LAW CONSUMERS ASSOCIATION

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A NOT FOR PROFIT PRIVATE COMPANY

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21 May, 2014

The Productivity Commission,
Locked Bag 2, Collins St East
Melbourne VIC 8003, Australia

Per email: access.justice@pc.gov.au

Dear Sirs,
Re: **ACCESS TO JUSTICE REPORT**

This Association does not have the resources to make a submission but has opted to make the following comments on the Draft Report.

Our experience has been acquired over 46 years and we have learnt that an effective way to cause reform is to offer alternatives, e.g., we started the first DIY Divorce Kit in the world in 1970 and consequently the Family Court was established in 1976 and later published our kit free of charge without acknowledgement. We established the first conveyancing company in NSW in 1979 consequently conveyancers were first licensed in 1992, thus breaking the conveyancing monopoly of solicitors.

We have been operating the Probate Company Pty Ltd since 1999 with the objective of breaking the probate monopoly of solicitors.

As a consequence we have been involved in prolonged litigation with the Law Society of NSW and in general have avoided providing assistance to litigants but that role is presently changing. We see a role for the development of persons who can provide effective assistance to litigants in persons with research of cases, establishing the correct procedure and flow in relation to forms, getting the litigant to prepare an honest and complete chronology of events with attached evidence to enable the identification of the cause of action, and engrossing pertinent affidavits and training of persons to provide back-up in court.

> **"Pro bono plays a small but important role in bridging the gap**
>
> The private profession has a long tradition of providing legal services

> free of charge, and governments are keen for them to do more. But the role of pro bono services in assisting disadvantaged Australians to access justice is poorly understood."

With respect, it seems the Commission poorly understands the role of pro bono services by lawyers having read submissions only by persons with a conflict of interest. Our dictionary translates 'pro bono publico' as 'for the good of the public'. Using the term 'pro bono' is misleading when implied to be 'free'. In many cases pro bono services by lawyers are a 'trawling' exercise to obtain fee paying clients and has been found to be so. In about 1977, Mr Ron Mulock, the then NSW Minister for Justice, closed the Penrith Legal Aid Centre operated by the regional Law Society for those same reasons. In February of this year, 2014, I, along with my colleague, Mr W. J. Orme, met in chambers Mr Justice Lindsay and the Chief Registrar in Probate, Mr Jupp, of the Supreme Court of NSW. Of relevance to this commentary was the comment by his honour that pro bono work by lawyers was significantly reduced on the licensing of conveyancers as solicitors were no longer able to 'afford' giving 'free' pro bono services because of the competition now in that market. There was also an admission by Mr Jupp that the court was set up for the convenience of the lawyers. Many consumers of legal services would perhaps not be surprised at these unconscious admissions which reveals the substitution of 'free' with 'being paid' and 'legal profession service' with 'public service'.

On the other hand, the NSW Land Titles Office is very much oriented towards their clients, being the consumers rather than the lawyers and provides a genuine public service.

> "Currently, parties that are self-represented or represented pro bono are not eligible for an award for costs if successful in a case. This reduces their ability to meet their legal expenses, and creates asymmetrical incentives that favour their opponents. There is a strong argument for allowing these types of parties to be awarded the costs entitled to Court processes in all jurisdictions have undergone reforms to reduce the cost and length of litigation."

The response to this observation lies in the existence of the Litigants in Person (Costs and Fees) Act 1975, copy attached. Also attached are comments on the application of this Act from an English solicitor's website.

In response to members plea for help in litigated matters mostly related to probate, family provisions and family law applications, LawConsumers is actively engaged in developing a program whereby it can -

1. Provide moral support in court with a 'McKenzie friend' "(from the case McKenzie v McKenzie (1971). " A person who sits beside an unrepresented litigant in court and assists him by prompting, taking notes and quietly giving advice".

2. Encourage litigants to prepare a comprehensive and totally honest

chronology of events.

3. Assist litigants with the preparation of affidavits derived from the chronology with supporting evidence.

4. Assist litigants with the selection of the correct forms.

5. Provide interpretation/identification of legislation, rules and cases.

6. Acquire skills in the use of austlli and barnet legal research websites.

7. Acquire skills in interpreting the Supreme Court Rules.

8. Develop a fair method of charging for the service.

9. Agitate for the adoption of legislation similar to the Litigants in Person (Costs and Fees) Act, 1975.

It has been observed that the nexus between the plaintiff's solicitor and the defendant's solicitor is broken where one of the parties is a litigant in person. As no lawyers are trained or experienced (including all court officials and judges) to deal with litigants in person this may well work in the litigant in person's favour. It is then not possible for negotiations to proceed privately between the parties solicitors without the party's knowledge. The litigant in person is not restrained by the 'professional rules of conduct' and can, amongst other things, copy the other party with all correspondence which may not normally be revealed to that party.

An alternative program being explored is to encourage litigants to make their case only by affidavit and to try and decide their matters by mediation.

By having both sides of a matter debate their arguments only by affidavit would remove the 'theatrical' aspect of the court and place a greater onus on the judge to make a decision in a more considered manner. It would probably also lead to a significant reduction in costs and time.

The rule that forbids barristers dealing direct with clients is a severe limitation of the best legal advice available to litigants unless briefed by a solicitor should be removed.

It is also a frequently heard complaint that the lawyers run their matters to suit themselves (they know best) and ignore instructions from their clients.

As is done in criminal matters, solicitors should be made to take personal responsibility in relation to costs for both sides in civil matters where it can be shown that the matter they commence does not achieve a better than even chance of success.

We note that "Parties derive significant private benefits from using the court system;

these benefits need to be reflected in court charges" however this comment does not reflect the reality that the major beneficiaries of the court system are the lawyers as confirmed in part by Mr Jupp as quoted above. The court is their fully serviced 'other office', paid for by the taxpayer.

Of great concern is the perception, reinforced by high profile cases such as Keddies Solicitors in NSW, that the reputation of solicitors is continuing its decline. This is another factor in limiting access to lawyers as consumers are becoming less confident in going to them for assistance in access to justice. Consumers are not convinced that fees of the order of tens of thousands of dollars are justified to get that access.

There are two major problems with the present justice system from the point of view of the litigant, one being that there is not one judge in Australia who has been trained ab initio as a judge - they are all from the legal profession trained in adversarial conduct. By contrast, in France and other European countries, judges arrive with specific training as judges. The second major problem is that most litigants have no experience in the court system, are mostly too emotionally involved in their matter and get exploited because the judge has no empathy with the position of the litigant but only with the lawyers representing the opponent of the litigant. The third major problem is the monopoly of lawyers. The monopoly was first given by parliament for the protection of consumers and it included the right to self regulate without being responsible to a Minister of the government. The only way in which parliament can interfere in the conduct of the legal profession is to change the Legal Profession Acts. This is not a responsive method of ultimate control and is exacerbated by the preponderance of lawyers of all political persuasion as members of parliament. The expectation of the NSW Law Society of the Premier of NSW was explicitly spelt out by John Marsden the then President of the Law Society in the President's Message published in the Law Society Journal in the June or July edition of 1992 when Mr John Fahey first became Premier of NSW. It is also apparent that the many amendments to the various state Legal Profession Acts have been defensive of the profession and have been made to appear to satisfy consumer dissatisfaction with the way in which the profession is regulated without making progress. At best these amendments have addressed the symptoms but not the problem which is the monopoly.

It is refreshing to note that the process of the Productivity Commission in getting this report does not appear to be dominated by lawyers and may make recommendations other than those seen in the many previous reports into the legal profession and the justice system.

Yours faithfully,
LAW CONSUMERS ASSOCIATION Pty Ltd

Max Burgess
Director

LawConsumers
since 1968