

ADVOCATES' IMMUNITY FROM CIVIL SUIT

SUBMISSION OF THE PUBLIC INTEREST ADVOCACY CENTRE AND THE AUSTRALIAN CONSUMERS' ASSOCIATION

This template is provided to assist you in responding to the Options Paper.

Part A contains general questions. Part B contains more specific questions about the various options for reform and ancillary mechanisms that could be used in conjunction with those options. You may also wish to make further comments or provide additional information on one or more of the options.

PART A: GENERAL COMMENTS

- Please indicate whether in your view the common law immunity for advocates should be:
 - (a) Retained;
 - (b) Abolished; or
 - (c) Modified.

Abolished.

- Please indicate the public policy considerations that you believe are significant. (For example, it might be said that the immunity should be retained in order to ensure that the finality of judgments is not undermined – ie to avoid re-litigation and collateral attack. Other public policy considerations which have been relied upon at various times are discussed in Appendices 1 and 2 to the Options Paper.)

The Public Interest Advocacy Centre (PIAC) and the Australian Consumers' Association (ACA) support the principle expressed in the comments of Justice Kirby in dissent in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.

We firmly support the view of the House of Lords in *Arthur JS Hall v Simons* [2000] 3 All ER 673 in which their Lordships abolished the common law immunity from advocates from civil suit in relation to court activities. We agree with their Lordships' view that there is no longer a justification for advocates to be immune from civil suit in relation to their court activities and, in particular, the comments of Lord Hutton.

Lord Hutton noted that where a person relies on a member of a profession to give them advice or to exercise their professional skills on the person's behalf, the professional should carry out the professional task with reasonable care. If the professional fails to do so and the client suffers loss, the client should be able to seek redress against the professional.

We see no reason to treat the legal profession in any special way and submit that Lord Hutton's 'first principles' approach should apply to legal practitioners.

- Please outline the advantages of your preferred option.

The removal of the immunity makes lawyers, as key agents in the legal system, accountable to their clients in the provision of all aspects of legal services.

It therefore acts as a systemic incentive to provide high-quality advocacy services, that are consistent not only with a legal practitioner's obligations to the court, but further, with his or her duty of care to the client.

It brings the legal profession into line with other professions that already bear liability for negligent or reckless conduct.

It is consistent with the general principle of justice that there should be a remedy to a wrong.

Ultimately, it will inspire greater confidence in the legal system by the general public who may perceive the continuation of the immunity as a measure supported by the legal profession to 'protect its own'.

Further, abolition of the immunity will ensure, in practice, that the risk of incompetent, negligent or reckless professional work by an advocate is not borne by the unlucky client but spread across all clients of lawyers through the insurance system.

- Please outline the disadvantages of the alternative approaches.

PIAC and the ACA recognise that, by creating an additional liability for legal practitioners who provide advocacy services, it is possible that professional indemnity insurance premiums will increase. This is a consequence of shifting the risk of loss as a result of negligent, reckless or incompetent advocacy to lawyers, their insurers and thus, ultimately, to all users of legal services.

If this should occur, it may well have an impact on Community Legal Centres (CLCs), and Aboriginal Legal Services (ALSs) and similar providers of low cost or free legal services. PIAC and the ACA note that CLCs do not undertake a great deal of advocacy work in situations where negligent advocacy is likely to give rise to substantial loss. PIAC and ACA nevertheless note that CLCs are underfunded and that any additional regulatory burden or cost will be likely to reduce their ability to continue to provide free legal services to the most disadvantaged and marginalised members of the community.

PIAC and the ACA are concerned to ensure that CLCs be protected from any such effect. However, we do not propose that CLCs ought to be exempted from the liability. We propose that in the event that CLC professional indemnity insurance costs increase as a result of the abolition of the advocates' immunity, the funding formula administered by the Legal Aid Commission be amended to incorporate any additional direct or indirect professional indemnity insurance costs that may arise as a result of removing the immunity.

PIAC and the ACA also note that there is a possibility that insurance costs will increase for the private profession. To the extent that this increases the prices that lawyers charge to their clients, this is a consequence of spreading the risk and in our view would be an acceptable price to pay for the reduced risk that an unlucky individual client should bear a large and unfair loss.

- Please indicate whether you consider that any of the ancillary mechanisms outlined in the Options Paper would be useful operating in conjunction with your preferred option.

We do not have useful comments to make on these proposals.

Finally, PIAC and ACA note that the Options Paper provides a detailed analysis of the issues. We do not have the resources currently to provide a more detailed response and so will not complete Part B of the Submission Template. However, PIAC and the ACA would welcome the opportunity to participate in any working group or subsequent dialogue between the Attorneys General, the legal profession and the broader community.

PART B: DETAILED COMMENTS

Option 2 – Abolishing the immunity:

1. What are the key risks associated with abolishing the immunity?

2. Do you consider that the risk of re-litigation and unmeritorious collateral attack is significant? What are the practical concerns?

3. Can these be addressed?

4. Is re-litigation against the public interest even where a claim of negligence has substance?

5. Do the risks suggest a different approach for civil and criminal proceedings?

6. Should ancillary mechanisms work in conjunction with the right of a litigant to bring proceedings against the advocate? If so, would the mechanisms described in the Options Paper be useful? Are they practicable? Would other ancillary mechanisms be available? Additional issues relating to possible ancillary mechanisms are set out at *Questions 24-32*.

7. If the immunity is abolished, is this likely to affect the conduct of proceedings in court? Will it have any impact on access to justice?

8. Do you wish to comment on the experience of overseas jurisdictions where the immunity has been abolished or has never applied?

9. What practical considerations would be relevant if the immunity was abolished?
In particular:
- Would there be a likely impact on professional indemnity insurance?
 - Are the rules of civil procedure in your jurisdiction adequate, having regard to the issues discussed at paragraphs 87-89 of the Options Paper?
 - Do you wish to comment on issues in relation to the standard of care?
 - Do you wish to comment on issues of causation?
10. Are there other issues that are relevant to the question of whether to abolish the immunity?
11. Please provide any further comments or information you consider relevant.