

22 February 2016

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Access to Justice Review
Department of Justice and Regulation
Level 24, 121 Exhibition Street
Melbourne VIC 3000

Dear Ms Richards, Ms Hunter and Ms Leonard,

Access to Justice Review Submission

Thank you for the opportunity to make a submission to the Access to Justice Review. My research and teaching focusses on access to justice particularly as it relates to the poor and disadvantaged. Most recently this has concentrated on ethics in mediation and integrated legal services in health care settings. I was a director of Victoria Legal Aid for 12 years (2000- 2012) and have been involved with community legal centres for over three decades. I have coordinated the clinical legal education program at La Trobe and participated in the *Best Practices in Clinical Legal Education* project.

This submission addresses the following aspects related to the Review's terms of reference:

- Definition of access to justice;
- Complex legal need;
- Integrated legal service delivery model;
 - challenges of 'joined up' services
- Increased use of Alternative Dispute Resolution;
 - Alternative Dispute Resolution and legal education;
- Role of Law Students in Improving Access to Justice;
- Legal Aid Impact Statements; and
- Maintenance of efficient and effective mixed model of legal assistance services.

Definition of Access to Justice

A preliminary matter is the definition of 'Access to Justice'. In the early 1970s concern to improve access to justice came from a realisation by many in the legal arena that the liberal claim of a justice system that ensured 'equality before the law' was a mere formal right with little substance and practical effect. Although the Productivity Commission canvassed a range of difficulties with defining access to justice it concludes a simplified approach by stating access to justice means, 'making it easier for people to resolve their disputes'. However I submit that access to justice is not just about access to courts and tribunals and is much more than the resolution of disputes. It encompasses how people navigate and are treated in the many transactions (with legal consequences) that comprise everyday life particularly those that are administered or involve government agencies. It is in these encounters that 'equality before the law' is experienced by most people.

As Marc Galanter states:

Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

Marc Galanter, 'Justice in Many Rooms' in M Cappelletti (ed.), *Access to Justice and the Welfare State*, 1981, Sijthoff,, p 161–2

This approach was adopted by the Federal Attorney General's Department in the 2009 *A Strategic Framework for Access to Justice in the Federal Civil Justice System; Report by the Access to Justice Taskforce* and I commend this broader and more expansive approach to this Review:

Access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are dealt with as quickly and simply as possible—whether that is personally (everyday justice), informally (such as ADR, internal review) or formally (through courts, industry dispute resolution, or tribunals).

Attorney-General's Department. Canberra, Attorney General's Department, P 4

Complex Legal Need

As recognised by the Productivity Commission some people experience multiple and substantial legal needs. The LAW survey reinforces the anecdotal regular experience of staff in community legal centres and legal aid commissions. The Commission noted that some demographic groups were more likely to experience particular legal problems than others and that some problem types are more likely to result in unmet need than others.

In a 2009 study at the West Heidelberg Community Legal Service (WHCLS) (collocated with Banyule Community Health (BCH)), the research findings about WHCLS clients were consistent with other legal need surveys and LAW Survey. During the research period, many community members who presented at WHCLS for legal assistance were: often experiencing other problems; often experiencing a significant number of other problems; likely to be experiencing problems related to their health; often experiencing problems with employment and housing, family and relationships, income and navigating the legal system; and experiencing a higher number of these problems if they are experiencing problems related to family violence and criminal charges. The WHCLS study confirmed people do not always seek assistance with legal or rights problems and if they do, other support services such as general medical practitioners and allied health and community services are often the first point of contact for such problems. (Noone 2012)

From the accounts given by the WHCLS clients in this study, they did not usually perceive their problems as single problem entities or even linear problems with a definable beginning and end. Rather the way they described their situations, was more like a ball in which the clients, particularly those with a large number and intensity of legal, health and social problem, seemed to be tumbling around in, attempting to manage bit by bit. (Noone 2012)

In the management of the civil justice system and formulation of legal assistance service provision models, it is essential that the complexity of unmet legal needs experienced by certain groups is taken into account. This means have regard to the data from large scale empirical surveys (like the LAW

survey) but also utilising more localised research that can identify the 'hidden communities' that often get lost in large scale surveys. (Noone 2007; Curran & Noone 2007)

Integrated legal service delivery model

International and Australian research have established links between legal and health problems; links between clusters of legal need and social disadvantage; and the prevalence of non-legal services as the first port of call for assistance with legal problems. These research findings provide strong support for integrating the provision of legal services with health and welfare services, and for establishing good referral practices between legal services and non-legal community and health services; for developing joined up services. (Coumarelos et al 2012)

Studies which establish the link between legal, health and social need suggest that a holistic approach to service delivery between legal, health and other community services could help to meet the needs of people and communities facing significant levels of social exclusion. It is suggested that legal assistance services for disadvantaged people will be most efficient and effective when they are, as far as practicable:

- targeted to those most in need
- joined-up with other services (non-legal and legal) likely to be needed
- timely to minimise the impact of problems and maximise utility of the service, and
- appropriate to the needs and capabilities of users. (Pleasance 2014)

The National Partnership Agreement on Legal Assistance Services has replicated some of this language in its anticipated outcomes. There is a clear focus on 'joined-up' services.

As noted by the Productivity Commission and partially as a consequence of the Law and Justice Foundation work, there is increased activity in Australia (and particularly in Victoria) in the delivery of legal services within a health care setting (called Health Justice Partnerships). Law and Justice Foundation research shows that legal professionals are only consulted for 16 per cent of all legal problems whereas people often turn to their trusted health and welfare professionals for advice and assistance with issues that have legal aspects.

The Health Justice Partnership (HJP) model of service delivery is based on the United States' Medical-Legal Partnership (MLP). This healthcare delivery model integrates legal assistance as an important element of the healthcare team. The model is built on an understanding that the social, economic, and political context of an individual's circumstances impacts upon their health, and that these social determinants of health often manifest in the form of legal needs or requirements. Research in the USA increasingly indicates positive benefits from this approach (see <http://www.medical-legalpartnership.org/mlp-response/impact/>).

The MLP model has three core components and activities:

- Provision of legal assistance within the healthcare setting. These services focus on early identification of potential legal problems by healthcare professionals. Often through the use of a *legal health check list*. This leads to early intervention, which can often alleviate or prevent medical and legal crises.
- Transforming Health and Legal Institutions and Practices. Through the model health professionals refocus their time with patients to assist in identifying issues that may impact on health, such as accommodation standards and personal safety issues in addition to treating medical symptoms and illness. Legal practitioners work in partnership with health care professionals to help identify and address the legal needs of patients through the delivery of advocacy training and the development of resources and toolkits for this setting.

- Policy Change. One of the key benefits of the model is the potential to influence policy reform, to improve the health and wellbeing of vulnerable populations through the advocacy of both the health and legal professionals of the HJP. (<https://www.justiceconnect.org.au/tags/health-justice-partnerships>)

Although there are a number of longstanding examples of the provision of legal services in a health setting in Australia (e.g. West Heidelberg Community Legal Service and Banyule Community Health) (Noone 2007), there have been a number of more recent innovative developments. For example the work of Inner Melbourne Community Legal Service with the Royal Women’s Hospital (Gyorki 2014) and more recently Royal Melbourne Hospital and Royal Children’s Hospital; Loddon Campaspe Community Legal Centre with Bendigo Community Health (Noble 2012); and Maurice Blackburn and the Alfred Hospital. In 2014, the Legal Service Board provided funds to 9 new Health Justice Partnerships.

I commend this model of legal service provision to the Review as an efficient and appropriate approach for *people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support*. This model of service provision should be examined as one alternative to the current organisation of legal assistance and may enable access to alternative funding sources.

Challenge of ‘joined up’ services

There are many elements involved in a successful integrated service and system approach to complex legal problems. Integration needs to occur at many levels including across sectors (whole-of-government), between organizations and across service delivery (professional) approaches. Consequently, challenges to integrated legal services occur at all these levels. For instance the research at WHCLS indicated that numerous factors facilitate and impedes integrated legal services. The WHCLS research reinforces the finding that integrated service practice relies on commitment to shared goals, communication and strong leadership. It involves the investment of scarce resources and energy in developing and maintaining relationships with other organisations (Noone 2012 & 2010). Many of these factors coincide with or reinforce findings of other research. Recent research and public policy on collaborative partnerships and ‘joined up’ services recognise the need to integrate service providers across sector, organisation and professional or staff divides. Integrated service solutions to problems are often concerned with finding a solution to a recognised systemic problem. They focus on defining the complexities of the problem and finding a service solution. Many partnership theories centre on the service system itself; how sectors, organisations and professionals can better communicate, capacity build and integrate to achieve solutions to complex problems. (Noone 2012)

The complexity within the individual person and communities are often overlooked for the complexity within the problem. Individuals and communities come with a unique set of characteristics and issues that impact on engagement with service solutions. Research demonstrates that recognising the needs of the local community, and then working with them to address problems, is essential for targeted, timely and appropriate solutions to complex problems. A critical challenge is to develop processes to understand individuals and communities advice seeking behavior (Pleasence 2014; Noone 2012).

Increased use of Alternative Dispute Resolution

Although the increased use of ADR has the potential to significantly improve access to justice, in 1994, the Access to Justice Advisory Committee identified the limitations of institutionalisation of ADR. The Committee consequently encouraged ‘appropriate training for mediators’, and establishment of

'screening processes to identify parties whose disputes may not be suitable for mediation'. The Committee also noted the need for regular evaluation of court-annexed mediation programs 'to identify whether any of the potential risks have eventuated and to introduce measures to correct any identified problems. (Access to Justice Advisory Committee, p279-80). I submit that these recommendations are still highly relevant.

The challenge for those concerned with Access to Justice is how to ensure the rights of the disadvantaged and vulnerable are enhanced and protected in the context of increasing use of ADR processes that are often mandated by courts and tribunals. As the Access to Justice Committee, Australian Law Reform Commission and the former National Alternative Dispute Resolution Advisory Council have stated, there is a critical need for ongoing empirical and in-depth research that not only provides data, but also looks at the quality of ADR processes and access to justice barriers. Evaluations of new developments must be regularly conducted and the processes reviewed. Most importantly, in recognition of the complex and paradoxical nature of access to justice developments, these evaluations must be rigorous and contextualised.

In the context of increased use of ADR within the formal justice system, I have previously suggested the following aspects need to be considered:

- Respect for the individual and their interests that recognises their capacity and situation.
- Parties involved in disputes with apparent power differentials must be fully informed and have access to appropriate advice (both legal and other) and support through the process.
- Guidelines for mediators' conduct when disputes involve repeat players and unjust outcomes.
- Ability and procedures for mediators to report systemic issues that arise from disputes.
- Need for ongoing quality research that is contextualised. (Noone 2011)

Specific issues raised in relation to access to justice and mediation include the loss of public interest law cases due to the mandated and private nature of ADR, inherent power imbalances, the informal nature of mediation and inequities.(Noone 2011) The current diverse and complex ADR landscape may create hurdles for disadvantaged parties and further hinder access to justice. In addition, the mandatory nature of some ADR regimes can mean that inappropriate matters are referred to ADR which then result in inequitable settlements or no settlement which further increases the cost of dispute resolution and stress for parties. (Akin Ojelabi 2011)

My colleague, Dr Lola Akin Ojelabi and I have gathered data from practitioners, mediation service-providers and policy makers, tribunal members and magistrates to examine issues relating to mediation and access to justice. In particular this research explored the question of whether mediation should be concerned with justice for disadvantaged people and, if so, whether it should be concerned with procedural or substantive justice, or both. Insights provided by the participants were drawn upon to explore how mediation can enhance and not diminish access to justice for the disadvantaged. Aspects of the justice quality of mediation were canvassed as well as comments on accountability within the mediation field. (Noone & Akin Ojelabi 2014)

It is clear that whether or not access to justice for the disadvantaged is enhanced, and whether the justice quality of mediation is ensured, depends on a number of factors including:

- the robustness of the intake processes;
- the skills, knowledge and experience of the mediator; and
- the quality of support and information available to parties in mediation.

The content and context of the mediation also has a bearing on the assessment of justice. The findings of this research project clearly indicate the need for further discussion about what justice means in the mediation context. Additionally, further research on how mediation impacts on access to justice is warranted. (Noone & Akin Ojelabi 2014)

Alternative Dispute Resolution and Legal Education

Lawyers are clearly in the job of helping people resolve their disputes. Lawyers also have a role in limiting the escalation of disputes. As the Productivity Commission recommended it is highly relevant for law students to be engaged in learning about the *full range of dispute resolution options, including non-adversarial options*.

Since 2006, the law degree curriculum at the School of Law, La Trobe University, Victoria has uniquely included a first year compulsory subject *Dispute Resolution*. Additionally La Trobe Law School offers a range of electives and Masters level subjects in dispute resolution. My colleague Ms Judy Gutman has researched the positives consequences of the inclusion in the law degree of non-adversarial approaches to dispute resolution (see details in reference list below Gutman 2007 & 2008).

Role of Law Students in Improving Access to Justice

In several of the Review's Background papers the use of law students to assist in providing services is discussed eg in relation to self-represented litigants and pro bono services. In Victoria, student involvement in provision of legal assistance services to the poor began more than four decades ago. For instance, the clinical legal education program at La Trobe University dates back to 1978 and the Law School maintains this strong commitment to social justice and to providing "hands on" legal experiences for its students. With a range of Clinical Legal Education programs in Melbourne and Bendigo, La Trobe law students are able to provide services to the local and wider community whilst enriching their understanding of legal theory, learning about the realities of law in practice and gaining academic credit. In La Trobe's clinical legal education programs, service to people who do not have the resources to access the legal system is intertwined with a high quality educational experience. All students are supervised by highly qualified Law School lecturers and legal practitioners.

When considering options for law student involvement the Review should refer to the *Best Practices: Australian Clinical Legal Education*, which was endorsed by the Council of Law Deans in 2012 (<http://www.cald.asn.au/resources>). It is relevant to ensure the quality of legal service provision and educational experience for the students. Clinical legal pedagogy involves a system of reflection, self-critique and supervisory feedback by which law students learn how to learn from their experiences and observation and, at its most effective level, how to take personal responsibility for clients and their legal problems. Clinical legal education is normally intensive, one-on-one or small group in nature, and allows students to apply legal theory and develop lawyering skills to solve client legal problems. It relies on structured reflection to enable students to analyse the learning and insights they gain from their course. Favourable staff-student ratios and collaborative learning environments support a climate in which each student is motivated to improve and perform at their best. However this environment requires appropriate and sufficient resources as detailed in the *Best Practices* document.

Legal Aid Impact Statements

Unremarkably, increased demand for legal aid can be directly related to shifts in government policy. There are multiple government policies relating to social security, immigration, employment, family and crime that impact on the demand for legal aid services. No allowance is made by government for the 'downstream' impact of these policy changes on demand for legal aid services. Despite the recognition of the need for impact statements in many other areas of policy development, it is still not standard to conduct impact statements when formulating government justice sector policy.

In 1990, the National Legal Aid Advisory Committee recommended 'all government policy proposals include consideration of the likely impact on the cost and need for legal aid programs'. At the time the Commonwealth government agreed to include the impact of legal services of any new policy proposal being considered by the Cabinet. It was also proposed that a legal aid impact statement protocol be adopted by the state and territory governments as well (NLAAC Report).

I submit that all changes to government policies should include a legal aid impact statement and, where an increase in demand is indicated, appropriate funding be provided. It is most obvious within the criminal justice sector (not only for legal aid but also for prisons, courts etc) but positive attempts to reduce family violence also generate increased demand for legal aid services. For instance, an increase in criminal prosecutions leads not only to an increase in demand for legal aid but also has other impacts. Overcrowding in police cells and increased workload for courts are examples of the consequences of increased numbers of police officers. The need for impact statements for justice sector policy changes is not confined to legal aid. They should include the impact on courts, prisons, prosecutions and a range of related services. (Noone 2013)

Maintenance of efficient and effective mixed model of legal assistance services

The National Partnership Agreement on Legal Assistance Services (NPA) seeks collaboration between the various legal aid service providers however the latent tensions and competition for funding between the private legal profession, the legal aid commissions and community legal centres is a significant challenge. One of the outcomes sought by the NPA is:

legal assistance service providers collaborate with each other, governments, the private legal profession and other services, to provide joined-up services to address people's legal and related problems;

Two aspects of this aim are the focus on collaboration between stakeholders in legal aid infrastructure and the provision of 'joined-up service' to address legal and related problems (discussed above). The NPA wants collaboration with government and other services not just between legal aid service providers.

Although there are recent examples of successful collaboration [eg NSW regional networks] the nature of funding arrangements militates against sustainable collaboration (Pleasant 2014). Tensions exist between legal aid commissions and the private legal profession; between legal aid commissions and community legal centres; and between governments.

Specifically the history of the Australian private legal profession's relationship with legal aid is a complex one. Despite the legal professional bodies being key advocates for increased legal aid funding, there is a latent tension about what the aims and objectives of legal aid should be, who should manage legal aid and who should provide it (Noone & Tomsen 2006). Although the private legal profession has a limited role in the administration of legal aid organisations, they remain an integral part of the legal aid service provision model. Between 60 and 70 per cent of legal aid funds are paid to the private legal profession in grants from legal aid commissions (Productivity Commission 2014). Consequently any changes to eligibility guidelines impact on their clients and often on legal practitioners' income.

The 2013 'legal aid crisis' in Victoria, illustrated the latent tensions between the private profession and legal aid commissions and the rhetoric used in that conflict resonated with decades old debates about the management and purposes of legal aid. (Noone 2014). As the Victoria experience illustrates, in the context of ongoing limited funding, the task of reviewing the merits and efficiency of certain legal practices is warranted but any changes to the status quo are likely to cause significant tensions

between legal aid commissions and the private legal profession. (PricewaterhouseCoopers 2015; Noone2013)

Including governments in the collaborative process is also challenging as, in the Australian federal system, there are inherent tensions between governments who often blame the other for lack of funding for legal aid. The State governments argue the Federal share of funding has dropped from 50 to 30% over last decade whilst they have substantially increased their contributions (Productivity Commission 2014 p 694). Whilst the Commonwealth government argues the State governments should increase funding as it is their policy changes that are responsible for the increase in demand of legal aid services (see discussion above). For example -increase in police numbers, introduction of Protective service officers, minimum sentences for gross violence and proposed change to suspended sentences.

For collaboration to have a chance of success, resources need to be allocated to the task. In a positive example, a project (partially funded by the Commonwealth Attorney-General's office) and in anticipation of the focus of the NPA, the Law and Justice Foundation of NSW (Foundation) has drawn together empirical research evidence in a *Collaborative Planning Resource* (CPR). The CPR is intended to support the planning of legal assistance services across Australia. (Coumarelos 2015). The CPR has two aspects: a Service Planning (SP) resource and Jurisdictional Data (JD) resource. The SP resource summarises the research evidence on legal need and access to justice and the implications for planning legal service delivery. It provides useful information for designing appropriate legal services for specific priority demographic groups: 'who' priority clients are, 'what' types of services are appropriate to their legal needs and capabilities, and 'how' these services might be delivered. The JD data on: the geographic distribution of the Commonwealth's *priority groups* for services; the prevalence of experiencing legal problems for each *priority group*; the geographic distribution of those most likely to be in *need of legal assistance services* for financial or other reasons.

Clearly the CPR will be an invaluable resource for those seeking to collaborate on provision of legal aid services, however there needs to be ongoing systemic support, from government, to enable the identification and development of program responses to local community justice needs. Without additional resources, legal aid service providers who are facing increased demand and declining funds will have little capacity to be actively engaged in these processes.

Conclusion

The ultimate challenge for those concerned about Access to Justice is to consistently and genuinely put the disadvantaged and poor individual and communities at the centre of service provision and policy changes. Rigorous research and evidence based policy should guide any changes to be made.

I would be pleased to provide further information or to discuss these matters with members of the Review.

Yours sincerely,



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LIST OF REFERENCES

- Dr Lola Akin Ojelabi,
(2011) 'Community Legal Centre's Views on ADR as a Means of Improving Access to Justice' (Pt I) 22(2) *Australasian Dispute Resolution Journal* 111;
(2011) 'Community Legal Centre's views on ADR as a means of Improving Access to Justice' (Pt II) 22(3) *Australasian Dispute Resolution Journal* 173.
- Christine Coumarelos, Pascoe Pleasence, & Zhigang Wei (2013), *Law and disorders: illness/disability and the experience of everyday problems involving the law. Justice Issues Paper 17*, Law and Justice Foundation of NSW, Sydney
- Elizabeth Curran & Mary Anne Noone (2007) 'The Challenge of Defining Unmet Legal Need' *Journal of Law and Social Policy* 61 -87
- Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Mary Anne Noone, Simon Rice, (2012), *Best Practices: Australian Clinical Legal Education*, Monash University, Clayton Vic Australia
- Linda Gorki, (2014) 'A Healthy Partnership: Legal and health issues often go hand in hand – community legal centres are responding in healthcare settings' *88 (1) law institute journal* 81
- Judy Gutman
(2008) 'Teaching ADR to Australian Law Students; implications for legal practice in Australia' 19 *Australasian Dispute Resolution Journal* 42.
(2008) 'Why Teach Alternative Dispute Resolution to Law Students: Part Two: An Empirical Survey' 16 (2) *Legal Education Digest* 14.
(2007) 'Why Teach Alternative Dispute Resolution to Law Students? Part One: Past and Current Practices and Some Unanswered Questions' *Legal Education Review* 125.
(2007) 'Why Teach Alternative Dispute Resolution to Law Students: Part Two: An Empirical Survey' *Legal Education Review* 67
- Peter Noble, (2012) *Advocacy Health Alliances: Better Health through Medical Legal Partnership – final Report of the Clayton-Utz Foundation Fellowship*
- Mary Anne Noone
(2014) Legal Aid Crisis: Lessons from Victoria's response 39 (1) *Alternative Law Journal* 40
(2012) 'Key Features of Integrated Legal Services: lessons from West Heidelberg Community Legal Service' 37 (1) *Alternative Law Journal* 26-30
(2011) 'ADR, Public Interest Law and Access to Justice: the need for vigilance' 37(1) *Monash University Law Review* 57- 80
(2009) 'Towards an integrated service response to the link between legal and health issues' 15 *Australian Journal of Primary Health* 203-211
(2007) "'They all come in the one door" The transformative potential of an integrated service model: A study of the West Heidelberg Community Legal Service' in Pleasence, Buck & Balmer, (eds) *Transforming Lives: Law and Social Process* UK The Stationary Office
(2006) 'Access to Justice Research in Australia' 31 (1) *Alternative Law Journal* 30
- Mary Anne Noone and Lola Akin Ojelabi
(2014) 'Ensuring Access to Justice in Mediation within the Civil Justice System' 40(2) *Monash University Law Review* 528
(2014) 'Insights from Australian mediators about mediation and access to justice' 25 *Australasian Dispute Resolution Journal* 212
Mary Anne Noone with Kate Digney, (2010) *"It's Hard to Open up to Strangers" Improving Access to Justice: The Key Features of an Integrated Legal Services Delivery Model* La Trobe University Melbourne Australia
- Mary Anne Noone & Stephen Tomsen (2006) *Lawyers in Conflict: Australian Lawyers and Legal Aid* Federation Press
- Pascoe Pleasence, Christine Coumarelos & Suzie Forell and Hugh M. McDonald, (2014) *Reshaping legal assistance services: building on the evidence base: a discussion paper* Law & Justice Foundation