Access to Justice

The importance of structural safety nets and government commitment to certainty

Submission to the Productivity Commission Inquiry into Access to Justice

8 November 2013

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WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

Many of our members engage in the provision of free legal services, "no win no fee" representation and pro bono representation. Additionally, many members provide volunteer services outside their places of employment at Community Legal Centres.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. –

The ALA is represented in every state and territory in Australia. We therefore have excellent knowledge regarding legislative change and what impact this will have upon our clients.

More information about us is available on our website.[1]

OUR STANDING TO COMMENT

The ALA is well placed to provide commentary to the Commission. Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are violated or supported by different Scheme models.

We are well aware of existing methods of compensation reimbursement across the country, in order for individuals to gain access to care, as they deal with intersecting Schemes.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field.

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INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Productivity Commission in its inquiry into Access to Justice.

We believe that access to justice is one of the greatest pressing issues in Australia today.

We note that the current inquiry will focus on civil dispute resolution: an area which we are particularly passionate about, given that many of our members are plaintiff lawyers, who regularly represent individuals in cases against large organisations and government.

There are many facets that intersect to impede access to justice, including low income; speaking English as a second language; living with disability; identifying as an Aboriginal/Torres Strait Islander; and acquiring an injury that does not meet requisite thresholds.

However, one of the greatest overall impediments, is any reduction in government support for access to justice.

The two main ways in which governments can impede access to justice is via reductions in funding to essential legal services; and legislative change that erodes existing rights – either to an actual claim, or that limits access to legal presentation.

The ALA submits that governments have one of the most influential roles to play in barring or assisting individuals in being able to use the law as a tool for equality in their lives.

Over 2012 – 13, various jurisdictions nationwide have seen significant scale backs in accessibility to state based compensation schemes through the abolition of rights and entitlements and the imposition of thresholds for accessing the schemes.

With the new Federal government about to resume parliamentary sitting within weeks, we are mindful of any further changes to laws that currently protect the rights of individuals, and potential for the abolition of some institutions that allow for the pursuance of rights.

In light of this, it must be acknowledged that the Productivity Commission has a complex role to play, and a vast task ahead. We acknowledge that it will be difficult for the Commission to unveil all of the current impediments in access to justice.

The evidence drawn from the ALA's members is that there is a marked concern regarding access to justice in Australian jurisdictions.

The fundamental platform of the civil justice system is simple; to provide justice in any civil dispute. It is necessary to identify the nature of the dispute, assess the evidence of the

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dispute and apply the laws to obtain an appropriate outcome.

Justice must be available to all. It cannot be exclusively accessible to some and not others. Any person who considers a wrong has occurred must be empowered to be able to seek a lawful solution. The access should not be dependent upon financial capacity, educational levels or other social factors. To have a justice system which operates on any other platform is an abhorrent idea which places the fabric of society at risk.

We acknowledge that the scope of the terms of reference is quite broad. The terms of reference specifically look at some of the structures that in and of themselves, help to facilitate individuals accessing justice, such as legal representation, and the ways in which this is billed.

These legal structures become much more important when looked at in light of any structural inequality, disadvantage or obstacles in an individual's life that may inadvertently make seeking civil justice much more difficult.

Every area that will be examined in this inquiry ultimately affects individuals' lives.

When looking at questions of access to justice, outcomes are intensely personal, often having a huge impact on someone's health. A failure for justice to be delivered and for individuals' values of fairness to not be held by others, can spur a sense of indignation and a challenge of spirit to fight for the rights of others that follow after them 'so that they don't have to go through what I did.' However, a failure for justice to be delivered can also lead to depression, resentment and a sense of helplessness. These impacts can also flow on to family members and community.

In light of this, justice is not an issue that can be measured in pure economic terms alone. Justice is not a commodity, but a foundation upon which Australian governments must build their every law.

We note with concern, the Commission's focus on 'restraining costs'. We note that governments across the nation in the past 12 months have introduced significant changes to the rights of individuals injured through no fault of their own, which have been cited to be on the basis of financial considerations, which are then proven to be baseless.

We look forward to working with the Commission to ensure that the rights of individuals across Australia are safeguarded, and not eroded by, the recommendations put forward.

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TERMS OF REFERENCE

The ALA notes that the terms of reference of the Issues Paper are extremely broad. The ALA does not seek to comment on all aspects of the Issues Paper. Some aspects are outside the framework of our expertise.

We will provide submissions on the following:

- Conditional costs agreements or 'no win no fee' costs agreements;
- Alternative dispute resolution;
- Costs awards and Court fees;
- Technology;
- Pro bono work;
- Solicitor / client costs;
- Advertising;
- Model litigant guidelines;
- Litigation funding;
- Class actions; and
- Thresholds.

In addition, we will provide submissions on practical considerations such as:

- The importance of accessing legal representation;
- The challenges of 'what if' rights; and
- Government actions nationwide 2012 -213; and
- The new Federal government.

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CONDITIONAL COSTS AGREEMENTS OR 'NO WIN NO FEE'

Conditional costs arrangements and agreements are widely known as 'no win no fee' agreements. Payment of legal fees is conditional upon by the successful outcome of the case.

Most, if not all, ALA members who practice in the areas of personal injury do so on this basis. This means clients are able to pursue their rights in circumstances where they otherwise would be prohibited from doing so. The individual lawyers will often not receive payment for their work for a considerable period of time, sometimes for years.

The importance of this contribution cannot be understated. Without the provision of such services, access to justice would be an unattainable dream for most of our members' clients. The existence of such fee agreements has a very considerable impact upon access to justice for many thousands of Australians, most particularly in the area of personal injury. Without doubt, if such agreements did not exist, there would be an exodus of people being able to pursue and exercise their rights.

In reality, the legal practitioner agrees to defer the receipt of payment for work performed until the case has been successfully concluded. Most cases resolve during the settlement negotiations and do not proceed to verdict. This can be a process which takes any time from several months to several years to complete. The variation in time can be due to a number of matters, including the complexity of the case, the age of the Plaintiff, the nature of the dispute, the attitude of the insurer and the breadth of evidence required to be gathered.

The ALA emphasises the importance of these agreements in the personal injury field. It is common for our members to represent clients who are immediately in a precarious financial position because of having suffered an injury. Statutory schemes have payment of wages for varying periods of time, always at a level below the person's pre accident rate of pay. Injured people often face periods of many months or years of being off work. Many are unable to return to employment due to the severity of their injuries. Many are forced onto Centrelink benefits.

If the person was unable to access such a fee arrangement they simply would be unable to pursue their claim.

The legal practitioner is taking all the risk in the matter. If the matter is not successful, the practitioner does not receive payment for the work performed.

Examples of the practical impact of conditional costs agreements include the below.

All case studies mentioned in this submission utilise pseudonyms.

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Case Study 1 – Robert and Conditional Fees

Robert was a 15 year old boy travelling as a passenger in a vehicle being driven by a family friend. The driver lost control of the vehicle causing it to leave the roadway and roll. Robert suffered significant injuries.

Robert is the oldest child in a migrant family of a single mother with three children. His mother was reliant upon Centrelink benefits for the family's financial support. Robert's mother, acting as his litigation guardian, consulted lawyers who acted on a "no win no fee" basis in bringing Robert's claim.

The nature and extent of Robert's injuries were disputed by the statutory insurer. Robert was required to litigate to have the injuries recognised as being caused by the transport accident. He was successful in this. He satisfied the required threshold for the bringing of a common law claim. His case was settled when he turned 19 years of age.

Robert's common law claim settled for a significant amount, recognising he would be unable to work for his entire adulthood. The settlement was approved by the Supreme Court. During the entire case, Robert's mother was not required to make payment of funds for Robert's case to progress. Both his solicitor and barristers operated on the "no win no fee" arrangement. If such an arrangement had not been in place, it would have been financially impossible for Robert's mother to have pursued Robert's entitlements.

Case Study 2 – Andrew and Conditional Fees

Andrew was at work in a factory setting. He was pulled into a machine, suffering a traumatic amputation of an arm and brain injury.

Andrew was unable to return to work. His injuries have prevented any return to work. Andrew has a wife and three young children. He was the sole breadwinner for the family. His statutory payment of workers' compensation was subject to a statutory maximum.

Andrew's solicitor and barristers acted on a "no win no fee" arrangement. His statutory entitlements were pursued. His common law action was pursued. Andrew's settlement reflected the serious nature of his injuries and the extent of his loss.

Andrew was financially unable to fund the prosecution of his rights. He would have been excluded from seeking the appropriate compensation without lawyers willing to act on a conditional basis.

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These cases are not exceptional. Rather, they are what occur day in and day out in every jurisdiction in the country. Access to compensation for personal injury is almost exclusively contingent upon lawyers being willing to act on a conditional basis.

For those individuals who do not have a high income, conditional fee agreements practically facilitate for a person to be able to afford legal representation at no initial personal cost.

In is usual for the legal practice to also carry the costs of disbursements during the conduct of a matter. Again, it is usually beyond the financial capacity of an injured person to be financing up front the fees commonly incurred in such matters, such as medical reports, court filing fees, interpreters' fees, investigation reports and actuarial reports. The legal practitioner may carry the debt of these disbursements for an extended period of time.

Some jurisdictions allow for an uplift fee in the terms of the agreement. The uplift was introduced so as to reflect the financial burden being carried by the legal practice. Effectively, a legal practitioner may not receive payment for several years. During that time, the legal practitioner is also carrying the the debt associated with the funding of the disbursements being carried.

However, in New South Wales, Section 324(1) of the *Legal Profession Act* prohibits a conditional costs agreement being used in a damages matter. Therefore, the uplift cannot be applied in New South Wales.

The ALA is strongly of the view that such a prohibition does nothing to add to the provision of access to justice. There is no reason of substance for such a prohibition. It merely acts as a prohibition to legal practices to provide such arrangements. The ALA considers such a prohibition should be removed.

Recommendation:

The ALA strongly advocates for the continuation of conditional costs agreements and recommends the prohibition on the usage in New South Wales be removed.

ALTERNATIVE DISPUTE RESOLUTION

The ALA is unable to provide data on the number, proportion and types of disputes resolved through alternative dispute resolution (ADR) and the relative satisfaction of disputants with the outcomes of using these mechanisms. We leave this question to those who collect and maintain such data.

The ALA strongly supports strengthening ADR to improve access to justice.

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Anecdotal evidence from ALA members is that, generally speaking, ADR translates into quicker, more efficient and less costly dispute resolution especially if engaged at the early stages of litigation. In relation to the question of whether fairness and equity is compromised in a situation where there is a power imbalance between disputants, this usually depends greatly upon the skills of the appointed mediator. Fairness and equity may be better maintained if practitioners delivering ADR services were regulated and mediators accredited by a national organisation prior to being permitted to practice. Regulation and accreditation would have a positive effect on mediator competency and quality by ensuring mandatory ongoing ADR education, auditing and adherence to a code of conduct. In this way, ADR would be strengthened and access to justice would be improved.

The ALA supports the development of court processes, including but not limited to guidelines for all stakeholders, that allow for access to a range of ADR alternatives so as to effectively and efficiently manage disputes. Again, anecdotally, ADR mandated by courts and tribunals seem to have a lower success rate than those parties who elect to engage in mediation prior to being ordered to do so.

A non compulsory system also enables greater flexibility for the parties to adjust to any unforeseen consequences of a system.

The ALA does not have any data to proffer an opinion as to the appropriate balance between public and private provision of ADR.

Recommendation:

The ALA supports the use of ADR as one tool in the civil dispute resolution process. Voluntary ADR provides flexibility and generally, a better will on the parts of the parties to engage on a genuine basis. The ADR alternative must be of a high standard and the contribution and participation of legal representation must be permitted (to prevent an imbalance of power between the parties) and compensated (to prevent a successful party being forced to fund the process themselves).

COSTS AWARDS AND COURT FEES

In most, if not all, jurisdictions, the general principle is that “costs follow the event” with the unsuccessful party being required to fund the costs of the successful party.

The ALA does not see that any alteration to this premise would change access to justice in any positive or substantial way. Potentially, the contrary could occur. Should jurisdictions

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become costs free, then there is a large disincentive for a deserving party to pursue their matter because of the imposition of an unrecoverable costs bill. This would be a considerable factor dissuading the pursuit of rights for many people.

Court fees themselves do act as a barrier for many people to access justice. There has been a broad based movement towards a “user pays” system within the Courts and Tribunals. The ALA is concerned with this trend and considers this has the effect of being a considerable impediment to access to justice. Simply, the person with insufficient funds to pay the Court or Tribunal fees will be unable to pursue their rights. The past twelve month period has seen substantial increases, at a rate well above the rate of inflation, to the Court and Tribunal fees in many jurisdictions across Australia.

Whilst there may be a theoretical relief available to a person seeking a waiving of the fee, ALA members report an increasing tendency towards denial by the various Courts and Tribunals.

This occurs even when the party is being provided with legal representation on a “no win no fee” basis. There appears to be one reason provided by the Courts in rejecting the claim for relief, and that is that the benefit will flow to the lawyer and not the person. This demonstrates a lack of comprehension regarding the functioning of a “no win no fee” costs agreement. A represented person may be required to fund disbursements under such an agreement. Therefore, such an approach by the Courts is placing a person at risk of having to be required to fund court fees just because they are being represented under a “”no win no fee” costs arrangement. Perversely, were the person required to fund their legal fees, they may be eligible for the waiver of the fees.

The process of seeking a waiver of fees can be complex. The process needs to be streamlined. A person in receipt of Centrelink benefits is clearly in a relatively poor financial position. This has been proven to the satisfaction of Centrelink. The ALA is of the view that receipt of such benefits should automatically entitle the person to the waiving of any fees. This is of particular importance in the various administrative Tribunals, which often have the objective of providing quick, informal and cheap access to justice.

Recommendation:

Courts and Tribunals must be more flexible in permitting the waiving of court fees.

TECHNOLOGY

The ALA agrees that advances in technology offer scope to improve the operation of all

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types of dispute resolution and that greater use of it should be made. Further, the ALA submits that funding of such technology is the major barrier and that proper funding of appropriate up to date technologies will improve access to justice and make it faster and more cost effective.

Technology can be best used to improve the efficiency and scope of service delivery by:

- Minimising snail mail and using email where appropriate for written communication;
- Solicitor/client videoconferencing or teleconferencing;
- Solicitor/barrister/client videoconferencing or teleconferencing;
- Delivery of court/tribunal information and services online;
- Electronic filing of court/tribunal documents;
- Court/tribunal videoconferencing or teleconferencing for directions hearings, entering orders by consent and return of subpoenas;
- Court/tribunal videoconferencing for expert witness conclaves;
- Court/tribunal videoconferencing for expert witness evidence; and
- Court/tribunal videoconferencing for court mandated mediations.

The availability, quality and use of technology in the circumstances referred to above already exists but it varies widely amongst Courts, Tribunals, ADR providers and legal practitioners in each jurisdiction.

Using technology as suggested above would also cost-effectively expand the availability of services in regional and remote Australia subject to the availability of or access to internet facilities. However, there will still be Australians unable to take advantage of technology because of their inability to use or gain access to the necessary technology.

If we are to improve access to justice, all Courts and Tribunals and their ADR offshoots and lawyers must embrace up to date technology. A minimum standard should be established in each jurisdiction and rolled out in stages as far as Courts, Tribunals and their ADR offshoots are concerned. The front end cost will likely be substantial but the time and cost savings in reduced Court, Tribunal and ADR attendances could ultimately be even more substantial. It is outside the ALA's expertise to provide an opinion in relation to the cost of delivering such technology. As far as legal practitioners are concerned, the delivery of practical technology education by their respective constituent bodies would be of assistance.

Recommendation:

The investment of adequate resources into technology for civil disputes will result in a more efficient justice system at a lower ongoing cost.

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PRO BONO WORK

The ALA strongly supports the view that pro bono work is an extremely important component in facilitating access to justice. However, it is only one component and is not a substitute for publicly funded legal services.

Whilst we are not aware of current statistics relating to how much pro bono work is being undertaken by the legal fraternity, the ALA suspects that there is more pro bono work being performed by lawyers than that which is recorded. Based upon ad hoc discussions with ALA members, individual lawyers and firms undertake pro bono work within their firms and/or volunteer to be rostered on to pro bono registers coordinated by law societies, bar associations, Courts, Tribunals, community legal centres and other organisations such as Salvos Legal Humanitarian. The nature of the work varies widely and includes criminal law, human rights, migration law, family law, personal injury law and other civil disputes. Such work may involve providing pro bono assistance for the duration of the matter or may simply involve a limited brief by providing legal guidance at the outset of a dispute or advices on prospects of success.

The ALA believes that the cost to legal practitioners undertaking pro bono work is the time allocated to pro bono matters which is taken away from paying client matters and in some cases, the disbursements incurred in carrying out the pro bono work. As in any litigious matter, one cannot always accurately predict the amount of legal work that will be involved. It can be difficult to get the balance of paid work and pro bono work right and such balance will vary in each legal firm. A failure to get the balance right can lead to a financial drain especially in small legal practices and can be a deterrent to undertaking such work in the future.

The ALA believes that the principal benefit of undertaking pro bono work is the attainment of a personal sense of satisfaction in having assisted a disadvantaged, marginalised and/or impecunious client whose case had merit, gain access to justice. Of course, there is also the kudos generated by carrying out pro bono work and its potential positive effect in the legal services marketplace.

The ALA itself does not provide a pro bono service and so, cannot provide any practical contribution to the issue of cost effective ways to make the provision of pro bono services more attractive. However, in 2010, the ALA did consider setting up a pro bono service but decided against it. One of the principal barriers was the cost of professional indemnity insurance and setting up claims protection systems as a not for profit organisation across our Australia wide potential volunteer members.

Legal practitioners and organisations considering undertaking pro bono work would benefit from a national template or national guidelines in this regard.

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It is noted the Victorian Government has introduced a compulsory benchmark of the provision of pro bono work from firms of solicitors seeking to gain government legal contracts.

The ALA considers such compulsory requirements as being an effective and immediate boost to the pro bono pool.

Recommendation:

The already enormous amount of pro bono work undertaken by the legal profession must be recognised. Contemplation should be given to following the Victorian model of establishing compulsory benchmarks for pro bono work for firms seeking to win government contracts.

SOLICITOR-CLIENT COSTS, CAPPING OF LEGAL COSTS AND FIXED COSTS MODELS

Solicitor client costs can be a contentious area of consideration. Generally, recoverable costs (party party costs) do not satisfy the entire costs of undertaking litigation. Party party costs are payable on the Court scale. The shortfall arises because frequently, the scale does not reflect the actual work required to properly prepare a case. Often, necessary work is not included in the scale. Often, the scale does not adequately reflect the market rates of undertaking the work or obtaining the evidence required in a particular matter. The short fall then forms the component of costs known as solicitor client costs, which are required to be paid by the client.

There has been a move towards the capping, restriction or total prohibition of solicitor client costs in some jurisdictions. This apparently has occurred as a knee jerk reaction to some high profile cases of a very small number of legal practitioners engaging in what appears to be over charging.

The ALA notes that each jurisdiction has the legal profession governed and over seen by a professional conduct body. These bodies have wide ranging powers to investigate and action improper activities undertaken by a member of the legal profession. The ALA considers these bodies are in fact the best placed to conduct such investigations and assume disciplinary action when required. The overseeing of any assertions of over-charging has and can be suitably managed by these bodies.

The prohibition and / or capping of solicitor client costs can in fact lead to a reduction in

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access to justice. The fact remains that a member of the legal profession cannot perform services as an economic loss or at a margin so low that it is too high a risk to consider that area of practice. The prohibition or capping (at an improper level) has the very real risk that it will drive legal practitioners from the practice area. This has the result of squeezing the supply of legal practitioners within that practice area and lessening the availability of practitioners from the legal consumer. Put simply, if it becomes uneconomic to practice in a particular area, legal practitioners will simply move from that area. This leaves a shortage of legal practitioners in that area.

These restrictions apply only in the areas of personal injury litigation. There are no similar restrictions on other general practice areas. Whilst the introduction of such restrictions may have political mileage in fact it can and does create a narrowing of the supply of practitioners within that field of practice and a reduction in access to justice. Although it is potentially an unpopular move, the ALA supports the removal of such restrictions.

Also within the personal injury practice areas, there are many jurisdictions which impose a compulsory fixed costs model. Ostensibly created to restrict the quantum of costs in these matters, the real impact is on the consumer of the legal service and again acts as an inhibitor to access to justice.

A statutory scheme will impose a fixed costs model on those participating within the scheme. The only real benefit is to the insurer or the statutory authority, which is able to know in advance its costs liability and use this as a mechanism to force the plaintiff into a position of submission. The statutory body or insurer is able to litigate forcefully and extensively, using the fixed costs model to make the pursuit of a claim uneconomic for the plaintiff. The person's access to justice has been thwarted.

Perversely, the other outcome is a fixed costs model will often result in a larger charge of solicitor client costs. The simple principles of economics apply. As an example, if the claim costs $20,000 to prosecute and the party party costs are $15,000 the solicitor client bill will be $5,000. However, if the insurer is protected by a fixed costs model which requires payment of $10,000, the insurer profits by $5,000 and the client is liable for the additional $5,000.

Fixed costs do nothing to encourage the appropriate settlement of cases. It enables an insurer or statutory body to engage in curial tactics. The consumer is denied access to justice.

Whilst there may be political mileage to be gain through the imposition of such models, the ALA strongly opposes such schemes. The fixed costs model does nothing to protect the consumer of the legal service and contrarily acts as a barrier to the person's access to justice.

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Recommendation:

Solicitor client costs are an appropriate method of legal practitioners being remunerated. Their existence in fact encourages participation in the market place of the provision of legal services. Legal regulatory bodies are able to manage any assertions of over charging through investigation and disciplinary powers. Solicitor client costs should not be removed or prohibited.

Capping of legal costs payable by an unsuccessful insurer defendant acts as a bar to access to justice. It merely causes the individual to bear a greater weight on the fees payable and puts the defendant insurer in an unfair position of advantage. There should not be capping of costs.

Fixed cost models act as a barrier to access to justice. The individual plaintiff is placed at an enormous disadvantage in the conduct of the litigation, to the extent it becomes uneconomic to pursue a claim. Fixed cost models should be prohibited.

ADVERTISING

The ALA also wishes to highlight that current restrictions on legal advertising for personal injury lawyers is constraining the potential of individuals to access justice.

If individuals are not aware of the laws that apply to them and any entitlements that they may have, it is questionable as to how people will access them.

Many individuals have experienced a 'referral roundabout' or simply not known where to turn when suffering personal injury.

Personal injury litigation is one of the most common scenarios that the everyday person may face in their lifetime. If individuals are not informed about their rights, there is a definite blockage to them in accessing justice.

We note also, that such restriction does not apply in any other professional area, or in any other legal area, such as family law, corporate law, or wills and estates.

Restrictions or bans on advertising for personal injury lawyers reduces competition in the marketplace. It results in the injured person being unaware of their rights, and being unable to accurately research the quality of legal services available. It prevents the injured person from exercising their rights. Knowledge is power, particularly when a person may be facing a critical point in their lives and their future financial security.

The ALA is strongly of the view that the restrictions on advertising prevent or restrict access to justice for many within Australia. Its removal is a cost free solution to enabling an immediate and greater competition in the market place.

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Recommendation:

Restrictions on advertising act as a barrier to access to justice. It results in the legal consumer being often unaware of their rights and unable to select appropriate and efficient legal representation. It discourages competition in the provider market place.

IMPROVING COURT ACCESSIBILITY, CONDUCT OF PARTIES AND THE MODEL LITIGANT GUIDELINES

Since 2005, the Commonwealth government, agencies, statutory authorities and their legal representatives (collectively herein referred to as "the Commonwealth") have been required to comply with the Model Litigant Rules. The concept can be traced to the traced to *Melbourne Steamship Co Ltd v Moorehead*[2] where the Court referred to a standard of fair play to be observed by the Crown.

It is a long held expectation that the Commonwealth will act in accordance with these guidelines. The Rules were introduced as an act of recognition of the extreme power imbalance between the Commonwealth and an individual in any legal scenario. The Rules are to ensure the power imbalance is not unfairly or inappropriately used by the Commonwealth.

The Rules impose an obligation to act promptly, to properly assess the prospects of success, to limit the arena of dispute, making an early assessment of the Commonwealth agency's prospects of success; limit the scope of the dispute, not require proof of a matter the Commonwealth knows to be true, give due consideration to alternative dispute resolution methods, not taking advantage of the other party's lack of resources, not relying on a technical defence unless the Commonwealth's interests would be unduly prejudiced, not commence legal proceedings unless it is satisfied litigation is the most appropriate method of resolving the dispute and apologising where it is aware that it has acted wrongfully or improperly.

The Model Litigant Rules do not prevent the Commonwealth from acting to protect Government interests. It is permissible to take all legitimate steps to pursue litigation, to test or defend claims, or to pursue litigation in order to clarify a significant point of law, even if the other party wishes to settle the dispute.

The Office of Legal Services Coordination, within the Attorney-General's Department, assists in respect of the responsibilities for legal services to the Commonwealth. The assistance consists of the provision of guidance notes and educational functions.

Victoria has its own Model Litigant Guidelines. For all intensive purposes, its nature and intent mirrors that of the Commonwealth.

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Australian jurisdictions have similar requirements of the signing of overarching obligation certificates. Courts have various Practice notes to ensure the timely movement of matters within the judicial framework.

The ALA is of the view that the Model Litigant Rules lack a significant penalty in situations where there have been breaches. Whilst there may be reporting and investigation, that is an occurrence which happens after the event. It is not proactive in stopping inappropriate conduct before or shortly after it commences.

As a remedy, it is reactive and occurs well beyond the timing of the inappropriate conduct. Whilst not a "toothless tiger" it does not compel proper conduct on the part of the Commonwealth (or other Governments) at the time of the running of the litigation.

In the personal injury jurisdictions, the injured person is frequently dealing with a statutory body. The power imbalance is enormous. Improper advice provided within the insurer can force an injured person to litigate. It is important to remember, the injured person has no option but to pursue a matter. An insurer cannot be forced to negotiate.

Examples of the power imbalance are provided below.

The ALA submits it is appropriate for the Model Litigant Rules to be armed with real sanctions which may be enforced or imposed by a judicial officer during the conduct of litigation. It is envisaged that would discourage the dragging of litigation and encourage proper investigation and preparation of cases by the Government, or its agency.

Case Study 3 - Selena and Model Litigant Guidelines

Selena was a self- employed hairdresser injured in a car accident in 2007. She suffered significant injuries eventuating in a spinal fusion. She made several attempts to return to her pre accident and alternative positions of employment but was unsuccessful.

The statutory insurer refused to accept the documentation relating to loss of income (for no apparent reason). The matter proceeded through pre litigation steps but settlement was not achieved. Selena was forced to litigate the matter. No offers were made at mediation.

In 2013, the trial ran for 6 days. On the 6th day, a document was produced by Selena's accountant. The document was sourced from the Australian Taxation Office and provided a listing of the dates Selena's tax returns had been lodged. This proved the returns had been lodged prior to the accident date. Such documentation had never been sought by the defendant insurer prior to the point of the production in court. Efforts to narrow the issues in dispute, made by the plaintiff's solicitors, were completely disregarded by the statutory insurer.

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The defendant statutory insurer then, for the first time, entered into negotiations. Selena had to be faced with no option but to pursue her common law claim in the court. The statutory insurer had clearly breached the Model Litigant Guidelines. Whilst Selena received payment of her party/party legal costs, she had forced into a further two year period of litigation due to the statutory insurer's failure to comply with the Model Litigant Guidelines.

Case Study 4 – William and Model Litigant Guidelines

William was injured in a motor vehicle accident in 2008. He was riding his motor cycle in the company of a group of friends. On a winding road, one of the other riders overtook his motor bike, forcing William to the side of the road, where he collided into the steel barrier. William suffered very significant injuries to his wrist and shoulder. He required several significant surgical procedures. He was forced to give up his work as a mechanic.

The statutory compulsory third party insurer refused to negotiate at all in the common law claim. The insurer had formed the view that William had simply lost control of his motor bike himself. William was forced into trial in 2013. On day five, the defendant gave evidence. In the course of giving evidence he admitted he had overtaken William in a dangerous place and accepted full responsibility for the accident. For the first time, the statutory insurer first entered into negotiations.

At the conclusion of the matter, the defendant stated he had never been interviewed by the statutory insurer at any time after the accident and leading into the trial. The first time he had been questioned in respect of the matter was a few days prior to giving evidence, by the barrister engaged by the defendant statutory insurer. The case had proceeded through pre-litigation steps, with no offers being made. William was forced to litigate.

At mediation, the defendant statutory insurer refused to make any offers. The conduct of the case made it clear the statutory insurer had formed a view regarding liability without proper investigation or diligence. William was forced into a litigation situation due to the failure of the statutory insurer to properly conduct the case. There was a failure to comply with the Model Litigant Guidelines (it was a Victorian case) However, there was no effective remedy to William for the breach. Whilst William received payment of his party – party legal costs, he still had to endure several years of litigation because of the statutory insurer's failure to comply with the Model Litigant Guidelines.

Recommendation:

Model Litigant Rules / Guidelines need to be provided with actual and meaningful

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sanctions.

CONTINGENT BILLING

The legal profession makes an enormous contribution to the provision of access to justice through the willingness of its members to provide legal services on the conditional basis.

Contingency fees are defined as the setting of legal fees as a percentage of the overall settlement or Court judgement. Currently, the charging of contingency fees is prohibited in all Australian jurisdictions. These are permissible in the United States and Canada and have recently been introduced in the United Kingdom, on a restricted (capped) basis.

There appears to be a public perception that the introduction of contingency fees would create an environment of wilful litigation. The ALA is not of this view. Each State and territory has legislation governing the conduct of the legal profession. Malicious prosecution of claims (if this even occurred) is controllable under the professional regulations. It must be remembered that there is a very substantial disincentive to bringing of unmeritorious claims – the fact this is most unlikely to succeed. We are unaware of any legal practice which would seek to engage in “wild” litigation when there is no merit in the claim, as the legal practice will be bearing the cost of the litigation and face little to no prospects of success. It is economic suicide to contemplate such action. It simply does not and would not occur.

The ALA is of the view that strong consideration needs to be given to the introduction of the use of contingency fees. This mechanism would provide an alternative model for those seeking access to justice.

Contingency fees remove the antiquated method of time-costing, which effectively, rewards inefficiency and does not recognise expertise and experience. An inexperienced practitioner will perform a legal task as a slower rate; will be required to spend a great period of time to obtain an outcome for a client. On a time-costing basis, this person will be entitled to charge a greater amount than an experienced and expert practitioner, who is able to complete the requisite work in a far greater efficient and effective manner.

On a more rudimentary level, contingency fees align the interests of the client with the interests of the legal practitioner. The best outcome is being sought in the quickest period of time. Contingency fees promote efficiency in practice and completely contradict any incentive to keep a case running through complex and possibly unnecessary interlocutory steps. Contingency fees provide a better level of protection for the consumer of legal services, as the legal practitioner has no financial reason to keep a case running for any longer than necessary. The legal practitioner will be far more attuned to the risks in the case.

Contingency fees also provide a high degree of transparency to the consumer. The client may have misgivings or doubts regarding the motives of their lawyer. There will no longer be

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any suspicion that the lawyer is simply prolonging the case whilst the client remains in a position of being able to fund the case. Whilst there are professional obligations upon the legal practitioner to not conduct the case in this manner, this often does remain as a perception in the consumer's mind. Importantly, contingency fees will offer a competition to the commercial litigation funding companies. This is of particular relevance in the class action jurisdiction, where often, the collective plaintiffs have no option but to accept the terms and conditions of a commercial litigation funder.

Recommendation:

Contingency fees should be permitted. These provide certainty and clarity to the legal consumer. They encourage streamlining and efficiency in practice. They provide effective competition to litigation funders.

LITIGATION FUNDERS

The ALA is aware of the ongoing debate relating to the issue of litigation funders. There are concerns raised about potential conflict of interest and the adequacy of capital. Litigation funders are currently used in the Australian context class action / mass tort litigation.

The conflict of interest allegation is that the litigation funder has an interest in the proceeding which may be at divergence from the interest of the client and / or the legal representation.

A corporate defender in a class action may describe the uncertainty of the capital basis of the litigation funder and whether there are sufficient funds to satisfy a potential adverse costs order.

Litigation funders provide an overview of the merits of the case, as, obviously, they are not at all likely to agree to fund a case without significant merit. The funder will consider the likely return on investment and it is not uncommon for that to be no lower than a multiple of three.

The litigation funder does accept a considerable financial risk when agreeing to fund an action.

Even in the relatively short history of Australia's class action litigation, it is clear that the presence of litigation funders does play a vital role in the provision of access to justice. Without this facility, many class actions would not have been brought. Simply, it would have been impossible for individuals or legal practiced to fund some of the litigation which we have witnessed over recent times. The fact is such litigation has acted in the protection of "small" consumers or investors. Such litigation has assisted in the improvement of corporate

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conduct in Australia. The ALA applauds such outcomes.

The ALA considers any potential concerns which may be expressed by interested parties are able to be addressed through the appropriate regulation of litigation funders. The ALA considers the presence of litigation funders has played and will continue to play, a considerable positive role in the provision of access to justice.

Recommendation:

Litigation funders are an appropriate tool for enabling access to justice. Funders provide the financial backing for a case which may otherwise be too costly for a legal practice to take on. Funders provide one avenue of financial capacity to enable litigation and the pursuit of rights to be undertaken.

CLASS ACTIONS

Group or representative actions are commonly referred to as "class actions". These have only a relatively recent history in Australia. The procedure was introduced in the Federal Court in March 1992 in Part IVA of the *Federal Court of Australia Act 1976 (*Cth) (FCA). Victoria introduced a very similar regime in Part 4A of the *Supreme Court Act 1986 (*Vic*)* in 2000 and in March 2011 the NSW legislature introduced a similar, but marginally enhanced regime, in Part 10 of the *Civil Procedure Act 2005 (NSW).*

At least one intention was to encourage an increase in product liability litigation.

The regime enables access to justice for many class participants, which may range into the many thousands in number. It is usual to operate in the scenario where there are a large number of people affected with a total quantum of a considerable amount but each individual has a quantum which is not significant enough to warrant independent legal proceedings. The members of the class would be precluded from access to justice but for the class action mechanism.

There may be scenarios where the quantum of a claim may be of a sufficient amount that the individual prospective plaintiff would undertake their own litigation. The class action mechanism allows for the more efficient management of common purpose claims.

The Australian system operates on the basis of an "opt out" rather than "opt in" basis. A member of the representative group will therefore automatically be within the class action. It is from the individual to opt out of the action, which any individual is able to do so. The system provides that there must be ability to opt out of the class.

The ALA considers the current system of automatic inclusion is preferable to the alterative

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on “opt in”. We consider that positive steps must be taken by a person in the latter to enter into the class and receive the benefit will inevitable result in people who would be otherwise entitled to be within the class missing out.

If there is a person who is determined to institute their own legal proceedings, then it is most probable that person will be of sufficient capability as to take the “opt out” option.

The current process therefore provides the coverage of a class action to more participations than would be covered by an “opt in” model.

Class actions play an extremely import role in the delivery of access to justice across a very broad band of potential practice areas. The system operates equally well for commercial, personal injury and financial matters. It is a very effective tool for empowering people and providing access to justice to many for whom it would otherwise be denied.

Shareholder class actions

Shareholder class actions provide a vehicle for individuals, who would never be able to bring an action themselves against a large bank or company, to be able to do so. The individual is faced with an individual claim would never be able to justify litigating themselves, but when joined with others in a similar situation, has scope to hold large companies accountable.

We note that shareholder class actions have become more common over the last decade, and also aid in encouraging appropriate corporate behaviour.

Product liability class actions

We note that class actions in relation to product liability and health issues, effectively force corporate giants to act responsibly and appropriately and assist in balancing the power between the affected individual and the corporate giant.

Other associated benefits include: raising awareness about health issues, such as faulty hip implants; dangerous impacts of medication and any systemic negligence in health monitoring (such as the breast screenings in Adelaide).

Class actions force public authorities to act with impunity. Class action litigation, for example, regarding increases in exposure to Legionnaire’s disease have resulted in improved standards in public health.

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Case Study 5 - Black Saturday and class actions

Currently before the Court is the class action relating to the 2009 "Black Saturday" bushfires in Victoria. That one action has ten thousand members of the class. Of that, there are 1,700 members who are within a personal injury category. The damages range from modest amounts to considerable amounts. The number of claimants and the range of the nature of damages being sought demonstrate the value of the class action as a tool for facilitating access to justice. Without the class action framework, the Court would be chocked with some ten thousand individual cases involving the calling of repetitive evidence. The class action enables the Court to manage litigation arising from the same event or circumstances in an efficient and cost effective manner.

The ALA is of the view that class action litigation does play an important role in deterrence of poor conduct on the part of defendants who previously would have been considered beyond the reach of the "ordinary" plaintiff. This serves to emphasise the importance of the common law in acting as a general deterrence.

Overall, the efficient and effective use of Court time is accentuated by the class action. Class actions enable economies of scale to operate in the litigation arena.

Recommendation:

The importance of class action litigation must be recognised and encouraged. These permit efficient use of Court time and resources, usually in complex matters. Economies of scale of achieved.

THRESHOLDS

The question of thresholds also continues to bar many claimants from being able to claim at common law nationwide. These thresholds differ across states, and some include the reliance on AMA guides that were never intended for the use of determining compensation. The thresholds also vary across the place in which the injury was incurred: for example, school, workplace, or public venue.

In Victoria, thresholds exist for transport accidents, work accidents, public liability and medical injury. The thresholds differ, depending on the source of injury.

The very blunt nature of the AMA Guides means that the consequential impact of an injury on an individual is not taken into account, and is irrelevant. For example, if an individual

sustained injury and their index finger were amputated, the practical outcome would be entirely different for a storekeeper and a professional concert pianist. However, both would be assessed as having the same level of impairment under the Guides.

This has the effect that the Guides can, consequently, extraordinary underrate the full impact of an injury on a person. The Guides also fail to take into account various negligent scenarios, such as misdiagnosis, which effectively means that an individual subjected to, for example, negligently provided medical advice that provides a misdiagnosis, cannot satisfy the threshold, as there is nothing within the Guide itself to substantiate it.

In Victoria, people who receive misdiagnosis receive nothing. They cannot satisfy the threshold.

Case Study 6 – June and Misdiagnosis

June was negligently misdiagnosed as having suffered lymphatic cancer. She was then put on intensive dosage of chemotherapy, and all her lymph glands were removed.

Subsequently, June found out that the diagnosis was incorrect. As a consequence of not having her lymph glands, she requires ongoing medical treatment for the rest of her life.

Because this ‘condition’ of the misdiagnosis is not within the AMA guides, she cannot satisfy the threshold. All treatment and care must be paid from her own pocket or via Medicare or private health insurance. The doctor has not paid anything.

The ALA is strongly of the view that thresholds themselves prevent access to justice for many people injured throughout Australia.

The economic impact of such thresholds is considerable. A person may be injured in circumstances that would entitle them to bring a damages claim against a negligent party, but id prevented from doing so because the injury does not reach the statutory threshold. The person may have considerable medical expenses, may be prevented from working. The person is then forced to rely upon Medicare and Centrelink. The drain on the public purse is significantly more than marked. Whilst a private insurer reaps the financial windfall, the tax payer is forced into funding the insured negligent action of another.

Recommendation:

Thresholds create a considerable barrier to access to justice, to the advantage of insurance companies. Thresholds cause a far greater adverse economic impact on

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the economy in general, resulting in the diversion of revenue to providing safety net assistance to injured people who are prohibited from seeking redress for their injuries because of the presence of thresholds.

ACCESSING LEGAL REPRESENTATION

Against the background of all of the structural ways we have referred to above in which access to legal representation is facilitated, it must be acknowledged that access to legal representation is perhaps one of the most important steps in accessing justice. Such access crystalises an existing right to redress with guidance as to how and if this process should be taken.

The work of Legal Aid and Community Legal Centres (CLCs) around the country cannot be underestimated. Their work is particularly pertinent to this inquiry, especially given that National CLC statistics reveal that about 60 per cent of their work is in civil law, 35 per cent in family law and 5 per cent in crime.[3]

We note the importance of both in providing services to individuals from a low socio-economic background.

Over 80% of the people helped by CLCs earn under $26,000 a year.

Reductions in funding to essential legal services that provide legal representation, such as Legal Aid and CLCs, inhibits the quantity and quality of work that can be taken on, and ultimately restricts the number of clients that can have their matter pursued.

The Australia Institute has conservatively estimated that 490,000 Australians each year miss out on legal help for financial reasons or lack of knowledge.[4]

Recommendation:

Increase funding to Legal Aid and Community Legal Centre sectors.

THE CHALLENGE FOR LAW REFORM IN PERSONAL INJURY

Many members of the ALA practice in the area of personal injury.

One of the unique challenges for law reform in this area, is that most people do not consider ‘what if’ they acquire an injury. For example, how will they get assistance, will they be eligible

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for redress and what will be the consequences be should this type of incident happen to them?

These consequences and the relevant 'what if' rights are not sought out regularly by a person or family unaffected by injury. Therefore, as the majority of people who will need to exercise such rights in the future are currently unaware they will be in this position, there are few that seek to find out information and rally for the rights of the injured.

For many individuals that acquire injury, they become aware of their rights, or lack of rights, to seek redress or compensation after an incident that occurs to them personally, or to a family member.

In the event of injury, two main areas are relevant to considerations of access to justice in the personal injury field: firstly, being able to effectively access legal representation, and secondly, having an avenue of redress existing at law.

Ability to access existing rights via an advocate

A right that cannot be exercised is no right at all. For individuals that require an advocate or legal representation given the complexities of their case; if an individual is unable to access one, usually their existing right, in practice, extinguishes.

In many types of personal injury disputes, self representation is a simple impossibility; given the reams of evidence required; legal documents and use of experts, it can be almost impossible for self representation to be successful in certain cases. In addition, the relative power of the opposing parties: including the specific powers of the party, or the volume of their available resources, can potentially be used intentionally or unintentionally to intimidate individuals to abandon claims or not pursue appeal.

While access in personal injury claims is facilitated by contingency fees, in some instances, changes in laws pertaining to the claiming of costs of legal representation may inhibit individuals from pursuing legal action.

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Case Study 7 - NSW *Workers Compensation Legislation Amendment Act 2012*

In 2012, the introduction of the *Workers Compensation Legislation Amendment Act* 2012 (NSW) removed the worker's previous entitlement to the payment of legal costs and disbursements on a regulated scale upon successful completion of the case and replaced such entitlement with the worker having to pay his/her own legal costs and disbursements unless able to obtain a grant of legal aid from the Independent Legal Assistance Review Service (ILARS).

The amendments also removed the jurisdiction of the Workers Compensation Commission to determine work capacity disputes, and now mandate that an insurer's decision on work capacity disputes is binding subject to complicated rights of review. In relation to the work capacity decisions by insurers, a lawyer acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review of a work capacity decision made by an insurer.

One of the most insidious amendments within the legislative package, and a clear example of denial of access to justice was the removal of the Workers Compensation Commission's jurisdiction to determine work capacity disputes and make orders for legal costs.

If a worker in NSW now wishes to review an insurer's work capacity decision he/she now has to navigate a legal, technical and convoluted process referred to in the legislation and expanded upon as to process in the WorkCover Capacity Guidelines (30 pages) and Guidelines for Work Capacity Decision Internal Reviews by Insurer's and Merit Reviews by the WorkCover Authority (31 pages plus supplements) without the assistance of a lawyer and often where English is his/her second language. This despicable situation amounts to nothing less than a denial of a worker's entitlement to legal advice. The worker is not entitled to a grant of legal aid from ILARS in relation to the review of a work capacity decision, which means that the worker is left with three possibilities, namely:

1. Find a lawyer who will act on the worker's behalf on the work capacity decision reviews for no fee.
2. Self represent him/herself in the work capacity review process.
3. Not pursue the right to review/s because it is all too complicated.

In Australia, a person charged with a serious criminal offence has an entitlement to legal assistance and representation. However, in NSW, a worker seeking to review the work capacity decision of an insurer effectively does not. How can this be?

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What about the NDIS?

We question whether there will also be similar limitations occurring on a practical level when cases on key points of law come before the Administrative Appeals Tribunal as a result of decisions made by the National Disability Insurance Scheme Agency, pertaining to the National Disability Insurance Scheme (NDIS).

Section 200A of the *National Disability Insurance Scheme Act 2013* (Cth) specifically provides that:

> *Nothing in this Act permits or requires the Agency to fund legal assistance for prospective participants or participants in relation to review of decisions made under this Act.*

While the underpinning objects and principles of the NDIS Act provide for the empowerment of individuals with disability, individuals attempting to review decisions on what may be complicated points of law, and setting new precedent, will have limited recourse to funding of legal representation.

While we acknowledge that there was an announcement of a funding package by the Labor government to assist advocacy, we question whether this will be upheld by the new Federal government, and also whether this funding will be sufficient.

The ALA strongly submits that appropriate levels of funding must be provided in the NDIS landscape to ensure that people with disability are able to access meaningful and competent legal representation in order to ensure their rights are preserved.

Avenues for redress existing at law

Many of the avenues for redress existing at law for personal injury are governed by the various workers compensation acts, motor accident legislation and various Civil Liability Acts, throughout Australia, and are vulnerable to government direction.

Sometimes, existing compensation schemes are also vulnerable to change as their financial position can be reduced to incur savings for the government (and losses for those hoping to claim).

Given that most people that will need to utilise the existing rights under compensation schemes are not yet injured and thus in a position to exercise them, these rights are uniquely vulnerable to government change.

These rights are also vitally dependent on governments acknowledging the importance of such rights and ensuring their ongoing certainty and security.

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Unlike other interests, which are usually framed by concrete outcomes and concrete interest holders, 'what if' rights, or a lack of them, are invisible and largely irrelevant to the public unless they are subjected to the kind of injury that they never thought they would sustain.

GOVERNMENT ACTIONS IN 2012 – 2013

In 2012, governments nationwide have, on many occasions, failed to acknowledge the importance of individuals' rights to seek redress following injury, and have failed to ensure ongoing certainty and security.

Case Study 8 - NSW Workers' Compensation

In 2012, significant changes were made to NSW workers' compensation, as described above. In June 2012, the NSW Government severely slashed injured workers' benefits and restricted their access to legal representation with the introduction of the *Workers Compensation Legislation Amendment Act 2012*, which has had the following impact upon injured workers:

- Workers who had been on benefits for many years as a result of serious injuries and not attained the new threshold of 30% whole person impairment were transitioned out of the scheme: dumped and transferred to Centrelink and Medicare benefits at the taxpayers' expense.
- Most injured workers were limited to 2 ½ years of weekly benefits before transitioning them out of the scheme if they have not reached the new threshold of 20% whole person impairment. Workers that may have been assessed at between 20% and 30% whole person impairment will then be transitioned out of the scheme after five years.
- Payments of reasonably necessary medical treatment and related expenses were limited to a period of 12 months following receipt of the last payment of weekly benefits.
- 'Journey to work' claims were predominantly denied entitlement to compensation.
- No one is eligible for a lump sum compensation payment for pain and suffering.
- A new high threshold (11% whole person impairment) was created for entitlement to lump sum compensation for permanent impairment.
- The entitlements to benefits arising from heart attack, stroke or disease in the workplace were significantly tightened.

What this has meant, is that workers in NSW have had many of their previously enforceable rights whittled away, with no other form of redress.

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For these individuals, their access to just outcomes has been significantly reduced.

Many of the individuals who will be most grievously affected are those working in heavy industry and transport, who due to the high risk nature of their work, stand to lose the most without recompense.

Case Study 9 - South Australia's CTP Scheme

In July 2013, similar experiences were felt in South Australia, when South Australia implemented drastic changes to its Compulsory Third Party Insurance (CTP) Scheme, which slashed the rights of individuals sustaining an injury below new thresholds. Thousands of people that previously would have been able to claim under the Scheme were eliminated in one foul swoop.

Incorporating the Queensland ISV system of assessment, and very high thresholds to gain compensation, this reform knocks out the smaller claims in South Australia. This will impact on at least 3,000 claims per year, which is approximately half of the total claims, 6,000, in any one year to date. For these individuals, they will be unable to claim for any economic loss, non-economic loss or only limited care costs or none at all. This will include a huge scope of injuries, including but not limited to:

- Minor head injuries involving uncomplicated skull fracture, minimal brain damage, dizziness, and memory loss;
- Injury to the coccyx requiring surgery;
- Fracture of the jaw, nose or cheekbone;
- The amputation of individual fingers or toes.

For injuries that do meet the thresholds, they will only be able to claim future economic loss at a rate of 80 per cent of the assessed amount.

A vast number of individuals that previously would have had a claim will now go uncompensated and have no option but to seek support through private insurance or what is available under the public health system and Centrelink.

This pattern could be replicated, and at a more extensive level, across other injuries: those sustained in the workplace; via medical treatment; general accidents or criminal injury, as these areas are also poised for reform under the National Injury Insurance Scheme.

However, a lack of access to compensation and adequate supports is not the only consequence. These measures greatly reduce the incentive to have regard to the safety of individuals.

South Australia's CTP scheme was not in financial trouble and was stable; however, the SA

Government advanced a cost of living argument as justification for the changes. Time has shown that it was in fact, a political move so that significant funds could be utilized for the 2013-2014 State Budget. In this case, the government essentially took money from the injured to use for their own purposes.

Case Study 10 - NSW Victims' Compensation Scheme

In 2011, PriceWaterhouseCoopers was commissioned to review the NSW Victims' Compensation Scheme, which provides compensation to individuals who have been a victim of crime, including domestic violence and sexual abuse.[5]

In September 2012, 80 leading organisations, including the ALA, wrote to the NSW Attorney General expressing concerns about any proposed changes to the NSW Victims' Compensation Scheme and called for extensive public consultation prior to any legislative change.

In the wake of the proposed changes, in May 2013, 30 organisations, spearheaded by Women's Legal Services NSW, lodged an urgent complaint to the UN Special Rapporteur on violence against women.[6]

A host of changes that significantly reduced individuals from being able to claim compensation were introduced, including the slashing of maximum compensation payments were slashed from $50,000 to $15,000 or less.

Draconian limitation dates were imposed which meant that many individuals would be barred from being able to claim.

The changes were also initially made retrospective: impacting on the more than 2 year backlog of claims still unprocessed by the Scheme. (A small window of time was then granted for some limited claims, however this was not publicised widely).

Many individuals who would have otherwise sought to claim under the Scheme are now in a much worse position than they would have been otherwise.

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Case Study 11 - QLD Workers' Compensation Scheme

The Queensland Government recently passed changes to the State's workers' compensation scheme that will impact not only on employees, but also on employers and taxpayers.

These include:

- Introduction of an impairment threshold of 5% and below that will remove the rights of half of all employees injured in unsafe workplaces to bring a legal claim;
- Introduction of strict disclosure requirements pre-employment that will require employees to disclose all pre-existing injuries or medical conditions. If an employee knowingly does not provide relevant information pre-employment and subsequently reinjures a pre-existing condition, that employee's right to compensation and damages is extinguished.

Before these changes, Queensland had the strongest workers' compensation scheme in the country – a financially stable and fair scheme with low premiums.

WorkCover Queensland's Annual Report showed that the average common law payout was almost 15% less than WorkCover's target amount, and that the total cost of common law claims was down more than $50 million compared to the previous year.

This was a scheme that was working well, but has now been fundamentally altered through excessive and unnecessary legislative change that will see a significant erosion in common law rights for all Queenslanders.

Case Study 12 - Victorian *Transport Accident Compensation Act 1986*

At the time of writing, the Victorian government is currently considering amendments to the Transport Accident Compensation Act 1986 (VIC).

These will:

- Specifically impact on psychological injury incurred as a result of a transport accident, or witnessing one;
- Effectively seeks to introduce a threshold definition that in reality, will mean that virtually no one will qualify.

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- This threshold requires a severe; long term mental or severe long term behavioural disturbance or disorder to be suffered for a continuous period of at least 3 years; be recognised mental illness or disorder; with the person having substantially failed to respond to effective clinical treatment AND having severely impaired function of clinically significant distress, AND severe impairment in relationships AND social AND vocational functioning. This is a new threshold. While currently before Parliament, if passed, it will be retrospective, coming into effect on 16 October 2013.
- This has been heavily criticised by psychiatrists, the Australian Association of Social Workers, and the Australian Psychologists Association as being clinically incapable of being satisfied.

Additionally, the government is seeking to abolish nervous shock claims in circumstances where the injured person was not directly involved in an accident and the nervous shock was caused by the death or injury of a person "predominately" at fault for the accident.

This will impact directly upon emergency services workers, family members, friends, and the "good Samaritan" providing assistance.

THE NEW FEDERAL GOVERNMENT

The new Federal government, prior to election, indicated that it would be opposed to a variety of structures and institutions that assist in facilitating access to justice at present.

In brief, we raise concern about the potential for:

- Any decreases in funding to essential legal services, including Legal Aid, Community Legal Centres;
- Any removal of the right to access legal advice, including representation for asylum seekers in offshore detention;
- Any removal of the right to appeal, including negative assessments conducted by ASIO;
- Any removal of working Tribunals with large caseload, including the Refugee Review Tribunal;
- Any removal of protections under Federal discrimination law, including s18C of the *Racial Discrimination Act 1975* (Cth);

- Any removal of prior government commitments to funding for advocacy for the National Disability Insurance Scheme and ensuring funding packages in place for appeal.

We also raise concerns regarding any proposal to eliminate any existing rights at common law for individuals that acquire injury, whether in the forum of work, on the roads, the community or in a hospital or surgery.

We note that the Productivity Commission recommended in its 2011 report, *Disability Care and Support,* that a National Injury Insurance Scheme (NIIS) be created to provide no-fault support for individuals that have suffered catastrophic injury.

The ALA maintains that the cost of providing for catastrophically injured individuals should not be rolled out at the cost of existing rights. We believe that there can and must be a peaceful co-existence of current and any new future rights under a new Scheme.

CONCLUSION

Ultimately, access to justice is an issue that affects all Australians, but most predominantly, those who come from low-income backgrounds.

Given the focus of the Inquiry on more the systems and structures in place that facilitate access to justice, we note that there are many other practical areas in which individuals are struggling to seek justice, and in which ALA members are involved in.

Such issues include:

- The presence of the *Ellis* defence barring individuals from being able to sue the Catholic Church for sexual abuse;
- Veterans affected by Maralinga testing;
- Treatment of asylum seekers, including compensation for unlawful detention and negligence;
- The Montara oil spill, which occurred in Australian waters in 2009, and to which Indonesian communities attribute mass degradation;
- The destruction of property of Indonesian fishermen in or near the Australian Fishing Zone; and

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- Deaths in custody.

There are many more areas that are in need of further investigation.

We look forward to reviewing the Commission's future findings, and working collaboratively towards greater access for all Australians.

SUMMARY OF RECOMMENDATIONS

Recommendation – Conditional costs agreements:

The ALA strongly advocates for the continuation of conditional costs agreements and recommends the prohibition on the usage in New South Wales be removed.

Recommendation – ADR:

The ALA supports the use of ADR as one tool in the civil dispute resolution process. Voluntary ADR provides flexibility and generally, a better will on the parts of the parties to engage on a genuine basis. The ADR alterative must be of a high standard and the contribution and participation of legal representation must be permitted (to prevent an imbalance of power between the parties) and compensated (to prevent a successful party being forced to fund the process themselves).

Recommendation – Court Fees:

Courts and Tribunals must be more flexible in permitting the waiving of court fees.

Recommendation - Technology:

The investment of adequate resources into technology for civil disputes will result in a more efficient justice system at a lower ongoing cost.

Recommendation – Pro-Bono Work:

The already enormous amount of pro bono work undertaken by the legal profession must be recognised. Contemplation should be given to following the Victorian model of establishing compulsory benchmarks for pro bono work for firms seeking to win government contracts.

Recommendation – Solicitor client costs:

Solicitor client costs are an appropriate method of legal practitioners being remunerated. Their existence in fact encourages participation in the market place of the provision of legal services. Legal regulatory bodies are able to manage any assertions of over charging

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through investigation and disciplinary powers. Solicitor client costs should not be removed or prohibited.

Capping of legal costs payable by an unsuccessful insurer defendant acts as a bar to access to justice. It merely causes the individual to bear a greater weight on the fees payable and puts the defendant insurer in an unfair position of advantage. There should not be capping of costs.

Fixed cost models act as a barrier to access to justice. The individual plaintiff is placed at an enormous disadvantage in the conduct of the litigation, to the extent it becomes uneconomic to pursue a claim. Fixed cost models should be prohibited.

Recommendation – Advertising:

Restrictions on advertising act as a barrier to access to justice. It results in the legal consumer being often unaware of their rights and unable to select appropriate and efficient legal representation. It discourages competition in the provider market place.

Recommendation – Model litigant guidelines:

Model Litigant Rules / Guidelines need to be provided with actual and meaningful sanctions.

Recommendation – Contingency fees:

Contingency fees should be permitted. These provide certainty and clarity to the legal consumer. They encourage streamlining and efficiency in practice. They provide effective competition to litigation funders.

Recommendation – Litigation funders:

Litigation funders are an appropriate tool for enabling access to justice. Funders provide the financial backing for a case which may otherwise be too costly for a legal practice to take on. Funders provide one avenue of financial capacity to enable litigation and the pursuit of rights to be undertaken.

Recommendation – Class actions:

The importance of class action litigation must be recognised and encouraged. These permit efficient use of Court time and resources, usually in complex matters. Economies of scale of achieved.

Recommendation -Thresholds:

Thresholds create a considerable barrier to access to justice, to the advantage of insurance companies. Thresholds cause a far greater adverse economic impact on the economy in

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general, resulting in the diversion of revenue to providing safety net assistance to injured people who are prohibited from seeking redress for their injuries because of the presence of thresholds.

Recommendation – Funding to essential legal services:

Increase funding to Legal Aid and Community Legal Centre sectors.

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