Review Of The Federal Civil Justice System ALRC Discussion Paper (DP 62)

Judges the key to improving the federal civil justice system

Closer judicial supervision of cases is one of the keys to dealing with major problems in the federal civil justice system, according to the Australian Law Reform Commission ("ALRC").

A major ALRC inquiry into the federal civil justice system has revealed that despite the common perception that our courts are "*in crisis and getting worse*", this is not the case - at least not in federal civil courts and tribunals.

"*Talk of crisis in the justice system can induce paralysis - a sense the problems are far too difficult to fix. However, at the federal civil level, it's really not operating all that badly*," ALRC President Professor David Weisbrot said.

"*Basically, we found that parts of the civil justice system are performing very well. For example, there has been consistent praise for the Federal Court as a 'world class civil court'.*

"*But there is still considerable room for improvement. A more active and strategic role for judges would address notorious trouble areas in litigation such as excessive discovery of documents, defective pleadings and tactical game-play by lawyers*," he said.

"*Some areas are not operating as efficiently or effectively as they could. ... There is also an overall need to address gaps in the civil justice system, especially in terms of setting ethical standards for lawyers and handling complaints against judges.*"

The ALRC proposals are designed to improve case management, making more effective use of judicial time and tailoring procedures to suit individual circumstances. The ALRC endorses a variation of the individual docket system used effectively in the Federal Court, so a judge (or a team of judges and registrars) has responsibility from start to finish for an allocated number of cases.

The inquiry also revealed that federal tribunals such as the Administrative Appeals Tribunal ("AAT") - which were established as a quick and economical alternative to courts - now cost the federal government almost as much as the federal courts, and cases take almost as long to resolve.

The ALRC has proposed the establishment of an independent Judicial Commission, that would receive and investigate complaints against federal judges, magistrates and tribunal members.

"*There's no formal process for lodging or investigating complaints against federal judicial officers. There is no code of conduct, nor any sanctions available short of removal from office by a vote of both houses of the Parliament*," Prof Weisbrot said.

Prof Weisbrot said the inquiry revealed that lawyers play *a "key role in settling cases early without the need to go to trial. We found that people without lawyers were much less likely to reach an acceptable settlement than those who were legally represented.*"

Other important proposals made in the ALRC's 566-page discussion paper, include:

- the development of guidelines on the use of expert evidence to prevent "*expert shopping*" and more active judicial management of expert evidence to avoid lengthy trials;
- the development of more comprehensive and rigorous practice for lawyers to overcome tactical games;
- the development of uniform national standards for education and training of lawyers, as well as greater coordination and oversight of educational programs to ensure quality;
- suggestions for the federal government to deal more effectively with its disputes - given its position as the major repeat player in the federal civil justice system, the federal government needs a strategic and coordinated approach to avoid, manage and resolve its disputes; and
- measures to ensure a greater consumer focus, to provide more information to people who use courts.

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ALRC inquiry into the federal civil justice system began in November 1995. The ALRC has been directed to consider the complex and interrelated issues of the cost, timeliness, efficiency and accessibility of the federal civil justice system.

The ALRC's review of the civil justice system is the largest and most comprehensive ever conducted in Australia. It has involved consultation with hundreds of lawyers, judges, tribunal members and people who have used the court system. As well, the ALRC has conducted

or commissioned empirical analysis of more than 4,000 case files.

The discussion paper *Review of the federal civil justice system* (DP 62) is the Commission's summary of its findings to date and its proposals for change. The ALRC is now seeking further comment on the issues and specific proposals contained in the discussion paper, before formulating its final report to the federal Attorney-General at the end of the year.

The scope of the inquiry

The Commission was asked to evaluate the workings of courts and tribunals exercising federal jurisdiction. The review has focussed on the Federal Court, the Family Court of Australia and federal review tribunals.

The federal government has a central role to play in securing necessary reform of the civil justice system. It is a lawmaker and architect of the federal justice system, paymaster and a significant litigant and frequent party to proceedings. The government's approach to disputes, dispute prevention, resolution and litigation is, therefore, highly influential.

A sense of crisis?

There are frequent calls for radical change to our adversarial legal system, coming from a sense that the system is "*in crisis and getting worse*". The ALRC's investigation of federal courts and tribunals does not support the crisis theory. There is no litigation explosion in the federal civil justice system. There is no systemic, intractable delay in case processing or resolution in the courts and tribunals looked at by the Commission.

Litigation and administrative review can be expensive and the Commission proposes changes to reduce costs. However, the Commission's research refutes - at least for federal civil matters - the well recited assumption that the justice system is open only to the very rich and very poor. A range of litigants use federal courts and tribunals.

Many of the calls for change suggest that our adversarial system should be transformed to become more "*inquisitorial*", giving judges rather than parties the primary responsibility for managing disputes.

However, some of the important guarantees in our Constitution relate to procedural fairness for parties before the courts. The introduction of case management, alternative dispute resolution ("ADR") processes and discretionary rules of evidence and procedure already have modified substantially many of the adversarial features of the Australian justice system. In fact, adversarial and inquisitorial systems have borrowed extensively from each other, so legal systems now have many similar features. The Commission does not believe there is now a need for a radical overthrow of the adversarial system.

The Commission does support better and more active judicial management of case processes. The ALRC considers that this would preserve the best features of the existing system, such as the emphasis on fairness, and provide a realistic solution to serious concerns about cost, delay and inappropriate legal tactics.

From the Commission's research, there are several excellent examples of effective practice within the federal civil justice system. Other areas of the system are not operating as efficiently or effectively as they should, and require substantial changes. The Commission's proposals are directed at these areas.

Accountability

The ALRC's review has identified a need to build increased accountability and transparency into the federal civil justice system.

Accountability of federal judicial officers

Judicial independence is the cornerstone of our justice system. However, there has been no formal process for lodging or investigating complaints against judicial officers. There is no code of conduct against which behaviour may be measured, nor have sanctions been available, short of removal from office by a vote of both houses of the Parliament.

The ALRC has proposed the establishment of an independent federal Judicial Commission - similar to the one in New South Wales - to receive and investigate complaints against federal judges and magistrates.

Accountability of the legal profession

The ALRC has proposed that the legal profession draft clearer, more comprehensive and appropriate national practice standards outlining the responsibilities and ethical duties of lawyers. Many overseas jurisdictions have legal practice standards which state both the rules and provide explanatory commentary, to illustrate the application of the rule in practical circumstances. The Commission strongly supports such an approach as a means of ensuring lawyers understand and follow both the spirit and the letter of the law.

The Commission sees the need for a greater consumer voice in the provision of legal services, through a proposed Federal Legal Services Forum. The Forum would provide information and reports highlighting expected practice standards and the costs of services, as well as independent advice to the federal Attorney-General. Its focus would be on improving the federal legal services market for consumers. It would not have a regulatory or complaints monitoring function. Its members would be appointed by the Attorney-General.

Accountability for costs

Consumers who are informed and educated about the cost and time taken for legal services are obviously in a better position to negotiate more favourable agreements about legal fees. However, most people, particularly in the family jurisdiction, are "*one-off*" users of legal services. There is little information publicly available to guide less experienced users of the legal services market.

The government should legislate to require lawyers working in federal jurisdictions to advise clients of comparative fee information (including court scales and information published by the proposed Federal Legal Services Forum).

While fee disclosure and an improvement in comparative costs information will assist clients to determine whether the fees charged by their lawyers are reasonable, lawyers' ethical rules do not set down guidelines to determine if fees are reasonable. The ALRC has proposed that legal professional associations develop these guidelines on reasonable fee, and make it clear that breach of these guidelines can amount to professional misconduct.

Education and training for lawyers and judicial officers

There is a clear need for greater structure, coordination and quality assurance in the provision of legal and judicial education in Australia.

The number of university law schools in Australia has grown from 12 in 1987 to 30 in 1999, but the growth in numbers of law students and legal academics has not necessarily spurred the desirable level of innovation, diversity and quality control in legal education.

Australian law schools are still anchored by professional admission rules, developed mainly by judges, which cling to the outmoded notion of what lawyers need to know, rather than around what lawyers need to be able to do. Law graduates need to be given the opportunity to develop the high level legal professional skills and ethics they will need to practice in changing and challenging work environments.

The ALRC has proposed the establishment of a broadly constituted advisory body, known as the Australian Council on Legal Education ("ACOLE"). ACOLE would be charged with developing model standards for legal education and training, including providing advice about the accreditation of legal educational programs.

The Commission's submissions and consultations overwhelmingly support voluntary judicial education and its continuing development. We have proposed the establishment of a National Institute for Judicial Education and Administration ("NIJEA"). Such a body would have formal responsibility for meeting the education and training needs of all federal judges and magistrates.

The Commission endorses the recommendation of the Administrative Review Council that tribunals cooperate to develop a minimum set of core skills and abilities required of effective tribunal members. We propose a federal Tribunals Council be established, comprised of the heads of the various federal tribunals and presided over by the President of the Administrative Appeals Tribunal ("AAT"). The Tribunals Council should promote and facilitate the sharing of professional information and experience among its members, to assist in education and training for administrative decision makers.

Costs

The Commission's terms of reference speak of the need for a simpler, cheaper and more accessible legal system. Information on costs in the discussion paper is drawn from government reports, annual reports and court and tribunal information, and from empirical research undertaken or commissioned by the ALRC.

There are some interesting observations to be made on costs from the figures available.

- The public cost of providing federal courts, tribunals, the Australian Industrial Relations Commission ("AIRC") and related organisations such as commissions and ombudsmen, can be estimated at $349 million in 1997-98. When the federal government's funding of legal aid commissions and community legal centres is included, the total expenditure comes to $470 million. Government spending on the federal civil justice system is thus relatively small compared with other areas of government funding.
- Federal tribunals were established to be a quicker and cheaper alternative to courts, but now cost the federal government almost as much as the federal courts. Legal fees paid by applicants in tribunal matters are little different from, say, the costs to litigate in the Family Court of Australia, which is a superior court.

Containing costs

The ALRC proposes that the Federal Costs Advisory Council calculate benchmark event-based scales for matters in the federal jurisdiction. The benchmark scales should be calculated in consultation with costs assessors, taxing officers, courts, tribunals, legal aid commissions, "*repeat player*" litigants and the Office of Legal Services Coordination in the federal Attorney-General's Department. The fees should be adjusted regularly, with a fundamental reconsideration every three years.

This should not be limited to simply making cost-of-living adjustments, but rather should also take into account any downward pressures caused by more efficient practices and procedures, competition and technological advances.

Courts and tribunals should use the benchmarks established by the Council to fix costs recoverable in federal proceedings.

Case duration (delay)

Many commentators and groups have nominated court delays as the one of the most pressing and severe problems in the justice system. However, the Commission's empirical work challenges some widely held beliefs about the workings of the federal civil litigation system, particularly concerning delays in the Family Court. The findings on case duration reinforce the need to ensure that reforms of any court or tribunal processes are supported by reliable data, rather than public perceptions and anecdote.

Family Court

The Commission's empirical research on the Family Court litigation process showed that approximately 50 per cent of all contested Family Court cases were resolved in less than six months. About 80 per cent were finalised in less than 12 months and 95 per cent in under two years. The delay of between one and two years can be a particular problem in cases involving children, however this delay relates to only 20 per cent of the cases in the Court.

Although the ALRC figures show cases are being resolved within a reasonable time period, 95 per cent of cases are resolved by settlement between the parties. Significant numbers of litigants and lawyers indicated to the Commission that parties are settling their cases because of their frustration with the Court's case management process when what they really wanted was a fast track to a decision by a judicial officer. These criticisms are discussed later in the briefing paper.

Times taken to resolve cases varied between Family Court registries. Sydney was the quickest, Canberra was the slowest in the ALRC sample. Some registries (Adelaide, Newcastle and Hobart) were reasonably quick in resolving routine cases, but were among the slowest in resolving the more difficult cases.

Federal Court

ALRC research showed that despite the complexity of many of its cases, the Federal Court disposed of 50 per cent of the sample cases within seven months, and 85 per cent within 20 months.

More than 60 per cent of sample cases were resolved by settlement; 35 per cent went to trial and received judgment. Very few cases were resolved "*at the door of the court*". The Commission sees the earlier settlement of cases as evidence of the success of the Federal Court's Individual Docket System ("IDS") of case management. Under this system, a judge has responsibility for the management of a case from commencement to completion. The ALRC's research and consultations indicate that this system is effective, allowing individualised and cost efficient preparation of cases, and encouraging compliance with court directions and early settlements, in appropriate cases.

AAT

The ALRC survey reveals significant variation in the time taken to resolve different case types in the AAT. Fifty per cent of the sample cases were completed in just over eight months and 90 per cent within 18 months. Veterans' affairs and compensation matters took the longest to resolve, while social welfare cases were the quickest.

Thirty-four per cent of AAT cases went through to a final hearing. However, a significant proportion of cases in the ALRC sample were settled late in the process - before or at the hearing. The AAT has sought to deal with late settlements by holding conciliation conferences in compensation cases. This appears to be working well.

The federal government as a litigant

Federal government departments and agencies are frequent parties to litigation in federal courts and tribunals. But despite its position as the major repeat player in the federal civil justice system, there is no strategic or coordinated approach by the federal government to avoid, manage and resolve its disputes.

The ALRC has recommended that the federal Attorney-General's Department develop a "*best practice*" dispute avoidance and management plan for federal government departments and agencies. Each department and agency should be required to establish a dispute avoidance and management plan, covering all types of disputes and all aspects of dispute avoidance, management and resolution. The Commission supports the Attorney-General's efforts to promote "*model litigant*" principles for departments and the lawyers appearing for the Commonwealth in disputes.

Legal aid

The Commission's research on legal aid has focussed on identifying within the federal civil jurisdiction how best to deliver assistance to the parties most in need, given the limited resources of legal aid commissions.

National coordination of legal aid has been identified as a federal government priority, and some progress has been made through National Legal Aid. The ALRC supports such moves.

The Commission has proposed that the federal government consider developing guidelines for legal aid commissions to identify "*priority*" family law cases involving vulnerable and unskilled parties, and allegations of abuse or violence. The ALRC also has suggested ways to "*unbundle*" and deliver particular assistance to other cases in family and administrative law, including migration and refugee matters.

Unrepresented litigants

Most people are represented by a lawyer in federal courts and tribunals, but there are significant numbers of litigants who are unrepresented for some part or all of their case.

In the Federal Court, unrepresented parties tend to be associated with migration and refugee cases and the court itself has been active in securing for them the services of volunteer lawyers.

In contested cases in the Family Court analysed by the ALRC, 84 percent of applicants and 68 per cent of respondents were fully represented. Some 10 per cent of applicants and respondents were represented for part of their case. Six per cent of applicants and 21 per cent of respondents were unrepresented for the whole of their case.

The presence of unrepresented litigants can create difficulties in case management, can adversely impact on that unrepresented party's ability to achieve an appropriate settlement and can increase the time taken for hearings. Not only is the unrepresented party disadvantaged, but the opposing represented party may be required to spend money on case events and hearings which do little to advance the case.

In review tribunals, a similar picture has emerged, with high levels of representation for certain case types, notably in veterans' affairs and compensation cases, where 90 per cent and 86 per cent of applicants respectively were represented. In social welfare cases studied by the ALRC, only 29 per cent of applicants were represented. In the AAT, where government departments are always the respondents - and always have legal representation - there is a marked inequality of resources.

The Commission's proposals on case management and legal aid are designed to deal with many of the problems associated with unrepresented parties.

Case management in the Federal Court of Australia

The Federal Court's implementation of the individual docket system ("IDS") was an important initiative in case management practice in Australia. The change was widely approved by those whom the Commission consulted – although there were suggestions for further fine-tuning.

The introduction of IDS has required judges to "*manage*" their own docket. Each judge's docket contains an average of 80 matters at any one time.

The key features of IDS as identified by the Federal Court, submissions and consultations are:

- increased judicial involvement and management in all stages of proceedings;
- a single judge is randomly allocated to a case from commencement to disposition;
- cases in areas such as intellectual property, taxation, trade practices (Part IV), human rights, admiralty and industrial law are randomly allocated to a judge on a specialist panel;
- individually tailored directions, procedures and listings for each case and monitoring of compliance with orders.

Close and continuing supervision by judges under IDS allows them to deal effectively with the trouble areas of litigation, such as defective pleadings, excessive discovery of documents and tactical games by lawyers.

The Federal Court and lawyers report improvements in case processing times since the introduction of IDS. The two problems identified for "*fine-tuning*" include the occasional difficulty in getting a hearing before a busy docket judge, and the variable case management practices evolving as individual judges develop their own management styles and practices.

The Commission has proposed that the Federal Court's procedural guides be revised regularly. Registry differences should be kept to a minimum. Better listing practices should be implemented to ensure cases are not delayed by an individual judge's hearing commitments.

Case management in the Family Court of Australia

Practitioners and litigants were very critical of the case management practices of the Family Court. These concerns were not directed at the quality of decision making, or at the integrity or professionalism of the judges and court staff. Rather, criticism is mainly directed at the way the Family Court views its functions and how it organises its dispute resolution processes.

In consultations and submissions to the Commission, litigants, practitioners, court officers and judges generally regarded the conciliation, counselling and mediation services provided by the Court as beneficial. However, the inflexible design of the case management system was said to add unnecessarily to costs and delays for many cases and to contribute to poor compliance with directions and orders. The complaint was that there were too many case events in the Court and many of these did not help to advance the matter to trial, or to resolve it. Many litigants and lawyers reported that cases were settling because of frustration with the Court's processes, expressed to the ALRC as the system "*just bullying clients into settling*".

The Court's stated objective is to provide "*uniformity*" and "*standardised practices and procedures*". One submission to the inquiry, from the Brisbane Women's Legal Service, said strict adherence to this policy means "*some individual litigants are pushed down particular avenues which do not suit their circumstances*".

Case management systems for family law disputes need to make effective use of judicial time and expertise and facilitate screening of cases, to make what has been described *as "the most important case assessment - that the case is routine*".

A lack of continuity in judicial officers managing the cases often forces people to tell their story over and over to different court officers.

In the ALRC's consultations, litigants and lawyers criticised the forms and documentation required in the Family Court. Some practitioners claimed that the Court's efforts to simplify documents and procedures has actually led to an increase in the amount and cost of paperwork needed.

The ALRC has proposed that the Family Court substantially improve its forms and initiating documents, its arrangements for discovery of documents and its referral of parties to conciliation and counselling.

The Family Court should introduce a case management system similar in which each case is allocated to a particular judge and registrar, who take responsibility for the case from commencement to finalisation. Because of the number of contested cases in the Family Court, it is not intended to place judges in charge of routine procedures which may be handled by registrars, but rather to allow difficult or complex cases to be referred more easily to a judge for speedy determination. Please note: The Commission's comments on the Family Court refer to the Family Court of Australia, not the Family Court of Western Australia.

Case management in federal merits review tribunals

The ALRC has proposed that the legislation and practice of review tribunals should further emphasise the administrative character of tribunals. Tribunal processes can and should be arranged to permit:

- improved investigation by tribunals;
- resolution of certain issues without the need to hear oral evidence; and
- cooperative training and working arrangements between tribunals and the government departments and agencies whose decisions are under review.

The Commission's proposals are aimed at supporting the flexible decision making processes available in review tribunals, without threatening their independence.

The ALRC proposes practice rules, directions, costs incentives and case management to enhance the role of party representatives in preparing and presenting cases and negotiating outcomes.

Case management practices within review tribunals should be made to work more efficiently and effectively. The median duration of cases finalised in the AAT was longer than for cases in the Federal Court. More effective management could be ensured, in the Commission's view, if registrars and members were given responsibility to manage a particular docket, or group of cases, and trained to be more exacting and effective in progressing cases and enforcing tribunal directions and orders.

Expert evidence

The use of expert evidence and expert witnesses is often criticised as a source of unwarranted cost, delay and inconvenience in court and tribunal proceedings. However, little research has been conducted in Australia on expert witnesses as a component of civil litigation costs.

The problems most frequently associated with expert evidence can be summarised as follows:

- there is a tendency for parties to "*shop*" for the expert who will give evidence supporting their case;
- it can be difficult for an expert accurately to present technical expertise in the formal processes of examination and cross-examination; and
- it can be difficult for courts and tribunals to sort through a proliferation of conflicting expert opinions.

The ALRC proposes judges and tribunal members more actively manage expert evidence, have flexible arrangements for the presentation of this evidence, and confirm that the primary responsibility of experts is to the court or tribunal, rather than the party paying them. Many of the Commission's proposals are endorsements of changes initiated by the Federal Court in cooperation with the Law Council of Australia.

Changes to the rules dealing with expert evidence will need to be implemented in federal tribunals and the Family Court of Australia. ❑