

If I Were Attorney-General...

Barriers to Justice: Access to Legal Services

There is an appalling lack of funding by Australian governments for the provision of legal assistance in relation to civil law matters.

In 1997/1998, the Commonwealth Government removed \$20 million from its funding of legal aid services. The pre-1997 funding levels have never been restored and the current funding levels are, in real dollar terms, less than they were in 1996/1997. The cuts to Commonwealth legal aid funding were coupled with the abandonment of the 'cooperative' model of funding which had allowed legal aid commissions to use funds from Commonwealth and State governments as they considered appropriate. This meant that federal funds could no longer be used to fund criminal law matters and civil law matters arising under state law. At the same time as the funding cuts, the Commonwealth introduced the 'purchaser/ provider' model which saw the government set guidelines which restricted the spending of Commonwealth legal aid funds on specific legal matters arising in the federal jurisdiction only.

This funding model has resulted in there being few or no government-funded legal assistance services in many areas of civil law. Clients with civil law matters, other than family law or Children's Court matters, will, in rare circumstances, receive assistance from legal aid commissions. More often than not, they are ineligible for legal aid funding and seek assistance from community legal centres or pro bono lawyers. Community legal centres, some of whom receive federal government funding, are not resourced to a level adequate to be able to advise on the range of civil law matters which arise and to issue and conduct proceedings.

Pro bono referral schemes, like the Public Interest Law Scheme, the Law Institute of Victoria Legal Assistance Scheme and the Victorian Bar Legal Assistance, have seen an increase in requests for assistance in meritorious civil law matters, particularly in relation to migration, bankruptcy, and employment law. Pro bono barristers and solicitors make a major contribution to securing access to justice for many individuals who cannot afford legal assistance, but who require advice or representation in relation to a legal issue which they are facing. However, there are limits to the capacity of pro bono lawyers to assist. Some matters are too large and 'open-ended' to refer to pro bono lawyers. In some circumstances, solicitors may have legal or commercial conflicts which prevent them from acting. Some matters do not fit the 'pro bono profile'; they may be about a case where a party took a commercial risk which back-fired and such cases are not considered appropriate for or deserving of pro bono assistance. Pro bono has also only made limited in-roads in addressing the lack of access to legal services by Indigenous people and individuals living in rural and regional areas.

The lack of affordability of legal services and the lack of government-funded legal services leads to individuals self-representing at all levels in the court system. In 2002/2003, 38% of parties in the Federal Court were self-represented litigants; in 2004, the Family Court reported that 47% of parties were self-represented at one stage; in the High Court in 2005/2005, in immigration, 88% of matters involved self-represented litigants. Self-represented litigants place a large burden on the court systems. However, most significantly, individuals' substantive rights are undermined when they do not have legal assistance and they try to represent themselves in the court system but are without the skills and knowledge to effectively do so.

The protection and promotion of fundamental rights requires that there be an effective remedy available in circumstances where those rights have been violated. Obtaining an effective remedy will, in many cases, require access to legal advice or representation to fully vindicate the breach of rights which has occurred. It is important that, in the first instance, people have access to legal advice and information to understand whether or not they have a claim or a defence, and if they do have a meritorious case, that they have the legal representation required to vindicate their position through further litigation processes.

If I were Attorney-General, I would seek to implement the proposal for the 'Restoration of a National Civil Legal Aid Scheme' developed by the Australia Legal Assistance Forum and discussed at the Access to Justice and Pro Bono Conference in Melbourne in September 2006. This proposal envisages that civil legal assistance would be available to an individual who meets a means test and who:

1. *has right of action against a person, a corporation or government which is justifiable in a court or a tribunal of competent jurisdiction;*

2. *has been or is likely to be the subject of action in such a court or tribunal; and*
3. *has a legal position which is assessed as having such merit, viz it passes the 'reasonable prospects of success' test, the 'prudent self-funding litigant' test and the 'appropriateness of spending public funds' test.*

Importantly, under this model, funding would be staged and would start with funding for taking instructions and negotiations, and move through to funding for representation at a hearing.

Another key aspect of this new proposal is that the scale of fees to lawyers accepting briefs to act from legal aid commissions should not be less than the scale fee provided for in the rules of the jurisdiction in which the matter would ordinarily be litigated, or such fees as would ordinarily be paid by the prudent self-funded litigant in case where no scale is available. This is essential if private lawyers are going to continue to be willing to accept legal aid work.

Legal redress should not be closed off to members of the community who have suffered a legal wrong, yet are without the means to pay for legal services. The restoration of a proper civil legal aid scheme by the Commonwealth is essential if the legal system is to offer individuals the chance of finding justice.

Paula O'Brien is Executive Director of the Public Interest Law Clearing House (Vic)