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Access to Justice
Productivity Commission
PO Box 1428
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Access to Justice Arrangements – Productivity Commission Issues Paper

Thank you for providing the opportunity to comment on the Productivity Commission Issues Paper on Access to Justice Arrangements. This is an issue of the utmost importance and I am happy to contribute to the debate based on the experience of the Victorian Legal Services Commissioner (the Commissioner) and the Legal Services Board (the Board) as key agencies regulating the legal profession in Victoria.

The *Legal Profession Act 2004* (Vic) (LPA) creates the Commissioner and the Board. The Commissioner is responsible for dealing with complaints made against lawyers, as well as for educating the profession and the community about the rights and obligations that flow from the lawyer-client relationship. The Commissioner has an obligation under the LPA to ensure complaints against lawyers are dealt with in a timely and effective manner.

Complaints may be about costs or conduct issues. The Commissioner will attempt to resolve costs complaints through dispute resolution processes, but does not have a power to make a determination in such cases. If a costs dispute cannot be resolved, the parties have the right to take the matter to the Victorian Civil and Administrative Tribunal (VCAT) for determination. Complaints about professional conduct will be investigated, with possible outcomes ranging from dismissal to cautions, reprimands and prosecutions in VCAT for unsatisfactory professional conduct or professional misconduct.

The Board is responsible for all other regulatory functions under the Act, such as the registration of lawyers (i.e. all functions relating to practising certificates, including the assessment of the suitability of persons to practice), trust account investigations, the appointment of external interveners to law practices, the prosecution of specific offences for which the Board has enforcement responsibility, exemptions from supervised legal practice and professional indemnity insurance requirements and the making of professional rules.

I will limit my comments in this submission to issues where the Commissioner and the Board have experience and knowledge. As a result, most of my comments will be directed to those issues raised in Part 12 of the paper, in particular in relation to the regulatory framework and billing. In addition, I will comment on funding for litigation (Part 13), self-represented litigants (Part 5) and informal dispute resolution mechanisms (Part 9 – ADR and complaints mechanisms). These issues are addressed under the headings in which they are organised in the Issues Paper, with reference to the specific questions raised under the headings.

Effective and Responsive Legal Services

Appropriateness of restrictions on non-lawyers carrying out legal work: The Board and Commissioner support the requirement under the LPA that, as a general rule, a person must hold a practising certificate in order to engage in legal practice. This approach ensures that those giving legal advice and acting in legal proceedings have undertaken relevant education and workplace training to prepare them for legal practice and have appropriate levels of professional indemnity insurance, providing consumers with a guarantee that minimum standards have been met. The potential supply of such practitioners is increasing well beyond the rate of population growth generally as university law faculties around Australia increase their enrolment of law students.

The requirement to hold a practising certificate does not prevent other professionals, such as tax agents, estate agents, mediators or migration agents, from working across functions or fields in which lawyers are also active. Such professionals may be required to express an opinion about the requirements of the regulatory framework in providing advice and services without engaging in legal practice. Indeed, the Victorian legislature has authorised one occupational group in Victoria, licensed conveyancers, to carry out some legal work in connection with conveyancing transactions including preparing agreements, conveyances, transfers, leases or mortgages in the course of those transactions.

As Commissioner, I have also had to address the role of cost consultants who assess legal bills of costs. While all costing consultants in South Australia, Western Australia, Queensland and Tasmania are qualified lawyers, in Victoria both qualified costs lawyers and non-qualified costs consultants engage in this activity. In the case of *Mietto v G4S Custodial Services Pty Ltd* [2010] VSC 304, the Supreme Court determined that appearance costs could not be claimed by a costs consultant. I have used this case to alert costs lawyers, costs consultants, the legal profession and the community generally that the *Mietto* judgment is not authority for suggesting that a costs consultant without a practising certificate is carrying on the activity of unqualified practice. However, there is a need for costs consultants and other occupational groups to eliminate any potential for confusion about what services are being offered. A person who does not have a practising certificate cannot offer legal services, nor can they imply that they offer legal services. Provided this is clearly conveyed, the legal costing area provides a good example of where lawyers and non-lawyers can work side by side.

What are the costs and benefits of creating a national legal profession? The Commissioner and the Board support the Victorian and New South Wales Attorneys-Generals' commitment to introducing Uniform Legislation for the regulation of the legal profession in 2014. Once this legislation has commenced, other jurisdictions will hopefully be encouraged to participate. Uniform legislation will reduce the regulatory burden faced by practitioners, law practices and consumers operating across borders. By removing inconsistencies in standards and regulatory requirements, the Uniform Law will reduce regulatory compliance costs and enhance understanding across the profession and the community generally relating to ethics and professional standards.

Are complaints process arrangements sufficiently independent and transparent? In Victoria, all complaints are handled by the Legal Services Commissioner. In other jurisdictions across Australia, complaints are either handled exclusively by the relevant professional association or by a combination of the professional associations and an independent regulator. The Victorian system avoids a perception of bias in favour of the profession that may arise when a body drawing its membership from the profession is also responsible for complaints and discipline. Making an independent regulator completely

responsible for complaint handling also avoids double handling of complaints and confusion about which body is responsible for investigating and enforcing disciplinary breaches.

Alternative fee arrangements/costs disclosure: Most billing in Victoria takes place on a time costing basis. Some firms do provide alternative billing options such as fixed costs. One advantage of a fixed costs approach is that it provides certainty and transparency to clients, allowing them to better assess the costs and benefits of engaging a lawyer and to plan for payment on a settled basis. Fixed cost charging also provides an incentive for lawyers to finalise a matter as soon as possible, removing possible perverse incentives to draw out work on a matter.

The biggest issue in the area of costs is poor communication, specifically the paucity of information about charging structures and the lack of costs disclosure. Many complainants state that they were never told that every call and email will cost them money. Delays or breakdowns in communication are compounded if complainants are charged for phone calls or emails chasing up action by their lawyer. A fixed costs approach removes the concern around such issues.

Possible disadvantages of fixed costs include the potential for overcharging, i.e. for fixing a cost in excess of the actual work performed. This can be overcome by an agreement that a refund will be provided in such circumstances. Consumers also have the right to request an itemised bill.

As with contingency fees (see below), fixed billing does not overcome the lack of certainty regarding the cost of disbursements in the initial stages of litigation, so the possibility of incurring such costs and their potential scope should be clearly explained upfront.

Using Informal Mechanisms to Best Effect

Alternative dispute resolution: Complaints that raise a civil dispute in Victoria are referred to the Commissioner's dispute resolution team (DRT). This process must be undertaken before any such matter can be determined by VCAT. In the 2012-13 financial year, where the Commissioner had power to resolve such a complaint, the DRT was able to assist the parties to resolve their complaint in 74% of matters.

Our experience is that this dispute resolution approach:

- allows the parties to focus the issues of importance to them, rather than being restricted by legal formalities;
- allows consumers to participate in attempts to resolve the dispute, in a way that is not possible in formal legal proceedings which represent a 'top down', imposed solution;
- reduce the anxiety that many complainants express about appearing before a tribunal, and the time and cost associated with such appearances;
- allow greater flexibility in finding a solution, without being limited to the range of remedies available in formal legal proceedings.

This alternative model for resolving civil complaints has also been used by the Commissioner to address certain conduct complaints through the establishment of the Rapid Resolution Team (RRT). This team addresses service related complaints and those complaints exhibiting no evidence of any serious disciplinary breaches, albeit often involving complex legal issues. Its brief was to resolve complaints sensibly with minimal delay. Ultimately, it gives lawyers a chance to resolve the complaint themselves, but with the LSC's help. I believe that this mirrors what many well-organised law firms already do without involvement by the Commissioner.

Funding for Litigation

Risks posed by contingency fees? From my experience as regulator, the biggest issue with contingency fees is again a communication problem in terms of lawyers neglecting to explain risks to prospective participants. Where such schemes are advertised as "no win, no fee", participating consumers are often unaware that they may still be liable for disbursements or for party-party costs.

What are the risks posed by/benefits of litigation funding? Given the barriers to entry posed by the high cost of litigation, litigation funding may enhance greater access to justice for those individuals or entities without sufficient resources to launch legal action on their own account, particularly in the context of class actions. Once an action has commenced, litigation funding can also aid plaintiffs by (1) ensuring a more level playing field where they oppose well-resourced opponents and (2) shifting liability for costs in the event that an action is unsuccessful.

One major issue which may arise in litigation funding is the possibility of a conflict of interest arising between the objectives of the funder and the funded litigant which could potentially compromise the litigant's interest. This issue may be compounded where legal practitioners representing the litigant(s) have a direct or indirect financial interest in the litigation funder. In addition to the existing regulatory framework, any future regulation proposed to deal with this issue must take into consideration the need to ensure the fairness of the bargain struck between the funder and the litigant.

Is Unmet Need Concentrated Among Particular Groups?

Self-represented litigants: There has clearly been an increase in self-represented litigants in recent years. In Victoria, both the County Court and VCAT have produced videos which run in the court/tribunal premises providing a guide to the major stages of proceedings. Any such assistance directed towards educating and assisting self-represented litigants in negotiating their way through the legal system will provide a greater benefit to the system as a whole.

Strategies to address unmet need: The Board and the Commissioner both contribute to an educational program directed towards the legal profession, consumers and the public generally and the Board funds a grants program for a variety of purposes, including legal education.

The most recent example of a grant to assist consumers is a pilot scheme using internet-based video technology to provide legal services to women in regional Victoria in abusive relationships.

I also made a submission to the 2011 Victorian Parliamentary Inquiry into Access to the Justice System for People with an Intellectual Disability. I attach a copy of this submission, which addresses a very specific area of unmet need and is based on information gathered in the course of the Commissioner's outreach visits to community service organisations.

Future consultation

I understand that public consultation will continue after the release of a draft report in April 2014 ahead of completion of the final report and I look forward to continuing to liaise with the Productivity Commission on this issue.

Legal Services **COMMISSIONER**

If you have any queries in relation to this submission, please contact Tim O'Farrell, Manager Policy, Legal Services Board and Legal Services Commissioner,

Yours sincerely

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