LEGAL REFORM: TOWARDS LAW MORE JUSTIFIED AND ANCIENT
(I AM WOMAN! LIVING IN MUMU LAND OVER MY DEAD BODY)

This is my second submission on the National Legal Profession Reform Project Consultation Package. It answers questions in the Council of Australian Governments (COAG) National Legal Profession Reform Taskforce Consultation Report later, starting with the second last questions, which are: *How can the co-regulatory model be best reflected in appointments to the National Legal Services Board? Are there more desirable alternative appointment processes?* These and other key questions are addressed after brief discussion of the Objectives of the draft Legal Profession National Law (2010). These Objectives were mainly addressed in my last submission and were found highly problematic for reasons addressed again briefly below. (The full submission is attached.) Logically, the Taskforce questions which ideally are now dealt with first, relate to the Board management structures which ideally serve COAG to satisfy key aims of national legislation and to improve all related social and environment outcomes fairly, assisted by dispute resolution services. Ideally, the Board always directs the lawyers' business rather than the reverse, unless instructed by COAG. Lawyers are feudal relics who invariably promote secrecy and recognize the value of competition on price alone.

Key Recommendations:

The National Legal Services Board and related administrative structures ideally support the aims of the Council of Australian Governments (COAG) to achieve national standards for social and environment protection fairly and cost-effectively.

To achieve and improve on these COAG goals the Board ideally seeks to establish all dispute resolution on a level playing field, not under the domination of courts.

To oversee or manage dispute settlement and legal breaches effectively at the national level, the Board will first need knowledge of what the key Australian dispute handling institutions are; what their missions are; what legislation guides them; how they operate and how many people they employ.

The Board should establish information and related curricula in regional industry and community contexts to achieve key COAG aims and disseminate it widely in cooperation with relevant industry organizations, media owners and others.

The Board should establish data driven management and ideally view the administration of all dispute resolution as action research to identify comparative performance and outcomes.

The Board should develop national and international industry and community relationships to achieve related regional, COAG and UN goals through competitive, quality management approaches to economic, social and environmental matters.

Revisiting the Objectives of the draft Law so as to Address Taskforce Questions

Chapter 8 of the draft Legal Profession National Law is entitled 'National regulatory authorities'. Part 8.2.4 deals with 'Functions of Board' and 8.2.4 (3) states *The Board has all the powers necessary to perform its functions and achieve its objectives*. This is untrue. The key objectives of COAG are the fair and cost-effective attainment of national standards in health and environment protection. The key goal in the draft Legal Profession National Law Objectives is: (a) *providing and promoting national uniformity in the law applying to the Australian legal profession'*. Even if this were possible, which given lawyers' interests and the feudal ways they pursue them is unlikely, it would not achieve COAG objectives. There is no way to achieve or measure the key Objective of the draft Legal Profession National Law, which is *to establish an efficient and effective Australian legal profession*. Australian lawyers are shown to be *incompetent and unethical* as they cling to pre-scientific assumptions and to practices imported from their feudal past which they continue to stubbornly reproduce in an era which should operate with scientific and democratic processes to serve the people, not with feudal process designed to serve their secret business with mates and their state monopolies.

There is a key distinction between national standards and national uniformity. The effective achievement of the former is wanted by COAG, but neither can be measured or attained by the draft Legal Profession National Law. The concept of standards relates to specified qualities of production, service provision, choice and life, ideally applying to all people and based on the United Nations (UN) Declaration of Human Rights, implemented through the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and related instruments such as the Rio Declaration on Environment. An administrative design to support and enhance *national standards* (**not** *national uniformity*) is required by COAG, to promote fair competition on a 'national level playing field' where government tries to ensure that guaranteed national minimum standards and goals related to economic, social and environmental protection and enhancement are met fairly and cost-effectively, in partnership with industry and related communities.

Fair competition is ideally designed to achieve and enhance this national platform of guaranteed minimum standards related to health and environment protection, with the aim of equal treatment for public, private or non-profit service providers, unless another course of action appears in the public interest. Wrongly mandated uniformity of service provision often prevents effective competition to improve outcomes in any area, including in the application of law and related practice. However, clear goals and definitions which people use consistently to define and compare practice and evaluate the outcomes are crucial for research and administration. The UN provides many good ones which I am sick of seeing changed by academic idiots in universities and government bureaucracies so that they can polish their careers and related specialisations while helping their mates to expand.

The draft Legal Profession National Law rarely uses definitions as distinct from interpretations, so its search for uniformity is not just wrong, it still predates the 18th

century Enlightenment. Good outcomes, rather than uniform practice are primarily what matters for good practice, whether these outcomes are expected to be guaranteed (as in bridge building safety) or can only be desired (as in improved mental health). No outcomes related to the COAG aims of fair treatment and health and environment protection will improve merely because some lawyers state they seek legal uniformity, with tongues no doubt lodged in their cheeks as usual. This seems one of many lawyers' ploys in the draft Law designed to feather their own nests and call it justice.

Writing in the Australian Financial Review (AFR 31.5.10 p.53), Alex Boxsell states that '*the federal government's bid to create a truly national legal profession has always had a dual purpose – to remove unnecessary layers of regulation for lawyers and law firms and strengthen protections for clients'*. The National Legal Profession Reform Taskforce Consultation Package does neither. There appears nothing in it to bring about legal cost reductions, aside from the proposed national treatment of professional indemnity, fidelity and related funds, which is discussed in a later submission. There does not appear to be any way to ensure that such savings would be passed on. There are apparently 55 bodies which currently have responsibility for regulating the Australian legal profession and the National Legal Profession Reform Project (p. 3) will add some more. One may assume the Board overlooks the other bodies and has the power to abolish them but I would be astonished if that ever happened. (Who could ever broach the subject politely enough?)

This submission is designed to address all the above problems primarily through the discussion of Board powers and data gathering to support COAG objectives which relate primarily to fair treatment and to social and environment protection. Like the last submission, this one assumes the good life we commonly aim for relies on the further development and spread of scientific methods and technologies to serve consumers and all the people, and also on the increasingly open, educated and democratic development which has usually been related to scientific and technological development historically. This direction now seems most easily fed by regional, national and global directions to assist market broadening and to implement key UN agreements to achieve sustainable development. Such development ideally recognizes the rights of current and future generations as being social and environmental as well as economic. Design of competition ideally supports attainment of such national and regionally identified goals.

This submission therefore assumes that alternative dispute resolution (ADR) systems should be designed to compete on level playing fields with courts, not be driven by them, because that is the only way to break the feudal stranglehold of the legal and financial brethren over all scientific and democratic development. This strategy also has the benefit of consumer choice - also a key driver of scientific and democratic progress. The National Legal Profession Reform Project Consultation Package does not mention ADR and I have no idea what the myriad different courts, tribunals, ombudsmen, commissions, mediation, conciliation or arbitration services which exist in Australia are or do. To oversee or manage dispute settlement and legal breaches effectively at the national level, the Board will first need knowledge of what the dispute handling institutions are; what their missions are; what legislation guides them; how they operate and how many people they employ.

While one is happy for engineers and surgeons to be certified to practice by their expert fellows, as bridges or bodies might otherwise collapse and we might die, if all lawyers died peacefully in their sleep tomorrow, Australia could more easily, quickly and cheaply become a far better place from all more logical, scientific, democratic and cost-cutting perspectives. The rest of us have far more relevant guiding knowledge and practice for designing law and its aims, key definitions and practice, and for dealing effectively with disputes and apparent legal breaches in the modern world, so as to improve it, than lawyers do. This is a hypothesis. To test it, ADR systems must compete with courts on equal terms, not under lawyers' control. Questions are discussed in a related way below.

Q. How can the co-regulatory model be best reflected in appointments to the National Legal Services Board? Are there more desirable alternative appointment processes?

The 'co-regulatory model' can only be guessed at in the context addressed by the draft Legal Profession National Law. The National Legal Services Board is the newly proposed regulatory authority which, according to the National Legal Profession Reform Project Consultation Package, ideally supports the Standing Committee of Attorneys-General by delivering the structure to achieve the draft Objectives of the draft Legal Profession National Law (2010). This draft Law primarily aims to gain national uniformity in legal practice, but there is no way to determine whether any of the Law's objectives are gained efficiently or effectively. One can only guess that the Board is supposed to be assisted in its unclear regulatory duties by Courts and by the proposed National Legal Services Ombudsman, among others. This undermines potential for Board decision making to achieve COAG objectives. It makes accountability impossible but greatly increases cost. The parliament and people are undermined. (Gee, how unusual.)

Figure 1 'Regulatory framework under the Legal Profession National Law' in the COAG National Legal Profession Taskforce Report (p. 4) suggests legal services should NOT be seen as one of many services provided to industries and others, which may also be compared for their effectiveness in producing good outcomes for their clients and wider communities. Figure 1 appears instead to depict a more strictly limited focus on the National Legal Services Board, the National Legal Services Ombudsman and Courts, all under the Standing Committee of the Attorneys-General. Figure 1thus depicts a legal and administrative structure which unfairly ignores government and commercial or non-profit ADR services which commonly struggle under the supremacy of feudal court process when trying to undertake mediation, conciliation or arbitration in more holistic and data driven ways. This regulatory framework is unclear, unfair and unduly privileges the occupation of lawyer. (A discussion of professions as occupations is provided later.)

The point of having a Board is to make management decisions. Section 8.2.4 'Functions of Board' states in (4) that '*Without limitation, the functions of the Board include oversight of the implementation and application of (i) this Law and the National Rules; and (ii) the policies and practices determined or adopted by the Board in connection with this Law and the National Rules*. **This Board seems only to be able to oversee, rather than to make decisions.** The section continues, but the above appears highly problematic for the purposes of achieving any government aims effectively and so undermines the

parliament. The National Legal Profession Reform Project Consultation Regulation Impact Statement claims 'lawyers are regulated as a profession, rather than an industry or an occupation' (p. 4). However, there is no special Ombudsman who deals only with complaints against the medical profession. The doctor works with others to deliver services in a broad industry context. Complaints against all health care workers are treated in the same industry context. Lawyers also appear to be most reasonably treated in the broad industry contexts they inhabit with others, because this could cost-effectively provide information and treatment more fairly and usefully to improve all practice.

Given the unclear management duties currently proposed for the Board in the draft Legal Profession National Law, plus the 55 existing legal regulatory bodies discussed briefly by the Taskforce, one wonders exactly what is wanted from the Board and what powers, if any, it has over any others. The Board seems powerless in spite of the draft Law's wrong statement, among many contradictory others, that it has all the powers to perform its functions. This submission therefore calls for the Board to serve the nation through COAG, using clearly related regional industry and community decision making structures. (The Ombudsman is addressed later, along with professions.)

The National Legal Services Board and administrative structures ideally should support the aims of COAG which are to achieve national standards for social (health) and environment protection and growth fairly and cost-effectively. In this context, the Board is ideally designed to administer a statutory authority model structure, which seeks social and environmental as well as economic goals. It should be made up of representatives from the key groups of the Australian people which the Board seeks to serve, to achieve the key national goals of COAG fairly. Lawyers of any stripe ideally are service providers, so are stake holders. The legal service consumers and funders are key stakeholders. Ideally, board members pursue the interests of ***key*** stakeholders outlined below. Board members are ideally chosen for their educated understanding of where each of the narrower sets of key stakeholder interests ideally fits into holistic and objectively independent analyses of how Australians can best be served by law and by those administering it now and in the future. Key stakeholder representatives ideally design whole of government approaches and data driven regulation of law, legal and dispute resolution matters, to achieve economic, social and environmental protection fairly and effectively. The key roles of all Australians for related Board representation are below:

Employers' representatives – (Industry is ideally defined for data gathering purposes according to the Australian and New Zealand Standard Industry Classification (ANZSIC)

Workers' representatives (e.g. workers in legal service provision or in financial service or health service provision and in other ANZSIC areas above)

Regional community representatives (e.g. state or local government representatives)

Consumers' representatives (also related to ANZSIC production codes)

Investors' representatives (banks; superannuation funds; insurance funds; government)

Board representatives from the above groups are ideally first expected to address the current lack of any data driven management in relation to legal standards and costs by using internationally consistent, scientific definitions and classifications in law and related dispute resolution wherever it appears reasonable to do so. The Board needs to know what industry and community dispute handling institutions already exist in the Commonwealth, States and Territories. The Board will also need to know what their missions are; what legislation guides them; how they operate and how many people they employ. Resist any temptation to fill the above Board positions with lawyers. Legal education rots the brain.

The statements headed 'National Legal Profession Reform – figures at a glance' in the Taskforce Report (p.3) claims legal services contributed $10.96 billion to the Australian economy in 2007-08 and the current cost of regulating the legal profession is approximately $65.5 million per year. One wonders how much of the $10.96 billion supposedly provided to the Australian economy could more realistically be seen as an economic cost to production generated by lawyers and courts, from the perspective of all the businesses forced by law to employ lawyers or contract their services, while passing the expense of this onto the surrounding communities of consumers and taxpayers.

One also wonders how the Taskforce figures were arrived at, as the National Legal Profession Reform Project Consultation Regulation Impact Statement (RIS) commits itself to hardly any figures and no projections. At the back of the RIS, a paper by ACIL Tasman relies for figures on the responses to the survey of regulatory costs conducted during the course of the previous project undertaken by ACIL Tasman on legal profession regulatory costs. This information was supplemented with 'telephone interviews with a select group of key representatives of the legal industry, consumer advocates and regulators' (p.3). ACIL Tasman appears to confirm they are dealing with unreliable data as they start their report with a page entitled 'Reliance and Disclaimer'. The Board must address the key problem of lack of effective measurement of legal and related services in order to begin to fulfil its national functions effectively. Compare the clarity and utility of data that Australians have about health care with the data provided by courts and ADR.

Q. The Taskforce has received submissions querying the use of the term 'Ombudsman' for the new national body, on the basis that the Law vests regulatory powers other than complaints-handling in the body. What is the view of other stakeholders on the use of the term 'Ombudsman'? What would be an appropriate alternative?

Q. The Taskforce seeks views on which entity or entities in each jurisdiction would be appropriate to act in the role of local representatives for the Board and Ombudsman in relation to the special functions.

The duties of the Ombudsman are best decided in the context of Board study of all similar bodies which handle complaints against people employed in all Australian industries, communities and related government contexts. This would assist fairer treatment and better data gathering to achieve higher quality management to support the achievement of

the aims of COAG, industries and the Australian community across the nation. For example, construction is one of many industries with many issues likely to be dealt with by Fair Work Australia. In 2008 the Deputy Prime Minister and Minister for Education, Employment and Workplace Relations, Julia Gillard, appointed the Hon. Murray Wilcox QC to consult and report on government commitment to establish a specialist division in the inspectorate of Fair Work Australia (FWA) for 'the building and construction industry'. Discussions of ideal approaches to dispute resolution and related matters in the construction industry are attached with recommendations for future directions. A related article covering all industries entitled 'A healthier approach to justice and environment development in Australian communities and beyond' was with my last submission.

The above investigation is ideally conducted in the context of comparative examination of state professional registration acts. This is also relevant for answering questions on the proposed conditions for practicing certificates for legal practitioners, addressed later. There does not appear to be a rational distinction between an occupation and a profession today. Professional status is historically based on university education followed by the mentored worker being acknowledged by existing experts in the field as having the capacity to practice competently and safely as a result of their acceptance under a state professional registration act. Lawyers are an ancient profession. They are driven daily by many pre-scientific and pre-democratic assumptions which are reflected in state and Commonwealth law, and in their monopoly control of legal services and courts. I guess the power of lawyers is also reflected in their state professional registration acts. This is a major problem for all other occupations lawyers rule over. Politicians come and go. Lawyers live throughout the centuries by constantly biting the ignorant and their children.

Today the term 'professional' may be applied to many people whose work may not require their approval to practice guaranteed under a state professional registration act, but who nevertheless require increasingly high levels of education before they take up work. State professional registration acts and their requirements may have now become an unfair hindrance to effective service and career progression for many highly skilled people who operate outside the specific conditions of a particular registration act. The above is not to deny many vital requirements in education and training or theory and practice. However, these requirements may be marked in many more effective ways than professional registration acts in any industry. For example, a person engaged in lifting loads with cranes has to be able to demonstrate their practical capacity to do so safely and is provided with tickets which certify this practical capacity. Psychologists have a professional registration act but I often wonder if their practice can be clearly shown to have an outcome value between that of the psychiatrist and the helpful lay person. It would be good to have research comparing the three groups to ensure that government does not go off on any wrong and expensive track. (Gee, how might that happen?)

The nature of the relationship between education and work was addressed in post-war debates between those economists interested in education conceptualised as an investment in 'human capital' and those interested in discrimination who saw education mainly as a social screening process. Human capital theories assume a direct, causal relationship exists between education, productivity and wages. Screening theories, on the other hand, assume that comparatively privileged social groups use the education system

to their own advantage by being in a position to narrow the channels of entry to education for their work by setting specific entry criteria, and by lengthening the time and cost of the education required for entering related jobs. Specific requirements in registration acts may also help protect the groups' jobs from competition by outsiders, thus increasing their industrial bargaining power by manufactured labour shortages.

With the rise of the American and international financial relations that led to the global financial crisis and that also privilege numerical presentation on the pretence that it is scientifically superior to other inquiry, the above debates have been forgotten. Current discussion has shifted to assessing the comparative 'social return' and the 'private return' of spending on human capital investment (education). For example, in a paper for Treasury's current inquiry into Australia's future tax system entitled 'The impact of the tax-transfer system on education and skills in Australia', Andrew Leigh quotes US data:

> 'In trying to set optimal education taxes and subsidies, it is useful to have regard to the literature on social returns to education. This suggests that social returns are present, particularly in the areas of crime (from higher school completion rates) and productivity (from higher university completion rates). However, the best estimates of the size of social returns suggest that in the main they should not be a key driver of policy. By contrast, there is robust evidence that private returns to education are large and significant. Completing year 12 raises gross income by 30% (relative to completing year 10) and completing a bachelor's degree raises gross earnings by 49% (relative to completing year 12). Taking taxes and transfers into account lowers these estimates by 11-15%, but the private gain from human capital acquisition is still substantial.' (p. 5)

The above seems to suggest education is not very functional for society, so governments should not waste much money on it. However, it is good for individuals able to last out the lengthening and costly education race. The current direction appears to be anti-democratic, unfair and distinctly stupid. It is one thing to saddle students with huge loans if they end up in the work that they paid to end up in. Does that happen in Australia?

Historically, the professional has often been distinguished from the worker who must follow orders. The professional is expected to exercise independent judgment and decision making powers autonomously, on the basis of the evidence related to a particular situation, and the authority vested in him or her as a result of being judged expert by professional peers in a particular field of study and its application. From a public interest perspective, the autonomy of the professional is most useful when it promotes his or her ability to increasingly meet the requirements of clients and the community in evidence based ways. Professionals ideally act in evidence-based ways, normally guided by education, experience and codes of ethics, which stress the goals of service to others.

In the past century there has been rapid expansion of industrial production, government regulation and related services, plus development of education to support a widening range of public and private sector operations. Broad and applied education requirements are increasingly seen as necessary for effective service provision in the client and public interest across the board. The global computer network has also massively expanded

opportunities for all to gain appropriate information to guide their actions. Today, many workers claim to be experts in their field, seeking to provide vital, high quality services in the interests of clients and/or a broader public. I do too, for free. A code of ethics is seen as a key management tool in many organizations and occupations. Much recent Australian legislation on development of national standards in health and environment protection and in supporting occupations therefore makes no distinction between the professions and other types of work. The word 'occupation' is used across the board.

Similarities between the aims of professional organizations and trade unions were driven home when a former Liberal coalition government Minister for Health, Michael Wooldridge, himself a medical doctor, referred to the Australian Medical Association as 'a bunch of industrial thugs'. It is difficult to imagine a lawyer demonstrating the public capacity for such honesty, even in jest. The ability for professional associations to pursue their members' interests through control of the market for their services may be far more comprehensive than most trade unions have ever had to pursue the interests of members. It is necessary to design industry structures which treat all occupations fairly and promote more scientific, safer approaches to work while assisting career mobility across the board.

Knowledge and practice of quality management is important in all industries and occupations, as demonstrated by many continuing education and risk management requirements in legislation such as state occupational health and safety acts and in contracts. This is discussed in the attached submission, 'Quality management of contract and other construction matters' made to the Productivity Commission (PC) inquiry into performance benchmarking of business regulation – planning, zoning and development assessments. Quality management involves consultative establishment of work aims and development of systems to ensure work practice is increasingly governed by data driven management to achieve consumer, community and related professional aims. Lawyers are a pre-scientific, pre-democratic profession which rules all others. Dilute them with acid instead of always being so polite to them for Christ's sake, or we will never grow up.

Q. Are the proposed conditions for practicing certificates appropriate to best discern the different types of legal practitioners? Are any additional types of statutory or discretionary conditions necessary?

The Taskforce states '*all lawyers providing legal advice and services (but not legal policy advice) to government agencies and related statutory authorities will be required to hold a practicing certificate. Lawyers employed as in-house council for businesses (corporate lawyers) will also be required to hold practicing certificates* (p. 10). However, I missed clear reference to this apparently new expectation in the draft Law and I understand neither the current nor the newly expected practices as a result of reading it. The Taskforce, on the other hand, points out ACIL Tasman estimates that an estimated 1700 government lawyers that don't currently hold a practicing certificate will be required to have one (p. 3). One assumes this figure is an understated guess. Does the draft Law refer always to one practicing certificate per lawyer or also to other coverage situations? How long does coverage last? What is the pricing rationale for the practicing certificate?

The definitions in the draft Legal Profession National Law refer only to '*compliance'* certificates. Do these relate to the discussion in **Division 2** entitled '**Australian practising certificates**? Section **3.3.4** of Division 2 entitled '**Prerequisites for grant or renewal of Australian practicing certificates** states that '*The Board may grant or renew an Australian practising certificate only if it is satisfied that the applicant:*

(a) is an Australian lawyer; and

(b) *is a fit and proper person to hold an Australian practising certificate* (etc.)

The above statements and what then follows does not clarify practising certificate requirements for me. One assumes they are the key financial issue at the heart of national uniformity. The draft Legal Profession National Law defines '*jurisdiction*' as '*a State or Territory*'. Is this expected to be the only meaning of the term in relation to the award and keeping of practising certificates? Would this be good from industrial perspectives and related product quality and pricing rationales? One assumes the price of certificates is passed on to taxpayers and consumers. Discussion of compliance certificates in **2.2.3** ***Prerequisites for Compliance Certificates*** also seems contradictory and confusing.

The practice of law is typically undertaken according to feudal and authoritarian principles rather than scientific and democratic ones, as demonstrated in my last submission. Proposed conditions for practicing certificates (whatever they are) appear to be mainly the result of lawyers seeking further restraint of trade to enhance their most powerful sectional interests against the interests of all Australians other than their mates. Boxsell (AFR 31.5.10, p.53) points out that the price of practicing certificates pays for legal aid, legal education and other matters that are better borne by government. These issues will be addressed in my next submission on funding, insurance and investment.

In the absence of clear and relevant definitions of work and related hiring practices in the Legal Profession National Law, any proposal designed to increase the number of mandatory practicing certificates, especially if it is as unclear as this one, will naturally encourage all current lawyers employed in government to seek to employ only those with practicing certificates, in case their work and hiring practices are challenged by the people they wish to influence or beat. This will have the added advantage, for all currently employed lawyers, of encouraging the practicing certificate as the required norm. This will be very costly and also compound the current problems lawyers are for the rest of us. (The way they manage our affairs is via their compulsory, very expensive, utter rubbish.)

Thus the feudally inclined rich may typically buy an increasingly lengthy, expensive and suitably restricted education for their offspring in order to ensure the family comfortably maintains its class position as close to the national seats of power and control as possible. Elite universities and the law firms which endow these institutions probably love the Law. However, this direction, especially in regard to practicing certificates, reverses what is necessary for any government which seeks to develop scientifically and democratically to serve its people, rather than to serve the controlling elites who may enrich themselves primarily through their legal and financial relationships, assisted by their family and related educational connexions. One naturally wants practicing certificates abolished.

Q. Should the National Law make provision for advisory committees, or should the composition and functions of such committees be left to the Board to determine? In which subject areas may they be required and what relationships should they have to the Board?

The more relevant information is available to the Board the better, from any scientific and democratic perspectives as distinct from fixed, authoritarian or adversarial ones. The National Law should not make provision for standing committees as such committees may naturally seek to limit the channels through which the Board is informed, to suit the vested interests of committee members or merely to reflect the united members' type of intelligence. The composition and functions of any advisory committees should be left to the Board to determine. However, in this context one recommends the practice of the Productivity Commission and many government inquiries, including this one. These typically produce an issues paper on a matter for consideration and then broadly advertise a related request for advice. All people with an interest in the matter may then respond by email. If courts and ADR practitioners dealt with matters in a similar way, but with more capacity where necessary for compelling written responses, the conceptual focus of all lawyers engaged in the process would be greatly improved at enormous cost reduction. It would also quickly distinguish the comparatively capable and incapable legal performers.

Article 2 of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (ILO 87), states '*Workers and employers, without distinction whatsoever, shall have the right to establish and subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.'* Lawyers or any others may therefore establish themselves as advisory bodies and offer their suggestions to the Board at any time, just as we all may send views to any elected government representatives, acting as individuals or groups. This ensures that those with the responsibility to make decisions may draw from the largest possible range of advice to make the best decisions, as distinct from being at the mercy of a series of privileged old boys' clubs, jealously guarding their feudal right to take Australians backwards expensively. Only openness can ensure that Board decisions are made as a result of consideration of the interests of its key stakeholders, who are all the Australian people, as distinct from as a result of pressure by vested legal or related interests, such as powerful law firms. Welcome to more scientific, democratic, merit based development. (Love and kisses to Microsoft, Google, TV, newspapers, radio and other quality media).

Key Board Concerns: Establish data driven management

Comparatively uniform approaches to data capture are vital for scientific and democratic practice but the Legal Profession National Law appears to have no awareness of this either in its treatment of definitions or elsewhere. The Board will have to consider how best to establish effective data gathering procedures in relation to all dispute resolution processes early in its life. Lawyers currently drive their funding without providing any effective data on the nature of their related work performance, its comparative throughput or outcomes. No doubt many government, private sector and non-profit organizations have already established more comparatively effective data gathering systems related to

dispute classification, treatment, outcome and cost to serve in a scientific and democratic community context which we increasingly hope to inhabit. However, the utility of these is suspect because of the current domination of feudal, authoritarian, costly court practice.

The most obviously qualified people to provide advice on data are the Australian Bureau of Statistics and other experts who understand measurement, especially as it is ideally applied in social or other scientific service provision to industries, regional communities and individuals. Duckett's work on the comparative provision of health care services in the United States and in Australia in terms of the access, equity, quality and cost of service provision was very useful. Superficially, provision of legal and related services appears ideally to take a similar approach to types of disputes in specified communities, as is taken to diagnoses and treatments of the huge variety of bodily complaints in health care systems. Casemix funding structures are applied to promote higher quality handling of illness and injury diagnoses cost-effectively. Such structures deserve further investigation for their application to apparent injuries dealt with in the Law. Insurances for a variety of the risks of practice may then be addressed in clearer, fairer and more integrated ways to prevent further calamity and gain more effective rehabilitation. The management and pricing of risk depends on probability (severity and frequency of risk) and costs of rehabilitation and improvement for the future. Fault is ideally allocated in broadly related regional industry and community contexts. The concept of 'proportionate' in the draft Law Objectives is not defined. Doesn't it relate to the level of force in battle?

Key Board Concerns: Establish key information and related curricula to achieve COAG aims and disseminate it widely in cooperation with relevant industry organizations, media owners and others

The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) advised health ministers to support national actions for safety and quality related to strengthening the consumer voice and learning from incidents, adverse events and complaints. From this professional perspective, dispute resolution should logically be managed as a service, like health or education provision, which aims to provide a lot more information to improve community health and related social or environmental outcomes. To achieve COAG objectives related to social, environmental and economic protection, Board members should seek to understand the key education or training curricula, work and related assessments which currently entitle lawyers and alternative dispute resolution practitioners to gain certificates and practice. In cooperation with relevant industry organizations and interested others, the Board should choose any preferred curricula and/or supporting information, which ideally should be national, and disseminate these educational products widely and free or cheaply in plain English by targeted mass media. Certifications to practice are ideally addressed in related industries and communities.

In this national industry and community context, quality management in any area of practice and related education may best be envisaged as human rights which depend on many clearer, more openly informed, scientific and democratic approaches to work and environment development, rather than on the driving interests of many more narrowly channeled, secretive, stupid and costly approaches to work. Certification to practice,

apparent breaches of good practice, dispute treatment and rehabilitation after problems, are ideally approached in this context. Feudal approaches to law and money have now led closer to perfect ignorance than perfect information, as demonstrated by the unexpected global financial crisis. They have also led to increasing destruction of natural environments, to market instability and to increasing economic, social and environmental inequality rather than market clearing and equal growth. Better data driven management and open information and education are antidotes to more opaque and costly practice. Any approval or certification to represent or practice should be considered in this context.

Key Board Concerns: Establish administration of all dispute resolution as action research to identify comparative performance and outcomes

Risk management is ideally a holistic approach to any work and community risk to promote improvement in social, economic and environmental matters affecting nations, regional groupings and individuals. It is a way of achieving continuous improvement in production and its outcomes. It is a logical and systematic method of identifying, analysis, treating, monitoring and communicating risks associated with any activity, function or process in a way which will enable organizations to minimize losses and maximize opportunities. It begins with the establishment of the strategic, organizational and risk management context in which action occurs. The next step is to identify and analyze risks in order to assess, prioritize and treat them. The final step is to monitor and review performance (AS/NZS 4360 – 1999). The establishment of ADR systems and the identification of their outcomes in comparison with each other and with those of courts may be seen as research, which is also consistent with the views of Popper (1972) that all administration is ideally seen as experiment or action research. This was discussed in the article sent previously, 'A healthier approach to justice and environment development'. A recent submission on the broader ideal context of research and development is attached.

The lack of comparative information about types of dispute, their treatment, and their outcomes is typical of legal practice. The health practitioner gathers evidence of personal problems, records a diagnosis and implements recommended treatment. Ideally this is applied with the variations the practitioner considers necessary in the light of all relevant evidence about the particular case or situation. Ideally, data recording is designed, both nationally and locally, to drive improvements in the quality of all treatment outcomes and to prevent re-injury. Record of typical and atypical patient situations, treatments and outcomes, ideally provides a broad data pool in which diverse situations and practices can be studied, in order to improve all future activity. This quality management approach is broadly relevant to contain service costs in many areas and improve service quality, including by and in dispute resolution. If legal practice is not a community service what is it? Law has a pre-scientific, authoritarian practice which collects little or no data to assist injury prevention, rehabilitation, premium setting or other cost containment in any setting. However, stay away from any 'tick the box' systems that please the illiterate and those who wish to avoid explanation for judgment. They soon become a meaningless pretence conducted by people who like to pretend anything they turn into numbers is scientific.

Key Board Concerns: Develop national and international industry and community relationships to achieve regional, COAG and related UN goals through competitive, quality management approaches to economic, social and environmental matters.

Quality management depends on production, research and education driving each other openly in an iterative process to gain better results for everybody. The attached submission on Australian research and development, including skills for more sustainable development, argues that all are ideally conceptualised to achieve national and regional goals which are social, environmental and economic through public/private and other community partnerships. Elected government representatives should now help identify and try to achieve the prioritized social, environmental and economic goals of regional communities in a way which also preserves natural and other resources for future generations, not just current users, voters or investors. These goals ideally reflect national aims and minimum standards and freedoms in United Nations (UN) instruments as well. Julia Gillard and Robert McClelland, the Attorney-General, want to address human rights education, which is ideally central to the functions of the Board and the Legal Profession National Law. See many supporting directions at www.Carolodonnell.com.au

In related regional and international contexts, consider the National Human Rights Action Plan of China (2009-2010) from the Information Office of the State Council of the People's Republic of China and the '*participatory rapid appraisal'* research and learning project led at Sichuan University in Chengdu Province by Yuan Hong-Jiang, Professor of health promotion, research and the needs of the elderly, and undertaken with European Union support. The research method involves flexible and informal on the spot analysis; undertaken in the community; using knowledge people already have; to build capacity to solve problems and to promote community level work in a way that is faster, cheaper and more accurate than most traditional academic research. Clear and effective project management may be developed upon an easy learning base, as discussed in attachments.

Construction is a key example of a service industry. It is a vital industry with which the Board should establish immediate relationships for future direction, because construction is undertaken in a market environment and logically precedes much later development. It is often based on land and exploits related natural resources in production. It employs many people in work which also has many business, employment and investment risks. Construction affects the community and natural environment by the building process and by what production and environment follows it. Open and good model relations between the Board and key managers in construction can assist direction in all related industries, communities and environments and so appears vital for quality management in Australia.

The quality management of contract and other construction matters for business health and environment development are discussed in an attached and related submission which responded to the current Productivity Commission reviews on Performance benchmarking of business regulation – planning, zoning and development assessments' and on the related education and training workforce. The submission discussed how to remove unnecessary protections for existing businesses from new and innovative competitors, as is required by the PC study on performance benchmarking. It also discusses current and

future supply of the education and training workforce in the context of industry and business performance benchmarking to support quality management and treatment of risk.

The submission argues the construction industry should use the home building contract more effectively and broadly as a model guide to quality management of the job. It should also take an Open University approach to teaching and learning on the job, supported by open curriculum content for key skills development and education, identified in key industry and regional settings and disseminated via videos, TV or other relevant media. This could be set up through the Building the Education Revolution (BER) Implementation Task Force or another construction industry body which will act openly, consultatively and fast. The ideal aim is for industry and its related communities to collectively manage key social, environmental, investment and risk related needs which have been identified in regional communities, together with government and other profit or non-profit investment sources, such as industry superannuation funds. Health, construction, communication and key related industries are well placed to lead the nation in quality management approaches to industry development in cooperation with others, such as COAG. Dispute resolution is ideally conceptualised in related industry contexts.

Chief Justice Spigelman has suggested the UN Commission on International Trade Law (UNCITRAL) Model Law should be adopted as the Australian arbitration law. It seems clear. He argues it would be a workable regime if it were adopted as the domestic Australian arbitration law as this would send a clear message to the international arbitration community that Australia is serious about a role as the centre for international arbitration. He stated that Australian competitors, like Hong Kong or Singapore, do not create a rigid barrier between their domestic and international arbitration systems and that neither should Australia. The Chief Justice also claimed that 'The focus on commercial arbitration as a form of commercial dispute resolution has always offered, but rarely delivered, a more cost effective model of resolution of disputes'. Doug Jones, of the Australian Centre for International Commercial Arbitration, commented that arbitration is still:

> ……..expensive and hugely inefficient, forcing many companies to prefer expert determination – due to a combination of arbitrators failing to insist on processes different to courts, and lawyers…….continuing to insist on intricate pleadings, excessive discovery and prolonged hearings. We need reform to distinguish arbitration from court processes.

The above is the natural outcome of ADR being captured by state registered lawyers, who pursue their own monopoly interests, rather than the interests of the people using ADR, or those of broader Australian communities. In 2009, the NSW Attorney General's (AG) Department produced an 'ADR Blueprint Discussion Paper' which suggested a 'Framework for the delivery of alternative dispute resolution (ADR) services in NSW (April 2009), with the latter managed by the AG Department. This is ideally carried out on a level playing field, not under the domination of courts or their legal lackeys.

Q. Are there additional means by which the role of consumers and consumer advocates in the national regulatory framework could be strengthened?

Many ways to strengthen the role of consumers and consumer advocates in the national regulatory framework have been addressed above. The concept of a 'consumer advocate' is ideally similar to that of a 'consumer representative' in the sense that both ideally seek the truth from broadly holistic perspectives which include their own, rather than merely seeking to advance the sectional interests which they come from, either in spirit or in fact. This perception challenges the normal legal ideal of 'balance' in which every problem or issue is primarily conceptualized as having two sides, which must be equally represented through the lawyers or broadcasters who introduce and direct it for a fair fight to occur. This view of balance in any arena is primarily feudal, rather than democratic or scientific. It is possible to be strongly committed to a group or position while still having the capacity to face an apparent truth, rather than to hide it, lie about it or refuse to explore or change one's mind, in order more strongly to support one's protégées or masters. An advocate should try to be independently honest. Lawyers are more like one eyed savages.

It is the job of the Board to attempt to represent and guide the interests of all Australians broadly by also guiding those who handle complaints or who seek to get their concerns addressed about situations which are often highly emotional for all involved. In this context I have often found the approach of SBS to expressing community standards more reasonable and helpful than that of many others, who often appear to take their lead from lawyers, and who preferably ask no questions some might construe as impolite. This is more like the way to community ignorance and built up resentments, posing as lack of discrimination or something similarly noble. The SBS code contains many statements such as: *'SBS leads the exploration of the real, multicultural Australia and our diverse worlds. This means:*

- *We are a pioneering broadcaster, going places that other broadcasters avoid;*
- *We reflect real, multicultural Australia – contemporary Australia is multicultural and multilingual; and*
- *We explore and connect the diverse cultures and perspectives that make-up the worlds that we live in.'*

The concept of scientific development is crucially important for democratic and sustainable development. However the limitations of narrowly scientific or professional approaches for facing multiple economic, historical, geographic, cultural, emotional and spiritual realities which each Australian person may experience differently from all the others must be faced. Subjective and individual dimensions are ignored at the price of the development of better informed, more democratic and more empathetic understanding of the context and progress towards the UN and national directions which we ideally share.

The Nuremberg Code stated all those involved in research must be properly informed and have the power and moral responsibility for autonomous speech and decision. It may also a useful frame of reference in much dispute resolution. The first principle of the Code states:

> The voluntary consent of the human subject is absolutely essential. …….
> The duty and responsibility for ascertaining the quality of the consent rests upon

> each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to others with impunity.

In relation to resolving any matter in dispute, people should normally be encouraged to speak for themselves by being provided with a social context that they can understand and contribute to effectively. A discussion paper on the protection of human genetic information by the Australian Law Reform Commission and the National Health and Medical Research Council (2003) concluded 'ethical inquiry is consistent with scientific inquiry, in that it is centrally concerned with the kind of procedures or discussions that allow all relevant sources of information and viewpoints on a disputed matter to be taken into account in coming to a decision'. Ethical judgment, like scientific inquiry, is ideally an ongoing activity for all, since community life is continually developing, along with knowledge and related conceptions of truth. This inclusive approach to ethical judgment also requires much greater recognition of the need for the expression and the increasingly informed participation of communities in all service provision. It also requires professional and educational approaches which sympathetically meet the subjectivity of all, including of those preferring to see themselves above the fray gripping those below.

Thank you for the opportunity to make this submission. The next will be on funding.

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