Johnson & Johnson MEDICAL

Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
Melbourne Vic 8003

Attention: Ms Prageya Giri
By email: access.justice@pc.gov.au

21 May 2014

Dear Commissioners

Productivity Commission's Draft Report on Access to Justice Arrangements, April 2014

Thank you for the opportunity to provide a submission to the Productivity Commission's Draft Report on Access to Justice Arrangements, April 2014 (the **Draft Report**). Johnson & Johnson Medical Pty Limited, Janssen-Cilag Pty Limited and Johnson & Johnson Pacific Pty Limited (together the **Johnson & Johnson Family of Companies**) welcome the opportunity to comment on the recommendations made by the Draft Report and how these may impact both the business community generally and more specifically, Australian healthcare. We would be happy to provide further commentary or detail if that would be of assistance to the Productivity Commission.

In Australia, the Johnson & Johnson Family of Companies consists of:

- *Johnson & Johnson Medical*, a medical devices and diagnostics business
- *Janssen*, a leading researched based pharmaceutical company
- *Johnson & Johnson Pacific*, known for its portfolio of leading consumer health brands – most people know our baby shampoo and Band Aids

We employ around 1,800 people, who are passionate about providing products and services to support the health of Australians.

The Johnson & Johnson Family of Companies work across both public and private sectors, providing the company with a solid understanding of Australian healthcare. We have the benefit of expertise and perspective on aspects of a product's lifecycles including from research, development and manufacturing to marketing and sales to professional education

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of healthcare practitioners. Through our international Johnson & Johnson affiliates, and locally, we are engaged in significant civil litigation both in Australia and elsewhere.

Recommendations of the Draft Report

We have not commented on each of the Recommendations made in the Draft Report. We have restricted our comments to matters which we feel are of particular relevance to either healthcare or the business community generally. Our comments below are raised in the order in which they appear in the Draft Report.

1 Recommendation 6.8

The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

The Johnson & Johnson Family of Companies opposes this recommendation insofar as it appears to abrogate a client's right to maintain legal privilege and confidentiality in their own information and advice. It is difficult to envisage a situation where these fundamental rights are secondary to the purpose of the investigation of a complaint made by a third party or an investigation commenced by the relevant complaint body. If such a right were to be granted to a complaints investigation body, the security of confidentiality and the maintenance of legal privilege must be maintained and protected at all times. In other words, the client should be the final arbiter of whether or not waive confidentiality and legal privilege.

We do note the Commission's reference to "subject to existing limitations" in Recommendation 6.8 and presume that this is a reference to the limitations mentioned on page 212 of the Draft Report (that the information may only be used to investigate a lawyer's conduct and subsequent disciplinary action and for no other purpose). Provided that there is no impact to a client's right to maintain legal privilege and confidentiality, we would support such a limitation.

2 Recommendation 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

The Johnson & Johnson Family of Companies strongly opposes this recommendation.

The promotion of therapeutic goods is subject to strong and clear regulation (both statutory and industry). The policy rationale behind such regulation is perfectly clear: to ensure marketing and advertising promotes the quality use of therapeutic goods, is socially responsible and does not mislead or deceive the consumer.

In the specific context of medicines, the ***World Health Organisation (WHO): Ethical Criteria For Medicinal Drug Promotion 1988*** specifically notes:

> advertisements to the general public should help people to make rational decisions on the use of drugs determined to be legally available without prescription. While they should take into account people's legitimate desire for information regarding their health, they should not take undue advantage of people's concern for their health, nor mislead the consumer into unwisely relying on medicines to solve physical, emotional or mood problems

If the Draft Report's Recommendation 7.2 were to be implemented, it is a very short step to predatory advertising by lawyers deliberately focusing on a person's concern over their health and that of their friends and relatives in order to generate business. Taking advantage of this concern is not acceptable, nor is it appropriate that such advertising may influence consumers to change their treatment regime without proper consultation of their healthcare professionals.

Two examples are illustrative of the issue and may assist the Commission in this respect. The first relates to a survey conducted in 2007 in the United States (https://investor.lilly.com/releasedetail.cfm?releaseid=248836):

> The survey, which was conducted among 402 psychiatrists who treat patients with schizophrenia and bipolar disorder, showed that, even when patients were responding well to their prescribed antipsychotic treatment, many requested a medication change because these drugs are featured in law firm advertisements. Other patients stopped taking their medication, often without telling their psychiatrist, for the same reason.
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> "Many of our patients already struggle with accepting their illness and staying on their prescribed treatment, and now they are experiencing new levels of fear due to the increasing incidence of these jarring advertisements," said Dr. Ralph Aquila, assistant clinical professor of psychiatry, Columbia College of Physicians and Surgeons; director, residential community services, St Luke's-Roosevelt Hospital Center, New York, NY. "This irresponsible advertising is hindering the progress of therapy for many of these patients and disrupting the important relationship between them and their healthcare providers. Plaintiffs attorneys

need to consider the consequences that these advertisements may have on patients."

The findings from this survey, which was commissioned by the National Council for Community Behavioral Healthcare and Eli Lilly and Company, are consistent with a Harris Interactive(R) poll of 250 physicians commissioned by the U.S. Chamber of Commerce in 2003(i) that examined how pharmaceutical litigation impacts prescribing decisions across disease states. However, this new survey went one step further by asking psychiatrists to examine the potential impact of this type of litigation on patient care. These new findings have implications for doctors who treat serious and persistent mental illnesses, and confirm trends in clinical practice that many people in the mental health community have observed, but have not been quantified until now.

The second example, while not advertising, concerns two Australian Broadcasting Commission's *Catalyst* programs aired in October 2013 collectively titled "Heart of the Matter" reporting on the use of statins, provides an interesting and instructive analogue. While the Audience and Consumer Affairs Unit of the ABC investigated the episodes and determined that there had been a breach of impartiality, it acknowledged:

There is an inherent danger when any program presents criticisms of medical practices or advice that people will act without consulting experts or fully considering the consequences. That is not a reason to avoid these controversial subjects if they are in the public interest (http://about.abc.net.au/wp-content/uploads/2014/05/Catalyst-Heart-of-the-Matter-ACA-Investigation-Report.pdf).

The "inherent danger" the Audience and Consumer Affairs Unit is referring is the "potential for people to decide not to take prescribed medication". Both episodes have been removed from the *Catalyst* website, and corrections posted on the ABC's "Corrections Page".

It has been reported that a Heart Foundation survey at the time (of 1,000 patients) found that 10% had ceased taking their prescribed medication because of the program (http://www.abc.net.au/news/2014-05-12/abcs-catalyst-program-breached-impartiality-standards/5447242).

If a program aired by the national broadcaster, acting in the public interest (albeit over the objections of medical and industry experts), which is merely not "impartial" (and presumably, determined not to be misleading or deceptive) and yet still has the impact of affecting the medical treatment of 10% of the relevant population; it is difficult to see how the provisions of the ACL will prevent more pointed advertising from lawyers having a similar (or worse) detrimental effect. It is not realistic to expect such advertising will have even the safeguards of

impartiality and public interest to mitigate their effect. Consider, for example, how a non-misleading or non-deceptive advertising campaign around the MMR or polio vaccination (eg "is your child displaying any of these symptoms?") may impact public healthcare – both the human cost and the costs to the healthcare system of an epidemic.

3 Recommendation 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

The Johnson & Johnson Family of Companies opposes the very broad draft recommendations to the effect that Tribunals should limit/prohibit legal representation of parties appearing before the Tribunal in circumstances where the Tribunal has a jurisdiction that would allow it to alter or extinguish a parties property rights or impose significant penalty or order for compensation.

4 Recommendation 13.1

Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.

The Johnson & Johnson Family of Companies supports this recommendation but does question whether there is any practical utility in litigation such as representative proceedings.

The Draft Report notes: "Requiring plaintiffs to also pay post-offer costs on an indemnity basis would strengthen the incentive for reasonable settlement offers to be made by defendants and accepted by plaintiffs" (see page 402). If the purpose of such a change is encourage reasonable settlement offers and avoid unnecessary litigation, is that purpose likely to influence a plaintiff who is being funded by a law firm on a "no win, no fee" basis? An indemnity costs order is no incentive to settle if a party does not have the assets to meet their own lawyer's costs let alone meet those of an adverse costs order.

As a separate but related point (to which we comment further at Recommendation 18.1), is that there is some incongruity in the Draft Report in that damages based billing is supported (which is likely to increase litigation

brought on a speculative basis) to "share the reward" although there is no corresponding "share of risk". One solution may be to require "no win, no fee" lawyers and those who participate in damages based billing arrangements (if that recommendation is accepted) to personally satisfy an adverse costs order if their client is unwilling or unable to meet that order themselves.

5 Recommendation 15.1

The Commission recommends that no change be made to existing tax deductibility of legal expenses.

The Johnson & Johnson Family of Companies supports this recommendation.

6 Recommendation 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- ***The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.***

The Johnson & Johnson Family of Companies strongly opposes this recommendation.

The issues with contingency based fee arrangements clearly identified by the Draft Report: pursuit of unmeritorious claims and creation of a conflict of interest, would be exacerbated by the introduction of damages based fee arrangements.

The Commission appears to accept that litigation funding presents a risk to consumers and accordingly recommends that litigation funders should be licensed as providers of financial products, be subject to explicit ethical standards and be monitored by the Australian Securities and Investments Commission (for financial purposes) and the courts (for conduct). We agree that there is a need for such regulation.

We do not agree that the regulation should stop at traditional third party litigation funders. The position, knowledge and sophistication of the consumer does not change as a consequence of where they receive their funding. "Damages based billing" is, simply put, litigation funding under a different name. If a litigation funder is to be subject to licensing, ethical standards and monitoring by ASIC and the Courts, and also be exposed to adverse costs orders

as a consequence, those requirements and consequences should be applied to any lawyer providing that same service.

An exposure to an adverse costs order would truly determine whether the case had merit beyond a short run at an early settlement for a substantial financial return.

7 Recommendation 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

The Johnson & Johnson Family of Companies notes the submissions made on this subject by the US Chamber Institute for Legal Reform (ILR) and endorses their view.

Yours faithfully

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Johnson & Johnson Medical Pty Limited