the client's complaint they are forced to accept the offer rather than pursue it to hearing to establish a precedent to benefit others due to possible costs consequences where the determination expected is unlikely to be more favourable than the offer put.

This process does not seem to provide any incentive for a number of respondents to remedy discriminatory aspects of their conduct. If the Administrative Decisions Tribunal or Human Rights Commission had broader powers of investigation and better resources to independently and proactively investigate cases of systemic discrimination where the same respondent is complained of to the Tribunal or Commission on a regular basis and make binding orders in relation to that respondent's behaviour, the resources of complainants, their legal representatives and the Tribunal or Commission repeatedly dealing with the same types of claims against these respondents would be saved. The legal representatives could direct their services to other areas of need, precedents could be set in a binding way for the respondent, and other similarly placed potential respondents, and the cost of delivering justice would be decreased overall.

### **Filing fee issues**

Clients of law firm pro bono practices regularly have to seek fee waiver from various Registries

<sup>4</sup> Apart from clients whose financial position is such that they would have no ability to repay the adverse costs order or clients who have the support of an organisation to meet such costs.

when commencing litigation. The approach to fee waiver varies in each Court's jurisdiction. In most cases, clients of law firm pro bono practices are not recognised as a class entitled to fee waiver. A separate application has to be made. This is time consuming, particularly in cases that need to be filed urgently and the outcome is uncertain.

There is also inconsistency regarding the administration of fee waiver schemes. Recognising clients of law firm pro bono practices as entitled to fee waiver across all Courts and jurisdictions would be of enormous assistance in efficiently delivering services to pro bono clients. It is acknowledged that these clients ought to provide proof of their inability to pay the fees and to make payment of the fees retrospectively in circumstances where a positive financial outcome for the client results. Consistency of application of fee waiver processes across jurisdictions would also greatly simplify the process. This would allow for certainty when advising clients of whether or not they would be entitled to fee waiver and efforts could be concentrated on legal issues rather than fee waiver administration.

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## **E. Alternative means of delivering justice**

We refer to our comments above regarding the provision of broader investigative powers to bodies such as the Human Rights Commission and Anti-Discrimination Board to avoid the duplication of matters being run on the same issue time and again as an alternative means of delivering justice for vulnerable groups.

Further, we note that a number of our clients experience difficulty pursuing their legal rights even with pro bono assistance. This is often due to the many other stressful factors they are dealing with in their lives. Generally speaking, the more vulnerable and marginalised the client, the more stress factors they are enduring and the more difficult they find it to dedicate the effort needed to pursue legal actions. Resourcing Commissions or Tribunals with appropriate inquisitorial and investigative powers and jurisdiction may assist in delivering justice to clients in these situations by reducing the client's need to take the running of the matter.

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## **F. Adequacy of funding of Community Legal Centres**

While Community Legal Centres provide relatively low cost legal services, the money spent on Community Legal Centres could have an exponentially greater impact if increased. As we have stated, the pro bono practices in private law firms rely heavily on Community Legal Centres. They are a central grass roots legal service provider and provide an excellent "triage" for local clients. While the National Association of Community Legal Centres can better comment on issues facing Community Legal Centres and their clients, we set out our experience of Community Legal Centres' abilities to provide assistance with the limited resources they currently have.

Community Legal Centres' salaries have not kept pace with salary growth within the Legal Aid Commission or the private legal sector. While there are notable exceptions of dedicated and experienced legal centre staff who have worked in the sector long term, generally there is high turnover and difficulty in attracting new staff and retaining that staff on the salaries offered. This provides particular difficulties in attracting and retaining staff in urban areas where the cost of living is high. It is not any easier for most legal centres to attract staff in rural and remote regions on low salaries. We are aware of a number of instances where legal centres have received no or limited applications for positions when they have become vacant and in some cases centres have had to raise the salary offered beyond what is budgeted in order to attract staff.

Centres with high staff turnover are forced to dedicate increased time to recruitment, file handover and staff training on induction at the cost of service delivery. "Organisational knowledge" is lost and so are client relationships. As a consequence staff can be limited in their capacity to run cases particularly test and public interest cases. Yet it is legal centres that are



best placed to identify such cases given their constant client contact at a grass roots level. Centres need a critical mass of staff in order to run cases effectively while servicing a regular client base with advice services and undertaking policy work. The smaller the staff the greater the impact turnover on the centre has.

Further, generally clients seeking legal assistance from a Community Legal Centre are facing a number of non legal but related issues. The ability for Centres to provide allied services such as financial counselling, community workers and social workers would better support the clients of the Centre and assist the Centre in providing better legal services.

Community Legal Centres are reliant on voluntary management committees. The committees are often representative of the local community or the client base of the Centre and this is a positive aspect of Community Legal Centres. However, demands on the management committee can be extensive and maintaining the Centre's relationship with the committee can be costly and time consuming. It would be useful to have dedicated funding to directed to resourcing management committees when funding is provided to Community Legal Centres...

Community Legal Centres may be assisted in attracting and retaining staff if non financial incentives could be provided to the staff. It might be possible to provide scholarships to students through their university careers if they are prepared to work in a Community Legal Centre for a number of years after graduation. These scholarships should be awarded on a competitive basis to ensure high quality candidates for the Centres. Similarly, waiver of part of a HECS debt could be granted to lawyers for each year they work in a Community Legal Centre. Perhaps higher fee waivers could be offered to those who will work in Centres where it is more difficult to attract staff such as remote regions.

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## **G. The ability of Indigenous people of access justice**

Gilbert + Tobin has a particular focus on providing pro bono services to Indigenous people. Our work in this area has focused in the civil arena but has included matters peculiar to Indigenous people including stolen wages work and stolen generation work. We do not undertake criminal work or family law work and have undertaken limited care and protection work. We note that Aboriginal Legal Services are best placed to comment on this issue. We provide our comments based on our experiences.

While Aboriginal Legal Services provide assistance to Indigenous people throughout the country, their resources are limited to acting in criminal matters and some family and child care and protection law. Notably they do not have the capacity to undertake civil work.

Specific funding is needed for Aboriginal Legal Services to undertake civil matters. The arguments for providing a specific service for Aboriginal arena in the criminal and family arena apply equally to providing civil services.

Many pro bono practices, including our own, have made efforts to work with Aboriginal Legal Services to refer civil matters and the National Pro Bono Resource Centre has produced a referral manual particularly for Aboriginal Legal Services to use to refer matters to pro bono practices. However, the number of referrals is small, even with an awareness of who will accept civil matters on a pro bono basis, it can be difficult for lawyers consistently working in the criminal arena to identify civil issues that clients might have. Our referrals of civil matters for Aboriginal clients generally come from Community Legal Centres or Aboriginal organisations with which we work. However in our view there is huge unidentified need in this area.

Indigenous clients are clearly the most systemically disadvantaged group we work with in our pro bono practice. In most cases although the client has been referred for one legal issue, once a relationship develops with the client several legal issues are often revealed. Frequently the client has faced many of these legal problems for a number of years but has not been able to

deal with them for reasons such as lack of awareness of services available, the inability to get to those services even if aware of them due to living in a rural or remote location and the need to prioritise other more pressing issues in their lives.

To overcome the remoteness issue civil legal services need to be funded to enable them to regularly attend rural and remote communities in order to communicate effectively and develop a relationship of trust with their clients. Services cannot be effectively provided by phone, fax and video link. Law firm pro bono services are very likely to be able to assist with matters the Service does not have capacity to take on but not having a presence in Aboriginal communities or rural or remote regions they are reliant on present services to identify and refer matters.

In relation to these other issues facing Indigenous clients it is vital to provide allied services so a holistic approach is taken to the many problems they are facing. Therefore like Community Legal Centres effective Aboriginal Legal Services for civil matters need to be resourced to provide these allied services. Again these services need to have a regular presence in Indigenous communities and not operate remotely.

If civil legal services are provided for Indigenous clients there will be an experienced and more deeply informed voice to engage on issues of policy and legal reform from an Indigenous perspective on civil legal issues.

We undertake a substantial amount of work for Indigenous organisations who need assistance on a range of issues including corporate governance. These organisations often provide vital services to Indigenous communities in relation to health, childcare or the provision of other social services. The benefits they provide are potentially great but their resources can be distracted by technical legal issues which could be resolved through access to regular legal advice and information on the conduct of their organisation and the obligations of those managing it. Well resourced centres to provide legal advice and information these organisations, located in regional centres throughout the country, would assist in meeting the needs of those organisations law firm pro bono practices do not have the capacity to assist.