



THE LAW SOCIETY
OF SOUTH AUSTRALIA
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

Submission

to the

Productivity Commission's Draft Report

in relation to

Access to Justice Arrangements

21 May 2014



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Introduction

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 South Australia. It currently has approximately 3,500 members.

The Society welcomes the opportunity to contribute to the Productivity Commission's Draft Report into the Inquiry into Access to Justice Arrangements, which has a focus on civil dispute resolution, constraining costs and promoting access to justice and equality before the law.

Given the significance of this inquiry, the Draft Report was considered by a number of the Society's Committees and all members were also invited to contribute their feedback. This submission incorporates their views.

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 contribute to the Law Council's submission.

The Society takes the opportunity to separately put its views forward to the Productivity Commission and to highlight a number of issues and factors peculiar to and of particular importance from a South Australian as we consider that this Draft Report deserves our particular attention.

Executive Summary

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 sizeable portion of society from adequate redress risks considerable economic and social costs."

The Society agrees with the thrust of these observations but is concerned at how the Draft Report has defined "access to justice".

For the purposes of the Inquiry, the Productivity Commission has used the term "access to justice" to simply mean, "making it easier for people to resolve their disputes".¹ This definition is insufficient as it does not recognise the role of the justice system to the fabric of our society. Access to justice means more than "making it easier for people to resolve their disputes". The courts are the independent "third arm of government". That the definition does not include this aspect of "justice", is a substantial omission.

One of the fundamental features of the Australian Constitution is the system of representative government and parliamentary supremacy. Parliamentary supremacy is the power of a legislature to make or unmake any law within their scope of power. However in a system of representative government, the supremacy of Parliament is not absolute. The exercise of the Parliament's power can be checked and balanced in two ways. Firstly, by the will of the people expressed in elections and secondly, by the courts in exercising their powers of judicial review. Chapter 3 of the Constitution entrenches the jurisdiction of the High Court to review the constitutionality of Parliament's actions in Australia. The judiciary's entrenchment in the Constitution means that "justice" is much more than just "making it easier for people to resolve their disputes". It is also a means of assuring to all people affected by the laws of the Parliament that the laws of this country have been lawfully made. Where there is a contest, the ultimate decision maker is the High Court. It is the highest avenue of redress and this should not be underestimated by "rationalising" the role of the courts.

A number of aspects of the Productivity Commission's Inquiry treat the question of access to justice from an economic perspective. This is a useful, and necessary, evaluation of aspects of the justice system. However, the justice system is not a sector of the economy that can be "commoditised". It ought to be recognised as the third arm of government and should receive appropriate resourcing and funding in order to effectively carry out its role as a "check and balance" against the other arms of government, respectively the Executive and the Parliament.

¹ Productivity Commission Draft Report, Access to Justice Arrangements, page 3

The Courts are an independent and impartial arm of our country's representative government. The Courts are free from the interests of the government, commercial interests and the interests of other citizens. People have a right to access the courts to enforce their legal rights and people and have an expectation that their disputes will be heard in a fair, independent and impartial manner. When other forms of dispute resolution are used, it cannot always be assured that the person resolving the dispute will always be fair, impartial and independent.

We make some brief comments below in regard to the complexity of litigation, quality and service standards, over-servicing, tribunals and the courts.

The increasing complexity of litigation

It is suggested that an onus be placed on lawyers to ensure their clients understand upfront cost estimates etc. However there is already an overwhelming onus on lawyers to this effect, and failure to meet it properly results in complaints and disciplinary processes.

However, as the Productivity Commission notes, "some estimates have become impenetrable". This is a fundamental problem that results when attempting to simplify complexity and uncertainty by disclosure. It leads to complex and worthless disclosure, as can readily be seen in retainers in the corporate investment sphere.

Judging quality and service standards

As the draft report elsewhere states, there is an over-supply of qualified legal graduates. There is no professional barrier to entry, beyond the difficulty in gaining the practical experience considered essential for effective legal practice. The barriers to entry are economic, that is, the present form of practice of the law is very expensive. At the 'high' end of the market, practice of the law can be highly profitable, but this is where the sophisticated clients exist, those who are quite capable of assessing what their commercial and legal needs are. At the unsophisticated end of the market, anecdotally many legal firms do not make much profit and many are struggling.

Over-servicing

The draft report appears to make an assumption that over-servicing is due to lawyers seeking more fees and activity based billing.² In our view, this assumption is unfair to the legal profession and ignores the fact that lawyers are under ethical obligations to provide a "full service" to clients. The problem of over-servicing in part arises from the ethical obligations that legal practitioners are currently bound to comply with.

² Productivity Commission Draft Report, Access to Justice Arrangements, pages 19, 182, 365

Rule 13 of the Australian Solicitors Conduct Rules requires a solicitor to ensure the completion of the legal services for that client unless an exception applies. The rule does not accommodate partial completion or “unbundling”. As a result of the ethical rules that apply to legal practitioners, lawyers are necessarily risk averse, and the willingness of Courts to find a legal practitioner liable for oversight in the full management of a client’s work means that lawyers must continually consider, and do, things which may ultimately be unproductive. The answer to this is unlikely to lay in further burdening and increasing lawyers’ overheads.

The Society is of the view that the provision of unbundled legal services can be risky for practitioners as it can create a conflict between the limited terms of the retainer and the lawyers’ own obligation to act in the best interests of the client at all time, and not impede the administration of justice. The Society is of the view that on the rare occasion a practitioner should agree to provide unbundled legal services, it should be subject to a specifically worded written retainer agreement which will provide adequate protection if the client’s instructions and the lawyer’s professional obligations conflict. We consider that “unbundling” of legal services is a worthwhile initiative worth pursuing but it would require changes to the legal profession conduct rules that currently apply to legal practitioners.

Tribunals and “creeping legalism”

The draft report says that some participants in the Inquiry are concerned about “creeping legalism” and that Tribunals are increasingly seen by users as formal bodies. The Productivity Commission writes that “the use of legal representation is thought to be contributing to this process with some representatives conducting themselves as if they were in court...Where legal representation is used it increases the costs incurred by parties.”³ The Society agrees that Tribunals are becoming more legalistic but the Society does not agree that lawyers are “contributing to this process”.

A greater consideration of the history of the development of the Tribunals would assist an understanding of how they have become more “legalistic” in recent years. When Tribunals were initially established, they were relatively simple and only dealt with simple matters. However as the years went on, Tribunals were increasingly provided with more jurisdiction. Many matters that are now heard in Tribunals used to be heard in courts.

The Parliament is responsible for a significant degree of the “creeping legalism” in Tribunals because Parliamentarians draft legislation. Laws such as tax laws, immigration laws and superannuation laws are beyond the understanding of even a well-educated layman. There is no alternative to dealing with these matters other than with professional expertise. It is

³ Productivity Commission Draft Report, Access to Justice Arrangements, page 15

well known that most Australians engage an accountant or tax agent to complete their tax return due to the complexity of Australia's taxation laws. The provision of legal advice for tax matters, immigration, superannuation and other areas of the law is no different. Over time, the Parliament has enacted laws that are so complex that ordinary Australians have little choice except to engage a professional to assist them.

The suggestion that legal representation should be excluded, and indeed should not be paid for, places a higher burden on a Tribunal, and is an invitation to an experienced user of the legal system to out manoeuvre or out negotiate an inexperienced and unrepresented user. This will not increase access to justice.

It is not unreasonable for some lawyers to conduct themselves in a Tribunal as if they were in a court. There are some Tribunals that have procedures that have become more formal over the years and therefore reflect some characteristics of a court. Moreover, the stakes can be very high in a tribunal (just as high as a court), particularly if a large claim is at stake or a person is facing deportation or other significant penalty. It is not unreasonable for a lawyer in these circumstances to vigorously advocate on behalf of their client. A client would expect nothing less.

If there is a view that tribunals should be less adversarial, then the matters that are allowed to be brought to tribunals for resolution should be less contentious. But that is not the case. There are many matters before tribunals that can be highly contentious, of high value and of legal precedence. One only needs to consider the workers compensation tribunals to understand this.

Court processes

We endorse the suggestion that Courts must proactively engage with litigants to identify the issues in dispute, and to tailor the evidence and process so that only what is necessary to be determined is adjudicated. The existing "rules – driven" processes administered from above by a Court officer who is necessarily disengaged from the issues and who by custom, training and often inclination is disinclined to confine the broad convention of parameters of litigation is insufficient and ineffective. Attempts to control the process by the imposition of rules traditionally do not work, and are no substitutes for pro-active management with a view to identification and limitation to the core issues.

That said, the baby should not be thrown out with the bathwater. There is an obsession with the idea that "discovery" of documents is excessive. The fact there is a number of factors affecting the disclosure of documents, and it is critical to ensure that the relevant documents are disclosed, especially when they are against a party's interest:-

- Traditional discovery has been confined (“directly relevant”) but remains indiscriminate;
- The process is made time consuming, costly and inefficient by the need to manually work through documents, list them, etc;
- The problem has been exacerbated by the explosion in electronic documentation, and especially by the practice of printing out emails and the like which ensures that multiple copies are disclosed;

We consider that excessive discovery tends to be a problem in larger cases. The Society also highlights that there are software programs that have become readily available which allow electronic disclosure to be conducted efficiently and effectively.

The issue of discovery is a problem that is likely to disappear by itself, as nearly all documents become electronic and as the software develops, to deal with it and becomes cheap and available. This is happening now, and is properly dealt with as part of the process of updating the Court’s technology and resources.

Our submission responds to a range of questions, draft recommendations and draft findings posed in the Productivity Commission’s Draft Report by reference to those questions and issues that the Society seeks to contribute to. The other issues which we have responded to in our submission include:

- Understanding and measuring legal need
- How accessible is the justice system
- The role of the civil justice system
- Understanding and navigating the system
- Information and redress for consumers
- A responsive legal profession
- Alternative dispute resolution
- Ombudsmen and other complaint mechanisms
- Tribunals
- Court processes
- Duties on parties and in particular the model litigant rules
- Costs awards
- Self-represented litigants
- Tax deductibility of legal expenses
- Court and tribunal fees
- Technology in courts
- Private funding for litigation
- Bridging the gap

- The legal assistance landscape
- Reforming legal assistance services
- Assistance for Aboriginal and Torres Strait Islander people
- Pro bono services

We enclose a comprehensive table that outlines the Society's views in response to the issues raised above.

Yours sincerely

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PRESIDENT