

‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’

ARPI Comment

On 23 September 2009, the Attorney-General, the Hon Robert McClelland MP, released the report of the Access to Justice Taskforce, ‘A Strategic Framework for Access to Justice in the Federal Civil Justice System’. The report has been released for public discussion and input.

The report proposes a wide range of changes to the federal justice system, designed to improve the resolution of disputes presently dealt with by federal courts, tribunals and other complaint handling bodies. Underlying these changes is a significant change in the federal dispute handling culture – every element of the justice system should actively work to resolve disputes.

An example of the new Commonwealth approach is the “no wrong number, no wrong door” approach. The differing elements of the existing system should be able to make quality referrals to an appropriate dispute resolution mechanism.

In the main, the Commonwealth paper adapts proven reform techniques to its existing justice programs (it is responsible for funding a wide ranges of programs and federal courts and tribunals). Most of the recommendations in the paper are neither contentious nor unique. The paper acknowledges the contribution of earlier reform efforts, including the UK Woolf reforms. However, unlike some of those earlier reforms, the present report does not attempt a detailed analysis of civil process, and instead concentrates on establishing a broader conceptual framework.

Fragmented system

Consumer interests, in relation to justice services, are best served by a simple, understandable judicial system which is dynamic and adaptive. The policy outlined in the framework paper has the potential for significant benefits for judicial service consumers, but carries significant systemic risk because of the underlying fragmentary nature of the Commonwealth justice system.

The Commonwealth legal jurisdiction is seriously fragmented. It consists of a (statutory) subset of law, being those dealing with matters the responsibility of the Commonwealth parliament. This fragmentary jurisdiction is split across a number of different administrative structures, complaint handling bodies, tribunals and courts. This situation is exacerbated by the need to provide jurisdictional coverage both in main cities and more remote locations.

Many of these problems have in the past been ameliorated by local state and territory courts dealing with commonwealth legal matters (retaining an essential unity for judicial service consumers). It remains the case that most commonwealth criminal prosecutions, and with commercial and civil litigation continue to be dealt with in state and territory courts. However, from the latter half of last century, there has been a trend to create separate specialist commonwealth jurisdictions to deal with particular classes of matters. One example of this change was the creation of the Family Court at Commonwealth level and the transfer of family matters over a number of decades from state and territory Supreme and Magistrate Courts to the Family Court. While many family law matters are concerned with matters that can be effectively resolved

entirely within the Family Court, disputes often risk the need for both state/territory and federal court involvement (eg, when the settlement involves the sale of property, the law governing the sale takes place under the ordinary state/territory law dealing with property) .

The report does not explore the basic architecture of the existing federal system. Had this occurred, other options may have become available. One controversial possibility may be the collapse of the federal jurisdictions into existing state/territory courts, with the capacity of the Commonwealth Government (as in Canada) to appoint federal judges into those state/territory courts. Less controversial, may have been the integration of Commonwealth courts and tribunals either into a single federal court or a similar action in relation to the underlying registries supporting the existing federal structures.

These options, considered respectable in most other Western Democracies, are not specifically considered, perhaps because of the broad policy level at which the report is targeted. However, the report is cognizant of the underlying problem, and emphasizes the need for efficient early targeting of dispute resolution options.

Dispute resolution techniques

The report notes the need to match dispute resolution techniques to the specific interests of the parties, to avoid the use of costly and ineffective techniques. However, the report goes on to lend support to the widespread use of alternative dispute resolutions technique, without a critical examination of the costs and benefits of this approach. This appears to be at odds with an earlier rider in the report about the avoidance of ineffective technique.

There is no doubt that in the appropriate cases, the use of high transaction alternative dispute resolution techniques might enjoy significant cost and time advantages over other more traditional alternatives. However, the uncritical application of alternative dispute resolution techniques to all cases carries significant risks. The use of alternative dispute resolution technique in some case categories can be far more expensive and time-wasteful than traditional mechanisms. In other circumstances, while alternative dispute resolution techniques may lead to the resolution of disputes, this may be no higher than those cases where the technique was not used.

Commonwealth legislation

The report specifically targets the existing Commonwealth statute book, which over a long period of time has become characterised by a huge amount of statutory material, which increasingly defies organization and is increasingly difficult to comprehend. The recommendations for the improvement of the statute book in the report (suggesting in the main a voluntary review process) do not match the review initiatives adopted in other federal states, particularly those that have addressed similar systemic problems in US state legislation. The failure to address this state of the Commonwealth statute book is a serious risk.

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