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Access to Justice
Productivity Commission
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Submission in response to the Productivity Commission Draft Report Access to Justice Arrangements of April 2014.

1. Support for the Draft Recommendations

MCA strongly supports the Commission's recommendations of adding information assistance measures to make consumer understanding of and navigation through the system better, particularly for vulnerable groups and in making tribunals easier to use via reduced legal formalism. **[Information Request 5.1] [Information Request 10.5 re tribunals]**

However MCA cannot see that realistically funding to provide such radical systemic reform is ever going to be available. Perhaps some pilot demonstration projects may get funding to act as public relations vehicles. But the risk is that this will only act to cover up the average way the system still operates.

True system reform seems economically impossible due to the way that the legal profession is structured.

[Information Request 5.1] In his 2009 book, ***Our Corrupt Legal System (Why Everyone is a victim Except Rich Criminals),*** Evan Whitton at page 35 makes the point just how long-standing is the rejection of truth by what Evan Whitton sees to be a legal cartel:

"While Europe opted for truth , England hesitated … Europe had spoken, but English lawyers and judges were making a lot of money from the accusatorial system, and the role of lawyers in a truth seeking system would necessarily be minimal. In 1219, the cartel accepted that trial by ordeal had to go, but decided to reject the investigative system, minus the ordeal and to persist with the accusatorial system, minus the ordeal and with inscrutable jurors instead of the inscrutable deity. Professor Theodore Plucknett said a trial was now 'just a newer sort of ordeal'.

From cases reviewed MCA's opinion has to be that this is still the situation today in Australia where legal process reform now lags other jurisdictions, the ordeal now being a financial one that amounts to a boon to rich criminals and the negligent who are protected by massive adversarial professional indemnity funds whose understanding of ethics is legally allowed to be whatever is allowed in the adversarial courtroom to protect their dollars.

It follows that the critical problem for consumers is probably not lack of training of agency staff so much as a lack of funding to respond to consumer needs plus a legal culture that can be consumer toxic when faced with a complaint that must seriously impugn the reputation of other professionals be they legal or medical. **[Information Request 5.2]** A good example of this is the case of a very senior neurosurgeon in the ACT and the way the complaints system destroyed a rehabilitation doctor who sought to protect patients from gross negligence. This was reported by journalist Ray Martin who also most importantly said at the same time on Channel Nine's current affairs program ***A Current Affair*** on 10 June 2013: *"And there's an old rule you and I both know, you don't take on lawyers you don't take on doctors and you certainly don't take on brain surgeons in court because you're going to lose"* .

It follows that Australian the civil courts have little to no value in the quality control of such professional services. The various ADR systems that have appeared in the shadow of the formal justice system as a cheaper band-aid solution are no substitute. They generally do not offer more than some form of what is presented as psychological closure which in reality is no substitute for a cash sum with which to allow services to be purchased to address disability. From hard consumer experience in NSW no confidence can be placed in the NSW Legal Service Commission or Health Care Complaints Commission to act strictly in the interests of a particular consumer who has a valid complaint about service. **[Information Request 6.1]**

In the draft at Chapter 15 The Commission seems to fail to address serious discrimination. Tax deductibility is a highly discriminatory measure. Large non-human real persons at law who cannot feel pain are thus assisted whereas the human being who has to perhaps sell their home to pay legal fees and has little to no income not only gets no help from tax deductibility but has to pay GST on legal fees out of the limited funds they have available to defend their human rights using the civil law which is all Australians have to use. The paper [Charlesworth, Hilary "The Australian Reluctance About Rights" Osgoode Hall Law Journal, Vol 31 No 1 1993 p195-232] explains that Australians do not actually have any rights but the ones they are able to defend via civil litigation.

2 What may be economically possible to eventually trigger real reform

To generate funding collecting data on just how badly the civil justice system is performing could provide a basis for improvement if the community can be allowed to see it and so demand changes via the political process. The problem is getting such a radical change agenda accepted by any political party.

Under today's poor economic conditions the only paths MCA can propose as triggers for substantive reform later on are :

2.1 Gradual automation module by module of general information provision and para-legal services for consumers using AI (artificial intelligence) and Expert Systems Technology linked to legal databases to replace the face to face interview and initial civil case or tribunal hearing preparation currently carried out by agency legal staff and solicitors. In time this can be a massive money saver as it will reduce the number of legal professionals and semi-professionals that have to be employed.

For this reason the profession will find it has to fight to stop such change. It is thus most important in defining the scope of such software application development that existing legal professionals not have direct control over the form of systems being developed or be given control over subsequent service delivery, or the result can be expected tol end up the same as for all the ADR channels that have been established. That is real reform will be deflected to simply expand the market for professional services. As Richard Ackland put it ***"Pricey lawyers colonise work that requires just half a brain"*** page 29 SMH Friday 11 April 2014.

MCA thus holds that service supply side of "the shadow of the law"should be populated mainly by computers not humans and form an R&D laboratory for the eventual development of a 21st Century justice system where some realistic democratic equality before the Law is for the first time possible as the economic cost of legal expertise outside of a court and tribunal can fall to close to zero.
[Information Request 6.2 One software module could be education about fee options and structures.**]**
[Information Request 7.5 The change will have to be gradual, ending up by displacing most low skill legal functions by intelligent software applications **]**
[Information Requests for chapters 11 to 14 Ending up with a non adversarial process that seeks to find the truth in a dispute rather than constructing a system of trial by financial ordeal will solve

many of these problems as the underlying reason for the problems is removed. **]**

2.2 Collect data on hardship produced by the way the system operates No dollar value is ever put on the harm the system of 'justice' does to vulnerable legal consumers. No quality controls exist on this aspect of system performance and it seems on the basis of past attempts at reform since 1852 when ***Bleak House*** was published (see the above Richard Ackland SMH reference) that the profession will continue to do what it has done for the last 162 years to resist reform. The hardship and the abuse by the justice system of what would be protected basic human rights in a nation with constitutional human rights is currently invisible as legal consumers lack a voice. MCA is of the opinion that documents of record produced by due process need not cover the actual history of a court case and indeed that very design of the justice system due process can work to cover up reality, as took place in the civil cases that were given as an example in our first submission. MCA is of the opinion that existing due process fails to stop higher courts producing documents that contradict what happened in lower courts or tribunals.

2.3 Collect data on the real return on investment that the legal services industry (including courts and tribunals) produces. MCA suggests that the industry does not make sense economically when compared to other essential industries.

2.4 Collect data on system failure. To include failures in the interaction of the criminal and civil jurisdictions. If the criminal jurisdiction had been used in the Chelmsford disaster the protection provided would have transformed outcomes in the civil courts. Other more recent medical cases in NSW and Queensland where a higher court reversed jury findings indicates to MCA that nothing has changed much in 40 years.
[Information Request 6.4 MCA holds that none of the complaints bodies are effective in serious cases where if the justice system had actually worked in accordance with the historical facts the complaint should have triggered criminal action. **]**
[Information Request 10.5] The legal concept of The Appeal is considered to be nonsense by medical consumers who have been ruined by our costly legal system since legal appeal is about process not factual reality, victims holding that higher courts seem to exhibit a first duty to rubber stamp the actions of judges in the lower courts. The superior ethic being applied being that the public should not be assisted in holding that their justice system is other than infallible. The classic example of this at work being the view held by Lord Denning that if the death penalty had been retained those Irish men convicted of terrorism in the UK would have been executed years ago thus forgotten and the media would not have had any interest in investigating facts and so exposing that the convictions were corrupt and that the convicted men were actually innocent.
[**Information Requests 11.1]** Perhaps we need a new truth seeking Federal Minister whose portfolio is about 'Putting Things Right and Defending the Human Rights of Australians' by a discovery of why justice process failures take place ?

2.5 Collect data on why court cases in legal negligence are all but missing when massive ongoing press reporting of consumers being very critical over legal service supply is so common.
[Information Request 7.1 The first loyalty of legal professionals to their peers in order to maintain total control of the market is a major obstacle to reform. See an alternative way to run a profession in a paper : Dugdale, Tony (1989) **"Restructuring legal and health services: the challenge to the professions",** Professional Negligence, May/June 1989. (p97-*102 'However, another approach to professionalism is to see professional status as resting not on market control but on quality control. This functionalist approach sees professions as receiving their status, privileges and autonomy from society in return for using their expertise in society's interests, promoting high ethical standards and ensuring quality of service with rigorous disciplinary procedures .... On this approach the reform proposals ... call on the professions to deliver their side of the bargain by taking quality seriously. ... operate audits, codes of conduct and effective complaints procedures* ... (in the context of the UK government's White Paper 'Working for Patients'.)

2.6 Aim to convert over time to use Truth Seeking Technology: Courts (and also tribunals when

modelled using the legal concepts that produced courts) are designed to find a winner not to seek the truth or even investigate to define the facts in a case. A barrister's key skill being keeping critical evidence out of evidence by use of due process rules. If tribunals and any related ADR can freed from the adversarial straitjacket and so seek the truth they could have advantages for consumers in disputes where a very asymmetrical power balance exists. **[Information Requests in chapter 10].** The key skill added would be the 21st Century concept of using scientific truth and analysis and this skill could also work to make tribunal process much more universal in application to various types of dispute and so allow consolidation.

2.7 In order to expose reality get an answer to the question : What would the economic and social outcomes be if the Tort of Negligence was retired from individual plaintiffs in Australian Civil Law where legal and medical services are involved ?

Listing some of the expected outcomes:

- For the vast majority of medical consumers who suffer permanent injury due to probable negligence no change would be evident as they would still qualify for a disability pension where applicable.

- The cost of negligence would still be cost-shifted to the federal budget but as no financial dimension of legal blame would now exist the disability pension could be provided for the actual disability as being iatrogenic in nature rather than for a constructed politicly correct but fake reason that cannot serve to identify disability causation.

- A very small number of medical consumers would not be driven into poverty due to attempting to take on the hopeless task of trying to beat massive defence funds in civil courts.

- In NSW injured consumers could still complain to the HCCC and perhaps, if the complaint was suitable, get an investigation and in some cases restrictions on practice would be imposed on relevant doctors.

- With no need for defence funds major losers would be the directors of defence funds who would not longer be able to draw $100,000 or more for a few hours of directors meetings each year.

In legal negligence cases MCA is not aware of any where success was possible for a consumer. Which raises another question: Where do NSW LawCover fund dollars end up ?

MCA suggests that in practical terms the tort of professional negligence in medical and legal cases has already been retired by stealth and what we are left with are massive costs to no effect for consumers except to make services more expensive.

Reviewing the April Draft Report indicates that the scope of this inquiry does not include radical changes needed to assist the class of medical consumer that MCA finds need the most assistance over access to justice.

These consumers are those who have suffered serious iatrogenic damage and are in need of serious levels of compensation in order to make the best of what is left of their life. Such a flow of funds from the suppliers of medical services would be expected to have market economic effects in changing the manner and range of services delivered since cases would act to change the profitability of supply in the manner that occurs in a free market.

In the UK it is understood that some level of free market operation does exist since NHS Trusts are

liable for the health care establishments they fund and operate and hospitals have thus had to close due to financial collapse following a loss in a medical negligence case. This is an example of a working market. Interestingly this outcome would be of concern to some community and consumer organisations because the services were no longer available. The logic being never mind the quality just feel the width. MCA does not feel that this manner of social thinking is useful when applied to vital services. What it reduces to is that some consumers must die or be disabled in order that others be saved. It is another way of power holders saying "we have standards above which we will not go!" Usually in the context of the power holders having access to a superior level of service by use of financial power in what has become a commercial market with two levels of performance depending on the ability to pay.

The medical services market here is of course not a free market but a failed one hence the inability of the consumer to influence in any meaningful way the quality of the product being consumed.

Additionally the consumer normally comes to the market under conditions of force majeure as a supplicant with the major funders of services (government and health funds) having an interest in minimising the total costs of services and only a secondary interest in product safety and all but no interest in a particular system victim even if mass media expose the case. Hence the high death and injury rates that have caused some legal firms to claim that Australian health care is most dangerous. A website directs viewers to SOLICITORS HELPLINE 1800 633634 , and reads "Medical negligence in Australia what every patient should know … Australia has the highest rate of medical error in the world according to the World Health Organisation"

In NSW to the best of MCA's knowledge a civil action is the only path to theoretical comprehensive compensation. Perhaps in NSW the HCCC Conciliation Registry process provides compensation in some cases but as this process is hidden behind a wall of absolute legal privilege MCA cannot be sure. The fact that such a wall must exist to even get the medical professionals to conciliation however speaks volumes about the power asymmetry existing between the parties to a dispute and government respect for those professionals when framing complaints management legislation. From the medical consumer viewpoint the medical game is fixed.

And should such an Australian working class consumer then seek to use the tort of negligence in the legal services market they simply encounter another market where this time it is the legal game that is fixed.

Is such access to justice just a fraud ?