APLA quoted in Senate Review of Legal Aid

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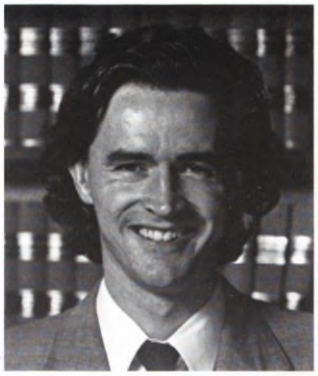

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We are beginning to see the signs of APLA's escalating lobbying campaign. Our submission to the Senate Legal and Constitutional References Committee, prepared and presented by Peter Semmler Q.C. and NSW Branch President Cathy Henry has been quoted in the Committee's controversial Third Report handed down in June this year.

The report has attracted attention because it is highly critical of the Commonwealth decision to reduce the legal aid system funding by refusing to accept responsibility for matters arising under State laws. The report says the Government decisions have been based on inadequate data, and notes that possible sources of data that did not suit the Government (e.g. numbers of unrepresented people appearing in the court system) were not analyzed.

APLA's submission concerned the civil law issues, where the Committee observed that the particular classes in which funding is available are limited and contain many gaps, many of significant social import such as product liability, public interest litigation, and test cases [p.114].

The Committee noted that civil legal aid could only be granted where [p. 113], "the action could not reasonably be expected to be conducted under a conditional costs agreement or similar arrangement with a private practitioner and no other scheme of assistance is available".

Here, the Report quotes APLA's submission,

"7.26 The Australian Plaintiff Lawyers Association also argued that legal aid should be available for product liability cases.

there is no point in the federal government passing legislation making it easier, for instance, for consumers to sue product manufacturers by the amendments to the Trade Practices Act if in reality the consumers cannot sue because they cannot afford to take on an unequal fight against a multinational manufacturer of a defective product. The whole point of the exercise is lost.

7.27 The Association also argued that there was an issue of equity involved:

If we are looking at equity in the delivery of legal services then surely it is the people who are victims of that kind of situation where they are innocent victims of exposure to a very toxic product to which they never should have been exposed who should get priority over people fighting over their house in a family law dispute or perhaps even some people accused in criminal cases. Surely these are the very people in society for whom the justice system should be set up and whose access to it should be facilitated by legal aid.

7.28 The Committee notes that the priorities and guidelines do not explicitly exclude product liability matters. It appears that in practice assistance for such matters is being refused because they are considered to be matters for which assistance is available under some conditional fee or contingency arrangement from the private profession.

7.53 In addition, practitioners may be reluctant to enter into contingency-type arrangements in any but the relatively simple and clear-cut cases. The Australian Plaintiff Lawyers Association informed the Committee:

It is becoming increasingly difficult for plaintiffs in personal injury cases to run cases. Many of them are turned away by lawyers who act in that field, simply because of the administrative costs of running the case, let alone the possibility that the lawyers may never be paid for what they do."

The Government reply seems to indicate they are content to rely on the private sector to fund access to justice [p.66], "... the willingness of the legal profession to provide pro bono services in these and other matters ensures that representation is available in most instances where there are meritorious damages claims."

The Report was neutral on the issue of legal expense insurance, but concluded that there was little value in it for existing cases within the limited legal aid guidelines [p.128 - 9].

The Government reply reads that "legal expense insurance is actually a means of providing access to the majority of Australians - those who fail to qualify for legal aid but who cannot afford to fund their own litigation."

The Committee endorsed APLA's view that the tax deductibility of litigation expenses by businesses was inequitable, and ironically represented a form of public subsidy of this class of litigant at a time when more needy litigants were going without. It recommended introducing equitable tax treatment of expenses [p.192].

In relation to lawyers' work within the community, the Committee observed that [at p. xxiii], "the current government has seriously misunderstood the nature of the extended legal community involvement in the provision of legal aid services and of discounted or pro bono services to other members of the broader community."

APLA supports the Committee's conclusion [p.xxiv],

"It is clear from numerous submissions that the legal aid system in Australia is fundamentally incapable of providing access to justice for an increasing number of Australians. This situation has significant implications for the future of many in our society, and the values central to a liberal democracy. A lack of effective access to justice leads inevitably to the marginalisation of the law and to increasing irrelevance of the core democratic institutions. It is not overly dramatic to assert that, legal aid is critical to the maintenance of justice and the rule of law, and ultimately, democracy."

Regrettably, the Report seems destined to fall on deaf ears. ■

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