Further Submission of Geoff Bird for the Productivity Commission Inquiry into Access to Justice Arrangements

The Commission has noted that 17% of the population have serious unmet legal needs. The Commission's proposals however would not help this 17% of the population. The Commission has got the wrong idea that these unmet legal needs can be addressed by having social workers providing advice to people. These people need lawyers, not social workers.

State Legal Aid Bodies

Last year my girlfriend applied for legal aid to be represented at a hearing of the Civil and Administrative Tribunal. She was facing an allegation that she was mentally incompetent, and the government was wanting to lock her up for another five years. Legal Aid Queensland did not even reply to her, but replied to the Adult Guardian, which is her legal opponent and the government agency that wants her to be locked up.

Legal Aid Queensland has a policy of not providing legal aid to contest guardianship proceedings. The reason for this is the Civil and Administrative Tribunal will not allow people in guardianship cases to have legal representation. They consider that legal representation is not necessary, as the cases are obvious. The United Nations on the other hand considers that people in guardianship cases must always have legal representation. Of course, if legal aid was available, a lawyer could apply for leave to represent the person, and then appeal the decision on the basis that the tribunal had denied the person the right to legal representation.

If there was a specific budget for Legal Aid Queensland to provide legal aid for people in guardianship cases, they would give the legal aid money to the Adult Guardian to argue the case that people should be locked up. It is not that there is not enough money to finance these cases, but it is that Legal Aid Queensland is biased in favour of the government. It is remarkable that they will even finance criminal cases. People charged by the police are obviously guilty. Police work for the government, and the government is never wrong, or so Legal Aid Queensland believes.

In my submission, the Commission should recommend that merit tests for legal aid be abolished. Instead, legal aid should be available if a case comes within the certain descriptions:

(a) if a person is in custody, or if the person is charged with a crime, and the prosecution is seeking imprisonment, or if the maximum sentence is one year's imprisonment or more and the prosecution has not said what sentence it is seeking;

(b) if a person is charged with a crime and intends to plead guilty;

(c) if a person's extradition is sought;

(d) if a person or the person's spouse is facing civil proceedings in which a court or tribunal has the ability to order that a guardian be appointed for the person or that the person be given involuntary medical treatment (the lawyer is to be selected at the absolute discretion of the person being represented and is to argue the case against deprivation of civil rights);

(e) if a person's natural or adopted child has been removed from his or her custody by a government agency or a proceeding has been brought seeking that the child be removed from his or her custody; and

(f) if a person is detained under quarantine legislation.

Legal aid should not be available for criminal appeals, but these should be funded by legal centres. If the person receives social security, he or she should not have to pay back any of the legal aid. If the person is working, the amount of legal aid he or she will have to pay back will depend on how much he or she earns and how long he or she has been earning this. Remember that, thanks to economic rationalism, about a third of the population are permanently on welfare of one sort or another.

Unrepresented Litigants

I have appeared as an unrepresented litigant in various courts, mainly to assist my girlfriend regain custody of her daughter and regain her freedom. Before that, I had studied one commercial law subject at university, so I knew the kinds of disputes that could and could not be litigated in the courts. We had a very good law lecturer, who had previously lectured in law at Cambridge University before migrating to this part of the world.

A vexatious litigant is a person who persistently brings cases that have no prospect of success. For example, if someone brought litigation based on the defendant having had an adulterous affair with the plaintiff's wife, that would be vexatious litigation, as adultery is no longer recognized as a tort as it once was.

Notwithstanding my having brought cases about disputes that the law recognizes, I was declared a vexatious litigant. One of the vexatious cases which I was said to have brought was for my girlfriend to have access to her daughter for one day a week. My girlfriend was also an applicant in that case.

According to the judge who declared me to be a vexatious litigant, there were altogether four vexatious cases that I brought. I won one of these cases, but the judge claimed this was just a fluke. In actual fact, in the case that I won, the judge hearing the case made it clear to the other parties that he was going to rule in my favour after having considered my lengthy written submission, so the other parties agreed to judgment in my favour by consent.

The vexatious litigant order was made ten years ago. I have not so far appealed the order, as most of the Court of Appeal judges were appointed by the former Labor Government, and in my view are corrupt. State Court of Appeals were set up by Labor Governments to enable judges appointed by the Labor Government to vet decisions made by other judges. I am planning to appeal the vexatious litigant order in about three years time, by which time I anticipate that the Newman Government will have appointed some more honest judges. I am very pleased with the Newman Government's choice of judges so far.

The Commission has asked about vexatious litigants. My impression is that Australian judges treat all unrepresented litigants as vexatious litigants. When someone is branded as a vexatious litigant, the government is in effect saying, "This person knows nothing about law." But neither do 90 percent of the population. Since all the government is saying about me is that I do not understand the law, like 90 percent of the population, I do not see that I should be stigmatized and treated as a public enemy.

As a vexatious litigant and implied public enemy, it is impossible for me to bring court cases. In theory, I can apply for leave to bring a court case. In practice, the legislation makes it unclear what the criterion is for granting leave. The judge can say, "I refuse to grant leave, as you have the recourse to complain to the Ombudsman about your girlfriend being enslaved."

But in actual fact, people cannot complain to the Ombudsman in Queensland, as it is a sham organization. The Ombudsman refuses to investigate my complaint because they say I have no standing, and they refuse to investigate my girlfriend's complaint, because the agency who she is complaining about withdraws any complaint she makes on her behalf. The Ombudsman legislation does not say anything about standing.

If there were concentration camps in Queensland, the Queensland Ombudsman would say that people do not have standing to make complaints about them. An elderly Polish lady has reportedly complained that the Australian nursing home she is living in is worse than the Nazi concentration camp where she was held during World War II. My girlfriend's concentration camp is like that. There are no stacks of dead bodies; they promptly remove the dead bodies in peacetime.

In my view, there should be no distinction between vexatious litigants and other litigants, and all unrepresented litigants should have to apply to the court for leave to bring a court case. If this approach was followed, unrepresented litigants will be treated much better by the courts, since a judge hearing the case will know the case has already been pre-approved by another judge.

Ombudsman Type Organizations

I have mentioned in my earlier submission how I think the Federal Magistrate Service should be converted into a Financial Ombudsman Service and be given jurisdiction over insurance and banking. Currently, such disputes are heard by a private arbitration service, where the arbitrators are appointed by large banks and insurance companies. That is a a conflict of interest. Also, the arbitrators appointed by the Financial Ombudsman Service are legally unqualified entry level people, when really such a position is equivalent in importance to a District Court Judge.

On reflection, the Family Court lends itself to being converted into an Ombudsman Service. There is not really any kind of family law dispute that could not be dealt with by such a service. Also, the Small Claims Tribunals in the States would lend themselves to being turned into Ombudsman services. They deal with similar kinds of disputes to what the existing Financial Ombudsman Service set up by the banks deals with.

With the Ombudsman services that deal with complaints about government departments, jobs with these agencies should not be career positions. A person should not work for one of these agencies for more than one year, and this should even include typists.

All complaints to the Ombudsman should be looked at in the first instance by a Senior Counsel, who should decide on the approach to be adopted towards the complaint. At present, complaints are being considered and thrown out by people with entry level jobs, who think Australia is perfect, and who, because of their lack of worldly experience, simply do not believe complaints. To them, it is patently obvious that there are no concentration camps in Australia; the authorities simply would not allow it, so they imagine.

Tribunals

The Commission appears to imagine that unrepresented litigants like tribunals. Here we have what economists call a "lurking variable". Unrepresented litigants only like tribunals because they do not usually award costs. It would be possible to prohibit courts from awarding costs, which would be just as good as setting up a tribunal.

Lawyers hate tribunals, because tribunal members have no social status, unlike magistrates and judges. Lawyers like to be magistrates and judges, but not tribunal members. This makes it hard for governments to recruit tribunal members. Tribunals end up being run by lawyers who cannot get jobs anywhere else. Since they are not very good lawyers, they do whatever the government asks them, just to be on the safe side.

The result is that tribunals place unrepresented litigants at a disadvantage. Cases in tribunals are not decided on the legal merit, as tribunal members have only a scant knowledge of the law. The objective of tribunal members seems to be for the most socially prestigious participant to win the case. For example, in the Mental Health Review Tribunal, where my girlfriend regularly appears, the most socially prestigious participant is the psychiatrist.

I have heard the interview on "The Law Report" with Mr Mundy, who seems to favour tribunals. It would be far better to abolish costs, and have a "counsel assisting the court", as I suggested in my previous submission. People who appear in magistrates' courts on traffic offences would be able to speak to the "counsel assisting the court", who could explain the relevant law, and make a submission to the court on the defendant's behalf. With a "counsel assisting the court", the difficulties raised on "The Law Report" would not occur.

The Commission asks whether mechanisms for appeals from tribunals are working. The short answer is no. In Queensland, appeals are restricted to an appeal of an error of law. This causes difficulty, as the distinction between an error of law and an error of fact is not obvious even to a judge. The appeal gets bogged down with whether the grounds of appeal are permissible rather than whether the tribunal has acted correctly.

In one appeal I was involved in, the tribunal had said, "We make a finding of fact that the Public Trustee has done a good job of managing so-and-so's affairs." This was an error of law because the tribunal had made a conclusion without saying how it had arrived at it. According to Palmer v Clarke [1989] 19 NSWLR 158, not giving reasons for a conclusion is an error of law. However the judge apparently thought that, because the tribunal had described its conclusion as a fact, how this was arrived at could not be looked at.

It is also very difficult to appeal a tribunal decision because judges have not studied administrative law as part of their law degrees, since it is an optional subject. In the case that I won, the judge, Justice H.G. Fryberg, apparently looked up the cases I had cited in my written submission, and found that my analysis of the tribunal's decision was correct. Most judges will not extend to unrepresented litigants the courtesy of looking up their cases.

The way that administrative law is taught at university also leaves a lot to be desired. People are able to pass a unit in administrative law without being able to critically evaluate a tribunal's written reasons. At Cambridge University, where my nephew is studying law, if they ask a question in an examination, and you give the wrong answer, you would end up getting maybe 2 marks out of 10. In Australia, if you get the question wrong, you could still get 8 marks out of 10 for mentioning the relevant cases, even though you cannot correctly apply the concept. People are passing law examinations when they do not properly understand the subject.

Mediation

I do not think that mediation is helpful. Most disputes in Australia are the result of a clash of cultures. Mediation only works with people of the same culture. Even with marital disputes, the dispute often comes about because the couple were from different cultures, and the marriage was held together only by lust, and not by shared values.

I took part in a mediation session with my next-door neighbour when I was living in public housing. My neighbour appeared to believe that anything we said in mediation would be reported to the magistrate and used to decide the case. He tried to give the mediator the impression that he had done nothing wrong and that I had caused the dispute. The cause of the dispute was the neighbour using the common area outside my flat as a living area, and having a lounge suite and television there.

I think my neighbour was right that mediation is being used to trick parties into making adverse admissions of fact that courts can take into account. This sounds like how the Labor Party operates; tell people that things they say will not be taken into account and then take them into account anyway. The sensible way to avoid disputes in public housing would be to have one of the tenants as the on-site manager, and for the department to go by the on-site manager's version of the facts.

Court Filing Fees

The Commission has said that it thinks that courts should charge filing fees that are set at such a high level that it will recover the cost of running the court. This seems to be the result of a misunderstanding by the Commissioners of what the courts are supposed to be doing.

The courts are essentially doing the same thing as what the police do and what members of parliament do. People come to members of parliament and to the police and to courts with grievances about their rights being infringed. They demand to be provided with redress.

It is helpful to consider concrete cases rather than abstract cases. Consider the case of the Morcombe family on the Queensland Sunshine Coast whose son disappeared. They went to the police alleging that their son had been kidnapped, and in actual fact he had been kidnapped and murdered. At no stage did the Morcombes have any evidence that their son had not run away.

Would the Commission suggest that the Morcombes should have to pay a fee to the police before the police will investigate their unsubstantiated allegation and look for their son? Should the Morcambes have to take out a HECS-style loan and pay back the cost of the investigation for the rest of their lives?

A complaint to a court is no different from a complaint to the police. The courts and the police have a duty to enforce peoples' rights. A right should not be made conditional on paying a fee. It does not make sense for someone to have a right to life and liberty, with this right being contingent on and subordinate to the payment of a fee.

It is symptomatic of a messed-up society that state governments expect tenants to pay $100 to a small claims tribunal, but they exempt small businesses from paying payroll tax, which most small business proprietors can afford, just like they can afford goods and services tax and income tax. If small businesses had to pay payroll tax, state governments could abolish court filing fees and pay off all their debts. Even giant corporations should not pay court filing fees as a matter of principle.

Legal Technicalities

The Commission apparently has the idea that legal technicalities operate to the disadvantage of the ordinary person and should be abolished. The opposite is the case. Legal technicalities help the ordinary person, and their abolition helps only shyster lawyers.

Let me give two examples of legal technicalities and how they help the average person. One legal technicality is that a party who wants to apply to the court for a procedural order has to give the other party at least 72 hours' notice. This legal technicality protects the unrepresented litigant in that he or she has three days to think about how to respond to the application.

In practice, the Family Court allows shyster lawyers to bring applications with no notice. This places the opposing party at an incredible disadvantage, and undoubtedly often leads to miscarriages of justice. It would not occur to an unrepresented litigant to challenge an application with no notice. If there was a technicality to the effect that applications without notice were forbidden, it would be a good thing.

Another legal technicality is that police cannot give evidence of a suspect having made a confession, unless the confession is in a video recording. At one time, it was a common practice for police officers to fabricate confessions. Having a rule barring confessions outside a taped interview would not prevent police from solving cases, as there would have to be other evidence for them to be speaking to the suspect in the first place.

The United States has the best legal system in the world. One of the reasons why their legal system is so fair is that they have so many legal technicalities. Where a case is thrown out on a technicality, the case is so lacking in merit that it would be thrown out anyway sooner or later. Better sooner than later.

It is much easier to put forward an argument based on a legal technicality than on the general merit of the case. Arguing on general merit requires great persuasive skill that most lay people do not have. Arguing on a legal technicality on the other hand is more within the scope of the lay person.

Some years ago, I wrote a Mental Health Bill to reform the law relating to guardianship and involuntary psychiatric treatment. I used a drafting technique that I call "idiot-proofing". This involves creating legal technicalities that would make it very difficult for a judge to maliciously abuse his power. The law is "idiot-proof" in that, even if a Labor Government was to appoint idiots as judges, which I say they have, it would not cause too much harm.

Many of the legal technicalities in my Mental Health Bill have been handed down in law reports, and are currently the law in Australia, but in practice are disregarded by tribunal members. By including these technicalities in legislation, this would make it more difficult for them to be disobeyed.

For example, according to a reported case, Ex Parte Persse [1828] 1 Molloy 219, the opinion of a medical practitioner that a person is mentally incapacitated is not admissible in evidence because it is a personal opinion rather than an expert opinion. According to this principle, psychiatrists should only be able to give evidence of facts that are personally known to them, just as in criminal cases. If this legal technicality was observed in practice, it would not be possible for my girlfriend to be locked up. Including this principle in legislation would ensure that it is observed, even though it is already the law.

A legal technicality which I have invented is that, if someone has their affairs administered by the Public Trustee, and one of their relatives expresses a wish to take over the administration of the person's affairs, the Public Trustee automatically loses the right to administer the person's affairs, even if the Public Trustee is doing a good job. This rule is necessary because judges have a mistaken belief that Public Trustee staff are diligent and competent because they work for the government, and would do a better job of managing a person's affairs than a relative.

The Commission should recommend the more widespread use of "idiot-proofing", by including legal technicalities in laws to prevent abuses of power. The requirement to provide a pleading is very salutary, and there would be many lawyers who abandoned their idea of suing someone for damages after they tried to write a pleading. Similarly, there would be many police officers who released a prisoner after finding no reference in the Crimes Act to the alleged crime.

Court Costs

The Commission has said nothing in its interim report about court costs. Past inquiries however have seen the awarding of costs to be an obstacle to access to justice. As a result, the Federal Parliament put in the Family Law Act that costs are not to be awarded by the Family Court unless a case is obviously rubbish. This provision has been subverted by the court to mean that an unsuccessful party will always be ordered to pay costs.

Suppose a person's marriage breaks up, and the spouse with the job and purse strings seeks exclusive custody of the children. The other spouse has no choice but to become an unrepresented litigant and defend the case. If someone is facing an attempt to have their children taken off them, obviously for cultural reasons they have absolutely no choice but to contest the case.

It is bad enough that family law cases are heard by registrars who hold extremist views, and who talk about parents "enjoying" children, as though looking after a child is comparable to sniffing cocaine. But then after suffering the legalized kidnapping of the person's child, he or she has to pay the legal bill for the shyster lawyers who arranged the kidnapping. This would commonly involve the unsuccessful party having to sell his or her car to pay these crooks. Family law practitioners in general are not much different from heroin traffickers, in that they create and feed off human misery.

Court costs are a relic of the feudal system. Looking at things simplistically, court costs make sense, as compensation for wasting the other party's time and money. An economist might think that court costs send the right "economic signals". On the contrary, court costs encourage lawyers to drag out rather than settle proceedings. Consider the John Grisham novels, written by a lawyer, where the associates are depicted as billing one client or other for every waking moment. Are the practices on which John Grisham novels are based indicative of the right "economic signals" being sent?

There are many tribunals where costs are not awarded. One might suppose that this would lead to a proliferation of cases being brought, but this does not happen in practice. Bringing a case is inconvenient, and people have better things to do. Alleged cases of vexatious litigants, on closer inspection, turn out to be cases of judicial corruption. If there was a genuine case of a vexatious litigant, the victim would have the recourse to sue the vexatious litigant for damages for abuse of process.

I was involved in a number of administrative law cases involving government agencies. In most of these cases, the government did not hire extra lawyers to contest my cases. The cost to the government of defending a case that I brought would typically be fifty dollars for photocopying. Yet, despite the case costing the government a trivial amount, they were able to obtain court orders for me to pay them thousands of dollars. The situation would be the same with any company that has over ten employees, and could afford to employ an in-house solicitor. It costs these companies very little to defend a case, so why should they be awarded ridiculous amounts of costs?

Legal Training

The Commission has made an interim recommendation that an inquiry be held into legal training, but without giving any reasons why. The Government does not see any need for changes to legal training, and will only hold an inquiry if the Commission recommends specific changes. I understand the Commission members are not legally qualified, but this does not prevent them from critically evaluating legal training. Just as someone does not need to be a military strategist to see that the bullying and rape of military cadets is not a good idea, so too it is possible for non-lawyers to criticize some aspects of legal training.

Consider the history of legal training in the United States. Until the 1960s, law was treated as a vocational skill like plumbing or carpentry. Law courses were readily available from private technical colleges and correspondence schools. Anyone who aspired to a career in business would complete a part-time law course and pass the bar examination. The chief obstacle to becoming an American lawyer was the ability to understand the subject, rather than the cost.

During the 1950s, American lawyers noticed how the legal profession was organized in Europe, and what a lucrative racket it was there. The legal profession in Europe is like the Mafia, but legal and socially acceptable. Envious American lawyers introduced the so-called Juris Doctor law degree into American universities, based on the law degrees of European countries.

Even though law is a subject that can be studied as an undergraduate degree, law can now only be studied in the United States as a postgraduate degree. This was intended as a restraint of trade, so as to restrict the numbers of lawyers, and make things more lucrative for existing members of the profession. The Productivity Commission was specifically set up to prevent restraints of trade, so this is something that you can legitimately make recommendations about.

The Americans have many salutary practices which we would do well to copy, such as the ability of lawyers to sue people in return for a share of the damages. On the other hand, many things in America are highly dysfunctional, such as their health system. The idea of having postgraduate Juris Doctor degrees is one of the dysfunctional things about America that we would do well not to copy.

Instead, we should copy America's historical legal training system, where legal training was readily available at a low cost. A country cannot have too many lawyers, as surplus lawyers can be business people; and likewise with accountants, doctors and engineers: you cannot have too many of them. They are only a problem when there are so few of them that they have disproportionate influence.

The Commission should recommend that funding for law degrees be increased to the point where any student with marks in the top 25 percent of the population academically is able to study law. (It should be likewise for accountants, doctors and engineers.) Funding should be contingent on universities offering law degrees part-time and by correspondence.

In my expert opinion as a vexatious litigant and "idiot savant" on legal matters, law degrees should have three majors: Commercial Law, Liability Law and Family Law. Liability Law would include criminal law and tort law. Family Law would include succession law and disability law. All majors should include administrative law as a core subject, as this is about how to run an official inquiry such as a court or tribunal. In all tribunals that I have appeared before, there is a profound ignorance of administrative law by the presiding lawyers.

One problem that led to my girlfriend being imprisoned is the scarcity of people who know anything about disability law, and in particular the English case law relating to guardianship and involuntary psychiatric treatment. There are only about a dozen people in the country who know anything about this area, and most of them are retired judges and vexatious litigants. Having a Family Law major would mean that at least 20 percent of lawyers would have studied this area.

One of the main areas of dysfunction in the Australian economy is the need for workers to meet absurd practical work requirements to become legally qualified to perform work. For example, it is possible to learn bricklaying in one week, but it takes five years of practical experience to get a bricklayer's licence. As a result, there is a shortage of bricklayers, and jobs are going to foreign migrants who have bribed officials in their own countries to get their licences.

The Productivity Commission was set up to look into this kind of dysfunction. It is not appropriate for the Productivity Commission to say that the legal profession is exceptional, like Vietnam veterans, and only lawyers and other Vietnam veterans can understand their point of view. It is out of line for the Commission to recommend a separate inquiry.

In Queensland, to become a lawyer, there is an educational requirement and a practical requirement. The educational requirement is essentially a law degree from a British Commonwealth university. The practical requirement can be met by working for a lawyer for one year or by an approved qualification.

One such qualification is the Graduate Diploma in Legal Practice offered by Queensland University of Technology. This involves a six month fulltime academic course and four weeks working in a solicitor's office. Essentially then, according to the legal profession, to become a lawyer, a student only needs four weeks of practical experience. I got my practical experience sitting in the back of the court watching how things were done.

I put it to the Commission that four weeks of practical experience is such a short time that no practical experience at all is really needed. No-one can credibly say that a student with a law degree and who has completed the Graduate Diploma of Legal Practice except for the four weeks of practical experience is not adequately trained to be a lawyer. In my submission, there should be no practical requirement at all, and the legal practice units should be included in the degree.

I have heard all sorts of horror stories about people finishing professional courses, such as medicine, and not being able to meet the practical work requirements to get a licence. They then end up having to study for some other university degree. You hear about people in longterm unemployment with three unrelated university degrees. Surely these things are a sign of economic dysfunction that the Productivity Commission was set up to eliminate. If there is an occupation where theoretical study is the only practical experience anyone needs, surely it is law.

Regulation of the Legal Profession

The Commission has put forward the idea of the "Model Litigant". In my view, it is not possible to be a model litigant without an extensive knowledge of law. It does not make sense to insist that ordinary people should be "Model Litigants". Rather, we should be insisting that lawyers should be "Model Lawyers".

In my view, Australian lawyers fall a long way short of the standard to be "Model Lawyers". This is not so much their fault, but rather they have not been taught how to be "Model Lawyers". (But then, as they say, "No-one ever is to blame.") Also, the way that people are taught to behave at some private schools is the opposite of how a "Model Lawyer" would behave.

A "Model Lawyer", in my view, would be someone along the lines of a Boy Scout or Girl Guide. A model family lawyer would refuse to represent a parent unless he or she agreed that the other parent could see the children. There is a lot to be said for making would-be lawyers join the police force before being eligible to enrol in law. Then they really would be officers of the court. It is not for no reason that many judges are Army Reserve officers.

The legal profession in Australia is lacking both in professional ethics and in legal knowledge. I have come across lawyers who know less about law than I do, and I have studied only one subject out of 24. What is needed is an ongoing programme of continuing education, so that if there are lawyers who currently know nothing, they will at least be good lawyers ten years from now. Any course of continuing education should include a hard multiple-choice test that people who know nothing cannot pass.

In my view, there should not be legal service commissions, creating jobs for the least competent of the profession. If a law firm has defrauded clients, other lawyers should sue them. If it is alleged that a lawyer should be struck off, the Attorney-General should bring a case in the Supreme Court. Suspending lawyers does not only affect the lawyer himself, but is also potentially damaging to his clients, and so public servants should not have the power to suspend lawyers.