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Productivity Commission  
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Dear Commissioners,

**Access to Justice Arrangements: Productivity Commission Draft Report  
Submission**

This submission responds to six matters raised in the Draft Report: definition of access to justice; complex legal need; increased use of ADR; ADR and legal education; integrated legal service delivery model; and legal assistance landscape. My working life focusses on Access to Justice particularly as it relates to the poor and disadvantaged. I have been involved with community legal centres for over three decades and was a director of Victoria Legal Aid for 12 years.

**Definition of Access to Justice**

A preliminary matter is the definition of 'Access to Justice'. In the early 1970s concern to improve access to justice came from a realisation by many in the legal arena that the liberal claim of a justice system that ensured 'equality before the law' was a mere formal right with little substance and practical effect. Although the Commission canvasses a range of difficulties with defining access to justice it concludes a simplified approach by stating access to justice means, 'making it easier for people to resolve their disputes' (Draft Report Overview p. 3). However I submit that access to justice is not just about access to courts and tribunals and is much more than the resolution of disputes. It encompasses how people navigate and are treated in the many transactions (with legal consequences) that comprise everyday life particularly those that are administered or involve government agencies. It is in these encounters that 'equality before the law' is experienced by most people.

As Marc Galanter states:

*Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.*

Marc Galanter, 'Justice in Many Rooms' in M Cappelletti (ed.), *Access to Justice and the Welfare State*, 1981, Sijthoff,, p 161–2

This approach was adopted by the Federal Attorney General's Department in the 2009 *A Strategic Framework for Access to Justice in the Federal Civil Justice System; Report by the Access to Justice Taskforce* and I commend this broader and more expansive approach to the Commission:

*Access to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve 'everyday justice'; the justice quality of people's social, civic and economic relations. This means giving people choice and providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved. Claims of justice are dealt with as quickly and simply as possible—whether that is personally (everyday justice), informally (such as ADR, internal review) or formally (through courts, industry dispute resolution, or tribunals).*

Attorney-General's Department. Canberra, Attorney General's Department, P 4

### **Complex Legal Need**

As discussed in Chapter 2 and Appendix H some people experience multiple and substantial legal needs. The LAW survey reinforces the anecdotal regular experience of staff in community legal centres and legal aid commissions. The Commission notes (pp 97-98) that some demographic groups were more likely to experience particular legal problems than others and that some problem types are more likely to result in unmet need than others (p 103).

In a 2009 study at the West Heidelberg Community Legal Service (WHCLS) (collocated with Banyule Community Health (BCH)), the research findings about WHCLS clients were consistent with other legal need surveys. During the research period, many community members who presented at WHCLS for legal assistance were: often experiencing other problems; often experiencing a significant number of other problems; likely to be experiencing problems related to their health; often experiencing problems with employment and housing, family and relationships, income and navigating the legal system; and experiencing a higher number of these problems if they are experiencing problems related to family violence and criminal charges. The WHCLS study confirmed people do not always seek assistance with legal or rights problems and if they do, other support services such as general medical practitioners and allied health and community services are often the first point of contact for such problems. (Noone 2012)

From the accounts given by the WHCLS clients in this study, they did not usually perceive their problems as single problem entities or even linear problems with a definable beginning and end. Rather the way they described their situations, was more like a ball in which the clients, particularly those with a large number and intensity of legal, health and social problem, seemed to be tumbling around in, attempting to manage bit by bit. (Noone 2012)

In the management of the civil justice system and formulation of legal assistance service provision models, it is essential that the complexity of unmet legal needs experienced by certain groups is taken into account. This means have regard to the data from large scale empirical surveys (like the LAW survey) but also utilising more localised research that can identify the 'hidden communities' that often get lost in large scale surveys. (Noone 2007; Curran & Noone 2007)

## Increased use ADR

### DRAFT RECOMMENDATION 8.1

***Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.***

Although the increased use of ADR has the potential to significantly improve access to justice, in 1994, the Access to Justice Advisory Committee identified the limitations of institutionalisation of ADR. The Committee consequently encouraged ‘appropriate training for mediators’, and establishment of ‘screening processes to identify parties whose disputes may not be suitable for mediation’. The Committee also noted the need for regular evaluation of court-annexed mediation programs ‘to identify whether any of the potential risks have eventuated and to introduce measures to correct any identified problems. (Access to Justice Advisory Committee, p279-80). I submit that these recommendations are still highly relevant.

Specific issues raised in relation to access to justice and mediation include the loss of public interest law cases due to the mandated and private nature of ADR, inherent power imbalances, the informal nature of mediation and inequities.(Noone 2011) The current diverse and complex ADR landscape may create hurdles for disadvantaged parties and further hinder access to justice. In addition, the mandatory nature of some ADR regimes can mean that inappropriate matters are referred to ADR which then result in inequitable settlements or no settlement which further increases the cost of dispute resolution and stress for parties. (Akin Ojelabi 2011)

The challenge for those concerned with Access to Justice is how to ensure the rights of the disadvantaged and vulnerable are enhanced and protected in the context of increasing use of ADR processes that are often mandated by courts and tribunals. As the Access to Justice Committee, Australian Law Reform Commission and the former National Alternative Dispute Resolution Advisory Council have stated, there is a critical need for ongoing empirical and in-depth research that not only provides data, but also looks at the quality of ADR processes and access to justice barriers. Evaluations of new developments must be regularly conducted and the processes reviewed. Most importantly, in recognition of the complex and paradoxical nature of access to justice developments, these evaluations must be rigorous and contextualised.

In the context of increased use of ADR within the formal justice system, I have previously suggested the following aspects need to be considered:

- Respect for the individual and their interests that recognises their capacity and situation.
- Parties involved in disputes with apparent power differentials must be fully informed and have access to appropriate advice (both legal and other) and support through the process.
- Guidelines for mediators’ conduct when disputes involve repeat players and unjust outcomes.
- Ability and procedures for mediators to report systemic issues that arise from disputes.
- Need for ongoing quality research that is contextualised. (Noone 2011)

## ADR and Legal Education

### DRAFT RECOMMENDATION 8.5

***Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.***

Lawyers are clearly in the job of helping people resolve their disputes. Lawyers also have a role in limiting the escalation of disputes. Consequently it is highly relevant for law students to be engaged in learning about the *full range of dispute resolution options, including non-adversarial options*.

Since 2006, the law degree curriculum at the School of Law, La Trobe University, Victoria has uniquely included a first year compulsory subject *Dispute Resolution*. Additionally La Trobe Law School offers a range of electives and Masters level subjects in dispute resolution. My colleague Ms Judy Gutman has researched the positives consequences of the inclusion in the law degree of non-adversarial approaches to dispute resolution (see details in reference list below Gutman 2007 & 2008).

### **Integrated legal service delivery model**

As discussed at pages 171 – 173 of Draft Report, there is growing interest in Australia in the concept of integrated legal service delivery. Given the proven connection between legal problems and health issues (Coumarelos et al, 2013) there is increased activity in the delivery of legal services within a health care setting (called Advocacy-Health Alliances). Law and Justice Foundation research shows that legal professionals are only consulted for 16 per cent of all legal problems whereas people often turn to their trusted health and welfare professionals for advice and assistance with issues that have legal aspects.

As detailed in the submission of Noone & Noble, the Advocacy-Health Alliance model of service delivery is based on the United States' Medical-Legal Partnership (MLP). This healthcare delivery model integrates legal assistance as an important element of the healthcare team. The model is built on an understanding that the social, economic, and political context of an individual's circumstances impacts upon their health, and that these social determinants of health often manifest in the form of legal needs or requirements. Research in the USA increasingly indicates positive benefits from this approach (see <http://www.medical-legalpartnership.org/mlp-response/impact/>).

The model has three core components and activities:

- Provision of legal assistance within the healthcare setting. These services focus on early identification of potential legal problems by healthcare professionals. Often through the use of a *legal health check list*. This leads to early intervention, which can often alleviate or prevent medical and legal crises.
- Transforming Health and Legal Institutions and Practices. Through the model health professionals refocus their time with patients to assist in identifying issues that may impact on

health, such as accommodation standards and personal safety issues in addition to treating medical symptoms and illness. Legal practitioners work in partnership with health care professionals to help identify and address the legal needs of patients through the delivery of advocacy training and the development of resources and toolkits for this setting.

- Policy Change. One of the key benefits of the model is the potential to influence policy reform, to improve the health and wellbeing of vulnerable populations through the advocacy of both the health and legal professionals of the AHA. ( see <http://advocacyhealth.net.au/> ; <http://www.justiceconnect.org.au/what-we-do/what-we-are-working/advocacy-health-alliance> )

Although there are a number of longstanding examples of the provision of legal services in a health setting in Australia (e.g. West Heidelberg Community Legal Service and Banyule Community Health), there have been some more recent innovative developments. For example the work of Inner Melbourne Community Legal Service ( formerly North Melbourne CLC) with the Royal Women's Hospital (Gyorki 2014); Loddon Campaspe Community Legal Centre with Bendigo Community Health (Noble 2012) (<http://lcclc.org.au/programs/advocacy-health-alliance/>); and Maurice Blackburn and Alfred Hospital(<http://www.heraldsun.com.au/news/victoria/bedside-legal-aid-for-family-violence-victims-at-the-alfred/story-fni0fit3-1226923390451> ).

I commend this model of legal service provision to the Commission as an efficient and appropriate approach for *people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support*. This model of service provision should be examined as one alternative to the current organisation of legal assistance and may enable access to alternative funding sources.

However there are many elements involved in a successful integrated service and system approach to complex legal problems. Integration needs to occur at many levels including across sectors (whole-of-government), between organizations and across service delivery (professional) approaches. Consequently, challenges to integrated legal services occur at all these levels. For instance the research at WHCLS indicated that numerous factors facilitate and impedes integrated legal services. The WHCLS research reinforces the finding that integrated service practice relies on commitment to shared goals, communication and strong leadership. It involves the investment of scarce resources and energy in developing and maintaining relationships with other organisations (Noone 2012 & 2010).

Many of these factors coincide with or reinforce findings of other research. Recent research and public policy on collaborative partnerships and 'joined up' services recognise the need to integrate service providers across sector, organisation and professional or staff divides. Integrated service solutions to problems are often concerned with finding a solution to a recognised systemic problem. They focus on defining the complexities of the problem and finding a service solution. Many partnership theories centre on the service system itself; how sectors, organisations and professionals can better communicate, capacity build and integrate to achieve solutions to complex problems. (Noone 2012)

The complexity within the individual person and communities are often overlooked for the complexity within the problem. Individuals and communities come with a unique set of characteristics and issues that impact on engagement with service solutions. The WHCLS research demonstrates recognising

the needs of the local community and then working with them to address problems is essential for successful integrated solutions to complex problems (Noone 2012).

### **Legal Assistance Landscape**

Australia 'mixed model' of legal assistance has been seen as an exemplar for legal aid schemes internationally. There are significant benefits to having a variety of legal assistance service providers catering to different communities and areas of law. Legal aid commissions, community legal centres, private legal practitioners and ATSILS each have developed specific expertise and knowledge about the needs of their client communities. However the challenge with a mixed model is to encourage collaboration between all the providers in order to ensure the community's needs are addressed efficiently, equitably and appropriately. Historically there have been tensions between the various providers (Noone & Tomsen) but more recently there has been greater productive collaboration. Although with significant budgetary pressures, the latent tensions can reemerge as illustrated in Victoria (Noone 2014).

In reforming the legal assistance landscape, the positive and unique features of the Australian 'mixed model' scheme should not be abandoned lightly. Rigorous research and evidence based policy should guide any changes to be made.

I look forward to the opportunity to discuss these matters further with the Commission in a public hearing.

Yours sincerely,

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