The Right to a Fair Hearing and Access to Justice: Australia's Obligations

Submission to the
Senate Legal and Constitutional Affairs Committee:

Inquiry into Australia's Judicial System, the Role of Judges and Access to Justice

6 March 2009

Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000
www.hrlrc.org.au

Maryam Minai, Helen Conrad and Philip Lynch

Human Rights Law Resource Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4450
F: + 61 3 8636 4455
E: phil.lynch@hrlrc.org.au
W: www.hrlrc.org.au

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre (***HRLRC***) is an independent community legal centre that is a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc.

The HRLRC provides and supports human rights litigation, education, training, research and advocacy services to:

(a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

(b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and

(c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The four 'thematic priorities' for the work of the HRLRC are:

(a) the development, operation and entrenchment of Charters of Rights at a national, state and territory level;

(b) the treatment and conditions of detained persons, including prisoners, involuntary patients and persons deprived of liberty by operation of counter-terrorism laws and measures;

(c) the promotion, protection and entrenchment of economic, social and cultural rights, particularly the right to adequate health care; and

(d) the promotion of equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples.

Contents

1. Introduction

1.1 Background

1. On 5 February 2009, the Senate ordered the review of Australia's judicial system, the role of judges and access to justice ("**Inquiry**").

2. The announcement came just days after Michael Kirby stepped down from the High Court bench before his 70th birthday and follows a budget submission by the Law Council of Australia that urged the Federal Government to spend an extra $250 million on legal aid.

3. Deputy Chair of the Senate Committee, Liberal Senator Guy Barnett who called for the Inquiry has said:

> Who judges the judges? The judiciary must be independent from the Parliament, but must also be accountable. The merits of an appropriate and rigorous complaints handling system will be an important aspect of our inquiry. The Senate will also inquire into the ability of people to access justice, legal aid and community legal centres, measures to reduce the length and complexity of litigation and alternative means of delivering justice.[1]

4. The Senate Legal and Constitutional Affairs Committee ("**Committee**") has been appointed to run the Inquiry, with particular reference to:

   (a) the procedure for appointment and method of termination;

   (b) the term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements;

   (c) appropriate qualifications;

   (d) jurisdictional issues;

   (e) the cost of delivering justice;

   (f) the timeliness of judicial decisions;

   (g) the judicial complaint handling system;

   (h) the ability of people to access legal representation;

   (i) the adequacy of legal aid;

   (j) measures to reduce the length and complexity of litigation;

[1] Nicola Berkovic, "the Senate has ordered a sweeping review of the judicial system", *The Australian*, 6 February 2009.

(k) alternative means of delivery justice;

(l) the adequacy of funding and resource arrangements for community legal centres;

(m) the ability of indigenous people to access justice; and

(n) other matters relating and incidental thereto (together known as the T**erms of Reference**).

1.2 Scope of this Submission

5. This submission analyses and discusses the Terms of Reference of the Inquiry with particular reference to the right to a fair hearing, as enshrined in art 14 of the International Covenant on Civil and Political Rights (**ICCPR**). The right to a fair hearing is a fundamental human right, is instrumental to the effective protection of all other human rights, and must be central to any discussion of access to and administration of justice.

6. Following the introduction of similar 'right to fair hearing' provisions in charters of human rights in other jurisdictions (in particular in the United Kingdom (**UK**) and state jurisdictions such as Victoria and the Australian Capital Territory (**ACT**)), an analysis of the jurisprudence developed in these jurisdictions is useful for determining the content of the right to a 'fair hearing' and evaluating the implications for access to justice in Australia.

7. Accordingly, through a discussion and analysis of the content of the right to a fair hearing, this submission aims to assist in guiding potential reform relating to the following Terms of Reference the subject of the Inquiry:

(a) the ability of people to access legal representation;

(b) the adequacy of legal aid;

(c) the adequacy of funding and resource arrangements for community legal centres;

and to a lesser extent:

(d) the cost of delivering justice;

(e) the timeliness of judicial decisions; and

(f) measures to reduce the length and complexity of litigation.

The discussion also touches on issues that are relevant to:

(g) the procedure for appointment and method of termination of judges;

(h) the term of appointment of judges; and

(i) the appropriate qualifications of judges.

2. Executive Summary

2.1 Content of the Right to a Fair Hearing

8. The right to a fair hearing is an essential aspect of the judicial process and is indispensable for the protection of other human rights. The basic elements of the right to a fair hearing are:

   (e) equal access to, and equality before, the courts;

   (f) the right to legal advice and representation;

   (g) the right to procedural fairness;

   (h) the right to a hearing without undue delay;

   (i) the right to a competent, independent and impartial tribunal established by law;

   (j) the right to a public hearing; and

   (k) the right to have the free assistance of an interpreter where necessary.

9. While many of these principles are already embedded into the common law and specific legislation, the development of policies to guarantee the right to a fair hearing inevitably involves striking a balance between the substantive and procedural elements of the right.

2.2 Implications for Australia

10. International and comparative jurisprudence on the basic elements of the right to a fair hearing indicate that access to justice and equality before the law are fundamental values underpinning not just the right to a fair hearing, but also Australia's legal system. Although these values do not have great leverage in decision-making by the courts, they present a powerful argument for arrangements such as legal aid and the impartial application of the law.

11. The role of procedure is often regarded as of secondary importance compared with substantive law. However, international and comparative jurisprudence indicate that procedure is important for ensuring adherence to the basic elements of the right to a fair hearing. Consequently, policies and formal procedures must be compatible with all of the basic elements of the right to a fair hearing that are enshrined in the ICCPR.

12. This submission identifies that access to justice is a fundamental requirement of a fair legal system. The Commonwealth Government must take steps to ensure greater equality in access to justice, including:

   (a) providing adequate funding for legal aid, community legal centres and impecunious and disadvantaged litigants;

(b) increasing accessibility to courts by simplifying rules of procedure and preventing the disproportionate impact of associated costs of litigation for certain individual litigants; and

(c) providing adequate services to assist individuals in accessing the justice system, including legal aid and free interpreters.

2.3 Recommendations

The HRLRC recommends as follows:

Recommendation 1

In its Inquiry, the Committee should give priority to the importance of equal access to justice as a fundamental requirement of a fair legal system.

Recommendation 2

The Commonwealth should provide increased levels of funding for legal aid, community legal centres and impecunious and disadvantaged litigants, particularly pre-litigation advice to prospective litigants.

Recommendation 3

Commonwealth Legal Aid and the Commonwealth should not seek financial contribution from applicants who have been granted aid under a 'public interest' guideline.

Recommendation 4

Commonwealth Legal Aid should consider the introduction of a system of 'cascading' financial contributions from applicants, where applicants do not meet the means test. A cascading financial contribution scheme would make applicants' contributions proportionate to their income.

Recommendation 5

The Commonwealth should increase accessibility to courts by preventing the disproportionate impact of associated legal costs of litigation for certain individual litigants.

Recommendation 6

The Commonwealth should provide funding for disbursements in pro bono matters where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved.

Recommendation 7

The Commonwealth should consider giving an undertaking not to pursue costs if it is successful in public interest proceedings in which it is a party.

Recommendation 8

The Federal Court Rules should be amended to provide a regime whereby, on application, a litigant could be declared a 'public interest litigant'. As long as that declaration remains current and has not been revoked, no adverse costs order would be made against a public interest litigant and the public interest litigant would not be required to pay any adverse costs orders, which relate to the final determination of the litigation.

Recommendation 9

The Commonwealth should ensure that all Commonwealth court procedures uphold the requirement of procedural fairness, including 'equality of arms', by providing the same procedural rights to all parties during the whole course of a trial.

Recommendation 10

Judges and court staff should receive comprehensive and ongoing training in relation to dealing with self-represented litigants.

Recommendation 11

Special Masters should be introduced to the courts to assist with increasing numbers of self-represented litigants. Special Masters would have a range of functions including meeting with the parties to narrow the issues in dispute and providing much needed guidance to self-represented litigants in relation to understanding court processes.

Recommendation 12

There should be an increase in the resources available to self-represented litigants including an investigation into the feasibility of establishing self-help centres or self-represented litigant legal clinics at all major courts and tribunals.

Recommendation 13

All Commonwealth court procedures should strike an appropriate balance between the right to an expeditious hearing and the substantive elements of the right to a fair hearing.

To this end:

1. claims should be heard without undue delay;
2. where appropriate, claims should be expedited; and
3. there should be an adequate number of judicial officers in each court and tribunal for the effective and timely running of proceedings,

but at all times, with due regard for the substantive elements of the right to a fair hearing to ensure that the fairness and probity of proceedings, and the quality of the decisions, are not compromised.

Recommendation 14

The Commonwealth should have regard to the content of the right to a competent, independent and impartial tribunal and related jurisprudence when reviewing the method of appointment and termination of judicial officers, in addition to issues of judicial appointment terms and qualifications.

Recommendation 15

The Commonwealth Government should have regard to the right to a public hearing when reviewing court practice and procedure.

Recommendation 16

The Commonwealth Government should take immediate action to ensure that interpreting services are made available where necessary in the interests of the administration of justice in all civil proceedings in Commonwealth courts.

Recommendation 17

The Commonwealth should provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.

3. A Human Rights Framework

13. Human rights are fundamental rights and freedoms that are recognised as belonging to everyone in the community. Of particular relevance to the Inquiry, they include equality before the law, the right to a fair trial and the right to be free from discrimination. Human rights focus on the fair treatment of all people and enable people to live lives of dignity and value.

14. The Inquiry raises issues that directly engage Australia's international human rights obligations.[2]

15. The international human rights framework makes it clear that both federal and state authorities have responsibilities in relation to the realisation of human rights. In particular, art 50 of the ICCPR expressly provides that, in federations such as Australia, the obligations of the Covenants are binding on the federation as a whole and must extend across all parts of that federation, without any limitations or exceptions. This means that, in Australia, all branches of government (legislative, executive and judicial) and other public or governmental authorities, at whatever level – national, state or local – must act to respect, protect and fulfil human rights.[3]

16. At its most basic level, the Inquiry relates to the fundamental issue of access to justice. Access to justice is an essential aspect of both the right to a fair hearing and the right to equality before the law.

17. The experience in comparative jurisdictions, such as the UK, Canada and New Zealand, is that a human rights approach to the development by governments of laws and policies can have significant positive impacts. Some of the benefits of using a human rights approach include:[4]

    (a) enhanced scrutiny, transparency and accountability in government;

    (b) more participatory and empowering policy development processes and more

---

[2] These obligations are found in a number of the major international human rights treaties to which Australia is a party, including the ICCPR. The ICCPR was signed on 18 December 1972 and ratified on 13 August 1980.

[3] Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004), [4]. See also art 27 of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), which provides that a state party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'

[4] See, generally, Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (July 2006); British Institute of Human Rights, *The Human Rights Act: Changing Lives* (2007); Audit Commission (UK), *Human Rights: Improving Public Service Delivery* (October 2003).

individualised, flexible and responsive public services;

(c) better public service outcomes and increased levels of 'consumer' satisfaction; and

(d) 'new thinking', as the core human rights principles of dignity, equality, respect, fairness and autonomy help decision-makers 'see seemingly intractable problems in a new light'.

18. There is strong evidence that the language and ideas of rights can be used to secure positive changes not only to individual circumstances, but also to policies and procedures resulting in systemic change.

19. It is relevant to this Inquiry that the Commonwealth Government is undertaking a national inquiry, the National Human Rights Consultation, regarding the legal recognition and protection of human rights. At this stage, the National Human Rights Consultation Committee is due to report to the Commonwealth Government by 31 August 2009.

20. A human rights approach to the current Inquiry will assist to develop recommendations that promote effective administration of justice and achieve the appropriate balance between the substantive and procedural elements of the right to a fair hearing.

4. Relevant Human Right to the Inquiry: Right to a Fair Hearing

4.1 Right to a Fair Hearing

21. The right to a fair hearing is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. Human rights considerations are of increasing relevance to the law governing the conduct of proceedings and to legal conceptions of what amounts to a fair trial or a just decision,[5] all of which are relevant constituents of effective access to justice.

22. The right to a 'fair hearing' is recognised and enshrined in art 14(1) of the ICCPR:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

23. The domestic and day-to-day significance of art 14 has recently been considered by Bell J of the Victorian Supreme Court.

24. In the *Tomasevic* case, which arose out of a criminal trial of a self-represented litigant before a magistrate, Bell J considered the legal significance of the ICCPR and, following a detailed review of the relevant authorities, held that, '[e]very judge in every trial, both criminal and civil, has an overriding duty to ensure that the trial is fair.'[6] Justice Bell considered this to be 'inherent in the rule of law and the judicial process'[7] and also stated that 'the proper performance of the duty to ensure a fair trial would also ensure [that the rights specified in the ICCPR] are promoted and respected.'[8]

25. The right to a fair hearing is echoed in international and domestic human rights instruments as follows:

(a) art 6(1) of the *European Convention on Human Rights* (**ECHR**):

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

[5] See generally Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007).

[6] *Tomasevic v Travaglini & Anor* [2007] VSC 337 [139].

[7] *Tomasevic v Travaglini & Anor* [2007] VSC 337 [139].

[8] *Tomasevic v Travaglini & Anor* [2007] VSC 337 [139]; see also [155].

(b) the *Human Rights Act 1998* (UK) (**UK Act**), which incorporates the ECHR into the United Kingdom's domestic law;

(c) section 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**):

> A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing;
>
> and

(d) section 21(1) of the *Human Rights Act 2004* (ACT) (**ACT Act**):

> Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

26. The concept of a fair hearing contains many elements and the standards against which a hearing is to be assessed in terms of fairness are interconnected. At the very least, the minimum basic elements of the right to a fair hearing can be said to consist of:

(a) equal access to, and equality before, the courts;

(b) right to legal advice and representation;

(c) costs of litigation;

(d) right to procedural fairness;

(e) positive duties to self-represented litigants;

(f) right to an expeditious hearing;

(g) right to a competent, independent and impartial tribunal established by law;

(h) right to a public hearing; and

(i) the right to have the free assistance of an interpreter where necessary.

27. It is notable that while many of these elements may also arise under the common law, the protection afforded in these human rights instruments provides for 'a positive right to a fair trial, rather than the right not to be tried unfairly as the common law provides'.[9] It is also notable that many of these aspects of the right are protected by effective administration of the court processes. The HRLRC recognises that the Inquiry seeks to assess the appropriate

[9] *R v Griffin* [2007] ACTCA 6 (5 April 2007), [4] – [6] (Higgins CJ, Gray and Madgwick JJ).

balance between access to justice and effective administration of such justice. This is dealt with in more detail below in regards to permissible limitations.

28. As reinforced by the *Tomasevic* case, international and comparative jurisprudence may be useful in assessing the nature and content of the right to a fair hearing. With this in mind, each of the elements of the right to a fair hearing is discussed below.

4.2 Elements of the Right to a Fair Hearing

(a) Equal Access to and Equality before the Courts

29. Article 14 of the ICCPR has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to the justice system.[10] The administration of justice must 'effectively be guaranteed in all cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice'.[11] This is inherently linked with notions of equality before the courts and may raise issues of court fees, complexity of procedure, a right to legal aid, awarding of costs and discrimination.

30. As recently stated by Bell J in the *Tomasevic* case, '[t]he inherent duty to ensue a fair trail and the human rights of equality before the law and access to justice may be said to breathe the same air.'[12]

31. Courts have determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.[13]

32. However, this right is not unlimited and courts have generally recognised the following categories of exclusion from the court process:

    (a) litigants who bring cases without merit;

    (b) bankrupts;

    (c) minors;

---

[10] See, eg, two recent decisions of the European Court, *Ciorap v Moldova* [2007] ECHR Application No 12066/02 (19 June 2007) and *Bakan v Turkey* [2007] ECHR Application No 50939/99 (12 June 2007), which confirmed that the right to a fair hearing includes a right of access to the courts as well as to legal aid and representation.

[11] United Nations Human Rights Committee, *General Comment No 32*, CCPR/C/GC/32, 23 August 2007, [9] (**General Comment No 32**). A general common is an authoritative statement of the interpretation and application of a treaty provision by the body responsible for that treaty.

[12] *Tomasevic v Travaglini & Anor* [2007] VSC 337.

[13] Department for Constitutional Affairs, *Human Rights: Human Lives* (2006) <www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf> at 21 December 2006.

(d) people who fall outside a reasonable time-limit or limitation period for bringing a case; and

(e) other people where there is a legitimate interest in restricting their rights of access to a court, provided the limitation is not more restrictive than necessary.

Limitations on the right to equal access to courts are discussed in further detail below.

33. Australia has previously been found to be in breach of its obligation to provide equal access to the courts. In *Dudko v Australia*, the United Nations Human Rights Committee (**HRC**) stated that Australia had breached its obligations under art 14(1) of the ICCPR since it did not provide an adequate reason why a prisoner in detention was not permitted to attend an application for Special Leave to the High Court of Australia. In that case, Australia failed to provide sufficient explanation of 'why an unrepresented defendant in detention should be treated more unfavourably than an unrepresented defendant not in detention who can participate in proceedings'.[14]

34. The HRC has also previously linked equal access to courts to the notion of equality. In *Olo Bahamonde v Equatorial Guinea*, the HRC stated that 'a situation in which an individual's attempts to seize the competent jurisdictions of their grievances are systematically frustrated runs counter to the guarantees of Article 14(1)'.[15]

35. In *Graciela Ato del Avellanal v Peru*, the HRC was of the view that the preclusion of married women from bringing suits regarding matrimonial property breached art 14(1) of the ICCPR as it discriminated against litigants on the basis of sex and marital status.[16]

Recommendation 1

The HRLRC recommends that, in its Inquiry, the Committee give priority to the importance of equal access to justice as a fundamental requirement of a fair legal system.

(b) Right to Legal Advice and Representation

36. In a speech on the state of the judicature, Gleeson CJ said

> The expense which governments incur in funding legal aid is obvious and measurable, but what is real and substantial is the cost of the delay, disruption and inefficiency which results from the

[14] *Dudko v Australia*, HRC, UN Doc CCPR/C/90/D/1347/2005 (29 August 2007).

[15] *Olo Bahamonde v Equatorial Guinea*, UN Doc CCPR/C/49/D/468/1991, [9.4].

> absence or denial of representation. Much of the cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.[17]

37. An essential element of a fair legal system, and a specific Term of Reference to this Inquiry, is the ability to access legal assistance for the purposes of obtaining a fair hearing. Accessibility of the law depends on awareness of legal rights and of available procedures to enforce such rights. When access to legal assistance is not available, meritorious claims or defences may not be pursued or may not be successful.[18] In many instances, 'injustice results from nothing more complicated than lack of knowledge.'[19]

38. The right to representation in criminal proceedings is enshrined in art 14(3)(d) of the ICCPR. Conversely, for civil matters, the jurisprudence regarding legal aid emphasises that the right to a fair hearing does not impose an obligation on the state to provide free legal assistance in such matters. It does, however, require the state to make the court system accessible to everyone, which may itself entail the provision of legal aid. Indeed, the complexity of some civil matters may actually require legal aid to ensure a fair hearing.[20]

39. According to the HRC's recent General Comment 32 on art 14 of the ICCPR (**General Comment 32**), availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.[21] The HRC encourages states to provide free legal aid in all types of cases where the individual cannot afford it, but observed that there may be situations where states are positively obliged to provide it.[22]

40. The European Court of Human Rights (**European Court**) held in *Bobrowski v Poland* that while there is no obligation to grant legal aid in all disputes, States should be guided by principles of fairness. States should ensure that a party in civil proceeding be able to participate effectively by being able to put forward arguments in support of his or her claims.[23]

---

[16] *Graciela Ato del Avellanal v Peru*, UN Doc CCPR/C/34/D/202/1986.

[17] Chief Justice Murray Gleeson, 'State of the Judicature' (Speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

[18] Victorian Law Reform Commission (**VLRC**), *Civil Justice Review Report 14*, 2008, 607.

[19] Chief Justice Murray Gleeson, 'Conference Opening and Keynote Address' (Speech delivered at the National Access to Justice and Pro Bono conference, Melbourne, 11 August 2006).

[20] Department for Constitutional Affairs, above n 13, 20. See also *Airey v Ireland* [1979] 6289/73 ECHR 3 (9 October 1979).

[21] General Comment No 32, above n 11, [10].

[22] Ibid.

[23] *Bobrowski v Poland* [2008] ECHR 64916/01 (17 June 2008).

41. In obiter comments regarding legal aid funding, the HRC said in *Dudko v Australia* that while a state has a discretion to direct finite legal aid resources to meritorious matters, this discretion should be exercised having regard to factors including 'the nature of the proceedings, the powers of the appellate court, the capacity of an unrepresented party to present a legal argument, and the importance of the issue at stake in view of the severity of the sentence'.[24]

42. It is clear that, in certain civil cases, these factors will effectively require the provision of State-funded legal aid. Thus, in *Bakan v Turkey*, the European Court held that the refusal of legal aid had totally deprived the applicant of the possibility of taking her case to court, in breach of her right to a fair trial.[25]

43. Similarly, in *P C and S v UK*,[26] the European Court held that the failure to provide an applicant with a lawyer was a violation because, in the circumstances, legal representation was deemed to be indispensable. Lack of legal representation prevented the party from putting forward their case effectively because of the complexity, high emotional content and serious consequences of the proceedings.

44. A state's obligation to provide legal aid was further clarified in *Steel and Morris v UK* in which the European Court held that states 'enjoy a free choice of the means to be used in guaranteeing litigants the right to a fair trial.'[27] The European Court reiterated that legal aid schemes represent but one of those means. The Court added that the right of access to a lawyer is not absolute and may be subject to restriction provided that those restrictions pursue a legitimate aim and are proportionate. It may be acceptable to impose conditions on the grant of legal aid based on the financial situation of the applicant or on the prospects of their success in the proceedings. It is not incumbent upon the state to seek, through public funds, to ensure total equality of arms as long as each side is afforded a reasonable opportunity to present their case under conditions that do not put them at a substantial disadvantage.

45. The case of *Currie v Jamaica*[28] involved a prisoner on death row and his ability to launch a constitutional challenge. The HRC found that the state's denial of legal aid amounted to a denial of a fair hearing. Although the HRC did not regard provision of legal aid as an absolute right of litigants, it held that the state was under an obligation to make proceedings in the

---

[24] *Dudko v Australia*, HRC, UN Doc CCPR/C/90/D/1347/2005 (29 August 2007).

[25] *Bakan v Turkey* [2007] ECHR Application No 50939/99 (12 June 2007). It was also relevant in *Bakan v Turkey* that the court fees were high, and the applicant had lost all of her income following the death of a relative (whose death was the subject of the legal proceedings).

[26] 56547/00 [2002] ECHR 604 (16 July 2002).

[27] *Steel and Morris v UK*, 68416/01 [2005] ECHR 103 (15 February 2005).

[28] UN Doc CCPR/C/50/D/377/1989.

constitutional court available and effective. The complexity of constitutional proceedings was a significant factor in determining that legal aid was required. It was not the denial of legal aid itself that amounted to a breach but rather that its absence resulted in a denial of access to the courts, which the state did not rectify in any other way.

46. Similarly, in *Golder v United Kingdom*,[29] the applicant, a prisoner, was denied access to his solicitor to discuss the prospect of bringing a civil suit. This was held to violate his right to a fair hearing because although not preventing him from bringing a proceeding altogether, it did prevent him from commencing it at that time. The European Court held that the fair conduct of a civil proceeding is meaningless if one does not have the right to bring the proceeding in the first place and explained that the convention presupposes the right of access to the courts just as it presupposes the existence of the courts themselves.[30]

47. In *Airey v Ireland*,[31] the European Court held that fulfilment of a duty under the ECHR requires positive action by the state and thus it is a positive duty to ensure effective access to the courts. Likewise, in its Concluding Observations on Norway, the HRC noted that civil proceedings are serious enough to warrant an entitlement to legal aid when they concern the attempted enforcement of a right protected by the ICCPR.[32]

48. The jurisprudence indicates that an individual's access to the justice system should not be prejudiced by reason of his or her inability to afford the cost of independent advice or legal representation. Indeed, any failure to provide legal aid to those who may otherwise be unable to access legal representation is likely to contribute to significant inefficiencies and additional costs in the legal system.

49. The HRLRC notes that the provision of legal aid represents only one means by which a state can meet its obligation to ensure a fair hearing and that a state may increase accessibility to courts by simplifying procedure. An increase in the availability of legal advice and representation and other reforms guaranteeing the basic elements on the right to fair hearing would reduce the number of unmeritorious claims brought before the courts and also enhance the protection of the human rights of litigants, therefore ensuring a fair and effective legal system.

---

[29] 4451/70 [1975] ECHR 1 (21 February 1975).

[30] Ibid.

[31] 6289/73 [1979] ECHR 3 (9 October 1979).

[32] *Concluding Observation on Norway*, UN Doc CCPR/C/79/Add. 112(1999). This was particularly so in the context of the discriminatory impact of high legal costs and the absence of legal aid on Sami protection of traditional livelihood from competing land uses.

Recommendation 2

The HRLRC recommends that the Commonwealth provide increased levels of funding for legal aid, community legal centres and impecunious and disadvantaged litigants, particularly pre-litigation advice to prospective litigants.

Recommendation 3

The HRLRC recommends that Commonwealth Legal Aid and the Commonwealth should not seek financial contribution from applicants who have been granted aid under a 'public interest' guideline.

Recommendation 4

The HRLRC recommends that Commonwealth Legal Aid consider the introduction of a system of 'cascading' financial contributions from applicants, where applicants do not meet the means test. A cascading financial contribution scheme would make applicants' contributions proportionate to their income.

(c) Costs of Litigation

50. The cost of delivering justice is a specific Term of Reference in this Inquiry. Indeed, an important aspect of ensuring equal access to justice is the applicant's ability to pay the associated costs and the discriminatory effect this has on disadvantaged members of the community. As Lord Bingham has said of the costs of litigation[33]

> everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined … [L]egal redress should be an affordable commodity.

51. According to the HRC's General Comment 32, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under art 14(1).[34] The HRC has noted that:

> in particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability

[33] Lord Bingham of Cornhill, The Rule of Law (the Sixth Sir David Williams Lecture delivered at Cambridge University on 16 November 2006) < http://www.cpl.law.cam.ac.uk/Media/THE%20RULE%20OF%20LAW%202006.pdf > at 5 March 2009, 20-2.

[34] General Comment No 32, above n 11, [11]. See also, Communication No. 646/1995, *Lindon v Australia*, [6.4].

> of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.[35]

52. In *Kreuz v Poland*,[36] the requirement to pay court fees was held to be a violation of art 6 of the ECHR because it imposed a disproportionate burden on the individual. While the right to a fair hearing does not endow citizens with the right to free civil proceedings, the European Court said that the imposition of court fees must be balanced against the burden placed on the individual litigant. The relevant factors in this case were:

(a) the level of court fees involved;

(b) the court had refused his application without taking into consideration any evidence; and

(c) under the relevant domestic law, an exemption from fees could be revoked when the circumstances of the individual changed, effectively suspending the fees temporarily and allowing the applicant to commence his proceedings.

53. The approach in *Kreuz v Poland* was confirmed in *Kijewska v Poland*.[37] In *Kijewska v Poland*, the applicant argued that court fees approximately four times her monthly income were excessive and amounted to a breach of art 6 of the ECHR. The European Court held that:

> having regard to the importance of the right to a court in a democratic society … the judicial authorities failed to secure a proper balance between the interest of the state in collecting court fees on the one hand, and the interest of the applicant in pursuing her civil claim on the other.

The Court further concluded that 'the refusal to reduce the fee for lodging the applicant's claim constituted a disproportionate restriction on her right to access to a court'.

54. The recent case of *Ciorap v Moldova* also illustrates that court fees may act as barrier to access to the courts in breach of the right to a fair hearing. In *Ciorap v Moldova*, the applicant had failed to pay the court fees in proceedings relating to his treatment in detention. Given the seriousness of his claim (which involved claims of torture), the European Court held that the applicant should have been exempted from paying the fee.[38]

---

[35] General Comment No 32, above n 11, [11]. See also, Communication No 779/1997, *Aarela and Nakkalajarvi v Finland*, [7.2].

[36] 28249/95 [2001] ECHR 398 (19 June 2001).

[37] *Kijewska v Poland* [2007] ECHR Application No 73002/01 (6 September 2007). See also *Bakan v Turkey* [2007] ECHR Application No 50939/99 (12 June 2007), in which the European Court held that the considerable court fees payable by an applicant who had lost all of her income following the death of a relative (whose death was the subject of the legal proceedings) were a barrier to access to justice, in breach of the applicant's right to a fair hearing.

[38] *Ciorap v Moldova* [2007] ECHR Application No 12066/02 (19 June 2007).

55. In *Aarela v Finland*,[39] the HRC held that a rigid application of a policy to award costs to the winning party may breach the right of access to justice contained in the right to a fair hearing. The imposition of substantial costs against a disadvantaged claimant may prevent them from bringing a proceeding at all and therefore hinder their ability to remedy a breach of their rights. The HRC held that there should be judicial discretion to consider individual circumstances on a case-by-case basis and that, without such a discretion, the imposition of indiscriminate costs acts as a strong deterrent to the whole community, particularly its disadvantaged members, in exercising their right to have their complaint heard.

56. It is clear that the availability of funding for the costs of litigation, including court fees, disbursements and awards of costs is critical to ensuring access to justice for impecunious litigants. In many cases, a lack of available funding creates a significant barrier to progressing claims and may result in an individual being unable to access justice effectively.

Recommendation 5

The HRLRC recommends that the Commonwealth increase accessibility to courts by simplifying rules of procedure and preventing the disproportionate impact of associated legal costs of litigation for certain individual litigants.

Recommendation 6

The HRLRC recommends that the Commonwealth provide funding for disbursements in pro bono matters where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved.

Recommendation 7

The HRLRC recommends to the Commonwealth consider giving an undertaking not to pursue costs if it is successful in public interest proceedings in which it is a party.

[39] *Anni Aarela and Jouni Nakkalajarvi v Finland*, UN Doc CCPR/C/73/D/779/1997.

Recommendation 8

The HRLRC recommends that the Federal Court Rules be amended to provide a regime whereby, on application, a litigant could be declared a 'public interest litigant'. As long as that declaration remains current and has not been revoked, no adverse costs order would be made against a public interest litigant and the public interest litigant would not be required to pay any adverse costs orders, which relate to the final determination of the litigation.

(d) Right to Procedural Fairness

57. A broad consideration of the right to procedural fairness will provide the Committee with an overview of ways to achieve to procedural fairness, including equality of arms, for the purposes of a fairer legal system.

58. Article 14 of the ICCPR provides procedural guarantees as to the conduct of a hearing. Essentially, the right ensures litigants have the opportunity to present their case in conditions without substantial disadvantage compared to the other party.

59. In this regard, General Comment 32 states that the right to equality before courts and tribunals also requires equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[40] There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.[41]

60. Bell J of the Supreme Court of Victoria held in *Ragg v Magistrates' Court of Victoria and Corcoris* that the right to a fair hearing includes the right to equality of arms. Equality of arms requires that both parties 'be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial'. In this case, equality of arms required that the defendant have adequate facilities to prepare a defence, which included access to relevant documents.[42]

---

[40] General Comment No 32, above n 11, [13]. See also, Communication No. 1347/2005, *Dudko v Australia*, [7.4].

[41] General Comment No 32, above n 11, [13]. See also, Communication No. 1086/2002, Weiss v Austria, [9.6]. For another example of a violation of the principle of equality of arms see Communication No. 223/1987, Robinson v Jamaica, [10.4] (adjournment of hearing).

[42] *Ragg v Magistrates' Court of Victoria and Corcoris* [2008] VSC 1.

61. However, the right to procedural fairness does not necessarily amount to a guarantee of a favourable outcome and errors of fact or law do not amount to a violation of the right.[43] The procedural guarantees include equal access to courts, fair and public hearings, and the competence, impartiality and independence of the judiciary.[44]

62. More specifically, the interests of equality between parties demand that each side be given the opportunity to respond to evidence put forward by the other. This may include access to material held by the other side or an equal ability to cross-examine witnesses. In *Gertruda Hubertina Jansen-Gielen v The Netherlands*,[45] the HRC stated that there is a duty imposed on courts (in the absence of time limits) to ensure that each party has the opportunity to challenge the documentary evidence that the other has filed and that proceedings should be adjourned if necessary. The European Court has also found that a fair hearing requires parties to have the opportunity to have knowledge of and comment on all evidence adduced.[46]

63. In *Anni Aarela and Jouni Nakkalajarvi v Finland*,[47] the complainants were precluded from responding to a brief the other party had submitted and which was then relied upon to their detriment. The HRC held that justice required the ability of each party to contest the arguments and evidence of the other party.

64. In the case of *Daniels v Walker*,[48] the parties agreed on a joint expert in accordance with the UK Civil Procedure Rules. However, one of the parties was dissatisfied with the report but was denied permission to seek their own expert. They consequently argued a breach of the right to a fair trial because denial had 'barred the essential or fundamental part of [their] claim'. The court agreed and said that where there were sound reasons for a party wishing to obtain further evidence before deciding whether to challenge part or whole of a report, then the request to instruct another expert should be allowed at the court's discretion. If, however, the damages claimed are modest, the court may, in the interests of proportionality, refuse the request and merely allow the party to put questions to the expert who had already prepared the report.

---

[43] *RM v Finland*, UN Doc CCPR/C/35/D/301/1998. See also *BdB v Netherlands*, UN Doc CCPR/C/35/D/273/1988 and *Martinez Mercader et al v Spain*, UN Doc CCPR/C/84/D/1097/2002.

[44] *BdB v Netherlands*, UN Doc CCPR/C/35/D/273/1988.

[45] UN Doc CCPR/C/71/D/846/1999.

[46] *Van Orshoven v Belgium*, 20122/92 [1997] ECHR 33 (25 June 1997).

[47] UN Doc CCPR/C/73/D/779/1997.

[48] [2000] 1 WLR 1382.

65. In the case of *Pappas v Noble*,[49] the ACT Supreme Court held that a provision in another Act which had the effect of rendering evidence inadmissible that would otherwise be determinative in civil proceedings would be inconsistent with the right to a fair trial.

66. The right to procedural fairness extends beyond court procedures, and may include the conditions in which people are held. In *R v Benbrika*, Bongiorno J of the Supreme Court of Victoria held that the circumstances in which the defendants were being held and transported meant that they were subjected to undue stress such that the conditions rendered the trial unfair. His Honour held that the court had the power to enforce rules of practice in order to ensure fairness and convenience to both sides, including a general power to prevent unfairness to an accused, and a duty to both protect its process from abuse and to protect those who are brought before it from an oppression or injustice.[50]

Recommendation 9

The HRLRC recommend that the Commonwealth ensure that all Commonwealth court procedures uphold the requirement of procedural fairness, including 'equality of arms', by providing the same procedural rights to all parties during the whole course of a trial.

(e) Duties to Self-Represented Litigants

67. The right to procedural fairness takes on particular importance when an unrepresented litigant is involved. The right to a fair hearing dictates that there will be circumstances where the court or tribunal will have to assist an unrepresented litigant, depending on the facts of the situation. The Victorian Civil and Administrative Tribunal noted in *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building)* that this obligation imposes a positive duty on a court or tribunal to give such assistance as is necessary to ensure the proceedings are fair. The application of the duty will depend on the litigant (including the litigant's intelligence and understanding of the case), the nature of the case and the institutional framework governing the relevant court or tribunal. Further, the duty to assist may extend to issues of law as well as procedure. However, the judge or tribunal

[49] [2006] ACTSC 39.

[50] *R v Benbrika & Ors* (No 20) [2008] VSC 80.

member must be careful not to become the advocate of a self-represented litigant and must keep in mind the need to afford procedural fairness to other parties.[51]

68. In the *Tomasevic* case, Bell J said of a court's obligation to provide assistance to unrepresented litigants:

> 127 Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> 128 Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> 129 The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the procedure that will be followed.[52]

Recommendation 10

The HRLRC recommends that judges and court staff should receive comprehensive and ongoing training in relation to dealing with self-represented litigants.

Recommendation 11

The HRLRC recommends that Special Masters be introduced to the courts to assist with increasing numbers of self-represented litigants. Special Masters would have a range of functions including meeting with the parties to narrow the issues in dispute and providing much needed guidance to self-represented litigants in relation to understanding court processes.

[51] *Seachange Management Pty Ltd v Bevnol Constructions & Developments Pty Ltd & Ors (Domestic Building)* [2008] VCAT 1479.

[52] *Tomasevic v Travaglini & Anor* [2007] VSC 337.

Recommendation 12

The HRLRC recommends an increase in the resources available to self-represented litigants including an investigation into the feasibility of establishing self-help centres or self-represented litigant legal clinics at all major courts and tribunals.

(f) Right to an Expeditious Hearing

69. The timeliness of judicial decisions and measures to reduce the length and complexity of litigation are specific Terms of References in the Inquiry. According to General Comment 32, an important aspect of a fair hearing is its expeditiousness,[53] while jurisprudence indicates that the complexity of litigation will impact the level of expeditiousness required. In fact, the most litigated requirement under art 6 of the ECHR is the right to a fair trial, followed by the obligation to ensure that proceedings do not exceed a reasonable time.[54] While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3(c) of art 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties are not compatible with the right to a fair hearing.[55] Further, the HRC suggests that, 'where such delays are caused by a lack of resources and chronic underfunding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.'[56]

70. It is clear from the jurisprudence that the level of expeditiousness required will depend very much on the circumstances of the case. Factors to be taken into account include:

(a) the type and complexity of the case;

(b) the conduct and diligence of both sides of the dispute; and

(c) the conduct and diligence of the court.

71. Some examples of decisions on the reasonableness of delay include:

---

[53] General Comment No 32, above n 11, [27].

[54] Council of Europe, *Annual Report 2008 of the European Court of Human Rights (provisional edition)*, available at < http://www.echr.coe.int/NR/rdonlyres/B680E717-1A81-4408-BFBC-4F480BDD0628/0/Annual_Report_2008_Provisional_Edition.pdf> at 5 March 2009, 67.

[55] General Comment No 32, above n 11, [27]. See also *Yves Morael v France* UN Doc CCPR/C/36/D/207/1986 and *Ruben Turibio Munoz Hermoza v Peru* UN Doc CCPR/C/34/D/203/1986, which held that a fair hearing in civil proceedings required justice be rendered without undue delay.

[56] General Comment No 32, above n 11, [27], See also, e.g. Concluding Observations, Democratic Republic of Congo, CCPR/C/COD/CO/3 (2006), [21], Central African Repulic, CCPR//C/CAF/CO/2 (2006), [16].

(a) the European Court placed a greater emphasis on the need for an expeditious hearing in the case of a terminally ill AIDS patient in *X v France*[57] and in a case concerning the adoption of a child in *H v United Kingdom*;[58]

(b) the European Court held that an employment dispute which lasted nine years was unreasonable in the overall circumstances;[59]

(c) the HRC has held that a delay of seven years in a dismissal complaint was unreasonable, as was a further two and a half year delay in the implementation of the remedy.[60] Conversely, two years and nine months was considered reasonable for a dismissal complaint in *Casanovas v France*;[61]

(d) the HRC held that four years in a case where a company's affairs had been placed under judicial supervision was a reasonable delay given the complexity of the case;[62]

(e) in *Fei v Colombia*,[63] a matter concerning the custody of children, the HRC considered the case to be a clear breach of art 14 of the ICCPR because custodial issues particularly require expeditious proceedings. Each matter took several years, there were inexplicable delays on the part of the state and the determination was handed down before the expiration of time to enter a defence;

(f) the European Court held that a dispute concerning employee wages lasting four years was unreasonable in light of the fact that the dispute was neither complex nor exceptional;[64] and

(g) in the ACT, section 21 of the ACT Act was used to allow a civil action to proceed despite the expiry of time limitations and delay.[65] In the circumstances, the court considered that to deny the applicant would have been unjust and there was no prejudicial effect on the other party.

---

[57] 18020/91 [1992] ECHR 45 (31 March 1992).

[58] 9580/81 [1987] ECHR 14 (8 July 1987).

[59] *Darnell v United Kingdom* 15058/89 [1993] ECHR 47 (26 October 1993).

[60] *Ruben Turibio Munoz Hermoza v Peru*, UN Doc CCPR/C/34/D/203/1986.

[61] *Casanovas v France*, UN Doc CCPR/C/51/D/441/1990.

[62] *Yves Morael v France*, UN Doc CCPR/C/36/D/207/1986.

[63] *Fei v* Colombia, UN Doc CCPR/C/53/D/514/1992.

[64] *Vilho Eskelinen & Ors v Finland* ([GC] No 63235/00, 19 April 2007).

[65] *Hanan Al-Rawahi v Mohammad Ali Niazi* [2006] ACTSC 84.

72. A lack of resources and chronic under-funding of the legal system generally cannot be an excuse for unacceptable delays.[66] In *Procurator Fiscal v Watson and Burrows*, the House of Lords (drawing on jurisprudence of the European Court) stated that it is generally incumbent on contracting states to organise their legal systems so as to ensure that the reasonable time requirement is honoured.[67]

73. In its Concluding Observations on Croatia,[68] the HRC highlighted concerns over breaches of art 14 arising from the suspension or discontinuance of cases because of the operation of statutes of limitations where there had been delays in the administration of justice through no fault of the litigants. The HRC stated that it is the obligation of the state to ensure compliance with all the requirements of art 14 and that in this case it was necessary for Croatia to accelerate reform of the judicial system through, among other things, the simplification of procedures and the training of judges and court staff in efficient case management techniques.

Recommendation 13

The HRLRC recommends that the Commonwealth ensure that all Commonwealth court procedures strike an appropriate balance between the right to an expeditious hearing and the substantive elements of the right to a fair hearing.

To this end:

1. claims should be heard without undue delay;
2. where appropriate, claims should be expedited;[69] and
3. there should be an adequate number of judicial officers in each court and tribunal for the effective and timely running of proceedings,

but at all times, with due regard for the substantive elements of the right to a fair hearing to ensure that the fairness and probity of proceedings, and the quality of the decisions, are not compromised.

[66] Suzanne Lambert and Andrea Lindsay Strugo, *Delay as a Ground of Review* (2005) One Crown Office Row <www.humanrights.org.uk/1030/> at 21 December 2006.

[67] *Procurator Fiscal v Watson and Burrows* [2002] UKPC D1, 55.

[68] *Concluding Observations on Croatia*, UN Doc CCPR/CO/71/HRV(2001).

[69] For example, the Federal Court of Australia's Fast Track system whereby suitable commercial matters proceed through a special, expedited procedure. The process is currently a pilot program being run out of the Victorian Registry. See further the Federal Court of Australia, Fast Track List, <http://www.fedcourt.gov.au/how/fast_track_list.html> at 6 March 2009.

(g) Right to Competent, Independent and Impartial tribunal

74. The procedure for appointment and method of termination, as well as the appropriate qualifications of the judiciary are specific Terms of Reference in the Inquiry. The Committee's consideration of these Terms of Reference should be guided by the right to a competent, independent and impartial tribunal.

75. The requirement of competence, independence and impartiality is an absolute right that is not subject to any exception.[70]

76. The importance of competence, independence and impartiality of the judiciary has also been emphasised by the United Nations Basic Principles on the Independence of the Judiciary (**Basic Principles**).[71]

77. The Basic Principles are persuasive, useful interpretative guides and provide detailed minimum standards concerning the elements of independence, impartiality and competence contained in the right to a fair hearing.

78. On the elements of independence and impartiality, the Basic Principles provide that:

a) The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary;

b) The judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences, direction from any quarter or for any reason;

c) The principle of the independence of the judiciary entitles and requires the judiciary to ensure the proceedings are conducted fairly and that the rights of the parties are respected.

79. On the element of competence, the Basic Principles provide that:

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

---

[70] General Comment No 32, above n 11, [19]

[71] Available at <http://www.unhchr.ch/html/menu3/b/h_comp50.htm > at 4 March 2009.

80. General Comment 32 expands and elaborates on the Basic Principles guide on the element of independence and states:[72]

> The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.

81. On impartiality, the HRC states:[73]

> The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.

82. In addition to the Basic Principles and General Comment 32, the following outline of case law and commentary also provides interpretative guidance in relation to the elements of independence and impartiality.

Independence

83. In a recent review of the Civil Justice System in Victoria, the Victorian Law Reform Commission (**VLRC**) recognised the independence and impartiality of judicial officers as a fundamental requirement of the court system.[74]

84. Members of the judiciary and commentators alike have provided useful guidance in defining what constitutes judicial independence.

85. In *Smits v Roach*, Justice Kirby observes that ''independence' connotes separation from other branches of government but also independence from the litigants, their interests and their representatives'.[75]

---

[72] General Comment No 32, above n 11, [19]

[73] General Comment No 32, above n 11, [20]

[74] VLRC, above n 18, 94.

86. According to Lord Bingham, judicial officers must be "independent in the sense that they are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure".[76]

87. A leading commentator, Professor Stephen Burbank, foreshadowed the 'role of judges' element of the Inquiry and defined judicial independence as follows: 'True judicial independence… requires insulation from those forces, external and internal, that so constrain human judgment as to subvert the judicial process.'[77]

88. Institutional independence has been defined by Sir Guy Green in the following terms:

> Judicial independence [is] the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise control.[78]

89. The Australasian Institution of Judicial Administration has noted the importance of judicial independence:

> Much has been written about judicial independence both in its institutional and individual aspects. Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. There are two aspects of this concept that are important for present purposes: Constitutional independence and independence in discharge of judicial duties.[79]

90. Chief Justice Martin notes that the distinction corresponds to another distinction which is often drawn between institutional independence and individual independence: 'Individual independence, or impartiality, is the absence of a personal interest in, or prejudice towards, the particular issues to be determined by the tribunal or court in a particular case.'[80]

---

[75] *Smits v Roach* (2006) 228 ALR 262 [104].

[76] Lord Bingham, above n 33, 27.

[77] Stephen Burbank, 'is it time for a National Commission on Judicial Independence and Accountability?' (1990) 73 *Judicature* 176, 177-8.

[78] Sir Guy Green, *The Rationale and Some Aspects of Judicial Independence* (1985) ALJ 135, 135.

[79] Australasian Institute of Judicial Administration, Guide to Judicial Conduct (AIJA 2nd ed, 2007) <www.aija.org.au/online/GuidetoJudicialConduct (2nd ed).pdf> at 12 February 2008.

[80] Chief Justice Wayne Martin, Judicial Appointments and Judicial Independence (paper presented at the Law Council of Australia Conference on the Rule of Law: The Challenges of a Changing World, Brisbane, 31 August 2007).

91. Chief Justice Gleeson has argued that it is a collective responsibility of the judiciary to ensure that community values and judicial independence are respected, and that judges are, in appropriate ways, held accountable.[81]

Impartiality

92. It is fundamental to the civil justice system that judicial officers in Australian courts uphold 'very high standards of manifest neutrality and impartiality.'[82]

93. Impartiality has been defined as 'a state of mind or attitude of the court or tribunal in relation to the issues and the parties in a particular case.'[83] In *Smits v Roach*, Kirby P noted that, ''Impartiality' is concerned with the judge's approach to the hearing and the determination of matters in dispute.'[84] Lord Bingham explains impartiality as judicial officers being "so far as humanly possible, open-minded, unbiased by any personal interest or partisan allegiance of any kind".[85]

94. The requirement of impartiality arises out of Australian common law and has been said to have a constitutional dimension. In *Ebner v Official Trustee in Bankruptcy,* Justice Guadron said: 'In my view, Ch III of the Constitution operates to guarantee impartiality and the appearance of impartiality through the Australia court system.'[86]

95. The Australasian Institute of Judicial Administration has taken a balanced approach to impartiality and made the following observation:

> It is easy enough to state the broad indicia of impartiality in court – to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides. None of this, however, debars the judge from asking questions of witnesses or counsel which might even appear to be 'loaded' in order to gain a better understanding and eventual evaluation of the facts, or submissions on fact or law. The more difficult and often controversial

[81] Chief Justice Murray Gleeson, Judicial Accountability, (paper presented at a conference on Courts in a Representative Democracy, Canberra, 13 November 1994) 16.

[82] *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411, at 418 (Kirby P); cited in VLRC, above n 18, 97.

[83] *Valente v The Queen* (1985) 24 DLR (4th) 161, 169 (Le Dain J – Supreme Court of Canada); cited in VLRC, above n 18, 97.

[84] *Smits v Roach* (2006) 228 ALR 262, [104].

[85] Lord Bingham, above n 33, 27.

[86] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363.

area concerns the judge's extra-judicial activities, which may give rise to a challenge to impartiality by reason of apprehended bias; conflict of interest; or prejudgement of an issue.[87]

96. The broad concepts of competence, independence and impartiality provide necessary safeguards against violation of the right to a fair hearing and promote the right to equality. The fact that these elements of the right to a fair hearing are considered as absolute demonstrates that they are crucial for effective access to justice. The Inquiry should draw on the various interpretations of the scope and content of these elements as mentioned above to inform any potential law reform in this area.

Recommendation 14

The HRLRC recommends that the Commonwealth have regard to the content of the right to a competent, independent and impartial tribunal and related jurisprudence when reviewing the method of appointment and termination of judicial officers, in addition to issues of judicial appointment terms and qualifications.

(h) Right to a Public Hearing

97. In its review of the justice system, especially in relation to the Term of Reference relating to alternative means of delivering justice, the Committee should be mindful of the right to a public hearing.

98. Article 14 of the ICCPR guarantees the right to a public hearing as one of the essential elements of the concept of a fair trial. It is a right belonging to the parties, but also to the general public in a democratic society.

99. The publicity of a trial includes both the public nature of the hearings and the publicity of the judgment eventually made in a case. The court or tribunal is obliged to make information about the time and venue of the hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits. The right to a public hearing means that the hearing should be conducted orally and publicly.

100. While the right to a fair and public hearing generally implies the right to an oral hearing, in certain circumstances, it may be permissible for a court to determine a matter by written

[87] Australasian Institute of Judicial Administration, Guide to Judicial Conduct (AIJA, 2nd ed, 2007) <wwww.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf> cited in VLRC, above n 18, 97.

submissions in the interests of efficient administration of justice.[88] However, where the hearing is a first instance hearing rather than appeal, only exceptional circumstances will justify departure from an oral hearing.[89]

101. These concepts were considered in *G.A. Van Meurs v The Netherlands*,[90] where the HRC held that labour disputes argued in oral hearings before a court are subject to the requirement that they be held publicly. Importantly, the HRC noted that this is a duty imposed upon the state and is not dependent on any request by the parties.

102. The right to a public hearing may be limited in certain circumstances where the interests of morals, public order or national security, or the interests of those under 18 or the privacy of the parties, require an exclusion of the public and the press. Article 6 of the ECHR provides that:

> [The] public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. [91]

103. However, any exclusion of the public must only go as far as is necessary to protect those interests. Even where the public has been excluded from the hearing, the court must pronounce its judgment in public.

104. The Victorian Court of Appeal in *General Television Corporation Pty Ltd v DPP*,[92] in obiter comment, endorsed the approach in *Gisborne Herald Co Ltd v Solicitor-General*.[93] The Court in *Gisborne Herald* held that where it is not possible to simultaneously give full effect to the rights to freedom of expression and a fair trial, 'it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial.'

---

[88] *Oganova v Georgia* [2007] ECHR 25717/03 (13 November 2007). In this case, the special features of the proceedings before the appellate court, including that it was primarily concerned with questions of law, was not competent to decide on matters of fact, and provided an opportunity for both parties to make extensive written submissions, justified the absence of an oral hearing, particularly given other 'legitimate considerations' such as 'the demands of diligence and economy'.

[89] *Abrahamian v Austria* [2008] ECHR 35354/04 (10 April 2008). By denying an oral hearing where the application had specifically requested such a hearing, and Administrative Court had breached art 6(1) of the ECHR.

[90] UN Doc CCPR/C/39/D/215/1986.

[91] General Comment No 32, above n 11, [29].

[92] [2008] VSCA 49.

[93] [1995] 3 NZLR 563.

Recommendation 15

The HRLRC recommends that the Commonwealth have due regard to the right to a public hearing when reviewing court practice and procedure.

(i) Right to an Interpreter

105. In order to have true access to justice, applicants must be able to understand the proceedings and processes. In some circumstances, applicants will require the assistance of an interpreter, either for their own benefit or to be used with witnesses. Therefore, the right to, and access to, an interpreter is a vital part of access to justice. There are two aspects to the access to interpreters: availability of an interpreter, and ability to either secure the services of a free interpreter or pay the costs of an interpreter.

106. While the right to the free assistance of an interpreter is only guaranteed in criminal proceedings,[94] in certain circumstances, the right to a fair hearing in civil matters will include the right to an interpreter. General Comment 32 notes that

> in exceptional circumstances, procedural fairness may require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.[95]

In the UK, public authorities must ensure that any person who is subject to a decision-making process has access to an interpreter if required.[96]

107. Within Australia, arrangements regarding interpreters in courts vary. In SA, WA and Tasmania, the courts will arrange for an interpreter to be present at either criminal or civil proceedings. The cost of the interpreter is not passed on to the parties.

108. In NSW, the courts will generally assist an applicant arrange for an interpreter to attend a civil proceeding. However, except for in circumstances of financial hardship, the applicant will usually have to meet the costs of the interpreter in civil proceedings themselves.

109. In Queensland, there is no right to an interpreter, either in criminal or civil trials. It is the responsibility of the party to arrange and pay for an interpreter in civil proceedings. Likewise, in Victoria, the court plays no role in civil proceedings in organising an interpreter to be present or to ensure that the services of an interpreter are available where required.

---

[94] Article 14(3)(f) of the ICCPR. Similar provisions are contained in the UK Act, ACT Act and the Victorian Charter.

[95] General Comment No 32, above n 11, [13].

[96] Department for Constitutional Affairs, above n 13, 23.

110. The unavailability of interpreting services in the courts presents a major barrier to access to justice. A party's ability to participate in the legal process is severely undermined where he or she is unable to afford to pay for an interpreter to attend a hearing.

Recommendation 16

The HRLRC recommends that the Commonwealth take immediate action to ensure that, where necessary in the interests of the administration of justice, interpreting services are made available in all civil proceedings in Commonwealth courts.

Recommendation 17

The HRLRC recommends that the Commonwealth provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.

4.3 Limitations on the Right to a Fair Hearing

111. Any limitations placed on an individual's right to a fair hearing require consideration of a range of factors, including the proportionality between a legitimate aim and the impact on the party's access to the court.[97]

112. In General Comment 31, the HRC stated that, where limitations or restrictions are made to rights under the ICCPR,

> States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[98]

113. The general principles relating to the justification and extent of limitations have been further developed by the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*. Those principles include that:

[97] *Tinnelly & Ors v UK*, 20390/92 [1998] ECHR 56 (10 July 1998).

[98] HRC, General Comment 31: *Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* UN Doc CCPR/C/21/Rev.1/Add13 (2004) [6].

(a) no limitations or grounds for applying them may be inconsistent with the essence of the ICCPR or the particular right concerned;

(b) any limitation must be provided for by law and be compatible with the objects and purposes of the ICCPR;

(c) limitations must not be arbitrary or unreasonable;

(d) limitations must be subject to challenge and review;

(e) limitations must not discriminate on a prohibited ground;

(f) any limitation must be 'necessary', which requires that it:

(i) responds to a pressing need;

(ii) pursues a legitimate aim; and

(iii) is proportionate to that aim.[99]

114. Determination of what is proportionate is heavily dependent on the individual circumstances of the case. In ensuring equal and uninhibited access to justice, courts have to balance the interests of individuals with the need to manage case load and avoid unnecessary delays. The avoidance of delay is, in itself, part of ensuring better access to justice for genuine litigants.[100] While restrictions impacting on the right to a fair hearing are allowed in some cases, courts have acknowledged that a restrictive interpretation of the right to a fair hearing should not be taken.[101]

115. In *R v HM Attorney General, ex parte Andy Covey*,[102] the UK High Court made it clear that the process of declaring someone a vexatious litigant was not necessarily an unjustified interference with their right of access to the court. Restriction of a vexatious litigant was required for legitimate protection of the legal process as well as those against whom the respondent may decide to litigate in the future. The court held that exclusion was the only proper course in the circumstances and it did not amount to a denial of the respondent's access to a court under art 6. The European Court's jurisprudence recognises the need for

[99] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985).

[100] Sir Anthony Clarke, *Vexatious Litigants and Access to Justice: Past, Present and Future*, First Keynote Address, Conference on Vexatious Litigants (30 June 2006) <www.judiciary.gov.uk/publications_ media/speeches/2006/sp300606.htm> at 21 December 2006.

[101] *Moreira de Asevedo v Portugal*, 11296/84 [1990] ECHR 26 (23 October 1990).

[102] [2001] EWCA Civ 254.

the reasonable and proportionate ordering by the court of its processes, including the requirement of a filter in some cases to ensure that the court processes are properly used.[103]

5. Implications of a Human Rights Framework for the Inquiry – Access to Justice

Regardless of means, all Australians should have access to legal services.

(Law Council of Australia Submission to the Federal Budget 2009 -2010)

5.1 Substantive Elements in the Right to a Fair Hearing

116. When the substantive elements of the right to a fair hearing are not adequately protected, the importance of the procedural elements of the right are diminished. For instance, there is no point in having procedural safeguards such as expedience and equality of arms, when an impecunious claimant lacks the financial means to access justice in the first place.

117. The Law Council of Australia has articulated this position well. In a recent submission to the Federal Government, the Law Council of Australia (**Law Council of Australia Submission**) stated that:[104]

> [e]quality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.

118. The Law Council of Australia has further stated that 'when legal assistance is not available to the economically and socially disadvantaged in our community, the integrity of the justice system is challenged.'[105]

119. Clearly, the disadvantaged and the impecunious are at greater risk of having their substantive rights to a fair hearing limited.

120. Legal aid funding has been identified as one of the important ways to enhance a person's right to a fair hearing. In recent years, numerous consultations and inquiries have raised concern about the lack of adequate legal aid funding in Australia. The following summary of the findings from these consultations and inquiries is aimed at assisting the Committee in

[103] Rosalind English, *Human Rights Update* (2000) One Crown Office Row, <www.humanrights.org.uk/374/> at 21 December 2006.

[104] Law Council of Australia, *Legal Aid and Access to Justice Funding 2009-10 Federal Budget*, 9 January 2009.

[105] Ibid.

addressing two of the specific terms of reference to this Inquiry – being the adequacy of legal aid and the adequacy of funding and resource arrangements for community legal centres.

121. In June 2004, the Legal and Constitutional References Committee (**Committee**) reported on their inquiry into the capacity of the legal aid and access to justice arrangements to meet the community need for legal assistance (**Fourth Report**).[106] A brief history of funding to legal aid, as reviewed in the Fourth Report, demonstrates the shortfalls that need to be addressed in this area. Prior to 1997 the legal aid commissions (LACs) of each state and territory were responsible for determining their own budget priorities and expenditure. The Commonwealth participated in such decisions through the Commonwealth Attorney-General's representation on the board of LACs. In 1996, the Commonwealth withdrew from this arrangement, and since July 1997 the state and territory legal aid commissions have been restricted to allocating Commonwealth funding to matters arising under Commonwealth laws.[107]

122. In summary, the Fourth Report provides facts and figures in relation to the level of legal aid funding which evidences that, prior to 1996, the Commonwealth made a proportionally greater contribution to legal aid than the States and Territories, but that since that time this has been reversed. Submissions from each state and territory LAC, relied upon for the Fourth Report, lamented that there is an insufficient level of Commonwealth funding. In conclusion, the Committee recommended a return to cooperation between the Commonwealth and state/territories, suggesting that this would reduce administrative costs and bureaucratic difficulties that people face where matters do not clearly fall within one jurisdiction. More importantly, the Committee recommended that such a move would signify a cooperative approach to meeting the obligation that a civilised society owes to its citizens in providing access to justice, particularly those who are already disadvantaged.

123. The Committee has previously conducted similar inquiries into the legal aid system in Australia, presenting reports in March 1997, June 1997(**Second Report**)[108] and June 1998 (**Third Report**),[109] and each time expressed concern at the level of Commonwealth funding of legal aid. In its Second and Third Reports the Committee expressed its basic disagreement with the Commonwealth Government's decision to no longer accept responsibility for the

---

[106] The Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004 (**Fourth Report**).

[107] The Commonwealth sets the priorities, guidelines and accountability requirements regarding the use of Commonwealth funds.

[108] Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Second Report*, June 1997 (**Second Report**).

[109] Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, June 1998 (**Third Report**).

funding of any matters arising under state and territory laws. However, it is evident from the Fourth Report that the Committee's concerns have largely remained unheard.

124. More recently, in March 2008, the VLRC produced a report from its Civil Justice Review Inquiry. On achieving greater access to justice, the VLRC stated that adequate legal aid funding is an essential component of the civil justice system and strongly supported the call for greater funding for legal aid in civil matters.[110] The VLRC received many submissions that documented a critical lack of legal aid funding for civil matters. The VLRC noted that there is substantial demand for legal assistance that is met by way of pro bono assistance, and considerable demand that is not met at all. The VLRC was of the opinion that the Government should not rely on the pro bono sector to fulfill what is a fundamental government responsibility.

125. Similar to the VLRC, the Committee has also previously raised concern about the pressures placed on the pro bono sector due to the inadequacy of legal aid funding by the Commonwealth.[111] The Committee reported that other parts of the legal system were 'increasingly unable, or in some cases, unwilling to fill the gaps caused by the Commonwealth's unilateral action' in changing the basis of legal aid funding.[112] Indeed, many submission to the Committee's 2004 Inquiry from a vast range of interested bodies argued that pro bono legal services should not be seen as a substitute for legal aid funding[113] and raised concern over the Government's increasing tendency to promote pro bono services as the answer to gaps in service provision.[114]

126. Considering the amount of pro bono assistance undertaken by community legal centres (**CLCs**), it is not surprising that the evidence in favour of investing in CLCs is compelling. For example, the National Association of Community Legal Centres (**NACLC**) has found that investing in access to justice issues reaps benefits for the individual, the community and the

---

[110] The Law Council of Australia has also stated that the provision of legal aid for civil law matters will remove a substantial barrier to access to justice, see above n 104, 7.

[111] Fourth Report, above n 106, 169, [9.33] to [9.34].

[112] Third and Fourth Report, above n 106, 169, [9.33].

[113] A representative from the Attorney-General's Department at the Second National Pro Bono Conference, Sydney, 20 October 2003; Fitzroy Legal Service, 33; Federation of Community Legal Centres (Vic) Inc., 5; Community Legal Centres Association (Western Australia) Inc, 18; Blake Dawson Waldron Lawyers, 10; Public Interest Law Clearing House, 23; National Pro Bono Resource Centre,2; The Law Society of New South Wales, 3; Law Institute of Victoria, 10, 12; the Law Society of South Australia, 3; Castan Centre for Human Rights Law, 8-9; National Legal Aid, 20-21.

[114] National Legal Aid Submission, 20-21.

economy.[115] As well as the intrinsic benefits of providing legal and welfare services to vulnerable individuals, CLCs undertake preventative work by engaging in community education, law reform and policy reform work.[116] The HRLRC supports the view that 'the value of this preventative work is far greater than the reactive costs that would be incurred in the absence of such services'.[117]

127. Indeed, the NACLC estimates that, for every dollar invested in CLCs, around $100 may be saved by CLC clients, government and other affected parties.[118] For this reason, an upfront investment in CLCs is more cost-effective than not investing (or inadequately investing) in CLCs.[119] However, in spite of the strong economic rationale for investing in CLCs, funding has failed to keep pace with the increased costs of providing these services.[120] The NACLC estimates that, over the last decade, CLCs have in fact experienced an 18% reduction in levels of funding.[121] The HRLRC supports recommendations that funding for CLCs should be steadily increased to enable them to build capacity and maximise benefits to the individual and the wider community.[122]

128. The Law Council of Australia Submission supports the view of the VLRC and the findings in the Committee's Third and Fourth Reports in relation to legal aid funding for civil matters. The Law Council of Australia has noted that as a result of the Commonwealth funding reductions of the mid-1990s, all Legal Aid Commissions shut down – or dramatically reduced – their civil law legal aid programs.[123] The Law Council of Australia also observed that with the Commonwealth funding family law legal aid, most state/territory revenue is used up in the

---

[115] Institute for Sustainable Futures, *The Economic Value of Community Legal Centres*, February 2006, p 4 available at: http://www.naclc.org.au/multiattachments/2305/DocumentName/EconValueISFRpt0306.pdf

[116] Ibid.

[117] Emma Partridge in National Association of Community Legal Centres, *Community Legal Centres Across Australia: An Investment Worth Protecting*, January 2008, [7], available at: http://www.naclc.org.au/multiattachments/2300/DocumentName/NACLC_fund08_CMYK.pdf

[118] See Institute for Sustainable Futures, *The Economic Value of Community Legal Centres*, February 2006, p 4 available at: http://www.naclc.org.au/multiattachments/2305/DocumentName/EconValueISFRpt0306.pdf

[119] Ibid.

[120] See Emma Partridge in National Association of Community Legal Centres, *Community Legal Centres Across Australia: An Investment Worth Protecting*, January 2008, [7], available at: http://www.naclc.org.au/multiattachments/2300/DocumentName/NACLC_fund08_CMYK.pdf, p 2.

[121] Ibid.

[122] Ibid, p 6.

[123] Law Council of Australia, above n 104, 6-7.

provision of criminal law services.[124] More broadly, figures compiled by the Government of Western Australia in 2008 and by National Legal Aid in November 2007[125] further reinforce that the recurring concerns raised by the Committee in its Third and Fourth Reports have not been adequately addressed.

129. Australia has an obligation to provide for the effective realisation of the right to a fair hearing. The inadequacy of legal aid funding, as evidenced by the Committee's previous reports, the VLRC and the Law Council of Australia, indicates that Australia has much ground to cover in order to enhance compliance with its international human rights law obligations in this area.

130. The HRLRC endorses the conclusion previously reached by the Committee as well as the recommendations made by the Law Council of Australia and the VLRC, that there is a need for greater legal aid funding. Indeed, the provision of adequate funding for legal aid services would represent a commitment from the Commonwealth Government to the principle that Australians are entitled to justice and to assert their legal rights regardless of their financial circumstances. The HRLRC further submits that legal aid funding, resulting in an increase in the availability of legal advice and representation, and other reforms guaranteeing the basic elements of the right to a fair hearing, would enhance the protection of the human rights of litigants.

5.2 Procedural Elements in the Right to a Fair Hearing

131. The terms of reference to the Inquiry has also required discussion of the procedural safeguards afforded by the right to a fair hearing. Teachings from similar inquiries in the UK suggest that reforms to the legal system should not be overly concerned with procedural aspects such as cost and efficiency.[126] Considerations for the effective administration of justice should not compromise the fairness or probity of proceedings, the quality of decisions or the independence of the judiciary.

5.3 Conclusion

132. The HRLRC submits that any proposed reform resulting from the Inquiry should not be overly concerned with the complexity, costs and delay of litigation, but should rather reflect *all* the

---

[124] Ibid

[125] Law Council of Australia, above n 104, 3.

[126] See generally the terms of reference for the review of the United Kingdom Crown Office List – Lord Bowman, *Review of the Crown Office List: A Report to the Lord Chancellor*, Lord Chancellor's Department, London, 2000; and see for example: Tom Cornford, 'The New Rules of Procedure for Judicial Review' [2005] 5 Web JCLI, http://spade3.ncl.ac.uk/2000/issue5/comford5.html

elements of the right to a fair hearing. More importantly, the substantive elements of a right to a fair hearing should not be compromised by reason of simplicity, cost or convenience.[127]

133. Finally, the HRLRC submits that the development of policies and formal procedures that are compatible with the fair hearing provisions of the ICCPR and enshrined in other international and domestic human right instruments, would lead to better policy outcomes by ensuring that the needs of all Australians are appropriately considered.

[127] In weighing up the balance between protection for the substantive v the procedural aspects of the right to a fair hearing, see generally comments contained in: Human Rights and Equal Opportunity Commission, *Submission to the Migration Litigation Review*, http://www.hreoc.gov.au/legal/submissions/migration.html at 25 February 2009.