



AUSTRALIAN BAR ASSOCIATION

ABA Submission - Access to Justice Arrangements: Draft Report

1. For the purposes of this inquiry, the Commission has used the term ‘access to justice’ to simply mean, ‘making it easier for people to resolve their disputes’. Unfortunately, this definition does not reflect the basic differences between the criminal justice system, civil dispute resolution and the fundamental role of the Courts.
2. Most legal activity is either related to compliance and regulation (the advice and actions corporates and individuals must take in order to comply with the law) or, it is transaction based. Almost all dealings between parties involve some type of transaction – whether it is a sale of business, a retail purchase or a marriage.
3. This legal activity can only occur effectively because of civil dispute resolution mechanisms. As Justice Heydon, commenting specifically on the need for certainty and efficiency in commercial life, noted:¹

Commercial life depends on the timely and just payment of money. Prosperity depends on the velocity of its circulation. Those who claim to be entitled to money should know, as soon as possible, whether they will be paid. Those against whom the entitlement is asserted should know, as soon as possible, whether they will have to pay. In each case that is because it is important that both the claimants and those resisting claims are able to order their affairs. How they order their affairs affects how their creditors, their debtors, their suppliers, their customers, their employees, and, in the case of companies, their actual and potential shareholders, order their affairs. The courts are thus an important aspect of the institutional framework of commerce. The efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce.

4. The role of the Courts in commerce transcends the mere resolution of particular disputes. The public resolution of disputes by the Courts influences commercial and corporate behavior more generally.
5. That occurs because those who are potentially affected by these rulings heed them in at least two ways. First, they see that the Courts are available to adjudicate and to resolve disputes. This has a salutary influence on commercial dealings. The fact that Australians have a Court system, and that Courts can if necessary be used, is a hallmark of our civilised way of life. It is one reason why doing business in Australia is regarded as desirable. Secondly, particular rulings educate and, in turn, influence the approach to particular problems in commercial and corporate life.
6. In these ways Australians know that when laws are interpreted or clarified by the Courts, their application is given greater certainty. In addition, Parliament legislates with the assurance its laws will be interpreted and applied by the Courts, and parties entering into transactions are given confidence about the way in which their disputes are likely to be determined.

¹ *Aon Risk Services Australia Ltd v ANU* (2009) 239 CLR 175 at 223 to 224 per Heydon J.

7. Although dispute resolution is an important component of the system, alternative dispute resolution provides none of the wider influences generated by the public way in which Courts resolve disputes according to law. Accordingly, although ombudsman or ADR processes are often cheap and fast, they do not create “law” and ought never be confused with the public role and function of the Courts.
8. It is entirely appropriate therefore for disputes to be ‘winnowed’ before reaching the Courts. Ideally, only disputes of a particular type ultimately resist the filters and barriers and find their way into courtrooms. Mr Jeremy Gormly SC defines the seven “Legitimate Types of Litigation” as:²
 1. *The intractable dispute;*
 2. *Where a dispute turns on an important point of law;*
 3. *Where interim relief or control of behaviour is needed;*
 4. *Matters of public interest;*
 5. *For the purpose of public vindication;*
 6. *In class action; and*
 7. *Where judicial certification, authority or approval is required.*
9. Those disputes that reach the Courts serve purposes which are wider than simply settling the matters in issue between the parties concerned. This, and the undesirability of other methods of dispute resolution, is why there must be adequate public funding for our Courts.
10. In these circumstances the ABA does not support **Draft Recommendation 16.2** which suggests that the fees charged by Australian Courts should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the Courts. This type of recommendation displays a serious ignorance of the public, pervasive role of the Courts. It ignores that what Courts do transcends any particular dispute which they might resolve. It overlooks that the presence of Courts forms an essential aspect of commercial life.
11. As the Commission itself suggests in draft recommendation 8.4: “...*Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes*”.
12. The challenge then is to ensure that the Courts continue to perform these important, public roles.
13. Large Court fees threaten the continued existence of the Courts, undermine the rule of law, and prohibit all but the very rich from access to them.
14. As well, the true test for whether Courts are performing adequately is not answered by simply asking whether they are profitable or not. Much of what the Courts say and do cannot be measured accurately by reference to the cost of resolving any one particular dispute, or by the cost of operations over, say, a year. As mentioned, an effective Court system is an essential aspect of our civilised society. Because the primary purposes of the civil justice system include the facilitation of commerce, and the implementation and enforcement of legislation and regulation, performance can only be measured by reference to the performance and operation of the wider legal system.

² Timeliness Forum, “*The Other Nine Cases*”, Jeremy Gormly SC, Denman Chambers, Sydney

15. Another vital consideration in access to justice is an understanding of the root causes of disputes. A root cause analysis is likely to suggest ways in which disputes can be avoided, as well as suggesting appropriate diversionary mechanisms. For example, where a number of disputes regularly arise from one regulatory or compliance process, a root cause analysis may suggest an appropriate diversion process.
16. Finally, there are many identifiable groups within our society facing difficulties accessing or participating in the civil justice system. Solutions and services should include all those facing barriers to accessing justice due to culture, disability, education, language and socio-economic disadvantage.

Chapter 7: A Responsive Legal Profession

17. The Productivity Commission makes several suggestions regarding the content of legal training.
18. The ABA agrees that it is timely to consider the structure and delivery of legal education and training. The profession has already identified this need. The ABA is currently reviewing the existing Continuing Professional Development Rules that apply to barristers across Australia.
19. It is however important to recognise that most legal activity is not related to litigation or dispute resolution. Beyond the Bars, most lawyers primarily facilitate transactions.
20. David Howarth, of University of Cambridge UK, explains in “*Law as Engineering*” that there is a misconception that lawyers are principally involved in litigation or dispute resolution. In fact, he argues, this is only a small component of legal activity:³

Lawyers, whether in the private or public sector, spend most of their time translating the desires of their clients into legal form and trying to keep their clients out of trouble. To achieve good results, they need to understand what their clients want and the context within which they want it. They also need to understand the difficulties characteristically encountered by their clients, both legal and in life. They rarely, if ever, set foot in a courtroom.

21. It is vital that the compulsory components of a legal qualification actually reflect what lawyers do and their required skills. The ABA notes that the LCA considers that there is an ongoing need for the Academic Requirements for Admission (The Priestly 11). There is definitely a need for agreed minimum standards but the structure of the law degree should be reviewed.

Chapter 24: Data and evidence

22. **Draft recommendation 24.1** suggests that “*all governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data and that research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.*”
23. Although intangible, the Australian justice system is an essential piece of infrastructure, supporting the rule of law and our democracy.
24. However, it is rarely treated with the discipline and respect of other types of infrastructure. Australian Governments should be encouraged to adopt a more rigorous

³ Law As Engineering - Thinking About What Lawyers Do - David Howarth, University of Cambridge, UK 2013

approach to our justice infrastructure, for example in providing sufficient resources, carefully considering the true impact of legal reforms and processes, and accurately measuring the performance of the system.

25. Measuring the performance of the civil justice system must consider the delivery of its overarching objectives and goals. Traditional measurements (regarding the numbers of cases commenced and finalised, for example) do not provide any accurate performance measure.
26. Further, the lack of effective oversight of the system often leads to significant cost displacements. Spending less on legal aid, for example, ultimately costs the Court system more because cases take longer to process and resolve. Valuable Court assets and time are not used efficiently.

The following inaccuracies in the Report should be corrected:

27. Page 217
The following statement is incorrect: *“There is limited data available on the number of barristers...”*.
28. In fact, there is an accurate list of every barrister practising as a barrister in each Australian jurisdiction. The ABA also conducts an annual census of barristers. Presently, there are 5,756 barristers in Australia.
29. The Victorian and NSW Bar Associations publish detailed statistics regarding the composition of their Bars on their websites and every Bar has a complete listing of local barristers on their websites.

http://www.vicbar.com.au/uploads//publications/The_Victorian_Bar_Inc_Membership_Statistics_-_February_2013.pdf

<http://www.nswbar.asn.au/the-bar-association/statistics>

30. Page 222
The University of Melbourne also has stopped offering undergraduate law and moved to a JD model. This omission seems odd given the size and pre-eminence of that University.
31. Page 225
The reading period is not *“effectively an apprenticeship under the supervision of a senior barrister.”* The role is one of mentor rather than supervisor. Reading is not the equivalent of supervised practice undertaken by solicitors. In Victoria, the reading period is 9 months, the first 2 months of which comprise the readers’ course.

The reference to Queensland’s restriction on direct briefs (for the first 6 months) is correct but may create confusion in this context and should be omitted.
32. Page 231
Other submissions have dealt with the purported “three stages” of training. As noted, these are more accurately described as university, practical legal training and compulsory continuing professional development.