



4 November 2010

Access to Justice
Productivity Commission
PO Box 1426
Canberra City ACT 2601

THE KINGSFORD
LEGAL CENTRE

By email: access@kingsford.com.au

Dear madam / sir,

Submission on access to justice arrangements inquiry

The Kingsford Legal Centre (KLC) appreciates the opportunity to make submissions on your inquiry into access to justice arrangements. Our submissions are drawn from the experiences of our clients and staff in dealing with the law and legal system with a focus on our case studies have been de-identified to protect our clients' confidentiality.

KLC is a community legal centre (CLC) and a member organisation of the National Association of Community Legal Centres (NACLC).

We provide free advice and casework on a wide range of legal matters for people living, working or studying in the Botany and Randwick local government areas. We also provide a specialist domestic violence and sexual violence service. NACLC is a national participant in the Australian Community Legal Centres Network (ACLCCN).

Reform of which particular aspects of the current legal system will generate the greatest benefits for the community?

We submit that the community would benefit from a reform of the civil dispute resolution system and where they can go for help with their legal services and legal services is a model which needs to be promoted to community members to be able to access the help they need.

In the research conducted by the Law and Justice Foundation, Coumarelos, et al, the significant gap of where people go for help from when they have a legal problem cannot be overemphasised. This research found that the most common source of legal help is a lawyer.

We submit that the report research done by the Law and Justice Foundation, which found that many people do not see lawyers about their legal problems, is a significant finding. For this reason, we think it is essential to create a legal system which provides help to people where they are seeking help.

¹ Coumarelos, Macourt, People's Legal Aid Network Wide Survey, Legal Need in Australia, Aug 2012.

re... in that situation, gets orders for the child and Paul is found guilty of assault and
breaches of the... Many women would not persist with such a

What are the benefits to individuals and the community of an accessible civil justice resolution system? How does a failure to provide access to justice on individual and the community broadly?

Inadequate access to justice means that...
continuing to resolve...
help then problems become more serious.

Jo and Susie

Jo and Susie live in a Homeless... linguistically diverse background. They have two children, one of whom has been... occasionally over the last few months. Their son, who has been staying with them, has had trouble getting a job and has had a few interactions with Police. One afternoon the son is visiting, been drinking alcohol. He threatens and...

After this, Housing NSW begin eviction proceedings on the basis of Jo and Susie's son's violence.

Jo and Susie are distraught by what their son has done and about the real risk that they will be homeless. KLC is able to negotiate with Housing NSW and a solution is reached which enables Jo and Susie to stay in their home, enables their neighbours to be safe, and their son to get help with his violent behaviour.

If they hadn't been able to get help... they could have ended up with debts to a range of service providers and dealing with a violent son without support.

What are the consequences of unmet legal need? For example, economic impacts arising from problems that can be traced to a lack of access to legal assistance?

The consequences of unmet legal need are many and varied. All clients seek advice from KLC at different stages of their dispute, we have the benefit of seeing the impacts arising from a lack of legal assistance earlier in their disputes.

Our clients have missed out on making claims for money they may be entitled to because they are ineligible for statutory compensation entitlements and real estate bond because they were not made aware of their rights as victims of violence, employees of...

Some of our clients have experienced financial loss because of a lack of legal assistance with their matter. By providing legal advice early in a dispute, we are able to mitigate losses clients may have in their matter in court.

Natasha

Natasha's hand was injured by her friend's garage door when the door was closing. Natasha incurred medical costs as a result of the injury she suffered.

Natasha sought advice from us about suing her friend's home insurer for the medical costs she incurred. Natasha did not...

Exacerbated by the removal of her children, Sarah began abusing alcohol and drugs. Sarah was eventually charged with driving under the influence of alcohol and drugs and sentenced to a period in gaol.

Sarah lost faith in the legal system after she learned that the Children's Court had ordered that her children live with John.

Some unresolved civil disputes, particularly matters involving domestic violence and family law disputes, Australian Institute of Criminology study analysis and 1999 found that 20.6% of all homicides involve intimate partners.

We also submit that unmet legal need also impacts more broadly on the community, increased demand for public social welfare services, such as public housing, social security and the care and protection system and in some cases, Corrective Services.

Disputes that have escalated to the point of needing an independent person to adjudicate costs and expenses for parties.

The financial and emotional impacts of individuals involved in unresolved causes individuals to be less impact on the labour market. Loss of faith in the legal system or public authorities adequately deal with disputes between parties can lead to civil unrest.

and the extent to which these costs dissuade complainants from pursuing resolution.

Data

financial costs, including the costs of advisory services, attention and litigation.

The current federal framework for discrimination is complex and creates significant barriers to access to justice. In our experience, the most significant barrier for people experiencing discrimination is the risk of incurring costs in the Federal Court system.

As a result of the adverse costs order, many disadvantaged complainants are reluctant to even lodge complaints with the Australian Human Rights Commission (AHRC), preferring state-based tribunals where parties bear costs on a party-party basis. At the federal level, KLC's experience is that courts at a federal level have not developed robust jurisprudence in this area of law. Decisions by the Federal Court are critical to the development of discrimination law in Australia, and in discrimination law developing a strong normative and educative role within the community.

The system as it presently stands is a war of attrition. Only very strong cases are settled. Individual complainants are unable to face the risks and pressure of litigation against well-resourced respondents.

Darren

Darren worked as a labourer in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer never believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medical condition affecting his ability to do his job. Darren's doctor stopped his work.

Darren lodged proceedings with the AHRC which failed to settle. A QCAT officer advised Darren that his case had the potential to be successful.

In our experience the costs associated with obtaining a court and tribunal proceeding below demonstrate some of our concerns.

Jane

Housing NSW initiated proceedings in the NSW Civil and Administrative Tribunal (NCAT) against an older Aboriginal woman receiving Centrelink. During the proceedings, Jane thought she heard the Housing NSW representative make racist comments during the proceedings, and there was evidence of racist comments in the transcript. Jane made a complaint about the proceedings to the NSW Ombudsman and the NSW Anti-Discrimination Board.

A private agency, who Jane engaged to obtain a copy of the transcript of the proceedings, charged her a fee of \$600 for a copy of the transcript of the two proceedings, plus the Guardianship Tribunal. No fee waiver was available. Jane could not afford to pay for the transcript and therefore could not be sure whether racist comments were made and could not consider taking action against Housing NSW if racist comments had indeed been made.

Sam

We represented Sam who was a victim of domestic violence. She had an apprehended domestic violence order (ADVO) to protect her from her husband. Sam's husband continued to call and harass her after the ADVO was made. Sam's husband was charged with breaching the ADVO. The police did not put forward enough evidence to show that her husband had breached the ADVO. We needed a copy of the court transcript in order to complain about the Police Prosecutor. We were aware that it would cost several hundred dollars to obtain a copy of the transcript. Sam could not afford to pay for the transcript.

The Commission invites comments on the timeliness of civil dispute resolution. Data are sought from you on the time taken to resolve disputes, both in and out of court, and the timeliness of individuals with timeliness.

We are particularly concerned with the extensive delays in the NSW Civil and Administrative Tribunal (NCAT) acting under the Industrial Instruments Act 1987 (IIA) which deals with such matters as the recovery of money under industrial instruments, for example, awards, enterprise agreements and statutory entitlements.

KLC invites use of the CIMC in preference to the General Division of the Industrial Instruments Act 1987 by employers as it is more cost-effective and user-friendly than the General Division of the Industrial Instruments Act 1987.

We understand that one magistrate was determining all matters listed in the CIMC until he passed away recently. Matters are now being determined by other magistrates seconded to the bench on a temporary basis. This has resulted in hearings for relatively simple matters set down to be determined in five months' time by magistrates who arguably lack the necessary expertise in the areas typically dealt with by the CIMC. This is very frustrating for our socio-economically disadvantaged clients who need this money for everyday living.

The Commission and the NSW Consumer, Trader and Tenancy Tribunal (CTTT) are friendly, cost-effective means to resolve disputes between consumers and businesses.

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Mandatory conciliation through the NSW Consumer, Trader and Tenancy Tribunal (CTTT) is a friendly, cost-effective means to resolve disputes between consumers and businesses.

However, we are still concerned that particularly disadvantaged people (discussed below) may find it difficult to access justice in the CTTT mechanisms, particularly when they are involved in a dispute with a better resourced party.

We submit that this is particularly true for people who do not have legal advocates, who are able to represent the interests of the disadvantaged party to a dispute.

Does the way in which the laws are drafted or interpreted contribute to the complexity of the law, and if so, how can it be better resolved?

To ensure better access to justice and increased accessibility in the law, KLC supports greater consistency and clarity across federal legislation in relation to how discrimination is defined and tested. In relation to the interaction between the Fair Work Act and federal discrimination law, KLC notes that there is considerable overlap between the Fair Work Act and federal discrimination law remedies. This has made it confusing for complainants who work in areas where both provisions apply. This has made the provision of specialist advice in this area more crucial and complex.

There are limited opportunities for people faced with discrimination in employment to get free legal advice or other options from CLCs. We believe this lack of expertise has resulted in a number of CLCs seeing their role as experts in this area and believes that this is a barrier to understanding of employment law and accessing legal services. CLCs is required in order for people to be informed and to access their rights under both the Fair Work Act and federal discrimination law. KLC recommends that CLCs be further funded to provide specialist advice to people experiencing discrimination in employment under the Fair Work Act or discrimination law in order for them to be able to exercise their rights most effectively.

In relation to the interaction of adverse action provisions and other provisions, KLC notes that this is an area where the law remains considerably complex and there have been various decisions under the Fair Work Act including on the extent to which discrimination law concepts and jurisprudence informs the understanding of adverse actions based on a protected attribute under the Fair Work Act. In particular, it is unclear whether:

- the meaning of protected attributes is informed by corresponding protected attributes under Commonwealth, state and territory anti-discrimination laws; and

⁴ For example, in *Hodkinson v Commonwealth* (2011) 201 F.T.R. 100 (2011) and *Shaw v The Commonwealth* [2011] F.M.C.A. 171 (31 March 2011) it was held that the ordinary dictionary meaning of the term 'discrimination' under the Fair Work Act is not applicable. In *Shaw v The Commonwealth* (2011) 201 F.T.R. 100 (2011) it was held that the ordinary dictionary meaning of the term 'discrimination' under the Fair Work Act should be considered in the context of the anti-discrimination laws.

- the phrase “not unlawful” under section 351(2)(c) of the Fair Work Act refers solely to exemptions under Commonwealth, state and territory anti-discrimination laws, or whether that phrase requires elements of discrimination under another jurisdiction to be satisfied.

KLC believes that it is not desirable to have widely divergent understandings, definitions and tests of discrimination under the Fair Work Act. KLC also believes that some concepts under federal, state and territory anti-discrimination law are so different that they cannot be compared.

KLC supports greater consistency across federal legislation in relation to how discrimination is defined and tested in order to ensure better access to justice and increased consistency in the law. KLC supports this as long as it does not undermine the adverse action provisions of the *Fair Work Act*.

In order to achieve consistency, an exhaustive list of prohibited grounds of discrimination is preferred to a non-exhaustive list. A non-exhaustive list of prohibited grounds of discrimination is not consistent with the approach of Commonwealth anti-discrimination law.

The current approach of Commonwealth anti-discrimination law is to identify a ground of discrimination in an area of life. Where an individual seeks to claim more than one form of discrimination, they must take action where each ground and each form of discrimination is examined in isolation with a comparator without that characteristic.

Using the case of *Simon v Commonwealth Bank of Australia*, the court requires a complainant to identify a comparator. In *Simon*, the complainant was a woman with a disability and a racial background. In reality, the discrimination experienced is not merely disability discrimination plus race discrimination. In the actual case, the complainant made a complaint about her employer's comment about her disability and her racial background. It can be an impossible task to prove that the complainant's discrimination was linked to any one attribute in isolation of the others. The experience of discrimination is based on the combination of multiple attributes, and *Simon*'s experiences cannot therefore be adequately recognised as a complaint that simply identifies disability and race discrimination. As a result, cases such as this often fail and make it more difficult for the individual to accessing civil justice.

In KLC's experience, the definition of direct discrimination and the development of the “comparator” test have fundamentally constrained the development of discrimination law. The legal test that requires a comparison of the complainant with a comparator where there is no genuine comparator is often difficult to apply. The comparator (often hypothetical) often does not exist. Lack of clarity over the characteristics of the comparator is a common problem. Lack of clarity over the characteristics of the comparator in a case of discrimination is strong. In the context of a comparator test, this creates further disincentives for complainants to pursue their case.

In order for Commonwealth anti-discrimination law to better protect the rights of persons and ensure consistent outcomes, the law should recognise intersectional discrimination as a separate ground of discrimination and not artificially segment the experience of discrimination.

functional impairments or consequences in relation to presentation of work in a workplace [at 90].

In order to achieve this, KLC submits that the comparator test be removed, and that intersectionality be included in the definition of discrimination, and that it is the object of the intersectionality of multiple attributes. KLC therefore recommends that intersectional discrimination be a distinct ground of discrimination.

KLC further recommends that the definition of discrimination include the ability to claim discrimination on the basis of the intersection of these attributes.

In terms of other legislative models, KLC suggests that the Canadian Human Rights Act definition is preferred. KLC recommends that the definition include the words "on the basis of the intersection of two or more of" and "attributes" to reflect the concepts of intersectionality, and the fact that it is the intersection of attributes but the intersecting nature of identities.

Finally, KLC recommends that as intersectional discrimination affects individuals who are facing systemic disadvantage in preventing them from being disadvantaged in accessing the civil justice system, finding of intersectional discrimination should have a positive impact on the awarding of damages to reflect the impact of the intersectional discrimination on individuals and to further prohibit such conduct.

What is the nature of this disadvantaged?

KLC assists many people in accessing civil justice. The following groups are particularly disadvantaged in accessing civil justice.

- prisoners because they have limited access to legal information and advice, particularly about civil and family law and legal problems;
- people with disabilities because they have difficulty accessing legal services, identifying and resolving their legal matters, understanding and implementing legal advice, and that due to their disabilities;
- people with limited resources because they may have limited knowledge of the legal system, it difficult to assert their rights with people and agencies with authority, such as landlords, police and employers;
- victims of domestic and family violence because they may be a compromised perpetrator of violence;
- people who are socioeconomically disadvantaged who have limited resources to assess and enforce rights and may have complex, interrelated problems;
- people who are in a disadvantaged position and have limited resources to assert their rights;
- employees because they are in a disadvantaged bargaining position;
- Aboriginal and Torres Strait Islander people because of their position in our community and their relationship with government agencies; and
- sexual minorities because they may fear being outed.

individuals with a disability and single parents were particularly at risk of experiencing legal problems, and other groups with high vulnerability are the unemployed and people living in disadvantaged housing. Accessible infrastructure and transport are very important for people with a disability, and industry buses may be very useful in providing access for people with a disability.

Those groups particularly disadvantaged in accessing justice are those individuals who may experience complex forms of discrimination. We submit that anti-discrimination law has failed to adequately recognise and address these complex forms of discrimination which has meant that the law has not been utilised by most disadvantaged people in our country.

Intersectional, or compound, discrimination is where more than one attribute of a person's identity, for example, a person with a disability who is also an Aboriginal person, or an Aboriginal person who is also a woman, is a factor in their experience of discrimination.

Simon

Simon is an Aboriginal man from northern NSW who has a kidney condition that means he needs dialysis three times a week. He lives in a remote town so that he cannot access dialysis treatment, which he requires three times a week. Many Aboriginal people live outside their towns and do not have regular medical treatment. He is unable to use community transport to get to his dialysis appointments because he is unable to walk or drive. His family and other community members have tried to help him but they are unable to do so. Simon has no choice but to leave his community.

Simon is not being discriminated against because of his disability, as community transport is provided to others who require dialysis. Nor is he being discriminated against because of his race, as other Aboriginal people can access community transport when they are healthier and able to walk or drive to town. It is really the intersection between his disability and his race that led to the discrimination.

According to the Legal Australia Wide Survey on Legal Needs New South Wales, taking any action in response to legal problems was a more common response among socially disadvantaged or disadvantaged people with a low income, a low education level, a non-English speaking background, while inaction may be suitable in some circumstances, some reasons for inaction were stress (30%), cost (28%) or not knowing what to do (27%).

What is also the nature of a disadvantage for some groups accessing the civil dispute system is that they may find it difficult to effectively comply with the court rules and procedures. Therefore, KLC recommends that the courts give consideration to developing a more litigant-in-person system where the process is run by people who conduct their own matters.

What mechanisms help people deal with their own legal needs successfully and effectively?

Giving legal advice to clients at an early stage is an effective way of helping people deal with their disputes. KLC provides three levels of legal advice: early advice, advice to fifty clients,

⁵ Christine Coumarelos, (2017), Law and Justice Foundation New South Wales, August 2017.

every week for legal advice. While some of these disputes, others are not being able to access essential for members of the community.

Maria

Maria had a car accident two years ago, had no insurance at the time, but then never heard anything. The accident was her fault as she ran into traffic without checking. After two years she has received a letter claiming that damage was much more substantial than what she thought that the repairs were only been done in the last two months.

KLC was able to help her write a letter and was able to return to KLC for further help. She was able to reach her legal problem, without having to go to court.

One of the other key areas of work of CLCs, including KLC, is community development and law reform. It is important to have effective systems of resolving disputes. It also ensures that shared issues can be dealt with effectively.

KLC has recently worked with tenants' estates about getting their local tenant councils' and meetings with Housing NSW representative concerned especially around housing repairs.

KLC has helped tenants groups taught tenants how to write effective submissions and letters to members of Parliament. Some NSW and

How might ADR or settling is it appropriate to facilitate resolution of disputes?

KLC supports the appropriate use of ADR to resolve disputes. ADR is most effective when all parties to a dispute are able to participate in the resolution and resolve the dispute. ADR is most effective when all parties to a dispute are able to participate in the resolution and resolve the dispute.

We submit that an imbalance in power between the disempowered party engaged in ADR. We submit that ADR between the following parties may result in unjust outcomes to the disempowered party.

- victims of domestic and family violence with perpetrators;
- employees with employers;
- tenants with landlords;
- debtors with creditors;
- individuals with public authorities;
- people with disabilities and people with limited capacity to participate in ADR.

We submit that people who are unable to participate in disputes may be assisted by advocates who are able to represent their interests in ADR. CLCs commonly perform this role, negotiating on behalf of disadvantaged people who find it difficult to do so themselves.

Li

Asian Workers at Work, an organisation which aims to empower
us for advice about unfair dismissal.

Li was being bullied and threw tea at him.

Two days after this incident Li was called into a meeting with her superiors where she
Another... the meeting to deliberate her...
was not asked for her side of the... (dismissal) was...
realised that she was being dismissed until a team leader...

We presented Li in an unfair dismissal application at the Fair Work Commission. Our client wants
to be reinstated. We successfully negotiated for our...
arbitration...
with her employer to...
resumed her job.

We submit that the ADR better resourcing CLCs at
services to represent the interests of disadvantaged parties.

The Commission services in Australia.

KLC believes that the NSW...
... is inadequate. While the current system of...
of independent oversight by the Ombudsman, the Ombudsman's role is essentially limited to
oversight / review only. The Ombudsman's Office does less than 1%...
year.⁶

We submit that the current system...
officers investigating other police officers in the same station or same...
Area Command.

CLC solicitors have observed that...
... dem... of express...

- a lack of confidence in the police complaints system by potential (and actual) complainants;
- frustration with the process and... provided); and
- fear of (or actual allegations of) retaliation or retribution by police (e.g. next day laying charges against the complainant).

KLC...
are going unchecked

The Québec Ombudsman found that:

"in investigations of... incidents involving... officers... process must...
the rights of both the citizens concerned and the officers and must take...

⁶ Meeting with Mr Gleeson...

realities of police work and the circumstances of the events investigated. The process must ensure not only that justice is done, but also the “appearance of justice.”

In our view, the current system suffers from a lack of independence from a perception of bias (and impartiality).

Independence refers to the relationship and independence with regard to the subject of the investigation. It may be the relationship between the investigating organisation and the organisation involved.⁸

Impartiality refers to the absence of bias with respect to one of the parties involved in the events. With respect to enforcement of the ministerial duty, the concept of impartiality is closely related to the concept of the strength of police solidarity. One of the practices applied in Canada and the UK to address these concerns is to ensure that qualified and competent officers play a key role in the investigative process.

Investigations of complaints conducted to the great satisfaction of the Commissioner, a new independent

Some of the funds currently used by NSW Police and the NSW Ombudsman for oversight, could be reallocated for this purpose.

Please feel free to contact us should you have any questions about this decision.

Yours faithfully,
KINGSFORD LEGAL CENTRE

Anna Cody
Director

Kellie McDoñald
Solicitor

⁷ <http://www.protekturducitoyen.qc.ca/>

⁸ *The Québec Investigative Procedure for Incidents Involving Police Officers: For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, Le Protecteur Du Citoyen (Québec Ombudsman), February 2010, p. 7. Available at: <http://www.protekturducitoyen.qc.ca/en/>

⁹ *The Québec Investigative Procedure for Incidents Involving Police Officers: For a Credible, Transparent, and Impartial Process That Inspires Confidence and Respect*, Le Protecteur Du Citoyen (Québec Ombudsman), February 2010, p. 7. Available at: <http://www.protekturducitoyen.qc.ca/en/>