THE LAW SOCIETY
OF SOUTH AUSTRALIA

Preamble

1. The Law Society of South Australia ("the Society") was founded in 1879. Its continued existence is enshrined in Part 2 of the *Legal Practitioners Act 1981* and it is the peak body representing the legal profession in this State. It currently has approximately 3,800 members.

2. The Society welcomes the opportunity to contribute to the Productivity Commission's Inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law.

3. Given the significance of this inquiry, the Society formed its own Working Group to review the Issues Paper, particularly from a South Australian perspective. The matter was also referred to a number of the Society's specialist committees.

4. The Society is a constituent member of the Law Council of Australia ("Law Council"), the national body representing the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law. The Society has appreciated the opportunity to participate in the Law Council's Working Group to examine the Issues Paper.

5. While we have contributed to the Law Council's submission and have put a great deal of effort into that submission, the Society takes the opportunity to separately put its views forward to the Commission and to highlight a number of issues and factors peculiar to and of particular importance from a South Australian perspective. The Society considers that this Inquiry deserves our particular attention.

Executive Summary

6. The Productivity Commission's Terms of Reference contain the following statements.

> *"The cost of accessing justice services and securing legal representation can prevent many Australians from gaining effective access to the justice system. For a well-functioning justice system, access to the system should not be dependent on capacity to pay and vulnerable litigants should not be disadvantaged.*

A well-functioning justice system should provide timely and affordable justice. This means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level.

> *A justice system which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs."*

The Society agrees with the thrust of these observations.

7. The justice system in Australia is multi-tiered with both Federal and State responsibility. One needs to be careful not to, in an inquiry such as this, generalise all issues, as each State and Territory is unique. For instance, South Australia is the only jurisdiction which administers its Courts through an independent body, the Courts Administration Authority.

8. The issues which we have addressed in our submission include

   - avenues for dispute resolution and the importance of access to justice
   - exploring legal needs
   - the costs of accessing civil justice
   - whether unmet need is concentrated among particular groups
   - preventing issues from evolving into bigger problems
   - utilizing informal mechanisms to best effect
   - effective matching of disputes and processes
   - improving the accessibility of courts
   - effective and responsive legal services
   - funding for litigation.

   This submission responds to questions/issues posed in the Productivity Commission's Issues Paper by reference to those questions/issues that the Society seeks to contribute to, cross referenced by the question/issue and the page upon which it appears in the Issues Paper.

CHAPTER 2 – AVENUES FOR DISPUTE RESOLUTION AND THE IMPORTANCE OF ACCESS TO JUSTICE

3. The Commission invites comment and evidence on the main strengths and weaknesses of the civil justice system. What should the objectives of the civil justice system be, and are they being achieved?

Australian civil law has its foundation in the English system. In our infancy, we chose to "receive" much of the English law. The English system in turn can trace its roots to classical Roman law. One of the fundamental principles which underpinned Roman law was the protection and preservation of individual rights. Some of these fundamental rights were gradually codified. In Australia today we see a vast majority of rights the subject of codification, not always for the better where those rights are modified or curtailed.

The civil justice system exists to ensure the protection of these rights. It is intended to provide an avenue for people to seek redress if those rights are infringed or to

seek clarification and/or enforcement of those rights. As such any civil justice system should be accessible. Accessibility involves a number of concepts namely

- appropriate Courts/Tribunals vested with jurisdiction
- physically accessibility particularly to rural and remote communities
- low threshold costs to utilize
- a costs structure to ensure appropriate levels of representation/advocacy.

The second part of the question is very broad. There are no doubt some aspects of the civil justice system in South Australia that meet these objectives, just as others do not. We refer to the Law and Justice Foundation report entitled Legal Need in Australia in particular to the South Australian references (p160 – 205) as evidence of both the "good and the bad". It is apparent that a number of demographic factors such as finance and health play an important role in the community's ability to access the civil justice system.

4. 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?

The LAW report (p180 – 182) summarises the socio-economic impact of legal problems as *"including adverse consequences on health, financial and social consequences"*. Obviously an accessible civil dispute resolution system goes a long way to alleviating these consequences. It will not however completely extinguish them.

An accessible civil dispute resolution system does have substantial economic advantages particularly if it is focused on early resolution. These include

- maintaining business structures and economic stability
- alleviation of some of the socio economic consequences outlined above with their resultant positive budgetary impact on the support mechanisms necessary to deal with those issues
- clarification of rights and certainty.

CHAPTER 3 – EXPLORING LEGAL NEEDS

7. What are the consequences of unmet legal need? For example, what are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?

We have already referred to the LAW report. Another insightful reference from a South Australian perspective is the SACOSS report entitled "South Australian Consumer Credit Legal Services: A Scoping Study" (January 2013). This report highlights the ever increasing

burden that cost of living pressures have and the increasing emergence of yet another area of unmet legal need.

Another discrete area is that of children's rights. One consequence of unmet legal need is that children's basic rights might be compromised: The United Nations Convention on the Rights of the Child (UNCROC) includes:

- *"Children have the right to know their parents and, as far as possible, to be cared for by them"* (Art7)
- *"Children should not be separated from their parents unless it is for their own good. For example, if a parent is mistreating or neglecting a child. Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child"* (Art 9)

9. How frequently do Australians — including individuals, businesses and other organisations — experience substantial civil legal disputes including in the area of family law? What is the nature of these disputes?

In South Australia, the Magistrates, District and Supreme Courts as well as a number of discrete specialist Tribunals operate under the auspices of the Courts Administration Authority (by virtue of the *Courts Administration Act 1993*). The Authority publishes annual reports which contain some data as to the nature and extent of dispute where proceedings are commenced.

Not all civil legal disputes are the subject of legal proceedings, in fact the majority are not and are resolved or abandoned well before. Once again we refer to the LAW report for detail in this regard. Chapters 3 and 4 identify the prevalence and nature of legal problems, and Chapter 5 provides some detail as to how they might have been resolved. In the area of family law, 1 million Australian children do not have both natural parents living with them (ABS report "Love me do" 2012). Of those 1 million, approximately 24% do not see one parent at all, or less than once a year (ABS report "Love me do" 2012). The ability of a child to personally participate in the family law justice system is limited, even though the child's life will be significantly impacted by the quality or lack of quality of that system. Children will suffer from any barriers to civil justice experienced by the adults in their lives.

In *"Children's access to justice in Australia's family law system"* (Legaldate, Vol 25, No3, July 2013 4-6), it was noted that children interact with the family law system by

- having no say or way to make their views known
- having their views represented through a family report written by a child welfare specialist
- having separate representation through an independent children's lawyer
- being unable to initiate proceedings on their own behalf.

Anecdotally, most children will fall within the three first categories. However, the success of their access to justice will be heavily impacted by the quality of the family law system, and the ability of the relevant adults to participate in that system in a fair and just manner. Furthermore, by failing to deliver justice to children in the family law system, the Human Rights of children may be infringed (eg UNCROC Art 7: *"Children have the right to know their parents and, as far as possible, to be cared for by them"*; Art 9: *"Children whose parents have separated have the right to stay in contact with both parents, unless this might harm the child"*; and 12: *"Children have the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account"*).

"The Family Pathways: Survey of Recently Separated Parents (SRSP) 2012" report from Australian Institute of Family Studies was submitted to Federal Attorney-General in April 2013. The survey included information about people's experiences of the family law system and how effectively it met their needs. It appears that the report has not yet been released to the public.

The Annual Reports of Courts to be released in Oct 2013 will provide updated Court-collected data.

CHAPTER 4 – THE COSTS OF ACCESSING CIVIL JUSTICE

12. 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 — from parties, lawyers, the courts and other institutions — on these financial costs, including the costs of advisory services, alternative dispute resolution and litigation.

It is important to understand the framework in which lawyers must operate in order to properly discharge their duties to their clients and the Court. There are also onerous obligations on lawyers to properly discharge their contractual and common law duty of care to their client. Whilst a lawyer owes a paramount duty to the court and the administration of justice,[1] a fundamental ethical duty of a lawyer is to *"act in the best interests of a client in any matter in which the solicitor represents the client"*.[2]

A corollary to that duty is that lawyers have no general immunity from being sued if they do not properly pursue a civil litigation matter. In the circumstances, lawyers are obliged to take every measure they properly and reasonably can to advance their client's legal interests. This inevitably multiplies the complexity, and cost, of disputes. For instance, in a breach of contract claim, in addition to the claim for breach of contract there may also be a claim for misleading and deceptive conduct, unconscionable conduct, waiver and estoppel. It is likely that each alternative claim

1 Law Council of Australia, *Australian Solicitor Conduct Rules 2011* (at 23 October 2013) r 3.

2 Law Council of Australia, *Australian Solicitor Conduct Rules 2011* (at 23 October 2013) r 4.1.1.

will require additional evidence both oral, in chief and in cross examination, and possibly further discovery.

A party may choose to be self-represented in litigation. However, an unrepresented litigant in Court inevitably leads to further delays in trial preparation and the conduct of the trial. This is because judicial officers often need to explain to the unrepresented litigant the process and, within permissible limits, what they need to do to present their case in Court. Whilst this is to enable procedural fairness and natural justice, it cannot be denied that this process is time consuming. Accordingly, not only are Court costs significantly increased but also the costs of the represented party.

Even in the civil justice system (and outside the criminal justice system), some disputants may often have no choice but to become involved in litigation. For instance, regulatory proceedings commenced by the Deputy Commissioner of Taxation, the Australian Consumer and Competition Commission, and various State environmental authorities are just a few examples where deniable of affordable legal representation is likely to lead to disputants unreasonably making concessions. This has become even more pronounced with the erosion of the principle of the rule of law by the substantial increase in the last few years of legislative penalty notices.
Where a party has made an informed choice to pursue litigation, and even though they might reach a successful outcome, litigation can be expensive. In some instances, the combined costs of the parties can exceed the combined amount of any dispute. In addition, the process of assessing or taxing costs can also be very expensive for the parties. If a party is not satisfied with a costs order at the conclusion of a trial, they can appeal the decision which leads to further substantial delay and additional costs.

Whilst we have no empirical evidence, the experience of solicitors and mediators, at least in commercial matters, is that quite often the parties do not want a full-blown adversarial process, or it is not suited for their purpose. In many cases the parties want an independent person to make an adjudication or decision for them. It remains critical however, that any such 'expert determination' process is informed by the law and is susceptible to appeal if it miscarries. Until recently (as seen from the Courts Administration Authority annual reports) our largest trial court has been the District Court. This Court has

- a relatively high filing fee
- a relatively slow process from the first Status Hearing until listed for trial, with trails now being listed into 2015
- judgements often delayed for long periods of time
- expensive cost of production of transcript during trials.

Often trials are adjourned because Judges are not available, although this is largely attributable to the busy Criminal List of the District Court.

Recent jurisdictional changes has meant that the Magistrates Court will have an increased workload with minor claims now below $25,000. This will have consequential effects on the extent to which parties may pursue their rights.

- A personal injury claim worth less than $25,000 may be extremely complex, particularly where persons are injured in motor vehicle accidents and an accredited impairment assessment needs to be performed to quantify whether the claim is below or higher than $25,000.
- The new Magistrates Court [Civil] Rules impose significant penalties on litigants which penalties do not exist in other jurisdictions and are weighted in favour of the defendant as against the plaintiff.
- Whilst those Civil Rules may be amended, the current position is that fewer lawyers will be prepared to act in respect to personal injury claims where they cannot with certainty provide advice to their client as to the potential costs that they might recover from the defendant nor the potential costs of the litigation generally.

Both the District Court and Magistrates Court have closed all country registries and centralised their registries in Adelaide, with the Adelaide Magistrates Court becoming the "Trial Court" for civil matters and the District Court conducting fewer and fewer circuits to country areas.

Parliamentary amendments to existing legislative schemes (such as motor vehicle and worker's compensation) mean that the law is continually changing and evolving which adds a layer of costs to participants.

13. *What evidence is there that the financial costs of civil dispute resolution are changing? Where in the legal process and/or in which areas of the law are these changes in cost accruing?*

The proliferation and complexity of legislation has made dispute resolution more expensive and complex. For example, in any commercial construction dispute, one usually has to consider not only common law (contract and negligence) but one has to consider *Worker's Liens Act*, *Security of Payment Act*, *Civil Liability Act*, the *Development Act*, the *Civil Liability (Apportionment of Liability) Act*, the Australian Consumer Law and Free Trade Agreements, their associated regulations and possibly several other statutory enactments. The demand for and the scope of dispute resolution services required would be reduced if there was less or simpler legislation and regulation.

The high cost of some litigation is often attributed to costing arrangements of lawyers such as charging by time, the hourly rate charged and contingency fees. Lawyer's fees concentrate a range of other charges and costs, including Court filing and hearing fees, transcript costs, expert witness costs, and various regulatory overheads. Some of these costs represent policy decisions to tax litigants. Ultimately, however all these costs reflect the complexity of disputes and the failure of courts to confine the issues they determine.

14. ***To what extent are the costs of dispute resolution proportional to the matters at stake? How frequently are parties dissatisfied with their legal expenses and has this been changing over time?***

Filing fees can be inequitable: for example, probate filing fees generate close to $7million in general revenue yet the cost of the services is close to $1-2million.

Moves to a "user pay" system by various governments undermine the role of government in providing an equitable and available Court system and when the costs of using the system are less than the revenue recouped this equates to a tax on the user which also increases the financial penalty.

Filing fees are often a barrier to some who wish to litigate, especially if a matter cannot be done in a lower Court.

16. ***The Commission invites comments on the timeliness of civil dispute resolution. Data are sought — from parties, lawyers, the courts and other institutions — on the time taken to resolve disputes, both in and out of court, and the satisfaction of individuals with timeliness.***

Complaints are generally made of the following

- delays in trial waiting lists
- lack of commitment in some jurisdictions to get involved in the conciliation process
- Court rules do not assist "getting to the pointy end of a dispute" quickly.

Attached is the latest report from the Courts Administration Authority which details pending rates to August 2013. There are a number of recent factors which have influenced these rates. They also highlight why the civil justice system cannot be looked at in isolation from the criminal justice system. Important is

- The effect that "fast tracking" historical sex offence cases and sex offence cases generally has had on not only the criminal system but also the civil system (since 2010).
- Changes in jurisdictional limits (1 July 2013) and their almost immediate effect on pending rates in the Magistrates Courts.
- A failure to adequately resource the system to deal with changes of this nature has a "flow on" effect for all other litigants who are already "in the queue".

19. ***How should the economic cost of delay of justice be measured?***

This is a difficult question. There is the initial underfunding of the system which is quantifiable. The Courts Administration Authority annual reports over the last 10

years demonstrate an ongoing decline in funding relative to need, and relative to increased cost.

There is the unquantifiable cost to the parties. We have already identified the socio economic factors at play. Quantification of the effect of delay on those is difficult but delay certainly cannot have a positive effect.

21. ***Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed? Do legal practitioners contribute to complexity, and if so how? What, if any, incentives do legal practitioners face to contribute to a more user-friendly system?***

Legal practitioners do not contribute to the complexity of the law. Laws are enacted and drafted by Parliament and we suggest that is the source of the complexity. We understand that some jurisdictions have 'Repeal Days', where the Parliament repeals out-dated, irrelevant or redundant statutes. We suggest that such a proposal is worthwhile further exploring.

Fundamentally, the role of legal practitioners is to assist clients to identify, pursue and vindicate their legal entitlements. That role is overwhelmingly performed by advice and negotiation. A relatively small number of disputes and issues require recourse to the courts, and of these, the majority are resolved by negotiation or ADR during the course of the proceedings. Nonetheless, the Courts provide the critical backstop by which the law is declared and disputes are determined. Both tasks are essential to the principled resolution of disputes out of court, as they provide the basis for rights-based negotiation and the enforcement of those rights when they are not honoured.

25. How should non-financial factors such as psychological and physical stress caused by legal disputes be taken into account when they relate to access to justice issues?

We refer to the LAW report (p83-87).

26. How important is face-to-face contact with lawyers or court officers? Does a lack of physical proximity represent a barrier to accessing justice? To what extent can technology overcome geographic barriers?

Face to Face contact between the legal practitioner and the client is important and desirable but perhaps not crucial. Lack of physical proximity can be a barrier especially where documents need to be shown to a person, or signed by a person and witnessed such as affidavits. The new Verification of Identity (VOI) requirements are also an issue for persons in remote areas. The use of Skype, videoconferencing, email and telephone can help to overcome geographical barriers.
These issues face country and regional practitioner almost daily. Some regions do not have sufficient resident lawyers. This is a separate and distinct issue in itself.

Many ordinary people find the justice system a wholly dis-empowering process. For many people the constant 'not knowing' caused by delays creates stresses additional to the dispute resolution process. Part of this can be overcome by embracing information technology (IT). IT can be used to provide parties with real time information as to the progress of their case, rather than having to attend meetings which cost time and money. Further, IT provides opportunity to remove the need and expense of litigants having to attend the Court to have the dispute resolved. Materials can be submitted and reviewed and submissions made online. Submissions would have to be kept short and simple, which could also be a means of empowering litigants. Court attendance is an alien and uncomfortable environment for many people and IT could provide a means of people having "their day in Court" but remaining in their home or community.

27. Which particular regions, groups or case types face geographic constraints to accessing the justice system? What are the costs to individuals and the community as a result of geographic barriers? Which particular mechanisms or jurisdictions have been effective at dealing with these barriers?

There are a number of difficulties peculiar to rural areas

- difficulty and expense in accessing courts due to distance. This is compounded by country court closures, and reduced sitting times and a reluctance by some courts to allow electronic filing and attendances at hearings by telephone.
- increased expense in effecting service of process in the country. As an example, personal service of application for a divorce in Lameroo cost $248. There would have been no cost if it had been done electronically.
- difficulty and expense in accessing legal advice due to distances, this being due in part to the difficulty in attracting and retaining practitioners in the regions, whether for private practice or community legal centres.
- closure of regional offices of the Office of Consumer and Business Affairs (OCBA) has made it more difficult and more expensive for country people to access those resources.
- withdrawal of circuits: it costs much more to take a weeks' worth of personnel to the capital than to send the Court to the town.

Remote dispensation of law treats regions as colonies and promotes feelings of being disenfranchised.

CHAPTER 5 – IS UNMET NEED CONCENTRATED AMONG PARTICULAR GROUPS?

29. What groups are particularly disadvantaged in accessing civil justice and what is the nature of this disadvantage?

We refer to the LAW report (p174 – 180) and the SACOSS report generally.

33. How does the legal system accommodate SRLs and does this take into account the attributes of SRLs themselves? How can parties best be assisted to self-represent?

The increasing number of Self-Represented Litigants (SRLs) poses a number of problems. Chief Justice Doyle in Thomas & Anor v Nash made the following observations:

5. *I want to record some aspects of the trial.*
6. *Mr Nash has acted for himself throughout. The trial was estimated to last three days. My assessment is that it should have taken no more than two or three days. In fact it took about nine days. The additional time substantially increased the costs of the case to the plaintiffs, and the cost to the public through the use of the Court and its resources.*
7. *The additional time is attributable to Mr Nash's inability to present his case efficiently, although I gave him such help as I was able to give him. On many occasions I had to sort out what it was that Mr Nash was interested in, and then formulate questions for him. I disallowed many questions because they were irrelevant, or of quite peripheral relevance only. On occasions I intervened of my own motion, to keep the case moving. Often when I disallowed a question, this led to ongoing argument on the part of Mr Nash, who was usually dissatisfied with my rulings. On occasions, when the questioning of witnesses was repetitive or to little effect, I warned Mr Nash that I would exercise my power as trial judge to limit any further questioning unless he moved on. Power to do so is given by r 209 of the Supreme Court Civil Rules 2006 (SA), but exists in any event as one of the Court's inherent powers over the conduct of litigation. Mr Nash had numerous documents upon which he wanted to rely. I considered many of them to be irrelevant. His documents were in a disorganised state. Often the Court had to wait while Mr Nash found a particular document upon which he relied. All of these things contributed to the length of the case.*
8. *I permitted Mr Coppola, for the plaintiffs, to interpose two medical practitioners as witnesses, even though Mr Nash did not consent to this. I did so because of difficulties in arranging their attendance, having regard to the unexpected amount of time being taken by Mr Nash, and because I considered that my decision would cause no unfairness. This also I considered to be within my powers as trial judge: see Sims v O'Sullivan [1952] SASR 179 at 183 Napier CJ.*
9. *I do not record this to criticise Mr Nash. It is not uncommon for an unrepresented litigant to cause problems of this kind. I record these details to*

draw attention to the private and public cost that is incurred in cases like this. This happens in other cases from time to time. I expect that it happens more often in the District Court, and more often again in the Magistrates Court.

10. *The answer is not to deny to members of the public like Mr Nash the right to appear without representation. Nor can judicial supervision be the complete answer. The case was prolonged despite my best efforts. It might be in the interests of the State to provide legal assistance, under tight conditions, to persons like Mr Nash. The time saved in court would go a reasonable way towards recouping the costs of the legal assistance".*

In South Australia, the recently established Self-Representation Service gives free legal advice and assistance to self-represented parties in the Supreme Court of South Australia. The service is operated by JusticeNet, an independent not-for-profit community organisation with the support of Flinders University.

The Service aims to help clients to:

- understand the law and the rights and perspective of the other party;
- observe court and tribunal rules and procedures;
- prepare documentation required to pursue or respond to legal proceedings;
- be aware of potential orders and the effect of not complying with orders;
- present their case in the best possible manner; and
- relieve the stress of litigation by providing problem-solving skills.

It offers 45 minute appointments (in person or by telephone) with pro bono solicitors who provide advice and assistance with discrete tasks, including:

- advice about whether, and how, to commence proceedings;
- advice about court and tribunal processes;
- assistance to draft documents such as applications, statements of claim, defences, affidavits and submissions;
- assistance to draft court and tribunal forms;
- assistance with preparing for trial and appearing in court;
- advice about appealing court and tribunal decisions;
- referral for pro bono meditation; and
- advice about other options for the resolution of disputes.

The Service helps people who are involved in, or who are considering commencing legal proceedings in the Supreme Court, and who are unable to afford private legal assistance and are ineligible for legal aid or other appropriate assistance.

This service of course does not address the issue of advocacy. Much of what the former Chief Justice had to say was directed to this issue.

The legal profession contributes greatly in this area through the provision of extensive pro bono resources. This does include advocacy. However there is still an unmet need.

There are of course some Courts/Tribunals that can accommodate SRL's. Small claims jurisdictions and some parts of the administrative appeals process are designed with SRL's in mind. However not all SRL's are adept at advocacy or poses the necessary skills. To open this up to non-lawyer representation is fraught with its own problems not the least of which are the strong regulatory and ethical considerations lawyers bring with them.

CHAPTER 7 – PREVENTING ISSUES FROM EVOLVING INTO BIGGER PROBLEMS

36. 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?

Ensuring that the cost of civil litigation is as low as possible is a matter of ensuring that dispute resolution procedures are as efficient as possible. That means reducing steps in litigation and putting a price or penalty on unnecessary steps. To that end:

- Rationalise Court registries. Having one Registry will improve efficiency by volume and also by not having any requirement to transfer files upon application or in an appeal.
- Courts need to be resourced properly. This includes giving the Court sufficient resources to introduce technology that will reduce costs, including filing documents by email.
- Once a dispute is filed and contested, ensure that sufficient resources (i.e. an experienced and independent dispute resolution expert, a Magistrate, Master, Judge) is given the power and the support to "crunch" the dispute, either to resolve it or make comprehensive orders as to how it is to be resolved.

Introduce market forces to deal with unnecessary interlocutory steps. At the moment there is no immediate consequence for unnecessary interlocutory steps. If costs orders and penalties were made, enforced and payable immediately, this would put a price on unnecessary steps and the market would react. This would immediately improve cost to access the Courts and immediately improve the efficiency of the Courts by ensuring that parties have a financial consequence if they cause an unnecessary interlocutory attendance.

CHAPTER 9 – USING INFORMAL MECHANISMS TO BEST EFFECT

54. What data are available on the frequency and timeliness of disputes resolved through ombudsman services? Are ombudsmen an efficient and effective way of resolving disputes with government and industry – where do they work best? How might ombudsman services be improved?

We draw a distinction between ombudsman who, using skill and experience in a particular industry, can advocate for a client, and "so-called ombudsman" who substitute for the justice system. An ombudsman has a real role to play where the amounts in dispute are small, and where there is an informed willingness on the part of the claimant to compromise his/her entitlements. Ombudsmen are not a substitute for actual access to justice. Rather, they are one of a number of supplementary tools.

65. How and to what extent do the current discovery rules impact on access to justice? In what areas does discovery particularly affect access to justice? How could rules of discovery be reformed to improve access?

The Australian Law Reform Commission (ALRC) noted that *"in many instances, pre-action protocols place obligations on parties to disclose relevant information and documents with the aim of facilitating settlement. Where no settlement is reached, the procedures aimed to narrow the issues in dispute between the parties in a manner that expedites the trial process".* [3] In principle, this should assist in reducing the need for, and cost of, any subsequent discovery of documents.
In the Federal Court, leave from the court is required for discovery and a party is not entitled to any costs or disbursements if discovery is carried on without a court order.[4] Order 15 Rule 2 of the Federal Court Rules 2011 (Cth) require a party to discover documents that it is aware of at the time it makes discovery having conducted a reasonable search. A party must discover documents

- that it relies on
- which adversely affects the party's case
- that support or adversely affect another party's case.

In making a reasonable search, the rule requires that a party must take into account

- the nature and complexity of the proceedings
- the number of documents involved
- the ease and cost of retrieving a document
- the significance of any document likely to be found

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3 ALRC-Victorian Law Reform Commission, Civil Justice Review, Report No. 14 (2008), 109

4 *Federal Court Rules 2011* (Cth) r 20.12.

- any other relevant matter.

The *Civil Dispute Resolution Act* (Cth) was enacted by Parliament in March 2011. The explanatory memorandum to the Bill said the overall aims of the Act are

- to change the adversarial culture often associated with disputes
- to have people turn their minds to resolution before coming entrenched in a litigious position
- where a dispute cannot be resolved and the matter proceeds to Court, to ensure the issues are properly identified, thereby reducing the time required for a Court to determine the matter.[5]

Eliminating formal discovery as prescribed by the Federal Court will reduce significant time and cost. Having parties at an early stage discover "key documents" that support or attack their case will significantly reduce time and cost. Parties exchanging a list of categories of documents where further discovery may be made and eliminating discovery duplication (where one party has already discovered a document) will further streamline the process.

72. How useful have pre-action requirements been in resolving disputes earlier? To which particular disputes are pre-action requirements most suited?

As *noted by the ALRC in its 2011 report at paragraph 11.11:*

"A major concern with pre-action protocols relates to the 'front-loading' of costs by requiring parties to spend more resources at an early stage of the process. For example, in complex cases where the parties are unlikely to reach early settlement, imposing onerous pre-action requirements may do no more than add to delay and costs for both parties in complying with the pre-action protocols."

The pre-action protocol process is likely to make a party turn their mind to a reasonably detailed analysis of their claim or defence at an early stage, which greatly assists pre-action negotiation, such as mediation. One of the main hurdles to settling at a pre-action or early stage is each party not clearly understanding their own case let alone understand each other's case. It is a common occurrence after a Court settlement or conciliation conference or a mediation, that one or both parties make substantial pleading changes to their case because the process has disclosed to them, usually on advice, that there are substantial matters that have not previously been considered. This obviously results in further time and expense being incurred by both parties and in a lot of instances the Courts, particularly when time has been allocated for the hearing of a matter which needs to be adjourned.

The ALRC also noted at paragraph 11.8 that *"in many instances, pre-action protocols place obligations on parties to disclose relevant information and documents with the*

5 Explanatory Memorandum, *Civil Dispute Resolution Bill 2010* (Cth), 4.

aim of facilitating settlement. Where no settlement is reached, the procedures aimed to narrow the issues in dispute between the parties in a manner that expedites the trial process".[6] In principle, this should assist in reducing the need for, and cost of, any subsequent discovery of documents.

Whilst pre-action protocols are sound in theory, there is no data or other statistics that would support a proposition that case flow management or pre-action protocols have reduced the cost of litigation in practice. Some jurisdictions have introduced formal pre-action protocols.[7]

76. What principles should apply in deciding how to award costs so that they create appropriate incentives for equity and efficiency in civil dispute resolution? In particular, what principles should apply to help ensure that the costs incurred are proportionate to the issues in dispute?

Allowing solicitors to charge legal fees based on a percentage based contingency fee would, in cases that are a dispute about damages or compensation, ensure that the costs are proportionate to the issues in dispute. There may be some cases where that would not be so, but on an overall basis for solicitors who specialise in an area there would be "unders and overs" and things would even out. That is, there may be some matters where the amount of work involved in the complexity means that the percentage based contingency fee does not properly reflect the work involved but there may be other cases where the fee may appear to be "generous".

Although there have been examples of "mega litigation" in South Australia, it is possibly not as common as in other jurisdictions. It has not been our experience that so called "mega litigation" in South Australia has significantly tied up court time. That is not to say that an instance of "mega litigation" may not arise in South Australia in future. With current funding shortfalls in the justice system in South Australia and with a less than full quota of judges, it is possible that should instances of "mega litigation" arise in South Australia in the future the court's resources may be impacted.

80. To what extent is lack of funding a barrier to greater use of technology in dealing with legal issues — both in terms of court processes and management and in providing outreach and other online services for those using the civil justice system? How can such barriers be mitigated?

It is obvious, but necessary to point out, that court processes would be substantially improved with the greater use of information technology.

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6 ALRC-Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008), 109.

7 Various State references including South Australian Magistrates Court Pre-Claim Procedures Rule 20-21, Supreme & District Court Rule 33

In the State Courts and Tribunals of South Australia information technology is fairly antiquated. A simple example is that e-filing is largely unavailable in SA courts and tribunals. When it is available it is sporadic and not uniform. In other words, whereas e-filing is available in some registries in others it is not. In one example where e-filing is not available in the registry it is available for interlocutory processes. There is no seemingly consistent approach even to that very basic subject.

The impact is that all legal firms in South Australia must employ people as rounds clerks. It appears in South Australia this is squarely a funding issue. Ironically the legal firms by and large have far better information technology systems than the courts themselves. There are examples of legal firms using their own information technology systems in the courts to assist expedite trials.

An obvious example of that is the typical South Australian court room. Whereas one would expect information technology would be utilised effectively to assist in streamlining litigation, our court rooms largely do not extend to provide those facilities.

For many years, the Society has supported legal fees insurance. It has potential to give access to justice for "the forgotten middle class". Legal fees insurance is a product that gives insurance cover, upon the payment of a premium, for the cost of specified legal services. In his study on legal cost insurance, Deputy Chief Magistrate Andrew Cannon concluded that "legal cost insurance could offer access to courts to middle class litigants without financing frivolous litigation."[8]

An ancient legal axiom states that the law, in all its majestic equality, "forbids the rich as well as the poor to sleep under bridges". That majestic equality, which provides legal aid for the poor and ready access to the legal process for the rich, is flawed in modern times by an embarrassing lacuna – the cost of accessing the law is prohibitive to many ordinary South Australian middle income earners. [9] The problem has been widely recognised for some time.

In 1991, the Society was instrumental in the introduction of legal fees insurance for members of the Public Service Association of South Australia (PSA), the union for public servants in South Australia. The legal fees insurance scheme was initially piloted with "seed" funding from the Society. Users of the scheme are provided with legal assistance for a variety of minor matters including family law, motor vehicle, personal and consumer protection, minor criminal matters and other common legal complaints.[10] The scheme is so successful that it survives to present day.[11] From 1991-2000, the insurance scheme assisted in over 9000 matters. Research undertaken at Flinders University noted that the PSA's scheme in South Australia is

[8] AJ Cannon SM, 'Legal Cost Insurance'(2000) 9 *Journal of Judicial Administration* 223
[9] AK Phelps and NW Morcombe, 'Hope for the Middle Income Earner' (1991) 13 (6) *Law Society Bulletin* 16
[10] Ibid
[11] http://www.cpsu.asn.au/membership/legal-advice

significant because it demonstrates that it is possible to establish well-designed and targeted legal fees insurance in Australia.[12]

In 1998, the Society also noted the introduction of a legal fees insurance scheme by the then Attorney-General Trevor Griffin. At that time, the Government's access to justice policy was "committed to encourage citizens to take out private insurance cover for legal costs and a Liberal and National Government will actively investigate the development of comprehensive legal expenses insurance schemes which have the potential to markedly improve access to justice for all Australians" [13].

Uptake has been limited in other jurisdictions, mainly due to issues relating to the size of the premium pool, difficulties in convincing consumers of the benefit of legal fees insurance, brokers and agents' unfamiliarity with the product and the public's wide misconception that they are eligible for legal aid.

While the Society acknowledges that the uptake of legal fees insurance has experienced difficulties in other jurisdictions, we remain optimistic about its potential and suggest further exploration, including quantitative and qualitative analysis about how legal fees insurance could be a commercially viable product that is available to ordinary Australians for a low premium.

81. How can technology be best used to improve the efficiency and scope of service delivery? What opportunities exist to increase collaboration across the sector to further develop the use of technology?

Subject to compliance with relevant rules of evidence, online services ought to be encouraged as an effective way to assist in the access and dispensation of civil justice. Undoubtedly this would also assist regional and country Australians. That said, any online approach to civil justice must be robust, must involve the judiciary and the legal profession and must not compromise a party's access to their traditional forms of civil justice.

All manner of things could potentially be dealt with online, and it is not difficult to imagine with inventive information technology and online solutions, that many of the briefer processes that currently require lawyers to attend in person in courts, may be circumvented.

[12] Francis Regan, 'Whatever happened to Legal Expenses Insurance?' (2001) 26(6) *Alternative Law Journal* 296
[13] Law Society of South Australia, 'Despite policy promises: Governments slow to act on legal fees insurance' (1998) 20(2) *Law Society Bulletin* 16

CHAPTER 12 – EFFECTIVE AND RESPONSIVE LEGAL SERVICES

92. What evidence is there of the uptake of alternative fee arrangements 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?

Contingency fees are unlawful in Australia if charged as a percentage therefore it is not possible to comment on their uptake. Although the traditional method for billing work is time costed billing, legal practitioners are attempting alternate methods of fee charging such as fixed price fees. Many clients however are in fact uncomfortable with alternate billing arrangements and a default position seems to be the hourly rate. It is easily understood, and is further understood to be the traditional method by which legal practitioners will charge fees. There are a surprising number of plaintiff claimants however who, unsolicited, ask whether contingency fees are available. As contingency fees charged as a percentage are unlawful in Australia it is not possible to tell how many plaintiffs would agree to that as an alternate to traditional fee billing, however anecdotally there is great interest amongst plaintiffs who seem to regard such a methodology as clear and understandable and without the risk of more traditional forms of billing.

106. What are the costs and benefits that accrue to legal service providers who provide pro bono services?

The better question is: what is the value of such pro bono services, how should they be evaluated and is there a mechanism by which the cost of such pro bono services can be recognised?

CHAPTER 13 - FUNDING FOR LITIGATION

109. How has the use of contingent billing improved access to civil justice in Australia, and could it be improved? What regulatory constraints should be used in relation to contingent billing and why?

The fact that lawyers are prepared to take on matters on a contingent basis and that litigation funders are prepared to invest means that litigants who would not be able to access the Courts through their own resources, are able to access justice.

The availability of litigation funding will lead to settlement of more cases as it will have the effect of "evening up" the resources of the parties as a well-resourced defendant need not worry about a meritorious case from a plaintiff, if the plaintiff does not have the resources to run / litigate the case. In the same vein class action procedures are very effective in providing access to justice. It means that litigants with a common interest can pool their limited resources and bring a case that may not otherwise be economic to Court – that must be improved access to justice.

110. *What risks are posed by litigation funding arrangements and how do these differ from the risks posed by contingent and other billing practices? What proportionate and targeted regulatory responses are required to manage these risks, and is more uniform regulation required across jurisdictions on this matter?*

Litigation funding in Australia is more or less unregulated. It is in essence perverse that a highly regulated profession such as the legal profession cannot charge a contingency fee based on percentage of the damages that a plaintiff receives, whereas plaintiffs are entitled to make agreements with litigation funders that result in a substantial percentage (up to 40%) of their damages to be paid to the litigation funder. From that, the plaintiff's legal practitioners are paid at the ordinary hourly rate. Is litigation funding therefore a bad thing? From the point of view of many plaintiffs it is not possible to pursue an action without litigation funding, particularly a substantial class action. In that sense therefore litigation funders are a necessary evil.

If however contingency fee billing based on percentage of damages is available to the legal profession, the influence of litigation funders would be substantially reduced. We suggest that that is a preferable approach for two reasons. Firstly, it is likely if such a contingency arrangement were to be introduced in Australia it would be likely to be kept less than the upper limits of what litigation funders will "charge" for litigation lending. Secondly, of the two alternatives, the legal profession is by far the more regulated industry and thus as a matter of public policy it is preferable to have the legal profession engaged in this way.

We are not aware of any evidence of firms settling more cases due to the availability of litigation funding. Litigation funders are themselves experts in respect of the risks of litigation, but it may be supposed that given the litigation funders effectively hold the "whip handle", they arguably may be in a position to apply pressure to a claimant group in, for example, a class action, to resolve the matter rather than proceed to litigation.

114. *How effective are class action procedures in providing access to justice?*

Class actions are extremely effective in providing access to justice. Put simply, the cost of a singular action may outweigh the benefit of bringing it but collectively brought as a class it may make access in the civil justice system possible when the reverse would not be so. It is also a deterrent to poor corporate behaviour. Beside the representative plaintiff, the added benefit is that no claimant in the class action is exposed to the risk of costs. The requirement for a representative plaintiff however is the reason why litigation funders are often involved. A representative plaintiff is likely to require an indemnity against costs that may be awarded against him or her in a class action if the action is unsuccessful. It is exceedingly rare to find a person prepared to be a representative plaintiff when the risk of an adverse result may result in a costs award against that person. The necessary evil therefore is the litigation funder.

115. *How effective are general disclosure requirements, such as for cost estimates, in the context of class actions?*

Funders require claimants to sign a costs agreement. Costs agreements are detailed and exhaustive. The Federal Court has upheld the validity of such fee agreements, however for a claimant it is really a "take it or leave it" scenario. To join the class is to accept the costs agreement of the litigation funder. A full understanding of such a cost agreement may turn on the sophistication, literacy or experience and legal intelligence of the claimant concerned. It is easily argued that some claimants may have a lack of understanding of such cost agreements.