

## THIRD NATIONAL ACCESS TO JUSTICE PRO BONO CONFERENCE

Brisbane 27 August 2010

**Plenary Session 2:** The case for funding  
**Presenters:** Dr John Falzon, Mr Michael Brennan and Father Frank Brennan  
**Chair:** Mr Glenn Ferguson

### The Case for Funding: Social Inclusion Perspective (Dr John Falzon)

Dr Falzon raised the following points:

1. The Australian society views disadvantaged Australians from a negative and flawed perspective:
  - a. as customers with choices rather than individuals with rights;
  - b. as suffering from an individual deficit rather than being subject to structural challenges;
  - c. as deserving to be pushed to the margins;
  - d. as privileged to receive government provided support services rather than as deserving those services as a matter of right.
2. It is necessary to restate at the outset that social exclusion is a structural symptom rather than the effect of a personal choice, attitude or deficit. Individuals are made and pulled apart by cultural structures. They are made to feel that their lives are worth little which consequently leads to the disempowerment of those individuals.
3. In the main, people are poor not because they are lazy, lacking ability or unlucky, they are poor due to the way society is organised.
4. People are systematically being prepared or made for a series of collisions of state instrumentalities. For example, Aboriginal adults are 14 times more likely to be sent to jail. First time they are offered some advocacy is when they have already been faced with breaking the law.
5. Yet, the law continues to lock up man or woman from a disadvantaged background, often as juveniles. It is a fact that more often than not incarceration only leads to more crime.
6. It is imperative that the government shows its support for a well-funded legal aid system and public interest advocacy.
7. Professor John McKnight has stated that “revolutions begin when people who are defined as problems achieve the power to redefine the problem.” Social inclusion cannot come from above. The people who are most disempowered in our society are the ones who know the truth of their own exclusion better than anyone and that the truth they, and those who take their side, speak must be spoken to each other. This is inclusion where the people are in control rather than being viewed as the mere objects of inclusion.
8. Social inclusion framework is useful but has serious limitations. Professor Ilan Katz has observed that the “the term social inclusion, while a lot warmer and fuzzier than social exclusion, lacks the connotation of exclusionary forces. It therefore implies a much stronger policy focus on helping the excluded to participate in mainstream society, without examining what it is about that society that excluded them in the first place.”

9. There is often an incredible presumption that people are incapable of analysing their own situation. This presumption carries with it a handy rejection of the notion of actually providing resources to people to allow them to articulate their analyses and proposed solutions. And yet under the struggle and hope the greatest social reforms have been wrought by grass-roots movements.
10. In the words of an Aboriginal Elder: "For Aboriginal Australians there is no such thing as justice, there is just us."
  - a. At the heart of humanity there has to be some sense of travelling towards greater social equality.
11. Australia continues to be a society of social inequalities – inequality of income and access to services are only some areas where the inequality occurs. The rich have significantly boosted their share of income over the last 5 years. The richest 20% of households own 63% of the wealth.
12. There is a clear need for redistribution of services.
13. It is not good enough to factor in the work of charities as a way to deal the issue of disadvantage. Charity is never a substitute for justice. The role of justice is to prevent the attack on the disadvantaged. The 1975 Inquiry into poverty concluded that "any serious attempt to eliminate poverty must seek to reduce those conditions that cause it."
14. Australia stands at the bottom of the list regarding the rate of expenditure of GDP when compared to for example the EU.
15. In 1998, the US state was split into two: state that provides social guarantees for the wealthy and policing state for the populous. People were forced underground because they did not seek assistance from charities.
16. Some of the facts concerning disadvantage include:
  - a. women without education are more likely to experience partner violence;
  - b. unemployed people are more likely to be assaulted;
  - c. renters are more likely to have their home broken into
17. Network of support, both financial and emotional, is important. Minor matters, if unresolved will become more serious.
18. Crime and legal problems and access to legal advice are all political problems or issues which must be addressed.

#### **The Case for Funding: Economic Perspective (Mr Michael Brennan)**

Mr Brennan raised the following points:

1. In 2008, PricewaterhouseCoopers (PWC) did work for the Victorian Bar in relation to fees received by Victorian barristers in criminal matters.
2. In 2009, PWC completed a report which sought to estimate the economic value of legal aid.
3. This report concluded that Australia's legal aid system was in a state of crisis and faced significant challenges if adequate funding of the sector was not prioritised by the government.

- a. The report regarded challenges as resulting from the ongoing impact of past budget cuts and the imposition of a funding distinction between State and Commonwealth legal matters. These decisions have, over time, made it increasingly difficult for the legal aid system to meet its core responsibilities of providing adequate representation for the most disadvantaged Australians facing serious legal problems.
  - b. This situation has been compounded by a significant fall in legal aid funding from public purpose funds due to the global financial crisis, which had previously provided a substantial component of overall legal aid funding.
  - c. The report notes that the opportunity for reform has arisen through the changed approach to Commonwealth-State financial relations introduced by the Rudd Government – creating a new system of ‘cooperative federalism’.
4. Economist and lawyers share a similar aim regarding rules and behaviour, namely that rules and behaviour are largely shaped through commercial transactions and various incentives.
  5. Social justice is a core good and valued by the society.
  6. Well functioning courts and legal system are more effective means in protecting the vulnerable than over-regulation.
  7. Supply issues are central to any consideration of the funding of the legal assistance sector. The supply is likely to be affected by the ageing population and the serious skill shortages in the future. Effects of these factors are being seen even today. It is important that arguments in favour of increased legal assistance sector funding are backed up by number and rigour is applied to all testing done in this area.

#### *The Economic Value of Legal Aid*

8. The following arguments were identified as justifying an increase in legal aid funding from an economic perspective:
  - a. more efficient court processes and proceedings will lead to administrative savings;
  - b. social benefits will be achieved through more appropriate outcomes, including dispute resolution (although hard to estimate in aggregate);
  - c. Ensuring more just processes and outcomes.
9. The PWC report estimated that for every dollar spent on legal aid there is a saving of \$1.60 (1.60 benefit- cost ratio). The benefit-cost ratio in relation to duty lawyers is .87.
10. Therefore, there is no magic or ‘optimal’ figure for legal aid funding, but there is some evidence that legal aid services generate net benefits. However, these estimates are based on a single aspect, that is, net saving; other benefits cannot be quantifiable
11. These estimates were derived from an examination of a series of case studies. For instance, provision of legal aid in a matter concerning a child resulted in a saving of \$103,000 (prevention of the matter becoming a legal issue). However, it is hard to predict what would have happened if there was no legal aid provided.
12. In criminal matters, it may well be the case that the defendant is found guilty notwithstanding the availability of legal aid.

### *Legal Aid funding*

13. In Australia, there is \$28.01 per capita on legal aid. This can be contrasted with the UK where the spending is \$83 per capita.
  - a. Grants to state and territory legal aid commissions from the state and territory sourced funding amount to \$8.90 per capita;
  - b. Grants to state and territory legal aid commissions from the Commonwealth sourced funding amount to \$8.26 per capita.
14. Since 1997 there has been an overall decline in per capita contribution by the Commonwealth:
  - a. 49% in 1996-97.
15. There has also been a significant fall in legal aid funding from public purpose funds due to the global financial crisis.
16. Anecdotally, there is a rising need for legal aid services.
17. What happens when there is relatively flat funding and increase in need for the services:
  - a. Need to restrict legal aid funding for certain cases;
  - b. Need to change legal aid means tests
    - i. In Tasmania, Victoria, Western Australia and Queensland there are certain categories of individuals who are below the Henderson Poverty Index but above the means test.
  - c. Need to reduce fees for legal practitioners providing services in legally aided matters
    - i. The practitioner fees lag not just for CPI but also in relation to the weighted out cost average;
    - ii. Barristers providing services in legally aided cases on a full time basis are averaging \$36,000 per year in fees;
  - d. Need to consider a source of potential public funding:
    - i. \$1.52 per capita would return the funding to the 1997-level;
    - ii. \$6.86 per capita would replace public purpose funds as a proportion of expenditure;
    - iii. \$3.10 per capita would ensure that those who are below the Henderson poverty index would receive legal aid;
18. Increase in the amount of funding announced in the 2010-2011 Federal Budget has improved the situation minimally. The funding is nowhere near enough to improve the situation.
19. The issue is not so much that there has been a significant drop in the Commonwealth funding commitment since 1997 but that legal aid is one of the rare areas that has not picked back up. The reasons for this failure are that there has not been a majority coalition support for provision of government funding to legal aid and access to legal services is not seen by some community members as something to rely on.

## The Case for Funding: Human Rights Perspective (Father Frank Brennan)

### *The Proposed National Human Rights Consultation Framework*

20. The National Human Rights Consultation Committee report contained 31 recommendations, 17 of which did not relate to a Human Rights Act.
21. Even though most people who participated in the consultation wanted a Human Rights Act and even though the majority of Australians randomly and objectively polled favoured an Act, no major political party in the country is yet willing to relinquish unreviewable power in the name of human rights protection.
22. In accordance with Recommendation 17, the government is putting in place a rights framework which operates on the assumption that the human rights listed in the seven key international human rights instruments signed voluntarily by Australia will be protected and promoted.
23. In accordance with Recommendations 6 and 7, Parliament will legislate to ensure that each new Bill introduced to Parliament, as well as delegated legislation subject to disallowance, is accompanied by a statement of compatibility attesting the extent to which it is compatible with the seven UN human rights treaties. Also Parliament will legislate to establish a parliamentary Joint Committee on Human Rights to scrutinise legislation for compliance with the UN instruments.
24. When interpreting new legislation impacting on human rights in the light of these relevant documents from the Executive and from the Parliament, the courts will assuredly follow the course articulated by Chief Justice Murray Gleeson in one of the more controversial refugee cases of the Howard era.
  - a. Gleeson said, “[W]here legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia’s obligations.”
  - b. He added, “[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose.”
25. Therefore, there is a welcome though incomplete addition to human rights protection in Australia.

### *Consultation Processes and some findings*

26. Colmar Brunton Social Research found that ‘only 10% of people reported that they had ever had their rights infringed in any way, with another 10% who reported that someone close to them had had their rights infringed’.
27. The consultants reported that the bulk of participants in focus groups had very limited knowledge of human rights.
28. 64% of survey respondents agreed that human rights in Australia are adequately protected. Only 7% disagreed. The remaining 29% were uncommitted.
29. Over 35,000 submissions were received. Of these, 27,888 advocated for a Human Rights Act; 4203 were against the Act.

30. Participants in remote areas do not speak of rights as such but of having a “fair go”.
31. Consultations with focus groups around Australia revealed that over 75% of Australians think that rights of people with mental illness, the elderly and the disabled people are not well protected.
32. Of the 8671 submissions that were able to be assessed and which expressed a view on the adequacy or inadequacy of the present system, 2551 thought human rights were adequately protected, whereas 6120 (70%) thought they were not.
33. There clearly is enormous diversity in the community when it comes to understanding of and perspectives on rights protection.
34. Recommendation 14 of the report recommends that the Federal Government develop and implement a framework for improving access to justice, in consultation with the legal profession and the nongovernment sector. Therefore there is scope for the legal profession to be involved.

#### *Need for lawyers*

35. The findings of the Marmot review indicate that those individuals living in deprived neighbourhoods can expect to have both a shorter life expectancy and disability-free life expectancy.
36. Similar findings exist in relation to those individuals living in poverty.
37. Life expectancy Aboriginal Australians is 67.2 for males and 72.9 for females. Therefore, Indigenous children born today can expect to live 11.5 years less if they are male and 9.7 years less if they are female when compared to non-Indigenous children.
38. There is scope for the legal profession to be involved in ensuring human rights are protected:
  - a. The inquest in Kalgoorlie into the death of Mr Ward in the back of a prison van in horrendous outback summer conditions. No one has been charged with any offence in relation to his death.
  - b. Follow up to the inquest into the death of five Torres Strait Islanders on the Malu Sara. When the incident was reported to police and the national search and rescue authority, the danger to the people on the Malu Sara was continually trivialised, and reports of their worsening predicament were disbelieved, ignored and even mocked. The regional manager and other staff had flown home in helicopters, and were dining with family and friends while two Commonwealth public servants were struggling to get the Department’s vessel back to its base. The regional manager failed to take charge of the incident, leaving a junior officer to manage as best he could. No one has been charged or disciplined for these deaths.
  - c. Tragic death of Cameron Doomadgee on Palm Island and the farce of administrative injustice and obfuscation which has followed this death in custody. Sergeant Hurley was acquitted of all charges in relation to the death of Doomadgee.

#### **Questions**

1. *The economic model assumes that the government is going to provide the funding for the legal aid system. Should the big businesses and mining industrials be required to put back in the community?*

- a. Mr Michael Brennan noted that there is traditional hostility from the Treasury and the Finance Department to make these businesses responsible for social factors. However, in theory there is no reason why this could not be done.
2. *Views on the proposed new National Partnership Agreement.*
  - a. The naïve view is that the solution is that there are clear demarcation lines between state and federal divide.
3. *Should income earned from legal aid be exempt from income tax?*
  - a. There is once again traditional hostility from Treasury to do that.
  - b. Alternative models could be considered such as incentives for a specified quantum of legal aid work.
4. *Is it the case that the disadvantaged Australians have no rights or alternatively that they have no right to access to those rights?*
  - a. Dr John Falzon noted that there are obvious channels of education about rights and access to those rights. It involves primarily outreach for service delivery, that is, reaching the people rather than waiting for them to come to you. For instance, it may involve having lawyers present at health centres or Centrelink offices, that is, where possible co-location of various services and hubs should be provided.
  - b. Father Brennan noted that there are a lot of Australians who say that they do not know what their rights are but the rights resonate with them. There is a clear need for enhanced education of the Australian communities.
5. *Views on having legal aid regulatory impact statements, that is, requiring the parliament to issue an impact statement in relation to legal aid funding every time a law is passed.*
  - a. Although this is a good idea, there might be significant amount of resistance from the Commonwealth given that it would also be subject to these.
  - b. It is difficult to quantify what the policy is.
  - c. Modeling the need for legal aid funding would need to be based on a range of factors such as unemployment and GDP levels.
6. *Could proceeds of crime (white collar crime, trafficking of drugs) be used to fund legal aid?*
  - a. This might present a temporary solution however it is unlikely to be adequate. Legal aid funding requires a source that is stable and the amount of funds needs to be constant from year to year. proceeds of crime funds would depend on the amount seized by police.