



Law Council
OF AUSTRALIA

*From the Office of
the President*

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Commissioner Angela MacRae
Productivity Commission
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CANBERRA ACT 2601

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

Dear Commissioner,

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

As you know, the Productivity Commission Inquiry into Access to Justice Arrangements is of significant interest to the Law Council of Australia and its constituent bodies. The Law Council is therefore researching and preparing a detailed submission in response to the Issues Paper, released by the Productivity Commission on 16 September 2013.

I note that a threshold issue raised by the Commission in its Issues Paper is the appropriate focus for the Inquiry – the areas in which its work might add the most value to the existing body of research and other work by academics, government and non-government organisations and the legal profession.

I have enclosed a preliminary submission, seeking to assist in relation to the threshold issue, entitled *Ways for the Productivity Commission to Value-Add*. I have also enclosed a working document which highlights some of the most significant recent work (known to the Law Council) relating to each chapter of the *Issues Paper*.

I hope you will find these papers to be of some assistance.

Yours sincerely,

Michael Colbran QC

HOW CAN THE COMMISSION BEST ADD VALUE?

The Law Council makes this immediate response to the question posed in the Productivity Commission's **Access to Justice Arrangements Issues Paper**, "How can the Commission best add value?" The Law Council's full submissions on the other issues will follow in due course.

The Commission observes that, in light of the extensive work already done, there ought to be a sharp focus on issues which are likely to provide the greatest benefit to the wider community. There has indeed been a vast amount of work done by a number of high level agencies on access to justice. The Law Council has prepared the attached table which cross-references the topics identified in the Issues Paper with major recent reports which have canvassed the relevant literature, examined local and overseas initiatives, consulted widely with stakeholders and made well-targeted recommendations for improvements.

The Law Council believes that the structure and funding of the legal assistance sector is the area of most acute need. The Law Council believes - in light of the economic perspective that the Commission can bring to bear on these issues and the fifteen month time frame for the Commission's work - that this is where the Commission can make the greatest contribution.

The Law Council places particular importance on the funding of Legal Aid Commissions which service this sector. While the evolution of alternative dispute resolution techniques from the late 1970s onward has brought very significant benefits, the formal justice system is integral to the health of the legal system overall. In that system, from the 1990s on, contractions in eligibility for grants of legal aid have reached a point where aid for civil cases is very low and aid in family law and criminal cases severely limited. The concern is that the contraction is driven by cost at the expense of justice.

The Funding Structure

State and Territory Legal Aid Commissions were established in the late 1970s. Funding has come from the Federal Government, the State Governments and interest on solicitors statutory guarantee funds. These funding sources have been variable.

The funding formula sees the Commonwealth fund State and Territory Legal Aid Commissions to provide aid in cases involving Commonwealth Law (eg family law, some criminal law, etc) and until 1997, cases involving people for whom the Commonwealth has special responsibility (eg, aborigines, pensioners and beneficiaries, recent immigrants, etc.) The Commonwealth cut back this commitment in 1997 by discontinuing the funding for the special responsibility category.

The Federal Government's contribution to funding sat at about 55% from the 1980s until 1997; since then it has sat at around 33% of the total. Funding in 1997 was \$10.59 per capita and is now \$8.97. Interest on solicitors' guarantee funds used to supply some 33% of the total but computerisation of banking, defalcations and other economic factors have made that an unreliable, sinking source of funding. Together, funding from State Governments and interest on solicitor's guarantee funds sources has increased to offset the Commonwealth reduction.

The present situation is that grants of legal aid are restricted to people who can satisfy increasingly severe means tests (Henderson Poverty Level or below), merits tests, quotas and the like. The effects of this are stark. For example, all jurisdictions (except New South Wales, which is likely to change), people facing criminal charges in magistrates' courts will not be granted legal aid unless they are likely to go to jail.

For the reasons set out in PWC Report, **Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism** (see esp chapter 8),¹ there is a real question about whether this funding model best addresses access to justice and whether it is most efficient way to achieve that policy objective. The Law Council advocates a co-operative federalism National Partnership Agreement which would set out national policy objectives and then determine the best ways to deliver and fund those objectives.

We note in particular, that another Report done by PWC, Commissioned by National Legal Aid has established that each dollar spent on legal aid returned between \$1.60 and \$2.25.²

Conclusion

The Law Council submits that the Productivity Commission could most add value in this Inquiry by focussing strongly on the level and structure of funding for the legal assistance sector to ensure that the most economically disadvantaged of the population obtain some reasonable access to the justice system.

¹ <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf>.

² "The economic value of legal aid: Analysis in relation to commonwealth funded matters with a focus on family law" <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf> at 39.

Productivity Commission Issues Paper

Areas of inquiry – comparative note

Past reports consulted comprise:

- Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) (***Civil Justice Review***);
- Access to Justice Taskforce, Attorney General’s Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) (***Strategic Framework Report***);
- Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (2009) (***Access to Justice Report***); and
- Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia*, *Access to Justice and Legal Needs Vol 7* (2012) (***Legal Australia-Wide Survey: Legal Need in Australia***).

Issues Paper		Past Reports
1.	About this inquiry <ul style="list-style-type: none"> - What has the Commission been asked to do? - What is in scope? - How can the Commission best add value? 	N/A
2.	Avenues for dispute resolution and the importance of access to justice <ul style="list-style-type: none"> - Avenues for civil dispute resolution - Why is access to justice important? 	Civil Justice Review <ul style="list-style-type: none"> - Chapter 1: Overview of the Civil Justice System. Strategic Framework Report <ul style="list-style-type: none"> - Chapter 3: The Supply of Justice; - Chapter 4: Conclusions about Access to Justice. Access to Justice Report <ul style="list-style-type: none"> - Chapter 2: The ability of people to access legal representation.
3.	Exploring legal need <ul style="list-style-type: none"> - What is legal need? - How many Australians experience legal need? 	Legal Australia-Wide Survey: Legal Need in Australia. Strategic Framework Report <ul style="list-style-type: none"> - Chapter 2: The Demand for Justice.

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Submission Briefing

Issues Paper		Past Reports
4.	<p>The costs of accessing civil justice</p> <ul style="list-style-type: none"> - Financial costs - Timeliness and delays - Simplicity and usability - Geographic constraints 	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 11: Reducing the Cost of Litigation. <p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 3: The Supply of Justice, see p34 (Costs of the Commonwealth Justice System); - Chapter 9: Costs. <p>Access to Justice Report</p> <ul style="list-style-type: none"> - Chapter 2: The ability of people to access legal representation; - Chapter 4: The Cost of Delivering Justice.
5.	<p>Is unmet need concentrated among particular groups?</p> <ul style="list-style-type: none"> - Self-represented litigants 	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 9: Helping Litigants with Problems and Hindering Problem Litigants, see p563 (self-represented litigants). <p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 8: Court based dispute resolution, see p111 (self-represented litigants). <p>Access to Justice Report</p> <ul style="list-style-type: none"> - Chapter 5: Measures to reduce the length and complexity of litigation and improve efficiency, see p90 (Measures relating to self-represented litigants). - Chapter 8: The ability of Indigenous people to access justice.
6.	<p>Avenues for improving access to civil justice</p>	<p>Each of the reviews contains extensive recommendations.</p> <p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 1: Overview of the Civil Justice System – Factors influencing the Civil justice System, includes distribution of civil and criminal business of the courts (71 ff).
7.	<p>Preventing issues from evolving into bigger problems</p>	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 2: Facilitating the Early Resolution of Disputes without Litigation.
8.	<p>Effective matching of disputes and processes</p>	<p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 6: Information about the law.

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Issues Paper		Past Reports
9.	<p>Using informal mechanisms to best effect</p> <ul style="list-style-type: none"> - Alternative dispute resolution - Ombudsmen 	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 4: Improving Alternative Dispute Resolution. <p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 7: Non-court models of dispute resolution. <p>Access to Justice</p> <ul style="list-style-type: none"> - Chapter 6: Alternative means of delivering justice.
10.	<p>Improving the accessibility of tribunals</p>	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 12: Facilitating Ongoing Civil Justice Review and Reform, see p722 (VCAT). <p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 3: The supply of justice; - Chapter 7: Non-court models of dispute resolution; - Chapter 10: Administrative law.
11.	<p>Improving the accessibility of courts</p> <ul style="list-style-type: none"> - The conduct of parties in civil disputes and vexatious litigants. - Court processes. - Reforms in court procedures - Cost awards and court fees - The use of technology 	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 4; Improving the Standards of Conduct of Participants in Civil Litigation; - Chapter 5: Case Management; - Chapter 9: Helping Litigants with Problems and Hindering Problem Litigants, see p590 (vexatious litigants). <p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 8: Court based dispute resolution. <p>Access to Justice Report</p> <ul style="list-style-type: none"> - Chapter 3: The adequacy of legal aid; - Chapter 5: Measures to reduce the length and complexity of litigation and improve efficiency, see p86 (case management).

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Submission Briefing

Issues Paper		Past Reports
12.	<p>Effective and responsive legal services</p> <ul style="list-style-type: none"> - A responsive legal profession - Legal assistance services - Legal assistance service funding - Pro bono 	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 10: Achieving Greater Access to Justice: A New Funding Mechanism; - Chapter 11 Reducing the Cost of Litigation. <p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 11: Legal Assistance; - Chapter 12: Building Resilience. <p>Access to Justice</p> <ul style="list-style-type: none"> - Chapter 2: The ability of people to access legal representation; - Chapter 3: The adequacy of legal aid; - Chapter 7: The adequacy of funding and resource arrangements for community legal centres.
13.	<p>Funding for litigation</p> <ul style="list-style-type: none"> - Contingent billing - Litigation funders - Class actions - Tax deductibility of legal expenses 	<p>Civil Justice Review</p> <ul style="list-style-type: none"> - Chapter 1: Overview of the Civil Justice System, see p77 (availability of public and private resources for funding); - Chapter 3: Improving the Standards of Conduct of Participants in Civil Litigation, see p181 (duties of insurers and litigation funders); - Chapter 8: Improving Remedies in Class Actions; - Chapter 11: Reducing the Cost of Litigation, see p676 (class action costs), see p642 (percentage contingency fees); - Chapter 12: Ongoing Civil Justice Review and Reform, see p725, (tax deductibility of legal expenses). <p>Strategic Framework Report:</p> <ul style="list-style-type: none"> - Chapter 11: Legal Assistance. <p>Access to Justice</p> <ul style="list-style-type: none"> - Chapter 5: Measures to reduce the length and complexity of litigation and improve efficiency, see p85 (Litigation funding).
14.	<p>Better measurement of performance and cost drivers</p>	<p>Strategic Framework Report</p> <ul style="list-style-type: none"> - Chapter 9: Costs.