The Productivity Commission's Draft Report on Access to Justice Arrangements: A Brief Survey

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In April 2014, the Productivity Commission released a Draft Report on 'Access to Justice Arrangements'.[1] It has invited public comment on the Draft Report albeit within a very tight timetable, with a view to presenting a final report to the Australian Government by September 2014.

I. SOME BACKGROUND

In the absence of a political upheaval, the report will be presented to a Government of a different political complexion to the one that requested the Commission to undertake the inquiry. The request was made in June 2013 by the then Assistant Treasurer in the minority Labor Government. If completed on schedule, the report will be presented to the conservative Coalition Government which enjoys a comfortable majority in the House of Representatives, but faces a fractious Senate. Leaving aside questions relating to the constitutional division of powers between the Commonwealth and the States, whether the Coalition Government will welcome yet another report on access to justice remains to be seen.

The Draft Report has three striking features:

- it represents the latest in a long line of official inquiries in Australia into access to justice;
- perhaps not surprisingly, the report reflects the economic emphasis of its terms of reference and the nature of the Productivity Commission itself;[2] and
- its 875 pages cover a wide range of topics that bear on access to justice and incorporate the fruits of research on those topics carried out in Australia and elsewhere.

II. A FAMILIAR LITANY

The Draft Report records the indisputable fact that numerous inquiries have been conducted in Australia into access to justice,[3] almost all of which have incorporated the expression 'access to justice' into their title and terms of reference. These inquiries highlight deficiencies in the civil justice system that are identified by the Productivity Commission. The litany is familiar:

- the legal system is too slow, too expensive for the vast majority of people who seek to enforce or defend their rights or interests and too adversarial;
- the law itself is far too complex for ordinary people to understand and in any event the complexity creates uncertainty and leads to expense and delay in the resolution of disputes;
- people often lack the knowledge to appreciate that they have a problem with legal dimensions and that there are institutions and mechanisms available to assist them in resolving the problem;
- the market for legal services is characterised by information asymmetry between the service providers and consumers, the significance of which

is compounded by insidious practices such as time-based charging;

- disadvantaged groups and individuals face many barriers in accessing the civil justice system, including communication difficulties, limited finances and a lack of understanding about how the system works; and
- dispute resolving bodies such as courts and tribunals have been slow to adapt to the modern world by eliminating wasteful procedures and practices, making their procedures more user friendly and by utilising new technology.

III. ALLEVIATING INJUSTICE

Since almost all inquiries, with relatively minor differences in emphasis, have made virtually the same criticisms of the civil justice system, obvious questions arise: why are the barriers to improving access to justice so apparently intractable? And why have successive inquiries over forty years or more essentially identified the same deficiencies?[4]

One answer can be found in the use characteristically made of the expression 'access to justice'. As the Productivity Commission recognises, the expression has been used by different commentators to convey different meanings.[5] I have made the point elsewhere that 'access to justice' has become a catchphrase that commands virtually universal adherence precisely because it can be employed without descending to detailed policy prescriptions.[6] Like other terms imbued with emotive connotations, it is an expression calculated to attract without necessarily committing anyone to particular remedial action.

It is not easy to transform the debate from one in which access to justice is an abstract aspiration to one which formulates objectives that are capable of attainment, or at least capable of being translated into reasonable benchmarks. The Draft Report certainly examines a series of important topics and makes recommendations or proposals for further inquiries in relation to each. But the difficulty of pouring content into the expression 'access to justice' is demonstrated by the Draft Report's attempt to define it. Rather than solving the definitional problem, the report seeks to avoid the difficulty by defining 'access to justice' for the purposes of the inquiry to mean 'making it easier for people to resolve their disputes'.[7]

It must be said that this is a narrow and inadequate definition. Mechanisms have long been available to enable people, including those without ready recourse to legal advice, to resolve their disputes speedily and cheaply should they choose to do so. The most obvious (and widely utilised) is of course a negotiated agreement between the complainant and the subject of the complaint. When agreement is not feasible, other mechanisms may be readily available depending on the nature of the dispute. These include industry dispute resolution schemes; recourse to regulators, ombudsmen and other complaints handling bodies; applications to bodies such as consumer claims and residential tenancy tribunals (whether or not subsumed with a larger tribunal

structure) which are directed by statute to proceed without legal formality and in accordance with the justice of the case; and alternative dispute resolution procedures such as mediation (whether or not involving lawyers).

In any event, there is a more fundamental difficulty with the Productivity Commission's definition. The core idea underpinning the goal of improving access to justice involves much more than making it easier for parties in conflict to resolve their disputes. The core idea can most simply be expressed as the alleviation (if not the elimination) of injustice.[8] The alleviation of injustice requires action in many contexts related to the legal system other than the resolution of existing disputes.

Injustice may be the product of misguided or deliberately harsh laws, lack of community understanding of basic rights and obligations (including the consequences of entering into legally binding transactions), cultural and linguistic obstacles to identifying, protecting or enforcing rights and entitlements, the inability of disadvantaged groups and individuals to locate or afford appropriate sources of advice and assistance (not merely in relation to existing disputes), as well as cumbersome, complex or unnecessarily expensive and dilatory court or tribunal procedures.

To be fair, the Productivity Commission does not limit its analysis or recommendations to improving mechanisms for resolving disputes. It recognises, for example, the obstacles confronting many Australians in understanding and navigating the legal system and the consequential difficulties many face in 'identifying whether a problem has a legal dimension'.[9] Nonetheless, the primary focus of the Draft Report is on issues relating to dispute resolution such as court and tribunal procedures, the cost of obtaining legal advice and representation, litigation funding, legal aid services and alternative dispute resolution. Had the Commission adopted a broader perspective, it would have had more to say about the many manifestations of injustice in and associated with the legal system.

IV. AN ECONOMIC PERSPECTIVE

The inquiry's terms of reference[10] reflect the economic constructs which underpin the work of the Productivity Commission and also tend to dominate political discourse in Australia regardless of the make-up of the political party holding power at any given time. The terms of reference acknowledge that access to the civil justice system 'should not be dependent on capacity to pay

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and vulnerable litigants should not be disadvantaged' and that a 'justice system which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs'. But the language used in the terms of reference is replete with economic concepts such as 'market failure', 'efficiency' and 'supply and demand'. No doubt for this reason the Commission sometimes applies the language of economics in unfamiliar ways as when it speaks, not entirely convincingly, of the 'market for litigation'.[11]

The Productivity Commission's emphasis on economic concepts narrows the focus of the report. The point is illustrated by the section of the Draft Report headed 'Promoting an efficient and effective civil justice system'.[12] In that section, the Commission adopts the submission of the Attorney-General's Department that the effectiveness of the legal system in contributing to the maintenance of the rule of law should be central to 'fostering social stability and economic growth'. The Commission considers that this objective would be achieved if the system:[13]

- 'upholds the rule of law, protecting individual and property rights as set out in Australian law (including the rights of those least able to defend themselves),
- has public institutions and policies that aim to ensure timely, cost-effective, and appropriate legal services are available to the Australian people, businesses, and community organisations,
- maximises the return from the allocation of public funding.'

It is implicit in these policy goals that the effectiveness

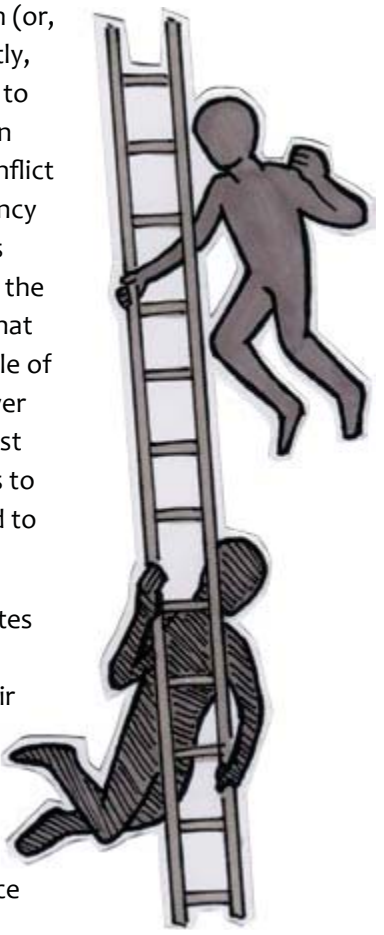
of the legal system, including courts, tribunals and other dispute resolution mechanisms, can be determined by measuring inputs and outcomes. The Commission reinforces the implication when endorsing what it describes as 'specific objectives' of the civil justice system. These include resolving disputes quickly, treating people fairly and ensuring that legal processes are just irrespective of personal, social or economic circumstances. The Commission's endorsement of these laudable objectives is, however, subject to the express qualification that 'from an efficiency perspective it is important that they are applied with some care to achieve the social licence [sic] at least cost'.[14]

Of course 'costs' are not necessarily confined to financial costs. The Commission is clearly aware that a broad cost-benefit approach to policy evaluation is a challenging undertaking. As the Draft Report notes, such an approach requires value judgments to be made about what is important to individuals and about other benefits and costs that may be difficult or impossible to measure.[15] The danger, however, is that the elements in a cost-benefit assessment that are readily capable of measurement will be given disproportionate weight when set against considerations that are incapable of quantification in monetary or mathematical terms.

It is therefore not surprising that the Productivity Commission yields to the temptation to concentrate on the measurable, particularly when Government expenditure is involved. An illustration is provided by the Commission's examination of court fees. The Draft Report correctly points out that cost recovery requirements are highly variable among Australian courts and jurisdictions (although it would be more accurate to say that statutory fee regimes are highly variable, since Governments benefit from the fees paid by litigants, not the courts). The report states that the main objectives of the fee regimes are to recover costs efficiently, to send price signals to potential litigants to consider alternative means of dispute resolution and to ensure reasonable access to justice is not impeded.[16] The report then asserts that the default position should be full costs recovery. It justifies this position by reference to jurisdictions, such as the United Kingdom and New Zealand, that have moved towards full costs recovery, but have granted relief to litigants assessed as unable to afford full fees.

There is little doubt that governments will find the Commission's default position to be attractive. There must be much greater doubt that, if a full costs recovery regime is imposed on litigants, the benefits of higher fees will flow through to courts and tribunals, as distinct from enhancing general Government revenue. But what is not clear from the Commission's analysis is why the principle of full costs recovery should be accepted as the default position. To characterise the civil justice system as simply a service to litigants for which they should collectively pay in full, overlooks the broader role played by courts and tribunals in preserving and protecting the rule of law, developing legal principles and maintaining both an orderly society and predictable outcomes in commercial transactions. It is undeniable that economic theory has much to contribute to the law and the legal system. The collaboration between economists and lawyers over the last few decades in particular has been enormously influential in shaping the development of legal principles in fields as diverse as the law of torts and competition law. But the civil justice system cannot be evaluated on the basis that it is essentially just another service provider.

The tension between purely economic concepts and the ethos of the legal system assists in explaining a more basic problem that bedevils discussions about access to justice. There is and always will be an irreducible tension between the understandable desire for courts and tribunals to provide an authoritative forum for swift and cheap resolution of disputes and the minimum procedural requirements of a fair and just judicial system (or, to put the matter differently, a judicial system that aims to avoid inflicting injustice). In Australia, the potential conflict between maximum efficiency and maximum fairness has been resolved in favour of the latter. Thus the principle that courts exercising or capable of exercising the judicial power of the Commonwealth must accord procedural fairness to litigants has been elevated to constitutional status.[17]



Procedural fairness mandates that the parties have a fair opportunity to present their case, usually including the right to adduce evidence and to test the evidence relied on by their opponent. The consequence

is that litigation fought out in the court system (and to a more limited extent in tribunals) will expose the parties to significant expense and, on occasion, to what observers may regard as extensive delays. The reality is that dispute resolution, even when conducted within the constraints of modern rules of court and case management systems, is a labour and time intensive business.

V. A CONTINUOUS PROCESS

None of this is intended to detract from the utility of the legal system being subjected to close scrutiny by external policy-making bodies such as the Productivity Commission. Nor is it intended to detract from the importance of bringing an economic perspective to the evaluation of the practices of courts and tribunals and others participate in the dispute resolution process. That perspective adds a dimension that is not always present in official inquiries and is particularly significant in assessing new developments in dispute resolution, such as the emergence of litigation funders whose activities have profoundly altered the nature of certain kinds of litigation.

The legal system, despite its reputation for rigidity and resistance to change, has demonstrated in recent times a surprising capacity to embrace far-reaching reforms. Sometimes the reforms are generated by internal initiatives, as with the widespread adoption of judicial case management in the courts. Sometimes they are externally imposed, at least in the first instance, as with the application of competition policy to the legal profession. Bodies such as the Productivity Commission pay a crucial part in what must be understood and accepted as a continuous process of evaluation and, in due course, improvement.

The Productivity Commission's work has been informed by the labours of its predecessors and builds on an increasing body of empirical research related to the legal system that has been conducted by academic institutions and public agencies. This is as it should be, since constant vigilance is required if injustice is to be alleviated.

REFERENCES:

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1. Productivity Commission, *Access to Justice Arrangements* (Draft Report, April 2014) ('Draft Report').
2. The principal functions of the Productivity Commission include holding inquiries and reporting to the Minister about 'matters relating to industry, industry development and productivity' referred to it by the Minister: *Productivity Commission Act 1998* (Cth) s 6(1)(a). The quoted expression is defined to include legislative or administrative action taken or to be taken by the Commonwealth, State or a Territory that affects or might affect the productivity performance of industry, industry development or the economy as a whole: s 6(2).
3. Draft Report, above n 2, 77.
4. The series of reports in Australia commences with Australian Government Commission of Inquiry into Poverty, *Law and Poverty in Australia* (Second Main Report, AGPS, October 1975).
5. Draft Report, above n 2, 78.
6. Ronald Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public and International Law* 85.
7. Draft Report, above n 2, 3.
8. This idea is elaborated in Ronald Sackville, 'Law and Justice: Do They Meet?' (2014) 37 *University of New South Wales Law Journal* (forthcoming).
9. Draft report, above n 2, 145–9.
10. The terms of reference are reproduced in the Draft Report, above n 2, v–vii.
11. Draft Report, above n 2, 329, 500.
12. Ibid 136–40.
13. Ibid 137.
14. Ibid 139.
15. Ibid 141.
16. Ibid 468.
17. See generally *Wainohu v New South Wales* (2011) 243 CLR 181.