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Commissioner Angela MacRae  
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Dear Commissioner

## **INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS**

I wish to refer the Commissioner to the comparative and empirical research study Annette Marfording with Ann Eyland, *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany*, which is highly relevant to the Commission's inquiry and available at <http://law.bepress.com/unswwps/flrps10/art28/>. As primary author I am fluent in both languages, hold law degrees from both countries with special expertise in comparative law, and have practical civil litigation experience in both Germany and New South Wales. Ann Eyland is experienced in the analysis and testing of quantitative data.

The study was funded by the Australian Research Council and the Law and Justice Foundation of New South Wales and earned the primary author a listing in the 2010 *Sydney Morning Herald Sydney Magazine's* special issue on Sydney's 100 most influential people. Numerous judges, legal practitioners, legal academics, journalists and unrepresented litigants contacted the primary author with interest and praise after the publication of the report.

That access to justice is in jeopardy in Australia has been public knowledge for quite some time. Most ordinary people cannot afford to pursue their rights in court or cannot afford to wait for a judicial decision while needing to begin rehabilitation for injuries sustained and facing the pressure of mounting legal costs.

The point of my research was to explore effective ways of rectifying those problems by examining a civil justice system which, according to the literature, produces less cost and delay than most other systems, and which I am familiar with, the German system.

An initial aim was to explore empirically whether the German civil litigation system does perform better in these regards than the civil justice system in New South Wales. If there was

evidence in support of those claims, the main concern would then become to investigate the features contributing to the comparative inefficiency and expense of the civil justice system of New South Wales on the one hand, and examining the features contributing to the comparative efficiency and affordability of the German system.

The report reviews the relevant laws and regulations in both systems, including civil procedure, both systems' constitutional context, legal education, judicial education and selection, court structures, case listing and assignment arrangements, the organisation and working methods of the legal profession, the rules regulating the legal profession and the judiciary, the rules regulating litigation costs, and the availability of legal aid and legal expenses insurance. For the Australian part of the study, the laws and regulations of New South Wales were central. Those of other states and the Federal Court were drawn upon in the context of reform discussions.

In order to allow a comparison of delay and litigation cost – the factors most impeding access to justice – and so as to facilitate a study of civil litigation practice and behaviour in both systems, the empirical research involved the collection and analysis of multiple empirical data, including:

1. Available court statistics on delay from the NSW District and Supreme Courts, and with respect to the German courts, court statistics on delay from all Regional Courts in Germany, those in the state of Baden-Württemberg and the Regional Court Stuttgart, taking account of central contextual factors impacting on court performance such as the number of judges and the number of cases filed and resolved.
2. A detailed analysis of a total of 240 court files in first instance civil cases finalised by judgment by the NSW District and Supreme Courts and by the Regional Court Stuttgart in three paradigmatic case categories: medical negligence cases, public liability cases and building disputes.
3. In-depth interviews with 22 judges and 30 solicitors in New South Wales, and with 21 judges and 35 legal practitioners in Baden-Württemberg, all of whom had been involved in a sub-set of the court files analysed.
4. Observation of civil proceedings at various stages in the process at all three courts.

A full discussion of the methodology used can be found in chapter 2 of the report.

Surprising about the interview data obtained in New South Wales was the high degree of dissatisfaction about the civil justice system on the part of judges and solicitors who work in that system and their concern to reform and improve the system. This finding goes counter to frequent perceptions that the legal profession is vehemently opposed to change.

As pointed out by the NSW Chief Justice Spigelman in an address to the 35<sup>th</sup> Australian Legal Convention in 2007, an important aspect that enhances litigation costs in New South Wales, where lawyers mostly charge by the hour, is the way in which legal rules of procedure and actual litigation practice increase the labour intensity of the process for lawyers.

What is most noteworthy about this empirical and comparative study is that it identifies key factors in civil litigation that tend to enhance complexity, delay, and litigation costs on the one hand, and key factors that are conducive to reducing complexity, delay and litigation costs on the other. This in turn makes it possible to implement effective civil justice reform in New South Wales and other jurisdictions.

### **Key factors enhancing complexity, delay and litigation costs**

The comparative analysis of the regulation of civil procedure in combination with the empirical data obtained – and especially the interview data – suggests that it is the regulation and practice of civil litigation in New South Wales which generally tend to enhance delay, lawyer time and thus litigation costs in New South Wales while the opposite is true in Germany. The following – often interconnected – factors appear to be central in enhancing delay, lawyer time and thus litigation costs in New South Wales:

- The formulation of the procedural rules on pleadings inhibits an identification of the real issues between the parties and allows lawyers to proliferate the issues. See chapter 6 of the report.
- This in turn inhibits early settlement negotiations between the parties, along with solicitors' working practices and strongly adversarial attitudes. See chapter 7 of the report.
- Along with the master calendar system or master list model of case allocation used at the NSW courts and problems in the administration of court files (see chapter 5 of the report), the formulation of the procedural rules on pleadings further impedes

judicial officers gaining familiarity with the case and its demands, which in turn impacts on the efficient progress of proceedings during the pre-trial stage and on trial efficiency. See chapters 8 and 9 of the report.

- The same factors, combined with the complexity and the language of the procedural rules and a continuing focus on party autonomy with regard to time-tabling reduce the effectiveness of pre-trial case management in achieving its purposes. See chapter 8 of the report.
- Factors including the master calendar system of case allocation, a lack of judicial preparation for trial, cultural attitudes, rigid sitting times, a focus on oral opening addresses and closing submissions, and the parties' liberty to present as much evidence as they wish, provided it is admissible, enhance the length of trials. See chapter 10 of the report.
- A lack of judicial specialisation and insufficient allocation of time for judgment writing in the master calendar system potentially delay judgment delivery. See chapters 5 and 9 of the report.
- A continuing focus on party-appointed experts, partly as a result of practical impediments regarding timing, selection, instruction and payment, enhances litigation costs and the risk of expert partisanship or bias, which may cause difficulties for judicial decision-making. See chapter 10 of the report.

On the basis of the comparative analysis of empirical data and legal regulation *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany* includes many recommendations to address these issues for future civil justice reform in New South Wales – and possibly other Australian jurisdictions.

### **Key recommendations with regard to the Inquiry into Access to Justice Arrangements:**

#### *Ensuring the collection of detailed and reliable statistics on court performance*

In comparison with the German courts the NSW courts fail to collect and make publicly accessible detailed and reliable statistics. This negatively impacts on accountability and appropriate research. I add my voice to the demand in the Australian literature that the courts must collect more detailed and reliable statistics and make them publicly accessible. See chapter 4 of the report.

### *Enhancing the affordability and proportionality of litigation costs and thus access to justice*

The South Australian Magistrates Court applies a lump sum cost scale which makes court costs proportional to the judgment sum and prescribes daily fees for counsel, witnesses' and experts' attendance at court, expert reports, and photocopies. Schedule 1 of the *Supreme Court Civil Rules 2006 (SA)* prescribes specific fees for solicitors' work in civil litigation, and prescribes maximum amounts for photocopying or printing documents. The nation-wide adoption of either model is recommended in order to enhance the affordability and proportionality of litigation costs and thus access to justice. It is recommended that this be coupled with a nation-wide adoption of a rule of principle that all cost items must be reasonably appropriate and necessarily incurred. See chapter 3 of the report.

### *Facilitating an early identification of the issues and thus dispute resolution by settlement prior to litigation*

In order to facilitate an early identification of the issues and quick and cheap dispute resolution by settlement prior to litigation the introduction of pre-action protocols, requiring the exchange of detailed information in plaintiff's notice of claim and defendant's reply, substantially following the Queensland model for personal injury actions, is recommended for all civil actions. See chapters 6 and 7 of the report.

### *Enhancing the efficient progress of proceedings*

In order to facilitate an early identification of the issues, enhance judicial preparation for pre-trial conferences and the trial and thus the efficient progress of proceedings during the pre-trial stage and trial efficiency, enhance early settlement once litigation has commenced and facilitate judicial instruction of court-appointed experts it is recommended that the pleadings rules in New South Wales be amended as follows: in all civil proceedings plaintiffs should have to comply with all the requirements for plaintiff's notice of claim under the Queensland pre-action protocol for personal injury actions; defendants should have to specifically detail all facts supporting their grounds of defence; both parties should be required to provide names and addresses of proposed witnesses and attach documents in their possession that support the facts they allege; both parties should be required to state whether they want to rely on expert evidence or consider that such evidence may be required. See chapter 6 of the report.

### *Facilitating early settlement*

In order to facilitate early settlement once litigation has commenced and provide an arguably more effective and less controversial means to save court resources, reduce delay and litigation cost, and achieve other intrinsic benefits of settlement than the current emphasis on referral to mediation or arbitration, it is recommended that consideration be given to introducing in the rules of civil procedure an obligation on the court to promote settlement at a compulsory early pre-trial settlement conference shortly after the pleadings have closed, which is to be devoted entirely to settlement discussions, conducted by a judge serving at the court, on a volunteer basis, with a different judge to conduct the trial, if settlement fails, and a mandatory requirement for the litigants themselves to be present as well as the legal representatives who are actually in charge of and have knowledge and authority regarding the matter. In addition it is recommended that training programmes on conciliation techniques be introduced for judges taking this role. Should the settlement conference fail to achieve the objective of settlement, it is further recommended that at the end of that conference the court is required to consider and discuss the need for expert evidence and the appointment of a court expert. See chapter 7 of the report.

#### *Enhancing overall effective judicial control and efficiency*

In order to facilitate early dispute resolution by settlement, enhance judicial preparation for pre-trial conferences and the trial and thus effective judicial control and efficiency, enhance party compliance with pre-trial orders, reduce the number of pre-trial conferences and the length of the trial, ensure certainty in hearing dates, reduce interruptions of witness or expert examination as a result of rigid recess and finishing times, and facilitate judicial instruction of court-appointed experts, it is recommended that the individual case management system or individual list model be introduced at all courts. See chapters 5, 8 and 9 of the report.

#### *Enhancing effective judicial control and efficiency during pre-trial case management*

Alternatively, it is recommended to assign the responsibility for all pre-trial case management of any one civil case to one person, in order to give the case manager familiarity with the case, enhance consistency in pre-trial case management and allow the case manager to respond appropriately and effectively to the way in which the legal representatives are handling the case. That single person should be a judge rather than a registrar.

In order to enhance effective and efficient pre-trial and trial management, it is recommended that case management skills training be a compulsory and central component of judicial

education programs conducted by organisations such as the National Judicial College of Australia and the Judicial Commission of New South Wales. If the current master calendar system or master list model of case allocation and the use of registrars to conduct pre-trial conferences are maintained, it is recommended that registrars also receive case management skills training. See chapters 5, 8 and 9 of the report.

#### *Judicial specialisation for more efficiency*

In order to enhance effective judicial control and efficiency, reduce the length of trials, and reduce potential delays in judgment delivery, it is recommended that the courts implement a system of greater judicial specialisation, at least in terms of establishing a clear division between civil and criminal cases. See chapters 5 and 9 of the report.

#### *Streamlining evidence*

In order to reduce the evidence prepared and presented by the parties and thus enhance efficiency and reduce the length of trials, it is recommended that definitions of relevance as in section 55 (1) of the *Evidence Act 1995* (NSW) be narrowed to “directly relevant”. See chapters 9 and 10 of the report.

#### *Accredited court-appointed experts*

In order to facilitate impartial, honest, and non-partisan expert evidence and thus strengthen the integrity of the judicial decision-making process, and to ensure that the appropriate expertise and proper qualifications are held by those giving expert evidence in the courts, it is recommended that an expert accreditation system as detailed in chapter 10 of the report be introduced. Once such an expert accreditation system is in place, it is further recommended that a procedural rule be introduced that expert evidence will only be accepted from accredited experts. The body or bodies administering the recommended accreditation scheme should be obliged to provide lists of accredited experts to the courts for selection as experts.

In order to align the function of expert evidence in practice with its legal definition, facilitate non-partisan expert evidence, enhance the integrity of judicial decision-making, reduce the number of expert reports, and reduce delay and litigation costs, it is recommended that the courts move towards a system based on court-appointed rather than party-appointed experts.

To counter-act the potential problem of larger expert numbers, more delay and increased litigation costs as a result of parties also appointing their own experts, it is recommended that a rule be inserted in civil procedural rules which states that expert evidence is provided by a court-appointed expert. This would mean that the opinion of a court-appointed expert is accorded a higher degree of probative value than that of party-appointed experts.

Regarding the remuneration of a court-appointed expert it is recommended that the costs of the court-appointed expert become costs in the cause so that they are ultimately borne by the party who loses. Regarding an advance that a court-appointed expert may reasonably demand it is recommended that this is to be provisionally paid by the party who owes the burden of proof on the issue. See chapter 10 of the report.

The table below refers the Commission to where in the report answers to particular issues raised in its Issues Paper can be found.

<b>Issues Paper</b>	<b>Report</b> <i>Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany</i> <b>(The table of contents will refer to specific pages)</b>
<p><b>2</b> <b>Avenues for dispute resolution and the importance of access to justice</b> Avenues for civil dispute resolution <i>Main strengths and weaknesses of the civil justice system.</i> <i>What should the objectives of the civil justice system be?</i> Why is access to justice important? <i>What are the benefits to individuals and the community of an accessible civil dispute resolution system? How does a failure to provide adequate access to justice impact on individuals and the community more broadly?</i></p>	<p>See chapters 3 and 4</p> <p>See chapter 1, pp 16-19</p> <p>See chapter 3</p>
<p><b>4</b> <b>The costs of accessing civil justice</b> Financial costs <i>The Commission invites comments on the financial costs of civil dispute resolution and the extent to which these costs dissuade disputants from pursuing resolution. Data are sought on these financial costs, including the costs of advisory services, alternative dispute resolution and litigation.</i> <i>To what extent are the costs of dispute resolution proportional to the matters at</i></p>	<p>See chapters 3 (and 7 re ADR)</p> <p>See chapter 3</p>



	<p><i>stake? To what extent are the costs of dispute resolution proportional to the matters at stake?</i></p> <p><b>Timeliness and delays</b> <i>Data are sought on the time taken to resolve disputes. What are the costs of delays to disputants?</i></p> <p><b>Simplicity and usability</b> <i>Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed? Which particular parts of the civil system are unnecessarily complex?</i></p> <p><b>Geographic constraints</b> <i>Does a lack of physical proximity represent a barrier to accessing justice?</i></p>	<p>See chapter 4</p> <p>See chapter 3</p> <p>See chapter 5, p 155</p>
<b>6</b>	<p><b>Avenues for improving access to civil justice</b> <i>What approaches to improving access to justice are not captured in the above taxonomy?</i></p>	<p>Pleadings; see chapter 6</p> <p>Expert evidence; see chapter 10</p>
<b>7</b>	<p><b>Preventing issues from evolving into bigger problems</b> <i>The Commission invites comment on strategies for the avoidance and early resolution of civil disputes. What evidence is there of the benefits and costs of these approaches and strategies?</i></p>	<p>See chapter 7</p>
<b>8</b>	<p><b>Effective matching of disputes and processes</b> <i>How do specialist courts and tribunals impact on the cost of dispute resolution and access to justice? How do they compare with consolidated courts/tribunals?</i></p>	<p>See chapter 5, pp 156-160</p>
<b>9</b>	<p><b>Using informal mechanisms to best effect</b> <i>The Commission seeks data on the number, proportion and types of disputes resolved through ADR and the relative satisfaction of disputants with the outcomes of using these mechanisms.</i> <i>What evidence is there that ADR translates into quicker, more efficient and less costly dispute resolution without compromising fairness and equity (particularly where there is an imbalance of power between disputants)? What is the potential for resolving more disputes through ADR without compromising fairness or equity?</i></p>	<p>See chapter 7, pp 211-219</p> <p>See chapter 7, pp 206-219</p>
<b>11</b>	<p><b>Improving the accessibility of courts</b> <b>Court processes</b> <i>Other than the matters discussed below, are there any other court or tribunal practices and procedures which may impede access to justice?</i></p>	<p>See chapters 6, 8 and 9</p>

	<p><i>How are imbalances in the resources available to disputing parties best addressed so that outcomes are not based on one party being able to effectively exhaust the resources of another, rather than winning on merit?</i></p> <p><b>Reforms in court procedures</b></p> <p><i>How effective have the case management systems, processes and practices adopted in different jurisdictions been in reducing cost and delay? How has their effectiveness been evaluated?</i></p> <p><i>What are the barriers to the effective implementation, operation and evaluation of case management systems, processes and practices?</i></p> <p><i>How could the case management systems, processes and practices adopted in different jurisdictions be improved to reduce the costs of litigation and improve access to justice more broadly?</i></p> <p><i>Are there examples of 'best practice' in case management systems, processes or practices? Could these examples be adopted or adapted by other courts and tribunals?</i></p> <p><b>Cost awards and court fees</b></p>	<p>Use of court-appointed experts; see chapter 10</p> <p>See chapters 5 and 8</p> <p>See chapter 8</p> <p>See chapter 8</p> <p>See chapter 8, pp 273-289</p> <p>See chapter 8, pp 292-299</p> <p>See chapter 3</p>
<b>12</b>	<p><b>Effective and responsive legal services</b></p> <p><b>A responsive legal profession</b></p> <p><i>What evidence is there of the uptake of alternative fee arrangements [alternative to time-billing] in Australia? Are there any barriers (legal or practical) to their uptake? Has the use of alternative fee arrangements altered the costs to both lawyers and consumers?</i></p> <p><b>Legal assistance services</b></p>	<p>See chapter 3</p> <p>See chapter 3, pp 80-86</p>
<b>13</b>	<p><b>Funding for litigation</b></p> <p><b>Contingent billing</b></p>	<p>See chapter 3, pp 78-80</p>
<b>14</b>	<p><b>Better measurement of performance and cost drivers</b></p> <p><i>How can the performance of the civil justice system be best measured? Are there limits to the extent to which data can inform comparisons across jurisdictions or across time?</i></p> <p><i>What data are and can be collected across the justice system to enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these?</i></p> <p><i>What is the value of the data currently being collected?</i></p>	<p>See chapter 4</p> <p>See chapter 4</p> <p>See chapter 4</p>

Upon request, I am happy to provide the Commission with a copy of the report in word format (1647 KB) and/or with two additional chapters on the collection (including discovery) and taking of evidence that due to its already lengthy format did not make it into the final report (221 and 229 KB respectively).