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Barriers to Public Interest Civil Litigation

Submission to Productivity Commission Draft Report
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The Flemington and Kensington Community Legal Centre, located in Victoria, Australia, has been notably involved in civil litigation with the establishment of the Police Accountability Project in 2007. One of the purposes of the Project is to provide an avenue to justice that would otherwise be closed for victims of police misconduct. We have undertaken a number of lengthy litigation cases such as *Haile-Michael v Konstantinidis* and *Matiang & Ors v Fox & Ors*, which have highlighted some systemic roadblocks for clients with limited financial resources who pursue civil litigation as an avenue for redress.

The Flemington & Kensington Community Legal Centre has been working with the victims of human rights abuses by police for over thirty years. Our casework, advocacy and law reform work has been informed by our experience, by comprehensive research and by established human rights principles and practises.

The Police Accountability Project is a specialist, innovative, public interest legal project located within the Flemington and Kensington Community Legal Centre, taking the lead in police accountability law and strategies. By providing victim-centred remedies, strategic litigation, evidence based research, community support and policy and law reform, the Police Accountability Project aims to provide justice for those who least experience it and by doing so hold police who abuse to account.

Drawing on the Flemington and Kensington Community Legal Centre's particular experience in assisting vulnerable clients litigate meritorious claims, we have elected to focus this submission on particular changes recommended by the Productivity Commission, as set out below. While we are generally supportive of those recommendations highlighted, we feel that more could be done to remove the barriers to the disadvantaged in civil litigation, specifically in court processes. Below we have outlined the changes we would endorse in addition to the Draft Recommendations that we support.

Draft Recommendation 8.1

Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations where possible.

Flemington and Kensington Community Legal Centre's Position

We support the use of alternative dispute resolution as an appropriate way to reduce the workload of courts and a swifter way to resolve disputes. However, a significant obstacle for litigants who are ineligible for Law Aid and do not have the means to pay for a mediator is the often prohibitively high costs of mediation fees. Our experience is that mediator rates can range from approximately $165 per hour[1] to upwards of $480 per hour[2]. In some jurisdictions, including the County Court of Victoria, parties must reach agreement as to which private mediator will carry out compulsory pre trial mediation - as a mediator is not appointed by the court.

In these scenarios, lawyers acting for State clients (such as Victoria Police or the State of Victoria), do not face the same financial obstacles as community legal centre clients, or indeed community legal centres, which cannot fund the up-front disbursement of mediator fees. Hence, unless disadvantaged clients can secure Law Aid funding for mediation costs, they may not be able to fulfill the court mandated requirement of pre-trial mediation without entering further financial hardship.

A solution to this problem would be to establish a pool of court appointed mediators who can do pro bono work or for parties to be able to apply for a 'fee waiver' for mediation fees (as litigants can with respect to other compulsory litigation steps - like payment for setting down for trial fees, filing fees and so on).

Recommendation 13 - Costs

Draft Recommendation 13.3

Superior courts in Australia that award costs, such as supreme courts and the Federal court, should introduce processes for costs management, based on the model from English and Welsh courts. Parties would be required to submit, and encouraged to agree on, costs budgets at the outset of litigation. Where parties do not reach agreement, the court may make an order to cap the amount of costs that can be awarded.

Flemington and Kensington Community Legal Centre's Position

While we support the general principle of reducing costs for lengthy litigation there should also be a way to vary the costs order as is the case in the English Civil Procedure Rules 3.21. This is important if unlikely or unforeseeable costs arise.

Draft Recommendation 13.4

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.

[1] http://wfmediators.com.au/mediation-process/our-costs/

[2] http://www.lawsocietysa.asn.au/other/mediation.asp

Flemington and Kensington Community Legal Centre's Position

We strongly support this Recommendation due to the decision in *King v King*[3] which put into doubt the validity of pro bono parties to receive costs if they would otherwise be successful in a costs order. Although the more recent case of *LM Investment Management Limited*[4] distinguished *King v King,* there still remains uncertainty in this area which legislation should clarify. It is also in the interests of clients (many of whom come from non-English speaking backgrounds) to be told that the work is for free rather than signing a complex Costs Disclosure Statement for the sole purpose of enabling their lawyers to apply for a costs order in the event they are successful. It would be better for all if pro bono lawyers could carry out their work without having to negotiating complex fee agreements with disadvantaged clients, safe in the knowledge that they will be entitled to seek an award for costs in the event they are successful. Without this protection, there is disincentive for lawyers to act pro bono and more clients will have to rely on their lawyers waiving their fees or acting under 'no-win- no-fee' agreements.

There is a lack of access to costs in the County Court where plaintiffs are awarded less than $50,000. Pursuant to rule 63A.24, Magistrate Court cost awards are not sufficient to cover the real costs of legislation. Nor is the Magistrates Court an appropriate court to manage complex police accountability legislation. This rule also creates a perverse incentive not to settle a matter for an amount under $50,000 due to the cost penalty. Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the cost rules of the relevant court, where the complexity of the matter requires the case to be brought in a particular jurisdiction. This should be clarified by legislation and relevant court rules. The amount to be recovered should be a fixed amount set out in court scales.

Information Request 13.1

The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to:

- the legal professional providing pro bono representation
- the not-for-profit body providing or coordinating the pro bono service
- a general fund to support pro bono services

Flemington and Kensington Community Legal Centre's Position

We believe the most effective way of distributing the costs award to the pro bono parties would be to the legal professional(s) providing pro bono representation and to the not-for-profit body providing the pro bono service. We don't believe there is any need for the coordinating body to receive a portion of the fee as this is a small segment of the work involved in the litigation. Additionally, we believe a general fund to support pro bono services creates an unnecessary layer of bureaucracy that will require more time to be spent on seeking approval to proceed with a case that will take away from remunerating the legal professional(s) who worked on the case.

[3] King v King & Ors [2012] QCA 81

[4] M Investment Management Limited (Administrators Appointed) v The Members of the LM Managed Performance Fund [2014] QSC 54

Draft Recommendation 13.5

Unrepresented litigants should be able to recover costs from the opposing party, subject to the costs rules of the relevant court.

Flemington and Kensington Community Legal Centre's Position

We strongly support this Recommendation for similar reasons expressed in Recommendation 13.4.

Draft Recommendation 13.6

Courts should grant protection costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

Flemington and Kensington Community Legal Centre's Position

We support the introduction of PCOs based on the model in the English jurisdiction from *Corner House*[5] if the following conditions are satisfied:

- the issues raised are of general public importance;
- the public interest requires that those issues should be resolved;
- having regard to the financial resources of the claimant and the defendant(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
- if the order is not made the claimant will probably discontinue the proceedings and will be acting reasonably in so doing

Recommendation 16 - Court Fees

Draft Recommendation 16.4

The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements - rather than waivers - as a means of fee relief if an eligible party is successful in recovering costs of damages in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:

- **parties represented by a state or territory legal aid commission**
- **clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.**

[5] R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192, [2005] 1 WLR 2600

Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.

Flemington and Kensington Community Legal Centre's Position

Currently the fee waiver process is costly and time consuming. We would heavily support the automatic granting of fee relief to parties represented by a state or territory legal aid commission or clients of approved community legal centres/pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief. Another mechanism that would aid the streamlining of fee waiver processing, would be implementing a single fee waiver application process, which would be made and processed at the start of litigation. A successful applicant would have all the fees over the course of the litigation waived, with an obligation to disclose to the court any changes to their financial circumstances, such that they no longer are eligible for the waiver. This would ensure that multiple fee waiver applications do not have to be made over the life of litigation - a process which is resource intensive for the courts, for community legal centres that need to put the applications together and stressful for clients who need to gather supporting documents multiple times (sometimes 20 or 30 times, if the litigation is long and complex). It would also minimise the delay of two to three weeks that currently results from processing of court documents, where fee waiver applications are attached to those documents (eg, subpoenas, initiating processes and summonses).

We also emphatically recommend the fee waiver coverage is more comprehensive. For example, court transcript fees and transcription costs are prohibitively expensive for community legal centres and their clients and fee waivers are not accessible in some jurisdictions (such as the County Court and Supreme Court – which outsource court transcription to private companies who do not provide fee waivers). Clients with limited means must therefore apply for Law Aid funding, which they may or may not get. The problem with this is highlighted by the scenario where a transcript is required to appeal an interlocutory decision of the County Court, to the Supreme Court. In that scenario, a client may be unable to get law aid funding before the appeal date expires (you have only 28 days to appeal an interlocutory decision of the County Court to the Supreme Court). Appeal rights may therefore be jeopardised because a disadvantaged litigant either cannot obtain funding for a transcript of a decision record, or because a litigant cannot obtain a copy of the decision record in time while they wait for either law aid to decide their funding application or a fee waiver application to be processed in those jurisdictions where you can get a fee waiver – eg, the Magistrates Court).

Another example of where coverage could be more extensive is with viewing documents produced under subpoena at the County Court of Victoria. Currently, there is a fee to view documents produced under subpoena which applies even if a litigant has received a fee waiver to issue the subpoena under which the documents are produced. There is no fee waiver available to view documents produced under subpoena.

We support a full fee waiver rather than a postponement on the basis that the purpose of compensation and tort law in general, is to put the plaintiff in a situation he or she would have been if not for the tort. If court fees are taken out of compensation payments, which are calculated for the aforementioned purpose, then victims will still be at a disadvantage after receiving a judgment in their favour. Conversely, if the fees were to be paid back out of an award for costs in their favour, it is possible that the complete costs award may not ultimately be recovered or only partially recovered from the defendant. In that scenario the court should keep the fees as a waiver, rather than a postponement as the plaintiff would not have received any money to pay the fees.

Information Request 16.2
The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:

- the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card
- passing an asset test in addition to possessing a concession or health card
- the receipt of a full rate government pension or allowance.

Flemington and Kensington Community Legal Centre's Position
We recommend that a Commonwealth concession or health card or the receipt of a full rate government pension or allowance should be a prima facie reason for a fee waiver. There is already an income and assets test required for these cards or payments and necessitating the same process for a waiver is redundant.

Draft Recommendation 17.2
Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.

Flemington and Kensington Community Legal Centre's Position
We support the use of the current CITEC eFiling system as a way save time and paper for filing court documents. However there are still fees attached to filing electronically and fee waiver application forms cannot be submitted electronically without incurring fees. We recommend that a way to accept and process these applications is added to the current system so that the litigants requiring waivers may make use of this technology and Community Legal Centres can use this service without fees.

We would be happy to provide further information or to appear in person to speak on the issues raised above should this be required.

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