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Access to Justice
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Avant Mutual Group Limited
ABN 58 123 154 898

Registered Office
Level 28 HSBC Centre
580 George Street Sydney NSW 2000

PO Box 746 Queen Victoria Building
Sydney NSW 1230

DX 11583 Sydney Downtown

www.avant.org.au

Telephone 02 9260 9000 Fax 02 9261 2921
Freecall 1800 128 268 Freefax 1800 228 268

Access to Justice Arrangements Draft Report

Avant welcomes the opportunity to provide input into the Productivity Commission's draft report on Access to Justice Arrangements.

Avant is a medical indemnity organisation providing professional indemnity insurance to over 60,000 medical and allied health practitioners and students in Australia. It is a mutual organisation, owned by its members.

Avant represents members in civil disputes in all jurisdictions around Australia, including through our team of over 50 lawyers who act for members in these disputes. The bulk of our civil work involves representing defendant members in medical negligence proceedings; however we also represent our members in other types of civil claims, for example as claimants in employment and contract disputes.

The Inquiry's Terms of Reference tend to focus on access to justice for vulnerable litigants. However, many of the barriers faced by disadvantaged litigants in accessing the civil system and the Commission's draft recommendations to overcome them apply equally to litigants more generally. It is this context that we provide the attached submissions.

Please contact me on the details below if you require any further information or clarification of the matters raised in our submissions.

Yours sincerely

Georgie Haysom
Head of Advocacy

Avant Submissions on the

Productivity Commission's Draft Report on

Access to Justice Arrangements

1. Introduction

Avant supports the timely and efficient resolution of civil disputes, as long as timeliness and efficiency do not come at the expense of a proper examination of the issues.

We note the Commission has used the term "access to justice" to mean "making it easier for people to resolve their disputes" (page 3 of the Draft Report). The Inquiry's Terms of Reference tend to focus on access to justice for vulnerable litigants. However, many of the barriers faced by disadvantaged litigants in accessing the civil system and the Commission's draft recommendations to overcome them apply equally to litigants more generally.

Avant is a medical indemnity organisation providing professional indemnity insurance to over 60,000 medical and allied health practitioners and students in Australia. It is a mutual organisation, owned by its members.

Avant represents members in civil disputes in all jurisdictions around Australia, including through our team of over 50 lawyers who act for members in these disputes. We therefore have experience accessing the civil justice system both as the client and as lawyers acting for insured individuals in civil disputes. The bulk of our civil work involves representing defendant members in medical negligence proceedings; however we also represent our members in other types of civil claims, for example as claimants in employment and contract disputes. Unnecessary costs of and delays in litigating civil disputes directly impacts on claims costs which may in turn impact on insurance premiums. Increases in premium could be passed on to consumers through increased healthcare costs.

It is this overall context that we provide these submissions.

Key points:

- Avant supports the timely and efficient resolution of civil disputes, but not at the expense of a proper consideration of the real issues in dispute
- Avant supports early exchange of critical and relevant documents and evidence and the early identification of the issues in dispute
- Avant supports case management that facilitates the fair and efficient resolution of disputes
- Avant supports the use of alternative dispute resolution to resolve civil disputes
- As an organisation representing members practising around Australia Avant favours nationally consistent and uniform processes. Lack of uniformity adds to costs.

2. Disputes involving medical negligence

Because the bulk of our civil litigation work relates to medical negligence, below is some background on the legal context of these disputes.

To be successful in a medical negligence matter a plaintiff must prove that the defendant departed from proper professional standards. This is peer-based test, and to prove breach of duty a plaintiff must obtain evidence from an expert who is a peer of the defendant. A plaintiff must also prove causation, namely, that had the defendant exercised reasonable care, the plaintiff would have avoided the harm suffered. Medical negligence matters are frequently complex, and routinely require expert evidence from several experts, often in different specialities and even sub-specialities.

Medical records are of paramount importance in medical negligence claims, and often the records of several different doctors and hospitals are required not only on the issue of damages/quantum, but also on issues relating to breach of duty and causation. Often these records are not in the possession of either the plaintiff or defendant, but in the possession of third parties. Because of privacy legislation and doctor-patient confidentiality, relevant records may only be accessed with the authority of the patient or under subpoena.

3. Court processes

As a national organisation representing insured medical practitioners in civil disputes arising primarily out of alleged medical negligence, we have experienced the different systems and processes that exist around Australia for claims of this nature.

We agree with the Commission's comment (at page 17) that progress towards more active judicial case management has been uneven across jurisdictions and that processes do not sufficiently ensure that unnecessary costs and delays are avoided.

In our experience the jurisdictions in which matters are dealt with most efficiently are those jurisdictions that:

- Require early provision of and/or early access to relevant medical records.

  Inability to access medical records at an early stage slows down the resolution process significantly and adds to legal costs.

- Require the parties to identify the issues in dispute early, whether in correspondence, pleadings or expert opinion

- Require early exchange of critical documents including expert opinion and relevant medical records

  Expert opinion exchanged at an early stage should cover all elements of the case – breach of duty, causation and damages.

- Use ADR as a mechanism for resolving the dispute at an appropriate time in proceedings

- Enforce compliance with timetables and court orders

  We are frequently required to attend multiple pre-trial appearances because directions and agreed timetables have not been complied with. This adds to the costs, and decreases the efficiency of both the court process and the way in which the matter is dealt with by the parties.

  Time limits should be enforced and observed, but there should be sufficient flexibility and discretion in the process to allow extensions of time where the interests of justice require it.

- Encourage a culture of compliance.

  Non-compliance and multiple pre-trial appearances seem to be the default position in some jurisdictions. Encouraging compliance may be assisted by the use of personal costs orders, self-executing orders, and requiring senior lawyers with conduct of the matter to attend and explain non-compliance to the court.

Avant supports the early identification of the real issues in dispute. Formal pleadings in the medical negligence context may be of varying quality. Good pleadings do assist in identifying the issues in dispute, but sometimes pleadings can be formulaic and of limited assistance. Taking interlocutory action in relation to pleadings and particulars is often counter-productive and often leads to increased costs. Of greater assistance in identifying the real issues in dispute is the expert evidence that is served in the claim, and the medical records.

Based on our experience, while processes aimed at increasing the efficiency of the litigation process are enshrined in legislation (pre-trial procedures) and court rules, compliance with and enforcement of these requirements varies. For example, the ACT and Queensland have similar pre-trial procedures. However the process in Queensland seems to work much better to resolve disputes than the process in the ACT. In our experience, lack of a proactive approach, for example through active judicial case management, increases costs and delays.

Nevertheless, in setting court directions a balance needs to be achieved between progressing the case and allowing the parties adequate opportunity to investigate and define the issues. Courts should be prepared to allow some latitude to the solicitors at the first and second review hearings to set a timetable that adequately reflects the requirements of the case.

Avant agrees with the following proposed reforms:

- All courts should examine their processes to ensure that they are consistent with leading practice in relation to case management, case allocation, discovery and use of expert witnesses. *(11.1-6, 11.8-10)*

- Courts should facilitate and promote options for the early exchange of critical documents. *(11.7*)

- Where appropriate, costs awards by courts should take into account whether a dispute could have been resolved prior to litigation. *(13.1*)

- Courts should examine opportunities to use technology to facilitate more efficient and effective interactions with users, reduce administrative cost and support improved data collection and performance measurement. *(17.2)*

4. Expert evidence

Expert evidence is at the core of medical negligence proceedings, and in our experience reforms to use of expert evidence (for example expert conclaves and concurrent evidence) have assisted in reducing costs and identifying the issues in dispute.

Avant agrees with the general proposition that practice directions should give clear guidance about the factors that should be taken into account in considering issues concerning the use of single experts, court appointed experts, expert conclaves and concurrent evidence.

However, we would be concerned if restrictions were placed on the use of experts or court appointed experts in medical negligence cases, especially on issues of liability. It is important in these cases to ensure that defendants are permitted to explore what a reasonable body of medical opinion may say without being restricted to certain experts.

5. Alternative dispute resolution

Avant generally supports the use of alternative dispute resolution to resolve civil disputes, and agrees that ADR can lead to lower costs and mutually beneficial outcomes.

ADR is used routinely in personal injury and medical negligence proceedings in those jurisdictions with pre-court processes and in those jurisdictions that have enacted procedural reforms. Avant has experience with various ADR mechanisms, including private mediations, pre-trial conferences, informal settlement conferences, court-ordered mediations, and mediations and conciliations facilitated by court officers.

In our experience, the use of ADR in medical negligence proceedings, together with tort law reforms, has assisted in reducing the costs associated with civil claims against our members and has reduced the claim to settlement duration of claims generally. Mediation works best when mediators are experienced in medical negligence and personal injury.

The effectiveness of ADR (whether in a pre-action process or within the court process) in all these contexts however relies on the exchange of critical and relevant documents in good time before the mediation or conciliation. In some jurisdictions we have seen a trend towards provision of relevant documents in the few days leading up to the mediation date or on the day of the mediation. Late service of relevant material is counterproductive. This could be overcome by better enforcement of timetables and or more active case management before the mediation.

Information request 8.1 seeks information about the use of mediation in low-value claims (up to $50,000). In our experience, many low-value claims can be resolved fairly efficiently without formal mediation as long as critical documents relevant to the claim have been provided. In these cases, resolution of the dispute is achieved by informal negotiation or informal settlement conferences. Formal mediation is used less frequently for low-value claims because the costs are usually disproportionate to the value of the claim. However, in some matters formal mediation may be appropriate but it is important to ensure that legal costs are proportionate to the value of the claim.

In some jurisdictions where small claims are dealt with in tribunals, conciliation with a tribunal conciliator is used as a way of narrowing the issues and resolving civil disputes. Costs are reduced if this is done on the same day that the dispute is listed for hearing, but only if key documents have been exchanged and the matter is fairly straightforward.

Avant supports the proposed reform that:

- Courts should continue to incorporate the use of appropriate ADR in their processes and provide clear guidance to parties about ADR options (8.1, 85, 12.1)

6. Other disputes and tribunals

We also act for medical practitioners in other disputes, including:

- Small claims for refunds of medical expenses
- Anti-discrimination matters
- Employment disputes

As noted by the Commission, tribunals are intended to provide a low cost alternative to the courts, where parties are self-represented and bear their own costs. However in our experience, the absence of legal representation increases, rather than

decreases, costs in many of these matters. Many of the matters in which we are involved are not straightforward but involve complex liability issues concerning medical practice and require expert medical opinion. This is not necessarily related to the value of the claim. In our experience, legal representation does facilitate the identification and resolution of issues in medical cases.

We do not agree with increased restrictions on the use of legal representation in tribunals. In our experience:

- Some matters involving small amounts in quantum can have more complex issues in relation to liability. Lawyers are skilled in focusing in on the relevant areas in the dispute and narrowing the issues so there should not be any penalty for seeking leave to have legal representation

- While legal costs can be disproportionate to the value of a claim, it is the costs that need to be contained, not the involvement of lawyers. Where you might make savings on the legal cost component of a claim by restricting the use of legal representation, the overall cost of the process may increase due to the inefficiencies with self-represented litigants.

Therefore we would be concerned if the current restrictions on legal representation in tribunal matters were enforced more strictly (as per draft recommendation 10.1). Tribunals should retain the discretion to permit legal representation in cases involving specialist knowledge such as medical cases.

7. Self-represented litigants

We agree with the Commission's comment that self-represented litigants can be at a disadvantage in higher courts. In our experience:

- having a self-represented litigant usually leads to increased costs because of the need for more pre-trial court attendances
- the courts rightly do what they can to assist self-represented litigants, but this usually results in more court appearances and increased costs

Avant supports the proposed reform that:

- Courts and tribunals should further develop plain language forms and guides, and should assist self-represented parties to understand time-critical events. *(14.1)*

8. Costs

Costs awards are routinely used as a mechanism to enforce compliance with orders. However in many cases costs orders do not act as an incentive towards compliance. This is particularly the case in matters where costs orders are made for non-compliance by lawyers acting for impecunious plaintiffs.

From time to time in some jurisdictions we experience the use of procedural tactics to delay proceedings (for example applications to transfer matters between courts). Costs awards do not really act as a disincentive to these tactics, especially where the client is impecunious, or because the lawyers know that the matter will resolve and costs will be “wrapped up” in the settlement amount (which is usually inclusive of costs).

In our experience, in some jurisdictions, where restrictions do not apply, plaintiffs’ legal costs in medical negligence matters can be significant and sometimes are even equivalent to or greater than the amount of damages awarded in a judgment or agreed in a settlement.

Limitations on legal costs, particularly for low-value claims ,provide greater incentives to claimants to bring and resolve matters outside the costly court process.

Avant agrees that settlement offers should be taken into account when awarding costs. The court rules in all jurisdictions should be clear about what amounts to a valid settlement offer for the purposes of costs orders.

Avant Mutual Group
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