

**SUBMISSION WITH RESPECT TO THE SENATE LEGAL AND  
CONSTITUTIONAL AFFAIRS COMMITTEE : INQUIRY INTO  
AUSTRALIA'S JUDICIAL SYSTEM, THE ROLE OF JUDGES AND  
ACCESS TO JUSTICE**

**The ability of people to access legal representation & the adequacy of legal aid**

Access to proper legal representation by a person suspected of or charged with a criminal offence is critical to ensure that there is fairness in the criminal justice system. It is particularly so in modern times where fundamental rights of citizens are eroded by State and Federal legislation. The need to ensure that the individual is properly represented is only heightened with the existence of such legislation and with the persistent emphasis in public debate on increasing penalties, particularly the call for custodial penalties. Further, with the reach of the criminal law widening with new offences, conduct which was not previously criminal, now is. With new laws comes uncertainty and the need to ensure that the application of legislation is tested, lest a person in respect of whom the legislation was not intended and does not apply is wrongfully charged. Additionally, the ugly reality is that prosecuting agencies, whether the police, government departments or the Director of Public Prosecutions, can and do proceed with charges in circumstances where it is clear that, on an objective analysis of the evidence, the matters should not be prosecuted. That presents a particularly pernicious aspect of our criminal justice system: the prospect of a wrongful conviction, ever heightened by a person who is unable to defend him or herself properly.

With both sides of politics often playing the law and order card in an attempt to win popularity, informed debate on the issue usually does not

come from those we have elected to represent us. Sadly, there is a great proportion of our society who have no interest in whether or not people who come to the attention of police have adequate legal representation: no doubt this apathy comes from the perception that it will never be them. This is why it is crucial that our leaders inform debate on the matter irrespective of whether there are votes in it or not. This is why this senate committee is so important.

One particular recommendation I would seek to make to the committee is that when the legislature passes legislation which impacts on a person's liberty, that concurrent legislative means be passed which ensure access to legal representation at all stages. (For example, in the pre-charge detention stage under the terrorism legislation.)

The reality is that legal aid funding in Queensland has been inadequate for a very long time: this is so with respect to payments made to practitioners who engage in the work, and to those sections of society who are ineligible for legal aid because of modest income but who are incapable of affording private funding.

#### *Inability of people to access legal aid*

The reality too is that for those who have to provide a contribution before they are granted legal aid, legal aid funding is illusory. In some circumstances, the contribution is set at a level commensurate with or higher than private firms may charge for the matter. In other circumstances, even though the contribution is not at private firm levels, it is still beyond the reach of the individual. By way of example, a person who is single, with no assets, no dependants, earning \$600 per week, will not get funding until such time as he/she is able to find \$740 by way of

contribution. That can simply be prohibitive for many people, and the difficulty is only heightened in these tough economic times.

Another difficulty with respect to the ability of people to access legal representation is that legal aid simply is not available for many things: take for example, detention under the terrorist legislation in the pre-charge period. This period can be the most critical for an individual and yet, there is no funding available for that. The same can be said for the lack of legal aid during the execution of search warrant and detention in police custody for questioning.

The means and merit tests that are applied in granting aid for summary pleas and trials significantly restrict our provision of representation. The fact is that the great majority of summary matters are not matters for which an accused would be eligible for legal aid means that many go without representation and many have to use the duty lawyer. Although duty lawyers are often experienced and skilled lawyers, the fact is that a person often can't get proper and informed representation by seeing a duty lawyer for minutes only before the lawyer has to present their case.

### ***Inadequate payment to legal practitioners***

The reality in modern law is that a practitioner very rarely makes profit on legal aid matters and often does them at a loss. Practitioners are prepared to do legal aid because it is an important part of giving back to the community, but it can not be its "bread and butter". Often, the situation is that a law firm can do legal aid only by being propped up by its private clients and can only undertake a limited percentage of legal aid.

The overheads involved in private practice means that each lawyer needs to bill at a ratio or approximately 3-4:1 to be “viable”. That is, if a lawyer earns a gross salary of \$50 000, that lawyer needs to “bill” \$150 000 to \$200 000 simply to earn his/her keep. A person simply can’t do that on legal aid alone: the volume required to bill at those levels is unachievable on a consistent and continuing basis without leading to practitioner burnout and/or clients not getting proper service.

The effect of this is that some of those in need of the best representation simply will not get it. There is inarguably a situation where the wealthy can, and do, retain the best lawyers and those less fortunate do not. That is not to say that many lawyers who undertake legal aid work are not competent: clearly the opposite is true. There are many talented and experienced lawyers who do legal aid work. There simply aren’t enough of them: In 2007-2008, 23 659 application for legal aid were received in Queensland in criminal law matters, an increase of 3% from the year before. Of those applications, 21 823 were granted.<sup>1</sup>

Another issue which leads to inadequate funding is the inability to distinguish funding level on a case by case level (with the rare exception of “fee packages” which are sometimes available in the very large cases). The funding available for, say, an indecent dealing charge will be the same whether the alleged offence occurred last year or occurred twenty years ago, but there can be a very stark difference in the amount of preparation required. “Historical” sexual allegations inevitably involve a great deal further preparation and investigation than current matters, yet there fee structure is the same.

---

<sup>1</sup> Legal Aid Queensland Submission to the CMC on Review of Police “Move on” Powers 2009.

Another problem is the inability for full funding for psychological and psychiatric reports. There can be no doubt that many persons charged with criminal offences are those who suffer from mental health issues: it is sadly the truth in more cases than not. In order for the lawyers, and ultimately the court, to understand the mitigation involved in the offending by reason of the mental health issues, full funding for reports is necessary. Without a proper report, offenders end up being sentenced for imprisonment too long (thus having a financial cost in addition to the human effect) or are not given the proper supervisor orders (which may assist the individual to rehabilitate).

Peter Russo

11 May 2009