Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Productivity Commission Draft Report on Access to Justice

Date: May 28, 2014

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual

The Australian Lawyers Alliance is pleased to provide a submission to the Access to Justice Enquiry

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 1,400 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.

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]

[1] Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

INTRODUCTION

1. The Australian Lawyers Alliance ("the ALA") is pleased to have the opportunity to comment on the Productivity Commission's draft report arising from its Access to Justice review.

2. The ALA is a nationally-based voluntary association dedicated to protecting and promoting justice, freedom and the rights of the individual. Our membership predominantly comprises lawyers acting for claimants in pursuit of compensation for personal injury.

3. The ALA takes considerable pride that its membership is at the forefront of providing access to justice for accident victims. If it were not for the willingness of ALA members to act on a speculative (no win/no fee) basis and, in many instances, to fund disbursements over some years, then most accident victims could not afford to pursue their claims.

4. The ALA does not seek to canvas the full scope of the Productivity Commission draft report – it is a wide-ranging review of the operation of the civil legal system. Rather, the focus of this submission is those aspects of the draft report upon which our membership is best placed to comment, based on hands on experience of assisting the injured in gaining access to justice.

5. The ALA would very much appreciate the opportunity to give evidence on relevant topics, as and when the Commission schedules public hearings.

6. The submissions set out below refer to recommendations and chapter numbers in the draft report.

DRAFT RECOMMENDATION 6.3 – A CENTRALISED ONLINE RESOURCE REPORTING A TYPICAL RANGE OF FEES

1. The ALA supports the general theory of providing further information to consumers of legal services. However, whilst the principle is easy to support, the difficulty comes with implementation:

   (i) It would no doubt require legislation to compel law firms to disclose confidential costs data (solicitor/client costs) to government. There would need to be significant safeguards with regards privacy. [It is noted in passing that it is difficult to see "*the big end of town*" ever agreeing to hand over to government de-identified data as to expenditure on legal costs in high priced commercial litigation.]

   (ii) There would be a cost to law firms in the provision of the data, with such costs presumably ultimately reflecting in the cost of legal services. It isn't as simple as compelling that data is handed over. The data has to be presented in a useable form and it has to allow relevant points of distinction to be identified.

   For example, there may be a vast difference in costs in a personal injury claim where the defendant admits liability rather than putting liability in issue. There can be vast differences in costs where there are pre-accident medical complications, multiple accidents, multiple defendants and a variety of other variables. Without taking into account these variables (in order to report on averages, medians and ranges in different types of actions), then the consequential data would be so broad as to provide little meaningful guidance to the public.

   (iii) Given that such information is only likely to be provided if disclosure is compelled then a regime of monitoring and punishment would need to be put in place to ensure compliance.

   (iv) What will be the costs imposition on national firms (of which there are a number in the personal injury sphere) who need to comply with different state regimes across different jurisdictions? Will a Victorian law firm, handling cases in New South Wales, South Australia and Tasmania be required to provide disclosure in each of those states for relevant matters, as well as in its own state? Again, the costs of disclosure will be reflected in the fees charged.

2. Thus, whilst the proposal is superficially attractive, the reality is that the publication of meaningful data, with a sufficient degree of specificity as to be useful and relevant is highly problematic with litigation of any complexity.

3. The difference between a personal injury lawyer trying to quote the costs of a legal case and a builder quoting on building a house is that the builder is not confronted with an opposing team trying to knock the house down. Litigation is more unpredictable!

DRAFT RECOMMENDATION 7.2 – ADVERTISING

4. The ALA supports the removal of all bans on advertising for legal services. In NSW and Queensland there are specific legislative bans and prohibitions on advertising in personal injury cases. This removes any capacity for law firms to advise consumers about their rights or to compete realistically on the basis of the cost of legal services provided. The removal of the bans would see a reversion to the prior situation where advertising for personal injury lawyers was subject to controls through the lawyers' duties to the Court.

DRAFT RECOMMENDATION 10.1 AND 10.2 – RESTRICTIONS ON LEGAL REPRESENTATION BEFORE TRIBUNALS

5. Whilst some personal injury litigants still have access to the court system, a good many claims are now resolved in specialist or general tribunals. For example, in NSW, many motor accident cases proceed to the Claims Assessment and Resolution Service (CARS), whilst workers have access to the Workers Compensation Commission for some disputes. The Victorian Civil and Administrative Tribunal has jurisdiction over those seeking review of all decisions made by the Victorian Transport Accident Commission.

6. The use of legal representation in both forums is widespread and understandably so. A person catastrophically injured in a motor vehicle accident may have a multi-million dollar claim being dealt with by CARS. The intricacies of personal injury law, involving a variety of caps and thresholds, the application of discount rates and the presentation of occasionally complex arguments with respect to characterisation of the circumstances of accident and causation of injury all compel competent legal representation. Similarly, the TAC decisions may vary from denial of a claim in its entirety, denial or termination of income support, to denial of required medical treatment.

7. There are ALA members who sit as tribunal members across a variety of tribunals in different jurisdictions. The common experience of our membership is that legal representation almost invariably results in the more efficient management and disposition of proceedings. It also leads to fairer results.

8. The ALA takes issue with the implicit assumption in Draft Recommendation 10.2 that lawyers appearing in front of tribunals seek anything other than an outcome that is fair, just, economical, informal and quick. Practitioners are now bound by legislative obligations, with the possibility of Court ordered sanctions, to prosecute cases in the most efficient manner.

9. Most lawyers are conscious of their client's limited resources. Most lawyers are busy and have other cases to attend to. Most lawyers want cases to run as smoothly and as efficiently as possible. There is no empirical evidence whatsoever to support any suggestion that lawyers deliberately string out proceedings for whatever financial benefit may flow.

10. The ALA urges the Commission to speak to experienced judicial officers and tribunal members as to their views on the advantages of competent legal representation and the disadvantages of litigation where one party is unrepresented.

11. Further, the ALA is deeply concerned that the removal of the right to legal representation in tribunals and any steps to discourage legal representation within the court system will result in further entrenchment of what are already significant institutional biases within the system.

12. Large multi-national insurance companies do not want for resources. Many of their in-house staff have legal training. Some are practising solicitors. If in the context of a personal injury claim the accident victim is required to represent themselves, then one party will be denied legal representation, but the other party (the insurer) will be utilising staff who are in-house lawyers or highly trained professionals.

13. The institutional representative will almost invariably already have extensive experience before the tribunal, whilst the unrepresented injured party is a one-off visitor. The only way in which the playing field can be levelled, to give both parties access to justice, is to allow the accident victim the right to legal representation. Any attenuation in the right to legal representation will merely reflect a dilution of the right to access justice through those specialist tribunals.

DRAFT RECOMMENDATION 11.1 – MORE INFORMAL COURT PROCESSES

14. The ALA supports measures to streamline court process. However, there are concerns that not all cases are suited to the fast-track approach. Some cases just cannot be hurried.

15. In personal injury litigation, there are those who have ongoing treatment, including surgery, even after litigation is commenced.

16. There are injured children who may need to have their case placed in a reserve or not ready list for some years until their injuries have matured and their damages are ready to be assessed.

17. Many jurisdictions already have various dispute resolution models superimposed over the formal Court procedure. The Victorian TAC scheme has operated under three dispute resolution Protocols, a negotiated process introduced in 2005 and widely recognised as being a highly successful model.

18. What does lead to better outcomes, both in terms of the court process and also health outcomes, is encouraging defendants to make early admissions of liability and fund early treatment. The ALA's experience is that far too many cases see an insurer leave liability in issue as a negotiating tool with the plaintiff, rather than making early admissions of liability and funding early treatment.

DRAFT RECOMMENDATION 11.10 – COURT APPOINTED EXPERTS

19. The ALA supports the use of court appointed experts in circumstances where neutral and independent experts are available. However, the ALA does have reservations about more extensive use of expert conferences "*earlier in the process*".

20. There is little point in having experts confer until all the necessary factual evidence has been obtained. Moreover, expert witness conferences (whether on liability or medical issues) are extremely expensive to organise and conduct. The reality is that the vast majority of cases do settle before hearing. Front-end loading the most expensive aspects of preparation may be counter-productive if matters are otherwise capable of resolution before such expenses are incurred.

DRAFT RECOMMENDATION 12.5 – MODEL LITIGANTS

21. The ALA supports clearer and better adoption of model litigant requirements by government and supports the extension of such obligations to institutional defendants such as government licensed insurance companies.

DRAFT RECOMMENDATION 13.1 – OFFERS OF COMPROMISE

22. The ALA supports courts taking into account settlement offers when awarding costs. However, both the Productivity Commission and the courts should recognise that the current offer of compromise rules contain a gross iniquity.

23. The purpose in having penalties for failure to accept an offer made by an opposing party is to encourage a realistic approach to settlement. However, under the rules currently in place in most jurisdictions, the penalties for plaintiffs who fail to accept an offer made by a defendant are grossly in excess of the penalties applied to a defendant for failure to accept an offer made by a plaintiff. This disproportionality is unfair and renders the offer of compromise rules ineffective and inefficient.

24. In most jurisdictions, a defendant who fails to accept an offer of compromise made by a plaintiff is ordered to pay the plaintiff's costs on an indemnity basis from the date of the offer. This means paying the solicitor/client gap between the full solicitor's account and party/party costs. The penalty is in the order of 25% to 35% of the plaintiff's total solicitor/client bill.

25. On the other hand, a plaintiff who fails to beat a defendant's offer of compromise is usually penalised by recovering no costs from the date of the offer and paying the costs of the defendant on a party/party basis from that date. Thus, the plaintiff loses his or her own party/party costs and pays the party/party costs of the defendant.

26. The disproportionality of penalty is in order of 5-6 to 1. Plaintiffs live in terror of failing to beat an offer of compromise because of the catastrophic financial penalty (two sets of costs). Defendants on the other hand (and they are usually institutional defendants) regard paying an extra 25% to 35% of one set of costs as being mild and therefore, inconsequential.

27. The Productivity Commission is encouraged to recommend changes to the offer of compromise regime so that it has some real "*teeth*" in relation to defendants who fail to accept offers made by plaintiffs. The Jackson Review in the United Kingdom into the conduct of civil litigation identified exactly this same imbalance in offer of compromise rules and ultimately recommended that plaintiffs be entitled to recover a 10% uplift on the damages awarded when an offer of compromise was exceeded (in addition to the indemnity costs penalty). The heightening of costs consequences for gratuitously prolonging litigation is in the interests of improving access to justice for individuals.

DRAFT RECOMMENDATION 13.3 – FIXED SUMS OF COSTS AND COSTS BUDGETS

28. Again, whilst the proposal is superficially attractive, the implementation is a good deal more problematic. At the outset of litigation, a plaintiff may not know whether liability is in issue, whether causation of injury is in issue and whether the nature and extent of the damages are in issue.

29. Indeed, when litigation is commenced, the insurer defendant may not be aware of its position in relation to these issues, as it is still reviewing records as to the circumstances of injury, obtaining the claimant's prior medical records and obtaining its own medico-legal evidence. It is usually some distance into the litigation before the issues fully crystallise and the parties can have a realistic idea as to what will be involved in the litigation.

30. Obligations for pre-filing exchange of information can bring forward the time at which both parties fully understand the issues, but not always. For a plaintiff trying to establish liability, it often takes a subpoena (that can only be issued with court proceedings) to obtain records from the defendant or other parties that allow full and final preparation of the case on liability.

31. For defendants, the plaintiff's prior treating records, employment records and other materials can often only be obtained with subpoena once proceedings are commenced. If a plaintiff cannot access documents through preliminary discovery and does not know precisely what is in dispute, then the plaintiff is in no position to set a costs budget (at the outset of litigation).

DRAFT RECOMMENDATION 13.4 – COSTS ON A PRO BONO BASIS

32. The ALA supports the creation of a right for parties represented on a pro bono basis to seek an award for costs. ALA members more frequently act on a no win/no fee basis. In immigration detention and other cases, there are ALA members who have acted on a pro bono basis. The necessity to cover overheads and living expenses restricts the pro bono capacity of any lawyer. If successful pro bono litigation saw the recovery of some costs on a regulated basis, then that would expand the capacity of the profession to provide such services.

DRAFT RECOMMENDATION 14 – SELF-REPRESENTED LITIGANTS

33. There is no doubt that there are increasing numbers of litigants appearing before the courts in person. This has in part been a consequence of the near abolition of Legal Aid for all civil causes of action.

34. Where the ALA and the Productivity Commission approach the issue from a fundamentally different perspective is the desirability of encouraging self-represented litigants within the dispute resolution processes.

35. To express the ALA's position bluntly, legal representation is good for litigants, the courts and society. It is efficient. It is cost-effective. It saves public resources.

36. There is no shortage of research and judicial opinion as to the demands in time, costs and resources that unrepresented litigants place on any dispute resolution system.

37. A useful starting point for consideration is that the legal profession provides an important educative and filter effect for would-be litigants. Most ALA members act on a no win/no fee basis. They usually provide an initial consultation to assess the merits of a case, without charge. Thus, most of those seeking to pursue an injury claim in most Australian jurisdictions can obtain "*free*" advice as to whether they have a case with merit.

38. In effect, the legal profession acts as a guardian to the litigation system by deterring potential litigants from pursuing unmeritorious claims. Given the availability of no win/no fee services in personal injury litigation, there are relatively few unrepresented litigants in the field. Those that are unrepresented tend to be those who will not listen to advice or who have mental health issues that mean they are unable to maintain a relationship with their lawyer.

39. The ALA takes no issue with the preparation and provision of clear and comprehensive material (guidelines, user manuals etc.) for self-represented litigants. However, there needs to be a cost benefit analysis before advocating greater levels of self-representation. The ALA anticipates that the costs to legal systems of the provision of legal services pales beside what it would cost the court system to have significantly more unrepresented litigants with all the additional time and effort that they require to assist them to run their claim.

DRAFT RECOMMENDATION 16 – COURT AND TRIBUNAL FEES

40. The ALA is seriously concerned as to proposals to run the court system on a user pays basis. As already identified above, the injured are only able to access tribunals and courts because solicitors and barristers are willing to act on a no win/no fee basis and because solicitors are willing to fund the costs of the necessary disbursements (medical reports, filing fees etc).

41. However, there is a limit to the resources that the legal profession are able to put into cases on a speculative basis. More exorbitant court fees mean high disbursements for solicitors, increasing the financial pressure on them and stretching their capacity to fund meritorious cases. This in turn means that more clients will be asked to pay disbursements upfront, reducing their access to justice. More clients will be forced to borrow to fund the costs of disbursements in circumstances where interest on litigation loans is not a recoverable expense.

42. The ALA emphasises that justice is not a commercial product. Individual litigants will not be able to afford access to tribunals or courts if they are charged costs on a commercial basis.

43. With regards Draft Recommendation 16.4, the ALA accepts that fee postponements would have some ameliorating effect, dependent upon the amount of bureaucracy involved in obtaining such postponements and the ultimate recovery of the fee from the unsuccessful defendant.

DRAFT RECOMMENDATION 18 – PRIVATE FUNDING FOR LITIGATION

44. Currently, all Australian jurisdictions ban lawyers from charging as a percentage of the damages recovered. Lawyers do their work and are paid a fair fee (if the case succeeds). Whilst there are undoubtedly advantages to moving to a damages-based billing system, the reality is that there is likely to be adamantine resistance to such a proposal from State governments who see the costs of workers compensation and CTP insurance as a cost on business. Anything that may encourage the injured to assert their rights and to have legal assistance in doing so tends to meet with institutional opposition from governments that are more interested in keeping premiums down than in providing fair compensation for the injured.

45. The implementation of this recommendation will remove the potential inefficiencies of time based costing. It permits the complete alignment of the interests of the client with the commercial interests of the legal practitioner. It provides transparency to the client. Further, it would provide competition to commercial litigation funders.

46. The proposals contained within Draft Recommendation 18.2 with respect to third party litigation funding companies, should Recommendation 18.1 be eschewed, will entrench the position of the existing litigation funding companies and significantly restrict the entry of new completion into this market.

47. The ALA agrees that this is a topic worthy of further discussion and research, although there are reservations about the enthusiasm of government for any change in this area.

CONCLUSIONS

48. There is much in the Productivity Commission draft report that the ALA supports. The fundamental points of difference largely arise over the value of legal services.

49. The ALA maintains that the right to a lawyer and access to legal representation is a fundamental issue of both fairness and efficiency:

- Ø Absent lawyers, institutional defendants will ride roughshod over the rights of the injured. That can be all too readily seen in systems where lawyers have been removed (such as workplace capacity disputes for injured workers in the NSW Workers Compensation system).

- Ø Lawyers help court and tribunal systems to operate more efficiently – they filter claims out, settle difficult cases and provide the expert advice and negotiation services that allows most litigants to avoid ever having to set foot inside a courthouse.

50. The real proof of the value of legal services in compensation claims is who chooses to use such services. It is no surprise that the ill-educated, those from a non-English speaking background and those without financial means seek out lawyers prepared to act in an injury claim on a no win/no fee basis.

51. Despite the fact that there is a cost to legal services (a solicitor/client costs gap), the well-educated and the well-resourced still choose to retain legal services for their compensation claims.

52. Most telling is that, even those best versed in the operation of compensation systems (lawyers, judges and insurance company claims officers), when injured, invariably obtain legal assistance rather than running claims themselves. These sophisticated consumers well understand that their best chance of a fair hearing and a just outcome is to retain professional legal services.

The ALA looks forward to the opportunity to address the Productivity Commission and provide whatever assistance it can with the current inquiry.