Submission

Access to Justice Arrangements

Response to Productivity Commission Issues Paper

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Access to justice goes beyond access to tribunals and courts. It's also about:

- *access to information and support*
- *access to opportunities, and having a fair and reasonable experience in everyday life (everyday justice).*

Most of the time we manage conflict and disputes ourselves. The second most common way of resolving a dispute is through informal justice[2]*. This includes using a third party advisor or facilitator (for example, an alternative dispute resolution practitioner or lawyer).*

The least common way of resolving a dispute is through the* formal justice system*. This includes going through the courts and tribunals, often with a lawyer.[3]

My interest is mostly in the informal areas of the justice system though I recognise and acknowledge the vital importance of the legal justice system.

I am a mediator and ADR professional. My resume is attached to this submission.

I do not comment on financial aspects such as legal aid, the community justice centre function, or litigation funding. I acknowledge the importance of these issues to the access to justice issue. They are not within my expertise.

I offer some anecdotal examples and case studies to illustrate my thoughts below.

My ideas are offered to contribute to discussion and perhaps to elicit different and innovative ideas to address the needs of our society to access to justice.

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[1] Full resume attached, mediator, ADR practitioner, former member of NADRAC and former lawyer.
I apologise to the Commission for the limited structure and research offered in some of my ideas. I lack resources to carry out research and have submissions professionally written.

[2] In this submission I will use the term informal justice as referred to in that report. Without making a judgement about it value I do not include in the ambit of informal justice that ADR offered by a court of tribunal or Ordered by a court or tribunal. This sort of ADR is of course important. By its nature however it is part of the formal justice system.

[3] http://www.accesstojustice.gov.au/Pages/Aboutaccesstojustice.aspx Attorney General's Department.

I answer some of the questions posed by the Commission throughout this submission and again apologise for its format that I recognise is not perfect but is the best I can offer with limited resources. I acknowledge the assistance of law student Aarthi Sridharan of UNSW and my assistant Eulalie Moore who assisted with this submission.

What should the objectives of the civil justice system be, and are they being achieved?

General comments and ideas about this question are included in the discussion below.

The Present discussion about Access to Justice is limited by five factors:

1. **The wrong premise;**
2. **The wrong question;**
3. **Ill-informed criticism;**
4. **Reactive and self-interested influences; and**
5. **Lack of data.**

1. The wrong premise:

The discussion about access to justice seems to be based on the premise, spoken or assumed, that access to justice is all about access to Courts and Tribunals or those organs of government that **decide** who wins or loses a dispute. It is not the reality for most people and most disputes.

Every report published or discussion paper written (with the possible exception of the Attorney General's Department "Strategic Framework") shines a spotlight on courts, tribunals and the formal legal justice system and seeks ideas about how society generally, or the disadvantaged in particular, can obtain access to that formal legal system. This tendance occurs despite the fact that the limited research that we have[4] demonstrates without doubt that almost all disputes that occur in our society are resolved without lawyers, the intervention of the courts or the attention of decision makers. Yet little attention and less government funding is available to the mechanisms (informal) by which most in society reach agreement.

The purpose of a justice system is to offer all aspects of society a fair, peaceful and just way of making decisions and when conflict occurs within our society a fair, peaceful and just way of resolving differences.

Access to the justice system should be available to the weak and the strong, the disadvantaged and the privileged, the poor and the wealthy, business and community. All members of our society should have the same "power" when it comes to engaging with the justice system.

[4] For example Law and Justice Foundation 2012

Justice includes formal justice administered by organs of government including courts, tribunals and government agencies with decision making authority *and* informal justice achieved through a wide range of interactions.

Government is a participant in the justice system in that it makes the rules where needed and then it accepts the responsibility of creating systems by which decisions are made (for example the rules of administrative decision making, constitution of courts and tribunals and the empowerment of police and military). As such government bears a heavy and rightful burden in a fair society to ensure that the rules and systems by which those rules are enforced are accessible, fair, peaceful and just.

Deciding who is "right or wrong" is a very small part of the justice system. It is a vital part, just as the keystone on a bridge or structure might be vital. The keystone, however important, need not be either the most expensive or the only mechanism to ensure the safety of the bridge. Indeed if other systems work, the keystone might be almost unnoticed and certainly low cost.

Courts and tribunals are like the keystones of the justice system. We should ensure that they are working, safe and effective. In a functioning system they might otherwise be almost ignored because most of us can cross our justice bridge easily and fairly without ever needing to know about the keystone.

It is the rest of the access to justice "bridge" that is important to the vast bulk of society. How wide is the bridge, how safe are the surfaces and the carriage ways, how easy is it for me to get there, can everyone use it fairly, and finally what is the cost to get across the bridge.

And yet in our debate about access to justice we spend by far the majority of effort and thought on the cost of the keystone (courts and tribunals) and very little on the other aspects of the system. The discussion paper in pages 3 to 5 addresses the financial costs and other access issues of the legal justice system.

This submission focusses mostly on aspects of access to justice that are outside the legal system with a particular focus on informal justice.

2. The wrong question:

The question that people want answered when it comes to access to justice seems to be;

How do we provide more access to more people to the legal justice system (the formal justice system)?

That is what Chief Justice of Western Australia Wayne Martin seems to be asking when he ponders and is quoted on page 1 of the Issues Paper. As was The Hon Michael Kirby AC CMG when he said:

The fact is that most ordinary citizens cannot afford to litigate a civil case in court today. Becoming involved in such litigation is, as Chief Justice Doyle described it, a "nightmare". ……

In certain circumstances, the handing down of a binding decision by an external third party, best serves the interests of justice and finality.

He goes on to say

Few disputants are as intensely interested in the elaboration of the law or the principles of justice as some lawyers are. Few find the intricacies of the law as fascinating as lawyers do. Most simply want a resolution of their dispute, particularly if they are commercial people deriving income for shareholders or ordinary citizens of limited means.

Or as the Hon John Doyle AC QC said;

The existing system for commercial litigation does not deliver effective justice.

Even cases of modest length and complexity routinely take two or three years or more to come to trial. For parties engaged in a business, this is almost always too long.

There is no standard that fixes a reasonable time to get to trial. But I am confident that most of us here today have had the experience of parties for whom the time lag makes the litigation impractical, or severely impairs the quality of the outcome of the case. Either the party does not sue at all, or sues but then, because of the delay, suffers other consequences that impair even a success in the litigation. Moreover, we regularly hear judges complain that when the case gets to trial the pre-trial activity appears to have done little to expedite the case or to improve the efficiency of the hearing. As well, we hear regular complaints from trial judges that trials themselves are over-elaborated, and take more days than they should.

Accordingly, I conclude that not only is the duration of cases a problem in the area of commercial litigation, but further that a lot of the activity that goes on adds to the delay and costs, and in the end is found to have contributed little or nothing to the efficient and just disposition of the case. This is a serious problem.[5]

What is the right question?

I suggest (perhaps radically) that the question that needs to be answered to offer a more robust justice system is:

How do we keep people out of the legal *justice system?*

I am not suggesting that all people be kept out of the legal justice system. What I suggest is that we keep the *wrong people* from accessing the courts and tribunals that are publicly funded, and that we place more funding and emphasis on strengthening the informal justice systems to achieve that goal.

[5] To a Victorian Supreme Court Commercial Law Conference of 9th September 2013.

The *wrong people* are:

a. those who don't need it,
b. those who will be damaged by it,
c. those who don't want it,
d. those who abuse it,
e. those who can afford other ways of having someone else make a decision for them if that is what they want.

Given the finite resources that are available to respond to legal need, are there particular types of civil legal need that are less critical?

There are not *less critical* cases or disputes. Everyone thinks that his or her own case is critical.

There are less worthy cases. Cases should not be excluded from the formal justice system; rather, our societal culture, systems and effort should address mechanisms of keeping less worthy cases out of courts or tribunals (the formal justice system). In that way the funding that is allocated to the most expensive parts of our justice system can be better utilised to deal with more need.

I will elaborate briefly on the *wrong people* so that my suggestions are not dismissed as "fringe" or controversial.

a. those who don't need it:

Such data that we have[6] suggests that almost all disputes are resolved outside the judicial system.

Worse, most cases filed in a Court do not lead to a judicial determination[7]. There are few had statistics but we know anecdotally that most cases filed in Courts and Tribunals (as high as 90%) never need a judicial determination[8]. An important data set is missing in most courts and tribunals. While courts record "disposal rates" of cases they usually keep no record that allows us to find out how many or what percentage of cases are settled as opposed to those that are determined by a decision or Order of the Court or Tribunal. Anecdotal evidence is that the vast majority of those cases that are filed result in a settlement. In the Family Court it is

[6] Law and Justice 2012 for instance.
[7] For example Family Court in and Supreme Court of NSW statistics.
[8] One data set that would assist us judge the value of the courts and their ADR programs is accurate data as to method of disposal not just disposal rates. Anecdotally I know that many cases are resolved through self-help and private ADR but there are not statistics.

some 400 per year from filings of many thousands. A fundamental question for cases that are settled is whether there was a need to file the proceeding at all.

Courts may argue that they facilitate settlement. There is nothing in the data or the research to inform as to what or how they facilitate settlement or whether settlement could be achieved without filing. It would be good to do some research as to the impact of the intervention of courts and tribunals on settlement. My anecdotal experience is that the cost, the trauma and the "adversarialism" of the court process makes it more difficult to resolve cases and I offer some anecdotal experiences in this submission. As a private provider of ADR services, I support the peaceful and fair resolution of conflict. I cannot prove my impact. I do know that the prospect of a case resolving when I mediate (whether it is referred to me for ADR by a court, subject to a court order to mediation, or is just the work of lawyers or managers who believe it is a good idea), is about 75 to 80%. This is higher than the 50% rate that is generally the boast of Court-annexed ADR services. Some court annual reports provide information about settlement rates at mediation.[9]

Settlement rates of courts and private providers should be measured if that is a criterion of success for justice provision.

The fact is, the vast bulk of dispute and conflict is resolved with little or no involvement of judges. There are still many cases and much conflict (the best measure would be those who file a court claim then later settle) that are in the legal judicial system and do not need to be there.

We can enhance access to justice by keeping those cases that do not need to be in the judicial justice system out of it.

Other cases that do not need to be in court are:

- Cases in which medical issues are in dispute. Most of these are now resolved with mediation and some tribunal intervention.
- Debt recovery cases where there is no defence. We could save a huge amount of the administrative cost of the courts if there were a mechanism to enforce an undisputed debt without intervention by a court.
- Cases involving the welfare of children and the infirm, except in the most extreme case (I note that the family court system has largely dealt with this issue by funding effective FDRPs and family dispute centres that mediate and counsel most parenting issues).
- Most civil litigation, of which something like 96% is resolved without trial.

[9] See for instance the Supreme Court of NSW 2011 annual report which records a "settlement" rate at court annexed mediation of 50%.

Diversion programs should be used to filter civil litigation away from the courts, without taking away the ultimate sanction of a court hearing for those who are not genuine in their efforts to resolve.

b. those who will be damaged by it:

There is so much evidence that litigation is damaging it hardly needs to be said. At the very least people do not like litigation (in 15 years of litigation my clients, at the end of a trial, never shook hands with the other side, smiled at them and laughed about the fun of the litigation promising to do it again soon). For those with legal problems, favourability of outcomes of these problems is less when the manner of finalisation is through a court or tribunal (litigation) than when it is solved by a method such as ADR or a complaint-handling body.[10]

> *The provision of access to justice is one of the fundamental cornerstones of our legal system and one which requires in my view some careful thought…..*
>
> *There are perfectly good and legitimate reasons why we should discourage litigants from having their case determined by somebody else rather than reaching their own agreement:*
>
> *The very nature of family breakdown makes it conflictual and there is a natural tendency which, if not checked, would result in many people positively choosing contested and adversarial pathways.*
>
> ***We know that escalating and continuing conflict between parents is positively disadvantageous to the welfare of children and for this reason alone we should be actively discouraging people from adopting that path if it can be avoided.***
>
> *Mediation and family dispute resolution is applied by all courts these days in civil litigation and if ever there was an area where it is entirely appropriate, it is family law.*[11] (emphasis added)

Or former Justice Kirby again:

> *In certain circumstances, the handing down of a binding decision by an external third party, best serves the interests of justice and finality. On the other hand, there are other circumstances where ADR has a special merit. These include, but are not confined to, cases where the disputants cannot avoid, or positively desire, an ongoing relationship. Such non-avoidance arises where parties are linked by blood or other long-term relationships. Desirable preservation of association arises where, despite a particular conflict, the parties see merit in ongoing business or other associations.*

[10] Law and Justice Foundation 2012, 154.

[11] The Hon. Diana Bryant QC, Chief Justice of the Family Court of Australia, Inaugural Family Law System Conference 19 & 20 February 2009 Old Parliament House, Canberra

c. **those who don't want it:**

This category includes all those who do nothing about their disputes, avoid them or could not be bothered. Those who are complacent and those who do not want a court to do their work for them, but rather go about changing what they can and accepting what they cannot. There are many who do not want a court intervention and some of those do not know that there are other choices.

This category also includes highly skilled and effective negotiators and collaborative problem solvers who find solutions to problems without the intervention of the courts.

Society can learn much from effective negotiators and collaborative problem solvers.

d. **those who abuse it:**

Anecdotally we know that some abuse the judicial system, using it to create expense, obfuscate or just to make trouble. They should be excluded from the formal justice system wherever possible.

e. **those who can afford other ways of having someone else make a decision for them if that is what they want:**

The best example is the dispute between Gina Rinhart and her family. Why should ordinary citizens (taxpayers) subsidise a squabble that is only about money, not how to make it, but who it belongs to?

Lawyers will say that justice is an essential part of the fabric to our society and I would agree.

Water is essential also to life. No one (not even lawyers) suggests that wealthy people or corporations get water for free.

Judicial justice is likewise essential but the argument that it should be free to all makes no more sense than saying that we should all have water for free.

3. **Ill-informed criticism:**

See comments regarding lack of data below.

Lawyers and judges in particular will say to the Productivity Commission that the "sky will fall in" if access to (legal or formal) judicial justice is in any way restricted. They have no evidence of the sky falling. Indeed every time that government makes a small step to

change behaviour or for other reasons puts a small impediment in the path to the courts the results are positive.[12]

4. **Reactive and self-interested influences:**

Judges and lawyers profit out of litigation. That is what Justice Doyle says not just by implication.

Lawyers and judges are good people. They want to help their clients. They do not (generally) overcharge. But they do have an interest in maintaining existing systems and they are very conservative. They should be part of the discussion. They should not, just because they are the best advocates, be the only or the even the loudest voices in the discussion about access to justice because they do not have an involvement in most cases. Indeed they do not act for most people involved in seeking access to justice.

When judges see access to justice it is from inside their court rooms. They only see a tiny fraction of the most fractious disputes in that environment.

Judges are quick to raise concerns about diversionary programs or more use of ADR. They do so with no evidence or experience in ADR. If you want to know what happens in a mediation room why ask a judge who never goes there? If you want to know about disputes and how to resolve them, why ask someone who only sees a small percentage of the most intractable disputes?

The more important people to ask are community workers who are assisting mothers escape violence or people trying to negotiate with a difficult credit provider, or a consumer seeking to return goods that do not work or someone who has been dealt with incorrectly in an application to a government agency or a community justice mediator or a financial or workplace counsellor. These people see far more justice dispensed than courts and tribunals and impact on far more people.

5. **Lack of data:**

When lawyers will suggest that the sky will fall in if we place any inhibitor to access to the courts or if we do not pay for very expensive court services they do so with no data. Government similarly lack data when they make important decisions.

The issues paper identifies this shortcoming.

The Federal Attorney General's Department has identified the problem.[13] And yet the quest to create a data or evidence base to inform decision-making languishes. I am not sure why.

[12] See case studies below re government diversion programs.
[13] *An evidence base for the federal civil justice system* by Managing Justice

If I am frank, most of what I write suffers from the same lack of data. I can offer anecdotes[14] but no hard evidence. Until data is mined or created we may never be able to measure cause and effect of very important and expensive policy decisions.

The Courts could tell us what the mechanism of disposal of cases is. Data from existing diversion programs could be obtained; qualitative data could be extracted by researchers. There is no funding and yet the Federal Government spends over $200 million just on the three Chapter 3 courts, not to mention the AAT and other tribunals. One piece of data from the Family Court suggested that for an expenditure of more than $100 million the Family Law listed just 779 cases for trial and 316 of those were resolved without a determination.[15]

One can only wonder whether the incredibly expensive infrastructure, security and cost of a court can be justified for the vast majority of cases that were filed and never heard.

The failure to gather data and to have evidence to support decisions strengthens the voices of those who seek to maintain the status quo and inhibits innovative decision-making.

How strong is the evidence that a relatively small number of individuals account for the bulk of civil legal disputes at a given point in time and/or over time? How well does the legal system identify and deal with cases of persistent need?

There is no data to answer this question.

What are the characteristics of individuals who experience multiple problems and what types of disputes are they typically involved in?

There is no data to answer this question.

See my thoughts above. Courts seem incapable of providing such data, or unwilling. For courts to identify whether cases before them are worthy would be to question their relevance in a huge number of cases. Courts will not do this as it would threaten their budgets and relevance. Neither will courts provide evidence of how well they deal with those with multiple needs.

Courts never help individuals with multiple problems and types of disputes. Indeed, for many, courts make their problems worse, and often deal only with the presenting problem, not the problem of mental illness, poverty, lack of education or even the impact of discrimination, real or perceived.

There is insufficient data to answer these questions.

Level 13, 239 George St, Brisbane, Qld, 4000
http://www.ag.gov.au/LegalSystem/Documents/Paper%20%27An%20evidence%20base%20for%20the%20federal%20civil%20justice%20system%27%20Feb%202011.pdf

[14] Because of this I offer a number of De-identified case studies at the end of this submission.

[15] See annexure for an extract from the Family Courts annual report 2011/12

There is anecdotal evidence of massive abuse of the court system, e.g. the C7 litigation, the Rinehart litigation. There is no measurement of the costs to society of such litigation.

Answers

There are no absolute answers. The fact that we have had at least 10 enquiries, taskforces and programs to address access to justice over the last 15 years suggests that access to justice is still an important issue, and that government and society are grappling with ways to best facilitate the services that lead to peaceful resolution of difference.

I offer below some ideas to support future discussion.

An open and forward thinking brainstorming of ideas could support better answers provided such brainstorming does not become an avenue to entrench position, privilege or existing practices.

The first positive suggestion is to **reject "adversarialism" as the preferred method of dispute resolution and embrace collaborative problem solving.**

Ideas to support this goal are:

- **Culture**

  Support programs and behaviours that encourage a culture of problem solving not adversarialism.

  Discourage adversarialism even when dressed up as support for the rule of law.

  Create heroes of those who support peaceful and just resolution of conflict not those who present as warriors using the system to beat others into submission.

  Business leaders and politicians can model behaviour that values collaboration and rejects competition and adversarialism for its own sake.

  Government and its agencies can practice collaborative problem solving rather than adversarialism.

- **Education**

  Students at all levels from primary to tertiary level can learn life skills not just of advocacy but about problem solving, conflict resolution, how to have difficult conversations, tolerance and understanding.

See culture above.

We get what we choose from education. In our schools, and particularly universities, competition and adversarialism are taught as positive attributes. Collaborative problem solving, negotiation and conflict resolution are hardly ever taught.

Lawyers should be compelled to learn how to negotiate collectively not competitively and to do that before they take their clients to litigation war.

- **Reward and cost**

  The winner takes all lottery of litigation can be discouraged with cost, penalty and reward.

  If a party were rewarded for registering their dispute pre litigation and seeking resolution by non-adversarial methods they might try to resolve before litigation.

  If a person was penalised for seeking out the courts assistance without there being a need this might change a culture of adversarialism as people learn new ways of having difficult conversations.

  If we learned to talk first and litigate last then much would be achieved.

  If we learned to talk in ways that are more likely to create consensus than conflict much dispute would be avoided.

- **Penalise the abuse of power**

  Courts are not places to exercise power.

  It was the abuse of power that lead to the creation of the common and equity courts. Now these are used to entrench the power of capital and government.

  Support the courts for the right cases, not all cases.

The Commission invites comment on strategies for the avoidance and early resolution of civil disputes. What evidence is there of the benefits and costs of these approaches and strategies?

Little empirical but much anecdotal evidence exists. We should seek ways of finding the data and information.

What mechanisms help people deal directly with their own legal needs? How successful and cost-effective have these been in resolving disputes?

See comments below re schemes such as community justice centres and pre litigation ADR programs that have worked.

What barriers and incentives do individuals face in attempting to avoid disputes or resolve them early, and which types of disputes are more or less amenable to avoidance or early action?

I refer to NADRACs paper Resolve to Resolve[16].

Can indicators be used to predict disputes or the individuals more likely to experience them? How can early intervention programs be best targeted and delivered? How can the use of instruments, such as legal health checks, be used to best effect?

Yes but we need to develop skills and benchmarks. They do not exist and we do not collect data.

Every case, every conflict and every dispute can be better managed by a form of triage or advice from experts as to possibilities for resolution.

There are many good examples of early intervention to avoid disputes and Family Dispute Resolution, for example, has been very successful.

Other examples are offered in the case studies below.

What is needed is attention and promotion of such services, not just to save costs, not just as a way of keeping people out of court but as a true and fair method of disputes being resolved. A negotiated outcome that takes into account the relative merits, the relative power of the alternatives for the parties, their interests and standards of legitimacy is what effective collaborative problem solving allows. Most call this negotiation and that is by far the most used method of achieving justice. Most negotiate without third party intervention. Some need the assistance of a mediator.

Education and capacity building to allow the least advantaged to negotiate fairly is needed to divert cases to less formal methods of justice.

Systems and institutions of a low cost (for example community justice centres) are and can be better used not just to find solutions but to educate.

[16] http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/TheResolvetoResolve.pdf

A study of the US Postal Services mediation program shows how mediation programs can be used not just to resolve disputes but to educate about how to communicate and behave to manage conflict more effectively.[17]

How easy is it for disputants to identify the most appropriate dispute resolution pathway, and how could improvements be made?

It is not easy.

People see the Courts as the answer and they deliver only one type of dispute resolution service well. The rest they deliver only to divert cases. It is not done as core business.

- **Triage**

Is there a mechanism or service that can be used to triage cases? The doctors that treat patients do not do the triage. Specialists in these services carry out that role. The same could be achieved in the justice system.

Create a triage system for disputes.

Create incentives for those who follow the effective path to justice and penalties for those who do not.

- **Expertise**

Neither ordinary citizens, judges nor lawyers have skills in identifying the most appropriate DR processes. There are experts who can be engaged to advise and assist.

Neither do most companies, their executives, or citizens learn about alternatives to formal justice or know how to access them. Education is important to ensure that problems are dealt with at the best place with the best process.

- **Support**

More energy and support can be given to assisting parties to avoid litigation. It works in family law disputes and in Retail Leasing, and in Farm Debt. It can work in other areas of dispute.

- **Diversionary programs**

It is almost impossible to access diversionary programs as the easiest and most visible pathway is through litigation. Then the courts refer many cases to ADR and they are settled. This seems like waste of the courts time. There is double handling. If we are to find

[17] *https://www.**usps**.com/redress/*

answers to the costs of the courts the logical place is in diverting cases away from the court system.

Diversion (to be effective and to save time and money) must take place before court or tribunal filing to have the greatest prospect of success, social benefit and cost savings.

Adversarial justice is the most easily identified, written about, and understood method of dispute determination even if most see it as flawed.

The court house is the most prominent building in the town, not the mediation centre, the counselling office etc.

Adversarialism becomes the default pathway. This does not serve the justice system as a whole and is incredibly expensive. To create more access to justice the courts must be the last not the first stop for people in conflict.

Governments could model behaviour by directing their agencies to commence or defend legal proceedings only if litigation can be justified and only if other methods of dispute resolution are not appropriate or successful in resolving conflict.

Where are there gaps, pressure points or overlaps in the various dispute resolution mechanisms now in place? To what extent does the current system direct people to the right place at the right time in dealing with their disputes?

The confusion of whether alternative mechanisms are different to litigation is exacerbated by the Courts delivering ADR processes. This confuses participants about the role of the court and about the difference between a court deciding a case and parties choosing to find another way without compulsion.

Pressure comes because ADR happens too late in the court system. Courts use ADR as a costs saving mechanism rather than as a conflict resolution opportunity.

One solution is to separate the courts and tribunals from alternative non-adversarial processes so as not to confuse the different processes.

How might people with complex legal issues be better directed to multiple legal and non-legal services to meet their needs? How can services be 'joined-up' to assist in this regard?

How can referral services be best employed within the civil justice system?

Triage is one answer. See comments above. The skills in assisting to choose the best processes should be highly valued. The concept that a judge with no experience of ADR is best placed to assist only needs to be said to be rejected.

Triage services, genuine, independent and skilled, can assist people to choose how to resolve their disputes.

Lawyers and Courts presently have a conflict of interest and a lack of skills as a vast amount of their revenue comes from litigation.

Parties to dispute are not ready to read or comprehend alternatives to court. They need assistance and guidance at an early stage.

Which matters, given their nature, are best directed to superior or lower tier courts and to what extent is this already occurring?

The Courts are expert at such direction and should be given more power to cross refer. They should keep out of ADR.

The filter needs to be before cases are filed so that cases coming to court go to the right court at the right time, when other methods fail.

How do specialist courts and tribunals impact on the cost of dispute resolution and access to justice? How do they compare with consolidated courts/tribunals?

Specialists courts add to complexity. It is possible to have multiple specialties under one roof (e.g. mega tribunals) so that triage is possible and more effective. Some courts and tribunals that could be abolished and folded into others include;

- Land courts and planning courts (could become part of District or Supreme Courts
- Family Courts (could be specialist divisions or parts of other levels of courts)

Administrative tribunals have shown how multiple specialist jurisdictions can effectively be collocated and administered.

Multiple court specialties lead to the cost and delay of transfers between jurisdictions, forum shopping and extra interlocutory disputes about forum.

How could registrars and other court personnel be used to greater effect?

The AAT has an excellent model that could be studied and replicated with registrars highly skilled and trained at triage and ADR who assist parties to resolve dispute and if not direct them to speedy hearing.

Ideally triage should take place before filing, though the AAT shows how cases can be filtered for best process even in a tribunal.

Some registrars could be specialists in process rather than law. In the Federal Circuit Court they are trialling the use of settlement registrars who act as a triage function.

How can referral services be best employed within the civil justice system?

See above. There are many answers to this question.

Triage is a key to delivering effective access to justice. Triage needs to embrace all methods of DR and assist parties to choose and engage whether that is in collaborative problem solving or adversarialism.

Data and create an evidence base

- **Pilots**

Such as the Ontario mandatory ADR program can assist in testing assumptions.

Such as the USPS Redress system referred to elsewhere in this paper.

- **What to measure**
    - Cost to parties and society (financial)
    - Satisfaction with process and outcome
    - Non-financial cost to participants, health, relationship cost etc.
    - Capacity to learn and grow
    - Impact on social cohesion
    - Awareness of process and systems

Can consumers readily judge the expected costs and benefits of taking action? Are perceptions of cost accurate? Should the legal costs of resolving common disputes be made more transparent?

My anecdotal experience as a costs assessor in NSW for more than 15 years, as a lawyer for 18 years and as a mediator of 18 years is that the answers to these questions are;

- No

- No and
- Yes

I know of no data to support my anecdotal experience. Legal Services Commissioners may have more data.

I seek to answer some of the Commissions other specific questions below.

ADR

The Commission seeks data on the number, proportion and types of disputes resolved through ADR and the relative satisfaction of disputants with the outcomes of using these mechanisms.

There is a huge gap in information that must be addressed. Energy and resources need to be invested to answer this question. Some agencies such as Retail Leases tribunals and farm debt mediation schemes have some data.

What evidence is there that ADR translates into quicker, more efficient and less costly dispute resolution without compromising fairness and equity (particularly where there is an imbalance of power between disputants)? What is the potential for resolving more disputes through ADR without compromising fairness or equity?

- There will be no compromise to fairness or equity provided ADR services are not replacing the court or tribunals decision making powers and parties have access to the courts if they cannot reach a consensual agreement.
- Refer to schemes already identified above.
- There is not sufficient evidence and it should be obtained.

Data is available from;

- AAT
- Law Society of NSW settlement week programs
- Ontario
- Family DR services
- The diversion program listed below that already exist and can give data about settlement rates
- The Courts if they would collect it
- Other jurisdictions

How might ADR be strengthened to improve access to justice? In what circumstances or settings is it appropriate (or not) to facilitate greater use of ADR in resolving civil disputes? How successful has ADR mandated by courts and tribunals been in resolving disputes and lowering the cost of litigation?

As an ADR practitioner I must declare a conflict of interest to answer these questions.

My answer is implied in my comments above.

I am absolutely certain, but cannot prove with evidence, that more diversion to ADR will improve not only the satisfaction but the cost of access to justice. I would like to see studies to answer these questions.

NADRAC is better positioned to answer some of these questions and its reports *Resolve to Resolve* and other reports address many of these issues[18].

Without an evidence base how can this question be answered. Trials in Ontario[19] suggest that diversion programs are effective and satisfaction levels are high.

Mandated mediation is not as effective as voluntary ADR see case studies below. This is not based on the quantitative evidence that needs to be gathered to be certain.

Conduct of Parties

How effective are model litigant rules and other existing legislative conduct obligations?

Ineffective.

Present model litigant rules only require agencies to "consider" alternatives to litigation. They should require justification for the use of courts NOT justification for the use of ADR.[20]

Rules give people more to disagree about.

Should existing obligations to encourage cooperation be strengthened or expanded?

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[18] www.NADRAC.gov.ayu

[19] http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/

[20] See for instance the experience of NCR referred to in an article by Carver and Vondra "Alternative Dispute Resolution: Why it doesn't work and why it does. *Harvard Business Review of Negotiation and Conflict Resolution 2000 Harvard Business Review.*

Yes.

The Commission invites comments and evidence on the 'user friendliness' of the civil dispute resolution system.

Anecdote and complaint supports the lack of user-friendliness. The civil dispute resolution system is a mystery to most except lawyers engaged in it regularly.

Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed?

Greatly

Do legal practitioners contribute to complexity, and if so how?

Yes but unwittingly.

What, if any, incentives do legal practitioners face to contribute to a more user-friendly system?

Lawyers are the gatekeepers to the system and do not have an incentive for it to be accessible and that may threaten the business model.

Which particular parts of the civil system are unnecessarily complex?

Court rules and legislation.

Are there leading examples of reducing complexity and promoting transparency?

Yes many systems that attempt to assist parties to address issues in dispute directly. Examples are given elsewhere in this submission.

How does complexity impact on parties to a dispute?

Of course by way of stress and cost.

How should the economic cost of unnecessary complexity be measured?

In a variety of ways including user impact surveys and financially through cost analysis.

How should non-financial factors such as psychological and physical stress caused by legal disputes be taken into account when they relate to access to justice issues?

Of course, if the purpose of the justice system is to be fair and peaceful. Conflict is stressful and damaging to some. That stress and damage should be measured although I am not sure how.

How useful have pre-action requirements been in resolving disputes earlier? To which particular disputes are pre-action requirements most suited?

It is my personal view that pre-action requirements as a tool to change behaviour are now essential. There is no study worldwide to support this although there are many who will predict disaster without evidence. There is an urgent need to trial and review proper pre-filing requirements to test effectiveness against the goals of the justice system.

Court Fees

What principles should apply in deciding how to award costs so that they create appropriate incentives for equity and efficiency in civil dispute resolution? In particular, what principles should apply to help ensure that the costs incurred are proportionate to the issues in dispute?

There is a need to ensure that users and losers pay. The proportionality principal should not apply. Cases about small amounts of money can be just as *important* (more important to some) than cases about millions. It is not the money but the social impact that should be the test in determining if money is well spent.

Use of Technology

To what extent is lack of funding a barrier to greater use of technology in dealing with legal issues — both in terms of court processes and management and in providing outreach and other online services for those using the civil justice system? How can such barriers be mitigated?

There is no funding of foresight for use of better technology.

How can technology be best used to improve the efficiency and scope of service delivery? What opportunities exist to increase collaboration across the sector to further develop the use of technology?

I believe that there are many opportunities and they should be explored by governments.

What opportunities are there to use technology to cost-effectively expand services, particularly for regional and remote Australia? What other groups might benefit from the delivery of cost-effective outreach and online services? Do some groups face particular obstacles in using online services?

I am not an expert but this should be investigated.

Education

Are the requirements for entry into practice as barristers and solicitors appropriate and what are their costs and benefits?

No.

What reforms could usefully be made to the academic qualifications and legal training required of prospective lawyers?

Reforms can be made in the education of lawyers and all citizens to better understand collaborative problem solving, negotiation and conflict resolution. These are life skills that are hardly addressed by the education system overall. NADRAC has done some work re lawyers.

What is the appropriate balance between public and private provision of ADR? Should practitioners delivering ADR services be regulated? If so, who needs to be accredited and at what level for the provision of different types of services?

These are the most complex questions facing my profession and it has neither the financial capacity nor the governance structure to answer them.

It is vital that these questions be answered to test the relevance and effectiveness of ADR services. **I support the investment of energy and resources to answer these questions.**

I trust that my submission is of assistance.

Steve Lancken BA LLB MPACS

November 2013

Case Studies – cases resolved without litigation. The argument for pre litigation processes.

These are all cases that I have mediated. No names can be provided due to confidentiality restrictions. The context of some cases has been changed slightly to protect confidentiality.

Individual Cases

High value dispute re private construction

No litigation was ever commenced in relation to this dispute that presented as a dispute about a massive construction contract. The contractor alleged that it had been underpaid by $50 million.

The owner of the facility said the project was overtime and over budget, that the construction was riddled with defects. The two managing directors agreed to engage in mediation.

Lawyers attended the first session, but for the next 2 days there were no lawyers. The commercial people worked out a way to complete the job, notwithstanding profound differences. Completion maximised the value of the project.

Four days of mediation and the commercial people were able to nut out a way to complete the project and it was finished six months later. The financial difference of now more than $50 million remained and was not resolved after another day of mediation, though it was when the Australian managing directors engaged their international organisations and facilitated an experts round table.

No litigation occurred. The companies continued to do business together and the project went into production.

Family business dispute

Father and son had been “equal partners” in a family company that had a turnover of more than $18 million and staff of 50 with many more contractors.

Father suffered from a gambling addiction and without authority took almost a million dollars from the company without authorisation, twice. The second time the son insisted that the business relationship end. His lawyer recommended mediation before any litigation occurred to recover the lost money.

After a day of intake, two days of mediation, and many tears, a transaction was devised allowing the father a graceful exit, the money to be repaid, the company recapitalised and the shares to be transferred over time from the father to the son. In three years if the company is successful the father will receive a final payment for his shares large enough to secure his retirement.

The mediation did not entirely resolve the relationship between the father and the son. It gave it the best chance of being restored to any extent.

Funds manager's partnership dispute

After bitter boardroom conflict, the partners of a fund management business with assets of more than $300 million were able to resolve an exit strategy for two of the partners that preserved the value of the management rights and allowed all to continue in the business of financial products as honest competitors.

No litigation was ever commenced though much was threatened.

$2 million business to business dispute

A purpose built asset did not perform. There were design and performance issued. The asset was worth over $1 million. The losses alleged were over $2 million.

The supplier was alleged to have caused losses. The supplier engaged a designer who also supplied some components that it was alleged were defective.

The parties agreed a program to fix the asset. The damages will be resolved at a later mediation date.

The lawyers supported their clients to find the mediator and discuss the various issues.

Bullying and harassment

Two case studies from many conflicts mediated or facilitated.

A managing director and the chair of an NGO restored a relationship that had been tense for over 18 months after 2 days of intake and mediation. The CEO had lodged a grievance against the Chair.

In another NGO the members of one 4 woman team alleged that the manager and team leader were bullying them and relationships were broken down. Two days of intake, a workplace conversation and goodwill lead to a business wide learning and conversation by which the six originally involved became leaders in a positive workplace program that was facilitated by expert facilitators.

Case studies – litigation failures

Small business partnership disputes in medical care, accountancy and other businesses.

In three cases of partnership disputes the parties had spent between $60 and $100 thousand each. In every case the litigation was settled at mediation with each party walking away, no damages and no costs paid. A total of $500 thousand over all three cases was paid to lawyers. Many court days of useless interlocutory hearings occurred for nothing.

Farm debt dispute.

One party resisted the need for mediation under the Act. The matter went to the High Court and no mediation took place.

There was a second default and mediation took place.

The farmer became bankrupt. No one knows if it was the litigation or bad farming. Some lawyers were never paid.

The farmer lost the asset she had litigated so hard to keep.

The bank was not paid in full.

Everyone lost.

Family provision dispute

After 2 days of litigation, relationships were worse than strained.

The disputants were the first wife and her two children who were those of the deceased, and a second wife and her four children.

The first wife said "this dispute has been so bitter I do not care if my children get nothing so long as I stop that bitch from getting a cent". This is "adversarialism" gone mad.

Case Studies Programs that divert cases from the Courts to other methods of Dispute Resolution

- Farm Debt Mediation legislation in most States
- Retail leasing mediation services in most states that require mediation before court filing
- Workers Compensation (workplace injury damages claims) in NSW
- Health Care Complaints legislation
- Costs Assessment regimes for lawyers in most states
- Consumer credit legislation
- Industry Schemes such as TIO, financial services External Dispute Resolution schemes
- Ontario mandatory mediation program

- Family law Dispute Resolution Legislation that requires reasonable steps to be taken to resolve parenting disputes before cases can be filed

All of these programs produce statistics available to the Productivity Commission and from my experience their registrars would be happy to assist with enquiries. In each case lawyers and their clients opposed the legislation or schemes. They are now universally embraced and money and relationships are regularly saved. In no case is there a prohibition on Court action though in each there is some barrier to unfettered access to courts and tribunals.

Resources;

1. Law and Justice Foundation 2012
2. http://www.accesstojustice.gov.au/Pages/Aboutaccesstojustice.aspx
3. http://www.ag.gov.au/LegalSystem/Documents/ … tice in the Federal Civil Justice System.doc (Attorney General's Department Strategic Framework for Access to Justice in the Civil Justice System
4. Courts and tribunal's annual reports

ANNEXURE

Extract from Family Court data.

First instance trials

Parties who are unable to settle their dispute require a judge to make a decision after a trial, although frequently parties reach settlement during the trial process.

Figure 3.5 provides the number of cases that are finalised at first instance trial. The Court had fewer trials in 2011–12, reflecting not only less cases coming before the Court but also, more particularly, the Court having fewer judicial officers to hear trials.

Figure 3.5 Cases finalised at first instance trial, 2007–08 to 2011–12