



Seeking Justice

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Access to justice is fundamental to a civilised society, yet it is out of reach for many Australians.

In a country that cites 'a fair go' as a defining value, access to justice surely goes to the heart of what it means to live in a truly fair nation of laws.

The right to access justice should occur regardless of where one lives, one's wealth, one's social status, one's capacity to speak English or any other factor.

The inescapable reality about ensuring meaningful access to justice, however, is that it costs money.

Citizens and other legal entities need more than the formal legal right to access legal institutions and defend their interests; they also require the practical means to do so.

This fact is broadly understood by Australians. In fact, most Australians believe that if they encounter legal difficulty and cannot afford a lawyer, they will be entitled to legal aid.

Unfortunately, in 2016, this is not the case. A severe drop in funding for legal aid over the past 20 years means that a strict means test is now applied.

At current funding levels, civil law assistance is virtually unavailable to anyone who is not in receipt of Centrelink benefits, meaning just five per cent of Australians now qualify for legal aid.

Even in cases where people pass the means test and other applicable tests, Legal Aid Commissions (LAC) in each State and Territory may still not have

enough funding to help them in criminal, family or civil law matters.

This leaves the vast majority of Australians without legal protection when they most need it. Many of those who do not qualify for legal aid are completely unable to afford the services of private lawyers to conduct their cases, or are unable to do so without significant hardship.

Increasingly restrictive means testing has left many people who live below the Henderson Poverty Line (an established measure of disadvantage) being denied legal aid.

In short, Australians are being denied access to justice because there is simply not enough government funding.

Furthermore, legal aid is not provided for every type of legal problem. Due to the scarcity of resourcing, the focus tends to be on matters involving children, such as family law, or on people who are at high risk of imprisonment.

As a result, other important matters such as housing, financial or employment issues are forced off the agenda.

Small wonder then that the number of unrepresented litigants in Australian courts and tribunals has been growing significantly over the past two decades.

Individuals are being left to battle well-resourced corporate opponents, abusive former partners or government agencies without any legal assistance or representation at all.

So how did we get to this point?

THE DECLINE OF LEGAL ASSISTANCE

In July 1997, the Australian Government changed its arrangements to directly fund legal aid services for Commonwealth law matters only – part of what is generally known as the 'Commonwealth/State funding divide'.

The drop in funding coupled with restrictive Commonwealth guidelines on where Commonwealth-funded assistance can be given has resulted in a significant reduction in Commonwealth responsibility for national legal aid.

Subsequently, the ratio of federal-to-state funding, once matched dollar for dollar, has slumped dramatically. The Commonwealth's share of total spending on legal aid has declined from 55 percent before 1996-97 to 32 percent today.

In dollar terms, the Commonwealth's contribution to Legal Aid Commission funding has reduced significantly, from around \$10.88 per capita in 1996-97 to around \$8.01 per capita.

In addition to Commonwealth and State Government payments, Legal Aid Commissions receive funding from the Public Purpose Funds, which are largely derived from the interest on funds held in trust by solicitors. Yet this source of revenue is vulnerable to economic fluctuations and the changing nature of transactions. With the economic downturn, distributions from these funds have been greatly reduced.

The gradual but steady erosion in Commonwealth funding was dramatically accelerated in 2014 when a new Federal Government used its first budget to drastically slash legal assistance services as part of its cost saving drive.

Multiple representations from the Law Council and other law societies and bar associations throughout 2014 fortunately resulted in the reversal of this decision in the 2015 budget.

The pre-existing structural problem, however, remains.

THE SITUATION TODAY

The Commonwealth Government may have reversed the most devastating single round of cuts to legal assistance services in the 2015 budget, yet failure to commit any additional funds to legal aid has still left a huge gap in service access.

A substantial further decline in Commonwealth funding for LACs is expected over the forward estimates, a funding decline that looks set to have serious consequences not just for the availability of legal aid, but also on the functioning and cost of the justice

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system as a whole.

In a 2009 report, PwC estimated that a \$1 cut in legal aid funding costs the Australian Government between \$1.60 and \$2.25 in reduced efficiency of the courts alone.

This figure is shocking enough, but consider what it does not include. The unmet legal need leads directly to costly social problems like unemployment, homelessness, familial breakdown, crime and recidivism.

We know that lives – especially those of vulnerable individuals – are often derailed by adverse justice outcomes or unmet legal need.

Without legal aid to mitigate against this risk, there are unquestionably greatly increased demands on public health utilities, mental health services, unemployment benefits, community programmes, and police resources.

The broader economic ramifications were rammed home in December 2014 when the Productivity Commission published the findings of its inquiry into legal assistance.

Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging, the Commission wrote.

However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as healthcare, housing and child protection.

Observing that "numerous studies" had shown that "efficient government-funded legal assistance services generate net benefits to the community," the

Commission made it crystal clear that greater funding was the only genuine solution.

"While there is some scope to improve the practices of legal assistance providers, this alone will not address the gap in services. More resources are required to better meet the legal needs of disadvantaged Australians," it found.

It recommended that civil legal aid needed an immediate \$200 million injection in additional funding from the Federal Government. The Commission noted that while \$200 million was never

easy to stumble upon in the modern climate, in this case, such an investment was wholly warranted.

Yet despite the Productivity Commission's careful research and rational conclusions, meaningful action from the Federal Government remains – at this stage – non-existent.

To address the growing gap in funding, the legal profession has increasingly stepped up efforts in the field of pro bono work and reduced-rate legal services. In many cases, firms have also accepted legal aid briefs at unreasonably and unsustainably low rates.

The problem is that this situation simply cannot be relied upon to continue. Furthermore, the early signs of a collapse in the good faith necessary to provide these services are already showing, with the withdrawal of law practices from legal aid work.

The simple fact is that the legal profession's pro bono contribution can never truly replace the responsibility of government to provide access to legal assistance for those who cannot afford it.

If Australia is serious about providing access to justice then there is no escaping that the Commonwealth, as the largest revenue-raising entity, must bear primary responsibility for the substantial shortfall in funding for legal assistance services.

IT IS TIME FOR CHANGE

The Law Council of Australia has long been committed to fighting for a revitalisation of legal assistance, and the victory in reversing the 2014 budget cuts was a significant one.

Nevertheless, it is the Law Council's view that as a profession we need to recognise that if Federal Government funding for legal aid has been allowed to slip for a generation, it is because the case for its retention has not been persuasive enough.

It has been too easy for a list of Federal Treasurers to simply bump legal assistance down the list of priorities until it falls off the bottom.

Despite the abundant evidence – including the Productivity Commission's detailed report – Attorneys General from the late 1990s onward have been unable to make the case that funding for legal aid should leapfrog other priorities.

That is why in this election year the Law Council has been campaigning to urge the Commonwealth to increase its legal aid funding to equal the current

contribution of the States and Territories.

As the legal year opened on 1 February 2016, the Law Council, together with its constituent bodies from across the nation, announced a coordinated national campaign on legal aid funding.

The key objective is raising public awareness of the need for greater Commonwealth funding for legal assistance services, specifically Legal Aid Commissions, Aboriginal and Torres Strait Islander Legal Services, Community Legal Centres and Family Violence Prevention Legal Services.

The key messages of the campaign are simple:

- The Commonwealth needs to increase its share of funding to legal aid commissions to equal that of the States and Territories;

- The Commonwealth, States and Territories should immediately and additionally contribute \$200 million to cover civil legal assistance, as recommended by the Productivity Commission.

During 2016, the Law Council has and will continue to work with law societies and bar associations and with political representatives.

Those of us in the legal profession understand how critical an issue legal assistance is, and the devastating impact the structural funding crisis is having on our court system and beyond.

The current election year provides a perfect opportunity to make the case for adequate legal aid funding.



JUSTICE OUT OF REACH

A solicitor at the coalface of legal aid services recounts the lived experience of those impacted when access to justice is out of reach:

"We are one of a small number of specialist centres that are part of a National Welfare Rights Network across the country that assist people who are having legal problems with Centrelink.

Many of our clients are simply mums and dads who developed serious illness and don't know their options or have experienced difficulty accessing entitlements from the opaque and complicated social security system.

We are swamped with people needing assistance and on a daily basis we need to make difficult decisions about who we can and can't help. If we meet someone with a complex situation, we need to weigh that up against the possibility of helping several people with less complex issues. Either way, people miss out.

Sometimes the best we can do for people is give them a kit of information and send them on their way. We seldom know the outcome for these people. We do know that many become homeless without access to justice.

Many of our clients have already or are likely to lose the roof over their heads through no fault of their own.

For example, Bill had an acquired brain injury but was working and was married with three children living at home. His partner became seriously and suddenly ill and epileptic and could no longer work or care for the family.

Bill needed to stop working to look after their insulin dependent baby, his wife and the other school-age children. He would have been eligible for social

security had it not been for the fact that he had received a compensation payment for his acquired brain injury, which he used to buy a house. We were able to have the Centrelink exclusion period varied, but without such assistance, it is likely his whole family would have become homeless.

We see similar cases again and again and our service is oversubscribed by 50 to 100 percent. We would love to be able to contribute to solutions that resolve the systemic access to justice problems, but our resources are so stretched, there's little opportunity to focus on the big picture. This is the challenge for policy makers — and we hope they rise to this challenge. Soon!"

Graham Wells,
Principal Solicitor at Social Security Rights Victoria.