

# Access to justice

By Geraldine Collins

The Productivity Commission's 'Access to Justice' inquiry was announced in June 2013 by the then Assistant Treasurer, David Bradbury. It will examine Australia's system of civil dispute resolution, including constraining costs and promoting equality before the law.

The inquiry is already well under way: an issues paper was released in September and initial submissions were due by 4 November. The draft and final reports will be released in April and September 2014 respectively.

The Australian Lawyers Alliance has lodged its initial submission and has subsequently met with Commissioner Mundy. We anticipate participating in the public hearings and providing a response to the draft report.

The inquiry's basic starting premise is that civil dispute resolution should be fair, equitable, timely and affordable. While these are laudable objectives, the ALA is wary of the direction the inquiry may take. A strong indication of the views of the Commission was delivered in the *Disability Care and Support* report in 2011. The draft report was damning in its assessment of the value of common law in providing adequate compensation to accident victims, and effectively recommended its gradual abolition in favour of the development of a no-fault system similar to that established in New Zealand.

While this approach has not been fully adopted in the context of the *National Disability Insurance Act 2013 (Cth)*, there is certainly a link between the NDIS and the movement towards a no-fault scheme for catastrophically injured people. It is very likely that the common law will remain a prime target in the future.

Of particular concern to our profession is the inquiry's emphasis on legal costs. Aspects of the costs of accessing justice and their impact on accessing legal representation under scrutiny will include:

- The trend of demand, effectiveness and costs of legal services;
- Factors contributing to the costs of legal representation;
- The structure of the legal profession;
- Court practices and procedures;
- Models of costings;
- Whether costs are proportionate to the amount in dispute;
- The capacity of disadvantaged people to access representation;
- Overseas reforms that have lowered legal costs; and
- Alternative dispute resolution models.

We believe that it is vital that the Commission obtain a comprehensive understanding of the issues facing clients in civil disputes. A simplistic approach could attribute

rising costs of representation and barriers to accessing appropriate legal services solely to the 'devious work of greedy lawyers'.

In fact, many factors contribute to the rising costs of providing legal services.

Firstly, the introduction of thresholds to access common law entitlements has resulted in the near-compulsory undertaking of litigation. Clients frequently have no option but to litigate in order to access their legal rights. The power imbalance between an insurer and an individual client is enormous. The insurer may seek to conduct litigation as a war of attrition against the individual. Costs can thus be escalated significantly by the conduct of one party.

Another significant contributing factor is the continual and long-term erosion of funding for Legal Aid and Community Legal Centres (CLCs) on a national level. This erosion has occurred over many years, to the extent that Legal Aid is unable to fund anything other than major criminal matters, and the CLCs face an ever-increasing tightening of budgets.

It is not for government to decide whether a civil dispute should be litigated. While a dispute may be of a relatively low financial quantum, the matter may be of great significance to the individual involved. The importance of such considerations – which are not necessarily economic – should not be disregarded when examining access to justice.

Certainly we do not condone inappropriate billing by legal professionals. But there are already disciplinary procedures to deal with any inappropriate practices – several high-profile cases demonstrate that these mechanisms are alive and working well.

Improving access to justice is central to the ALA's mission as an organisation. But it is also complex, underpinning our notions of individual identity, rights, safety, social norms and the fundamental fabric of our society. Ensuring adequate and timely legal representation at a reasonable cost will therefore not be achieved by examining only those factors that can be assessed through an economic prism – justice runs deeper than that. Limiting people's rights or denying them the benefits of legal representation and advocacy should have no place in meeting this challenge. ■



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