

Submission to the Senate Legal and Constitutional Affairs Committee: Inquiry into Access to Justice

30 April 2009

Maxwell M. Walker

1. Perspective

1.1 I am an Australian undergraduate student enrolled in the Bachelor of Laws degree program at the Queensland University of Technology. I am in the final year of this program. I am currently undergoing training to be a legal practitioner, and therefore have direct, recent exposure to the content of contemporary legal education.

1.2 I have also had extensive practical experience with community legal centres including the *Caxton Legal Centre* and the *Queensland Public Interest Law Clearing House*. Through volunteer work undertaken at these two venues, I have gained insight into the barriers to justice that exist in the community.

2. Justice

2.1 Justice is a difficult term to define. For the purposes of this analysis, we can identify two separate species of justice: social justice and legal justice. Some theories of adjudication would indicate that this is a false distinction; however it is a working assumption that allows us to quantify an inherently confusing region of communal life and thought. What, then, is legal justice? We can begin by stating that it is justice within a legal system, rather than in the social context in which laws exist. We can go further and state that legal justice is a just outcome in a legal matter. We can point to factors that preclude people from pursuing just outcomes in their legal matters, such as a lack of legal representation or assistance.

2.2 However, the conclusion in [2.1] presupposes that legal representation is equivalent to legal justice. This is inaccurate. When we talk about access to justice we are really referring to access to the judiciary, and specifically the judiciary's power to activate and apply the law to the benefit of the person seeking a determination in a legal dispute. The existence of judicial access, and the facilitating effect this has on the pursuit of the full beneficial application of the law, renders an outcome legally just.

2.3 How, then, can people access the judiciary and receive the benefit of the law? Some facilitating factors, such as legal representation and assistance, are referred to in the terms of

reference for this inquiry. Here the matter becomes more complex. All persons in society have access to legal representation, and this access is equal, but this equality is of a formal nature. Because legal justice and social justice are separated at a fundamental level, the substantial inability of a person to access legal services is not relevant to an assessment of the legal legitimacy or legal justice of an outcome. It is legally just to disregard the social factors that substantially affect any individual's ability to access legal representation or assistance.

- 2.4 Legal representation is a commodity based on an information asymmetry. Non-lawyers don't know what benefit they can take from the law as it relates to them and they don't know how to effectively access the judiciary to enforce that legal benefit. Where a person cannot afford the commodity, that person cannot have the commodity. A person's ability to access the judiciary and the benefit of the law, and therefore access a legally just outcome, is substantially limited in accordance with their inability to acquire the commodity.
- 2.5 This result does not accord with our experience. We observe that people frequently receive legal advice and representation without paying for it, for example from Legal Aid and volunteer community legal centres. Why is this? The answer lies in the reaction of legal practitioners to the dichotomy of legal and social justice. Where a person with an ability to provide legal representation or assistance also recognises the effect that the commodification of legal services has on the ability of a person to achieve a legally just outcome, and further finds that it would be socially or morally unjust to allow that disability to play its course, there exists strong motivation to selectively de-commodify their service. The *sine qua non* of the provision of *pro bono* legal assistance and representation is therefore the ability of practitioners to identify social justice as an aspiration, based on their extra-legal, social and moral beliefs, and act on that aspiration to enforce legal justice in a matter.
- 2.6 Monetary issues are not the only barriers to achieving legal justice that exist in the community. In my capacity as a legal volunteer I have witnessed other phenomena such as age, ethnicity, gender and educational background constantly emerging as barriers between people with legal issues and the judicial application of legal benefit. Much emphasis is placed on legislators and the judiciary to recognise and alleviate this pressure. However, it would be naïve to isolate these actors. While they play a primary role in creating law, they are still part of the broader legal community.
- 2.7 So where do lawyers, judges and legislators learn the vital skills of social and moral recognition mentioned in [2.5]? At a fundamental level, it is in the law schools. The same legal education received by lawyers is received by judges and legislators. The schooling a lawyer receives allows him to interpret situations experienced in practice, and to respond to these

situations. These responses are developed and refined in practice, but still depend heavily on the content of the initial legal education.

3. Legal Education

3.1 The abilities mentioned in [2.5] are not easily developed. The concept of social justice sits against the grain of contemporary legal education. The formal, commodity-based philosophy underlying conventional legal practice is heavily enforced in undergraduate law courses. How then can law students acquire skills of attitudinal reflective practice? The best place in a law degree where these skills can be imbibed is in jurisprudence courses. It is through these courses that the underlying nature of the legal system is exposed. The effects of the commodification of legal representation, the implications of assumptions of ethnic, racial and gender homogeneity and all the other principles and fictions upon which the legal system rests are exposed and analysed in jurisprudence courses. It is through these courses that undergraduate law students can acquire the skills necessary to apply their own moral and social orientations in the legal community in which they operate. A lawyer cannot be expected to recognise the social injustice inherent in the legal system without a full and proper understanding of that system.

3.2 We can see, then, that an education in jurisprudence is an essential element of any legal education. It is a prerequisite to the development of social and moral legal skills. The presence of these skills in the legal community is essential to the achievement of a coincidence of socially and legally just outcomes in legal matters. It is disparaging, then, to see that certain universities, including the Queensland University of Technology, have removed jurisprudence from the prerequisite category. As of 2009, students will not have to complete the *Theories of Law* unit in order to receive a *Bachelor of Laws*.

4. Conclusion and Recommendation

4.1 The skills that lead to the development of ethical, moral and social awareness in the legal community are developed in undergraduate jurisprudence courses. Practitioners cannot be expected to act to dissolve barriers to justice if they have no ability to discern those barriers as being anything other than normal, acceptable and fair. Access to justice in the community is therefore at least partly dependant to on the content of legal education. The lack of compulsory jurisprudence courses can only have a detrimental effect on the ability of community members to access justice. I would therefore submit and recommend that the mandatory content of law degrees be reviewed with a view to making jurisprudence courses compulsory.