

OVERVIEW AND CONCLUSIONS

This inquiry presented an opportunity for the committee to re-examine access to justice, following its previous reports in March and June 1997, July 1998 and June 2004. For most of this period, and to date, funding for the Australian legal aid system has been dominated by the Commonwealth's 'purchaser/provider' funding model.

These funding arrangements influence all aspects of the legal aid system, as will become apparent, however, the committee's inquiry focussed less on funding for the system and more on individuals' ability to access justice. The broad terms of reference capture, in essence, whether members of the Australian community, and especially its disadvantaged members, are able to: access justice; what impediments there are to accessing justice; and potential means of improving access to justice.

Access

The report begins with a consideration of people's ability to access legal representation, including a summary of previous reviews and inquiries, the non-government National Legal Needs Survey, current Australian Government legal aid programs, and reasons for a lack of access to legal representation.

The committee heard significant and on-going criticisms of overall levels of funding, and noted cynicism that the Australian Government will adequately increase funding for the legal aid system. The committee accepts that the legal aid system is not adequately funded, and accordingly, in conjunction with other measures, recommends that governments and relevant stakeholders review existing funding arrangements and service delivery levels to ensure that the legal aid system is properly resourced to meet the needs of the Australian people, as well as recommending an increase in funding for legal aid service providers, particularly in rural, regional and remote areas.

Most importantly, the committee acknowledges contemporaneous initiatives to empirically determine the demand for legal aid services and unmet legal needs of the community. The committee considers such data fundamental to identifying the current weaknesses of the legal aid system, and formulating appropriate, long-term policies and strategies for a strong system which universally delivers access to justice. To complete current surveys, the committee recommends governments fund a comprehensive national survey of demand and unmet legal need in Indigenous communities. The committee also calls for the publication of interim results for the National Legal Needs Survey no later than February 2010.

Specifically in relation to access to legal representation, the committee singles out for mention, and commends, those members of the private legal profession who undertake pro bono legal work. The committee heard that a significant amount of pro bono legal services are delivered each year by legal practitioners. Without this contribution, the committee acknowledges that many disadvantaged Australians would likely not be able to access any form of legal representation.

The committee promotes and encourages pro bono work throughout the legal profession, and makes a number of recommendations designed to facilitate the provision of pro bono legal services, including, for example, the introduction of a mandatory pro bono legal work requirement for all classes of practising certificate.

Legal aid commissions

The report continues with a more detailed examination of the adequacy of funding to legal aid commissions, particularly under the Legal Aid Program, including government levels of funding, areas of unmet legal need, the Commonwealth/state funding divide, the Federal Financial Relations Framework, and the Legal Aid Priorities and Guidelines.

The committee heard that there are areas of law not sufficiently funded for the provision of essential legal aid, namely family law and civil law services. Part of this problem is reflected in the adoption and implementation of strict means tests which set unrealistic eligibility criteria. The committee is concerned that the lack of legal aid funding adversely affects the best interests of children, as well as those members of the Australian community who are most disadvantaged.

For this reason, the committee recommends an increase in funding for the Legal Aid Program, the development and implementation of realistic and consistent national means test income and assets levels (with inbuilt inflators), and the development and implementation of a national civil law program in identified high need areas.

Evidence to this inquiry, as with earlier inquiries, continued to express dissatisfaction with the Commonwealth/state funding divide, which, it was argued, arbitrarily distinguishes between Commonwealth and other law matters, complicating effective service delivery. The committee reaffirms its preference for the abolition of the 'purchaser/provider' funding arrangements which create the controversial divide.

Cost

The fourth chapter broadly examines the financial cost of delivering justice by canvassing the annual costs of the federal court system, the cost of disbursements in litigation matters, exposure to adverse costs orders, and the cost of legal representation.

Evidence stated that financial costs inhibit individuals' access to justice, with potential and actual litigants unable to afford disbursements, and various inconsistent disbursement schemes not able to significantly dispel the barrier. The committee considers this impediment capable of remediation, and recommends that governments develop and implement uniform disbursement funds throughout Australia, including for pro bono legal matters. Also in relation to such matters, the committee recommends that the indemnity principle be abrogated to encourage legal practitioners to accept pro bono clients.

On a different front, the committee also heard that the high cost of private legal representation and relatively low remuneration scales for private practitioners undertaking legal aid work inhibit individuals' access to legal representation. After acknowledging the invaluable role of the private legal profession in the legal aid system, the committee recommends a nationwide review and modernisation of legal aid fee scales (with inbuilt inflators) so as to promote practitioners' continued participation in the system.

Length, complexity and efficiency

During the inquiry, the committee investigated measures to reduce the length and complexity of litigation, and improve efficiency, particularly measures relating to civil and family law litigation, and self-represented litigants.

The committee heard that people with limited financial resources cannot afford lengthy, complex and inefficient litigation, and that a number of civil and family law courts have introduced targeted measures to improve these people's access to justice. The committee commends the courts concerned for these proactive measures which should enable more Australians to access the judicial system, and encourages all courts without such measures to consider their implementation in the very near future.

Self-represented litigants experience particular difficulties accessing justice, and the number of such litigants is by all accounts increasing (for various reasons). While much has been said regarding the impact of self-represented litigants on the judicial system, the committee expresses concern at the apparent lack of relevant empirical data, and the quality of justice that self-represented litigants are able to achieve.

Accordingly, the committee recommends that governments commission research to quantify the economic effects that self-represented litigants have on the judicial system, as well as funding the establishment of a comprehensive duty solicitor scheme in high need areas throughout Australia.

Alternative means

In addition to judicial measures, the committee examined alternative means of delivering justice, including early intervention and prevention, alternative dispute resolution, restorative justice, justice reinvestment, clinical legal education, and Indigenous specific issues.

The committee found that early intervention and 'triage' serve an invaluable purpose in diverting people away from the justice system on more appropriate, efficient and cost effective pathways. The committee also found that a holistic approach would most benefit those members of the community experiencing multi-faceted and complex problems, and commends those legal assistance service providers who have adopted this client-focussed approach.

The committee heard that restorative justice programs are an alternative and more capable means of delivering justice than the traditional criminal justice system, particularly for Indigenous peoples who are over-represented in that system. The

committee makes a recommendation for the Australian Government to consider funding a number of restorative justice pilot programs in areas where there is an over-representation of offenders in the criminal justice system.

A related topic was justice reinvestment where the committee approves the concept of diverting funds from incarceration to community-based programs and services that address the underlying causes of crime. The committee notes that this policy could result in reduced rates of incarceration and significant costs-savings, better outcomes for both individuals and governments.

The committee encourages state and territory governments to promote these outcomes, financially and by reviewing local policies and laws which have the effect of increasing rates of incarceration. The committee recommends also that governments fund and develop a targeted justice reinvestment pilot program in the criminal justice system.

Community legal centres

Picking up on an earlier thread, the report then examines the adequacy of funding to community legal centres under the Community Legal Services Program, including funding levels, areas of unmet legal need, and recruitment and retention issues.

The committee heard criticisms of the highly unpredictable application-based grants process, whose replacement with a new funding model was recommended in March 2008. The committee recommends that the development of that model be expedited for the benefit of all community legal centres.

As with legal aid commissions, the committee also heard significant criticisms of core funding levels, the low level of which, it was said, results in community legal centres not being able to deliver services, retain staff or properly resource their work environment. The committee acknowledges the cost-benefit of centres, and considers that they need to be properly funded to cope with demand presenting and not presenting at their doors.

However, as a necessary corollary of increased funding, the committee considers it reasonable to review and where necessary introduce accountability and transparency requirements, for example, measurable key performance indicators and benchmarks for all publicly funded community legal centres. Accordingly, the committee makes two targeted recommendations, including an increase in funding for community legal centres, subject to enhanced accountability and transparency requirements.

Indigenous legal services

The final chapter of this report concerns the ability of Indigenous people to access justice, and covers topics such as an appropriate legal assistance service, the adequacy of funding to Aboriginal legal services, including Family Violence Prevention legal services, and the Indigenous Law and Justice Framework.

Again, the committee heard significant criticisms of core funding levels, particularly as compared to other legal aid service providers and notwithstanding additional expenses associated with the provision of Indigenous legal services. The committee is concerned that this adversely impacts on one of the community's highest needs groups, Indigenous Australians and their ability to access justice.

The committee therefore recommends increasing the level of funding for Indigenous legal services (with loadings for additional expenses), as well as recommending that governments inquire into and report on joint funding for the Legal Aid for Indigenous Australians program with a view to more equitably apportioning responsibility for the provision of legal aid services to Indigenous peoples.

Language was a specific barrier to access to justice. The committee heard that interpreter services throughout Australia are limited in their capacity to provide translation services and whilst essential, and when available, legal aid providers are not able to afford such services. The committee recommends a partial solution, increased funding to court-based interpreter services, but considers that non-financial solutions such as enhancing English language skills among Indigenous communities must also be explored, a matter beyond the scope of this inquiry.

The committee heard that Indigenous legal services experience difficulty attracting permanent and experienced legal practitioners due to demanding working conditions and relatively low levels of remuneration. The committee agrees that this impacts on the consistency and quality of legal services provided to Indigenous peoples, and recommends that it be addressed, commencing with a joint government review of current salary levels across legal aid commissions and Indigenous legal services, and followed by proposals for salary level reforms.

The committee also received evidence concerning Indigenous women's chronic disadvantage in their ability to access justice, including in relation to domestic/family violence and sexual assault. In this regard, the committee considers it highly important for governments to provide Indigenous women with appropriate victim support measures, as well as addressing their legal needs.

However, the committee heard that some Indigenous legal services are inaccessible to Indigenous women due to perceived or actual conflicts of interest, and also the limited location of some services. Fundamentally, the committee noted evidence that Indigenous women's needs are not being met because they are not involved in the strategic development of Indigenous women's legal services. The committee therefore supports the development of targeted Indigenous women's law and justice strategies.

Summary

The committee considers that the legal system is not sufficiently providing members of the Australian community with access to justice. The inquiry highlighted numerous areas where reforms would be beneficial, and the committee makes findings and recommendations, as appropriate.

Clearly, weaknesses in the legal system could be partially rectified, or rectified in the short-term, with increased, and targeted, levels of funding. However, in the current economic climate, this might not be feasible. Nor would it be necessarily prudent.

The inquiry emphasised what has been said before, including to previous committee inquiries: that the Australian legal system is beset with various weaknesses, some endemic, some deeply rooted and some based in non-legal causes, all of which are interconnected, thus requiring large scale rather than microeconomic reforms.

The committee is not convinced that the weaknesses in the legal system have been appropriately recognised, or identified, making remediation nigh on impossible. In the committee's view, this has concurrently lead to long-term and on-going criticisms, reviews and inquiries into the system, none of which are ultimately productive.

The committee advocates a decisive commitment on the part of all governments, all legal service providers, the legal profession and all other interested stakeholders if Australia is to have a strong, viable and cost-effective legal system.

However, the committee has reservations as to whether there is enough will and impetus to embark on a large scale reform of the legal system, and if there were, when practical reforms might reasonably occur.

Consequently, in this report, the committee makes recommendations focussed upon short-term solutions, with the express provision that the committee does not view these recommendations as the ultimate solution to achieving a strong and appropriate legal system for all Australians.

The committee urges all governments to bear in mind that the legal system is currently afloat, arguably badly, due to a considerable amount of goodwill, but that this could evaporate at any time, creating a crisis in the delivery of legal services and resulting in diminished access to justice for many Australians.

The committee commends informed forward planning. At present, reforming the legal system might appear difficult, onerous and expensive, but the committee believes that, ultimately, the investment of effort, time and money will result in significant benefits to all concerned. Otherwise, the committee predicts that within a decade it will again be inquiring into a failing, or failed, legal system and asking, 'why wasn't something done about this ten years ago?'