SUBMISSION

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ACCESS TO JUSTICE ARRANGEMENTS

A submission by the New South Wales Bar Association in response to Productivity Commission Draft Report on Access to Justice Arrangements (April 2014)

NEW SOUTH WALES
BAR ASSOCIATION

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Introduction

The New South Wales Bar Association welcomes the opportunity to comment on issues raised in the Productivity Commission's Draft Report released as part of its reference on Access to Justice Arrangements. The Bar Association is a voluntary association representing the interests of almost 2200 practising barristers in New South Wales.

The Bar Association does not seek to provide a running commentary on all aspects of the draft report. Rather, these submissions will focus on aspects of the draft report which the association considers problematic, unworkable or otherwise worthy of comment. In doing so, they seek to represent the accumulated experience of our membership who appear day in and day out in our courts and tribunals, and are exposed first hand to the difficulties of individuals in gaining access to our system of justice.

The Bar Association would also greatly appreciate the opportunity for representatives to give evidence at relevant hearings of the commission to be held from 2 June 2014.

Those chapters, draft recommendations and information requests in the draft report which raise concerns will be addressed in numerical order below.

Draft Recommendation 5.1

As indicated in its submission in response to the Commission's earlier Issues Paper, the Bar Association strongly supports the work undertaken by LawAccess in New South Wales. A New South Wales Government agency, LawAccess plays a major practical role in the co-ordination of legal assistance. LawAccess works extensively to raise community awareness of its services, and the levels of client satisfaction and performance are uniformly high. The Bar Association agrees with the commission's assessment that the LawAccess model provides a working template for other jurisdictions. As noted in the association's previous submission, the legal profession played an active role in the establishment of LawAccess, and continues to be involved in its administration, in addition to working co-operatively with it in the provision of legal services. It is however essential any organisations established along these lines be properly resourced to enable them to fulfil their charter. The Bar Association notes that LawAccess NSW has recently experienced a substantial cut in funding from the Public Purpose Fund which endangers its effectiveness as a first point of contact for legal advice and referrals.

Information Request 7.4

Under the *Legal Profession Act 2004* (NSW), monies held in the Public Purpose Fund are applied to meet costs and expenses in relation to the legal profession disciplinary system (section 290) and by way of discretionary payments for other purposes (section 292). Those discretionary payments may be made for a variety of purposes ranging from supplementation of legal aid funding and the improvement of access to the legal system to legal education and research. In view of the strictly limited funds available in the statutory NSW Public Purpose Fund, the association considers that priority should be given to (a) the costs of the legal profession disciplinary system and (b) supplementary legal aid funding and funding for other legal assistance schemes which directly facilitate access to justice, such as the Bar Association's Legal Assistance Referral Scheme and the Law Society of NSW's Pro Bono Scheme.

In the current environment, discretionary payments from Public Purpose Funds should give priority to these direct forms of legal assistance over legal research and information services, such as the Law and Justice Foundation.

This is particularly important in view of the very real decline in funding for Legal Aid services in recent years, in both civil and criminal law, which has resulted in an increasing strain being placed upon other means of legal assistance, whether through Community Legal Centres, court pro bono schemes, professional organisation arrangements such as the NSW Bar's Legal Assistance Referral Scheme and the individual pro bono contribution made by many practitioners.

The pro bono contribution of legal practitioners is important, but ongoing reliance should not be placed upon it to remedy major deficiencies in the legal aid system. Pro bono work, no matter how well co-ordinated, cannot be an adequate substitute for properly funded legal aid and can never provide a comprehensive solution to wider access to justice issues due to its voluntary and, in many cases, undocumented nature.

However, in the current funding environment where legal aid funding appears to be in terminal decline, scarce PPF monies need to be directed to those areas which can have the most direct impact on access to justice, that is, to legal aid and other legal assistance services.

Chapter 8: Alternative Dispute Resolution

In its previous submission, the association noted the inconsistencies that arise in the context of the current national system for the oversight of mediation accreditation.

In this regard the association supports the Procuctivity Commission's draft recommendation 8.6 that peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

Chapter 10: Tribunals Draft Recommendations 10.1 and 10.2

The Productivity Commission's draft recommendation 10.1 is, with respect, misconceived. As noted in the association's previous submissions, tribunals rightly provide flexibility in terms of the application of rules of evidence and legal representation. The point must be made, however, that a number of aspects of the jurisdiction of, for example, the new NSW Civil and Administrative Tribunal ('NCAT'), such as the proposed Occupational and Regulatory Division which deals with professional discipline matters, need to operate with more formality. The NSW Government has rightly concluded that there should be a right to legal representation across that

Division. The general model adopted for the new NCAT is that parties can have legal representation by leave. Legal representation in many cases enhances the capacity of tribunals to deal with complex questions, and leads to greater efficiencies in terms of hearing time and efficiency. As noted elsewhere in this submission, self-represented litigants have the capacity to consume large amounts of court or tribunal time and resources.

The contribution made by the legal profession to the efficient management of proceedings in forums other than traditional courts has been recognised by the Deputy President Sams of the Fair Work Commission in *Applicant v Respondent* [2014] FWC 2860 (1 May 2014) at [20-21]:

> In my experience, the prospects of a case being run more efficiently and focused on the relevant issues to be determined, is more likely where competent legal representation is involved……With the greatly increased exposure of all courts and tribunals to self-represented litigants, with all of the well known difficulties this brings, the appearance of a focused, experienced and sympathetic legal practitioner is, more often than not, a welcome relief.

The Bar Association does not accept the assumption implicit in draft recommendation 10.2 that lawyers lack an appreciation of the nature of tribunal processes and the objectives of fairness, justice, economy and prompt resolution of matters. The association suggests that the Procuctivity Commission consult with experienced tribunal members in relation to this point. The experience of the association is that legal practitioners greatly assist tribunals in achieving of these objectives and that tribunal members are keenly aware of this fact.

Furthermore, in certain aspects of Tribunal jurisdiction, unrepresented litigants regularly find themselves appearing against institutional parties (eg a landlord represented by an agent in a rental dispute; Centrelink represented by an in-house lawyer). In these situations, the institutional representative will normally have extensive experience in Tribunal processes, leaving their unrepresented opponent at a substantial disadvantage. In these circumstances, it is crucial in the interests of fairness that tribunals have the ability to grant leave to allow legal representation in order to allow such disparities to be addressed.

Draft Recommendation 11.9

The Bar Association generally supports the Procuctivity Commission's draft recommendation. However, it is important to note that, although the judicious use of experts and concurrent evidence procedures can be effective in certain circumstances, their mandatory general application will serve to escalate cost and delay.

Draft Recommendation 13.1

The Bar Association is concerned at the inequities involved in the current system governing offers of compromise under the Uniform Civil Procedure Rules 2005 (NSW) ('UCPR').

The purpose of the offer of compromise regime is to encourage settlement. The encouragement comes from having a financial penalty for parties who fail to accept a reasonable offer of compromise. Unfortunately, under the current structure of the UCPR, the penalties for plaintiffs and defendants are disproportionate and, in relation to defendants, ineffective and thus inefficient.

Under Rule 42.14 of the UCPR a defendant who fails to accept an offer of compromise made by a plaintiff (where the plaintiff does better at trial) is ordered to pay indemnity costs to the plaintiff from the date of the offer.

Recoverable party/party costs usually represent about 75 per cent of total solicitor/client costs. On the assumption that an indemnity costs order effectively requires the defendant to pay the full solicitor/client costs, then the penalty to the defendant is approximately 25 per cent of the plaintiff's costs.

Where the plaintiff fails to accept an offer of compromise from the defendant and the defendant does better at trial then the plaintiff recovers no costs from the date of the offer and has to pay the defendant's costs from the date of the offer. The penalty to the plaintiff is 75 per cent of the plaintiff's own costs and 75 per cent of the defendant's costs (assuming a similar solicitor/client costs gap for the defendant).

Assuming roughly even costs as between the plaintiff and defendant, the size of the financial penalty for the plaintiff is six times the size of the financial penalty for the defendant (25 per cent of the plaintiff's costs as opposed to 75 per cent of the plaintiff's cost and 75 per cent of the defendant's costs). It follows that the offer of compromise rules exert a disproportionate influence on plaintiffs. The penalty for a plaintiff who fails to accept a reasonable offer can be a catastrophic costs order if there is a lengthy trial. The effects on a defendant are much milder. For institutional defendants such as insurers or government the consequences are inconsequential.

In a fair system of justice the penalties imposed upon parties for unreasonable conduct of similar magnitude should be even. There should not be grossly disproportionate penalties.

It is noted that the Jackson review of the conduct of civil litigation in the United Kingdom identified exactly this same problem (the rules being relevantly similar). The recommendation (which is being implemented) is for plaintiffs to recover a 10 per cent uplift on the damages awarded when an offer of compromise is exceeded.

This unjust imbalance on penalty embedded in court rules needs to be addressed.

Draft Recommendation 13.2/p19 Overview

The Bar Association notes the Procuctivity Commission's comments contained at p19 of the Draft Report Overview to the effect that existing costs arrangements encourage legal practitioners to 'over-service and drive up the costs of litigation and the length of a trial'. This philosophy appears to underpin the commission's draft recommendation 13.2.

The notion of 'overservicing' is in itself problematic. A client who loses a case would be unhappy with a legal representative who fails to take extra steps which may have resulted in its success in order to avoid 'overservicing'. Parties are unable to ask a judicial officer in the course of proceedings whether they have done enough to win a case. It is simply not possible to finely calibrate the amount of the preparation in most cases so that they barely squeak over the line for a win.

Further, the association rejects notions of overservicing in the context of a party/party costs regime, where by definition costs are assessed at the level of what is reasonable. Costs assessment processes are in place to ensure oversight of costs awarded. If one or both parties engaged in overservicing (or 'gold plating' to adopt the current economic jargon) then any such excess preparation would not be recoverable as 'reasonable' party/party costs.

Draft Recommendation 13.3

The Bar Association acknowledges that there is a case in favour of requiring parties to submit costs budgets at the outset of litigation in limited circumstances. Agreed litigation costs budgets could play a useful role in certain kinds of commercial disputes where the following factors are present in proceedings:

- sophisticated clients;
- a clear ambit of the dispute;
- where the kind of dispute occurs frequently;
- where the kind of preparation required is readily predictable; and
- where protection from adverse developments is available.

In other circumstances, requirements to prepare such budgets may in fact generate additional costs by providing parties with the opportunity to overassess fees and make ambit claims, requiring additional preparation and court time to contest and resolve costs budgets.

Accordingly it would not be appropriate for such a requirement to have broad application. The association notes that it would give rise to inconsistencies with the Procuctivity Commission's own suggestions concerning the broader application of abolition of formal pleadings in Draft Recommendation 11.1.

The introduction of even a limited system involving submission of costs budgets would need to be supported by appropriate funding to allow for the extra judicial time as courts list matters to monitor its implementation and operation.

Chapter 14 Self-Represented Litigants Draft Recommendations 14.1 and 14.2

Litigants appearing without legally qualified representation is an increasing phenomenon, particularly in the light of declining levels of legal aid. Self-represented litigants have a significant adverse impact on courts and tribunals, with resultant implications for delay and cost.

As mentioned in the Bar Association's previous submission, the Family Court in 2000 issued a research report, *Litigants in Person in the Family Court of Australia*, which highlighted the difficulties caused by increasing self-representation before that court. Subsequently the Australian Institute of Judicial Administration has issued a report, Litigants in Person Management Plans: Issues for Courts and Tribunals, which also explored the issue.

Litigants in person increase the demand on time, costs and resources in the court system. That impact is felt by all court personnel (ranging from judicial officers to registry staff and

court officers) who, while not being able to give legal advice, are required to explain court processes and procedures to the litigant. Further, decisions involving self-represented litigants often need to be documented to a greater degree than in other cases.

However, while it is appropriate for courts to provide some procedural advice to self-represented litigants, clear boundaries must be set in respect of such assistance. Providing appropriate assistance to unrepresented litigants in these circumstances is fraught with difficulty. These kinds of problems are well illustrated by the following comments from the decision of the Full Court in *Bahonko v Nurses Board of Victoria* [2008] FCAFC 29 (at [10]):

> The liberty which the Court frequently extends to unrepresented litigants was systematically abused by Ms Bahonko in the present case. She seems unwilling to respect reasonable standards of conduct in the material which she appears to feel she may place before the Court as a matter of right. The processes of the Court and the Court itself are brought into disrespect if unreasonable relaxation of ordinary standards is extended to litigants in person simply for the reason that they are without legal assistance. There is no basis to think that the rights of any litigant in person are infringed or diminished by the steady insistence that proceedings in this Court are not be used as a means of sullying the reputation of other parties to the proceedings or third parties who are not directly involved in the proceedings at all. Ms Bahonko, by her conduct, breached the necessary standards in a systematic and apparently intentional way.

The availability of legal advice to potential litigants has an important educative effect, by relaying to clients the legal points they can and cannot win. In this way, legal practitioners act as the gatekeepers to the litigation system, by providing advice on merits and deterring many potential litigants from pursuing actions that, although ultimately hopeless, would otherwise exhaust vast amounts of court resources. Unfortunately many self-represented litigants are individuals who have received, but do not accept, legal advice that their cause of action lacks merit.

The Bar Association agrees that self-represented parties could be further assisted by the preparation and provision of clear guidelines and user manuals. The Civil Justice Council in England recently released a manual for self-represented litigants. A similar approach in Australia would provide a useful background tool for self-represented litigants.

As noted in our earlier submission, the New South Wales Bar Association has taken a proactive role in educating its members concerning issues relating to self-represented litigants. Following a first edition in 2001, in 2012 the Bar Association released the second edition of its Guide to Barristers on Dealing with Self-Represented Litigants, which provides guidelines to enable members of the bar to clearly identify the parameters within which they should work when dealing with self-represented litigants.

Under the *Legal Profession Act 2004* (NSW) practise as a barrister is subject to the New South Wales Barristers' Rules. The kinds of issues which arise surrounding self-represented litigants mean that some clarification is required regarding the application of the Rules in these situations. For example, there is a general prohibition restraining a barrister from conferring or dealing directly with the party opposed to the barrister's client. Further, a barrister must take reasonable steps to avoid the possibility of becoming a witness in the case. Very real difficulties may arise where, for example, a barrister deals directly with a self-represented litigant in relation to settlement negotiations and an issue later arises as to what was or what was not said in the relevant discussions and whether or not an agreement was reached in those discussions. The Guidelines serve to assist barristers in balancing these duties when dealing with self-represented litigants.

Draft Recommendation 16.4

The Overview notes at page 19 the disparity in bargaining power in litigation between two extremes. On the one hand, it identifies well-resourced, repeat users of the system, such as government, insurers and big business, and asks how the bargaining power of these litigants can be kept in check. On the other hand, the commission asks how self-represented litigants can be placed on a better footing.

The Bar Association is concerned that there are a large number of people who fall in between the two extremes identified who are unable to afford the costs of litigation. For example, average wage earners are unable to meet the costs of personal injury litigation without the existence of special measures, such as speculative fee arrangements. Increases in court fees would further reduce the ability of such individuals to enforce their legal rights in areas where speculative fee arrangements are not generally available.

Further, moving to a user pays system leads to the commoditisation of justice. A very restrictive fee waiver regime denies access to the system to those who do not fall within the ranks of the privileged or the poor.

The Bar Association recognises the inherent tensions that exist between the practical realities of an under-resourced system of courts and tribunals, and the difficulties involved for ordinary people in accessing the justice system. If court fees are to increase in order to supplement inadequate government funding of the court system, the association would strongly support the increased and formalised use of postponements on the basis of financial hardship.

The Bar Association also supports the expanded use of fee waivers in the the court system. At present, fee waivers are only applied in very limited circumstances for litigants receiving social security payments, for example. As mentioned above, a far wider range of potential litigants have financial difficulty in accessing the courts to excercise their legal rights, and a substantially expanded system of fee waivers would provide some relief in this regard. The average family budget does not have a 'litigation' line item.

However, it is the association's preferred position that court fee increases should not be used as a substitute for inadequate resourcing of the courts, and that it is an inherent responsibility of government to ensure that sufficient funds are applied to allow better access to the court system for potential litigants.

Draft recommendation 21.1

Draft recommendation 21.1 involves the separate management of Commonwealth and state legal assistance for civil as opposed to criminal matters. The Bar Association does not consider that separate management of civil and criminal funds is sufficient to address the current chronic underfunding of legal aid generally.

Whilst the Bar Association accepts that there must be a limit to the level of legal aid funding, there needs to be consideration by government as to whether to increase funding to enable the proper representation of individuals in civil proceedings. This may in fact lead to savings for the court system. In that respect, a cost/benefit analysis should be done as to the increased time and costs associated with unrepresented litigants conducting their own hearings as opposed to when similar cases are subject to legal aid funding. By reducing the amount of legal aid available, the cost of conducting unrepresented litigant matters shifts to the budget of the Courts and increases legal fees for opposing parties.

Chapter 23 Pro Bono Services

The Bar Association supports any measures which would increase the effectiveness of pro bono and other legal assistance services. However, as noted in the association's previous submission, it is important to recognise that undue strain is placed upon the legal assistance sector by the chronic underfunding of legal aid in this country.

The underfunding of legal aid prevents legal aid commissions from realising their goals. This failure is evidenced by the strict application of eligibility criteria and the reduction of services offered by Legal Aid which in turn have contributed to levels of unmet demand for legal assistance. This demand is being met, in part, by pro bono assistance provided by the private sector and through schemes such as the association's Legal Assistance Referral Scheme. There is no other profession which undertakes a similar level of pro bono work, and in no other area are governments, state and federal, so dependent upon voluntary contributions as they are on the legal profession.

Pro bono work undertaken by legal practitioners should not be relied upon to remedy major deficiencies in the legal aid system. Such work should supplement a properly funded legal aid system. By its very nature, it cannot solve broader access to justice issues which require a comprehensive and adequately funded government response.

The Bar Association notes the Procuctivity Commission's comments concerning pro bono work undertaken by the Bar generally. As noted in the association's previous submission, barristers contributed approximately 2750 hours of work under the NSW Bar's own Legal Assistance Referral Scheme in 2012-13. Further, under the association's Duty Barrister Scheme, which has been operating at the Local and District Courts at The Downing Centre, Sydney since 1994, it is estimated that over 4,000 members of the public are assisted each year.

The Bar Association's previous submission also sets out details

in relation to the various court legal assistance schemes under which barristers give their time in providing pro bono and other legal assistance. In addition to these formalised legal assistance schemes, individual barristers contribute countless hours of pro bono work of their own motion, for individuals, local clubs and other not-for-profit organisations. The Bar Association does not collect data on the number of pro bono hours provided by individual barristers to meet the level of demand for legal services, apart from the statistics kept for its Legal Assistance Referral Scheme.

The Productivity Commission rightly makes the point that there is a dearth of reliable statistics concerning the pro bono and legal assistance contribution of practitioners. This is particularly so in relation to members of the Bar, who are by definition sole practitioners, and do not have the capacity and perhaps inclination of, for example, large firms, to promote the time spent on this kind of work. The Bar Association is however currently conducting a survey of its members in relation to a number of issues including time spent on pro bono work, which it is expected will provide a better picture of the contribution of the NSW Bar in this regard.

26 May 2014