1. Introduction to the Inquiry

Contents

Background

1.1 On 10 May 2010 the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to explore options to improve the practical operation and effectiveness of discovery of documents in proceedings in federal courts.

1.2 The Inquiry was initiated following a recommendation in the report of the Australian Government Attorney-General's Department's Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System.*[1] The underlying premise for this Inquiry is that the costs of discovery, which can be very high, may inhibit access to justice and generate, in addition, an undue public cost.

Access to Justice Taskforce

1.3 The Strategic Framework developed by the Access to Justice Taskforce included the following 'Access to Justice Principles': accessibility; appropriateness; equity;

1 Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Rec 8.2.

efficiency; and effectiveness.[2] A key objective was 'ensuring that the cost of and method of resolving disputes is proportionate to the issues':

> Cost can be a significant barrier to justice. The cost to disputants and the cost to Government of resolving disputes should be proportionate to the issue in dispute.
>
> Adequate information about costs is essential in assessing proportionality. The provision of greater information regarding the costs of the justice system allows better identification of the most appropriate pathway to resolution and, in particular, whether litigation is the most appropriate course.[3]

1.4 Case management was identified as critical in addressing proportionality of costs: 'Case management of litigation will help to ensure that costs incurred are directed to resolving the dispute, and limit costs from collateral actions'.[4]

Managing Justice

1.5 In the report, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC Report 89 (2000), the ALRC had pointed similarly to the importance of control through case management:

> In almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control.[5]

1.6 While noting that discovery is 'an essential litigation tool', enabling parties to obtain information relevant to their own and the other party's cases and to request other parties to produce relevant documents,[6] the ALRC considered that discovery has proved problematic in practice, leading to consequential increases in costs:

> Problems with discovery result from party responses to discovery requests. Parties may obstruct or subvert disclosure, refusing to provide or destroy or conceal relevant documentation which might have assisted the other side. In some circumstances the party requesting discovery is 'fishing'—seeking disclosure of significant numbers of documents, perhaps with the intention of creating sufficient aggravation or embarrassment to encourage settlement, or hoping to uncover material which will remedy a weak case or lead to new causes of action. In other instances, parties volunteer vast numbers of documents, not to be helpful and cooperative but as a mechanism to hide a single incriminating document which might now be lost in the detail. The discovery process is used strategically by parties. Such tactics can result in significant costs, involve repeated interlocutory hearings and be very time consuming.[7]

1.7 One law firm contributing to the *Managing Justice* inquiry submitted that '[i]n large scale commercial litigation, it is our experience that there is no interlocutory process more in need of reform than discovery'.[8]

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2 Ibid, 62–63.
3 Ibid, 64.
4 Ibid, 64.
5 Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System*, Report 89 (2000), [6.67].
6 Ibid, [6.67].
7 Ibid, [6.68].
8 Ibid, [6.68], citing Arthur Robinson & Hedderwicks, *Submission 189*.

Other inquiries and reports

1.8 Other inquiries that have been of assistance to the ALRC include: the review of the rules and principles governing the costs of civil litigation in England and Wales conducted by Lord Justice Jackson in 2008–2009;[9] the report of the National Alternative Dispute Resolution Advisory Council (NADRAC) in 2009, including consideration of the greater use of alternative dispute resolution (ADR) as an alternative to civil proceedings and during the court or tribunal process;[10] the review of the civil justice system in Victoria by the Victorian Law Reform Commission (VLRC) in 2006–2008;[11] the report of the British Columbia Civil Justice Reform Working Group in 2006;[12] the report for the Chief Justice of Hong Kong in relation to reforms to civil proceedings of the High Court and the District Court of Hong Kong in 2004;[13] and the review and consolidation of civil procedure in England and Wales conducted by Lord Woolf in 1994–1996.[14] The key principles for reform considered in these inquiries are summarised below.

Review of Civil Litigation Costs

1.9 In November 2008, the then Master of the Rolls, Sir Anthony Clarke, appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations in order to promote access to justice at proportionate cost.

1.10 Commencing on 1 January 2009, Lord Jackson's preliminary report was published on 8 May 2009,[15] identifying relevant issues for consideration during an extensive consultation period to follow. Among the topics covered, with some illustrative examples,[16] were:

- the basic facts—how much civil litigation there is, and what lawyers earn;[17]
- research and consultation into costs—academic studies, views of court users and stakeholders, and statistical data;[18]
- the funding of civil litigation—legal aid, before or after the event insurance, third party funding, conditional fee agreements ('no win, no fee'), and contingency fees;[19]

9 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009).
10 National Alternative Dispute Resolution Advisory Council (NADRAC), *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).
11 Victorian Law Reform Commission, *Civil Justice Review*, Report 14 (2008).
12 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006).
13 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004).
14 Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995).
15 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009).
16 As summarised in Judicial Communications Office (UK) 'Lord Justice Jackson publishes preliminary findings of his civil litigation cost review' (Press Release, 8 May 2009) <www.judiciary.gov.uk>.
17 R Jackson, *Review of Civil Litigation Costs: Preliminary Report* (2009), pt 2.
18 Ibid, pt 3.
19 Ibid, pt 4.

- fixed costs—assessing the present regime;[20]
- personal injuries litigation;[21]
- other specific types of litigation—such as consumer claims, housing claims, environmental claims, defamation proceedings and collective actions;[22]
- controlling the costs of litigation—e-disclosure, case management, cost capping and cost management;[23]
- regimes where there is no cost shifting—small claims and employment tribunals;[24]
- the assessment of costs by the court;[25] and
- a review of costs systems in other countries—including Australia.[26]

1.11 The final report was published on 21 December 2009 and set out a coherent package of interlocking reforms, designed to reduce litigation costs and to promote access to justice. The report's key findings and recommendations[27] include:

- proportionality—the costs system should be based on legal expenses that reflect the nature and complexity of the case;[28]
- success fees and after the event insurance premiums to be irrecoverable in 'no win, no fee' cases (conditional fee agreements), as these are the greatest contributors to disproportionate costs;[29]
- to offset the effects of this for claimants, general damages awards for personal injuries and other civil wrongs should be increased by 10%;[30]
- referral fees—fees paid by lawyers to organisations that 'sell' damages claims but offer no real value to the process—should be scrapped;[31]
- qualified 'one way costs shifting'—claimants will only make a small contribution to defendant costs if a claim is unsuccessful (as long as they have behaved reasonably), removing the need for after the event insurance;[32]
- fixed costs to be set for 'fast track' cases (those with a claim up to £25,000) to provide certainty of legal costs;[33]

20 Ibid, pt 5.
21 Ibid, pt 6.
22 Ibid, pt 7.
23 Ibid, pt 8.
24 Ibid, pt 9.
25 Ibid, pt 10.
26 Ibid, pt 11.
27 As summarised in Judicial Communications Office (UK) 'Jackson Review calls for a package of reforms to rein in the costs of civil justice' (Press Release, 14 January 2010) <www.judiciary.gov.uk>.
28 R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), chs 3, 35.
29 Ibid, chs 9, 10.
30 Ibid, ch 10.
31 Ibid, ch 20.
32 Ibid, chs 9, 19.
33 Ibid, ch 16.

- establishing a Costs Council to review fixed costs and lawyers' hourly rates annually, to ensure that they are fair to both lawyers and clients;[34]
- allowing lawyers to enter into contingency fee agreements, where lawyers are only paid if a claim is successful, normally receiving a percentage of actual damages won;[35] and
- promotion of 'before the event' legal insurance, encouraging people to take out legal expenses insurance, for example as part of household insurance.[36]

The Resolve to Resolve (NADRAC)

1.12 On 13 June 2008, the Australian Government Attorney-General wrote to NADRAC requesting that it enquire into and identify strategies to remove barriers to justice and to provide incentives for greater use of ADR as an alternative to civil proceedings and during the court or tribunal process. The letter of reference asked NADRAC to provide advice on strategies for litigants, the legal profession, tribunals and courts, as well as initiatives the Government might take, including legislative action.[37] In particular, NADRAC was asked to consider:

- whether mandatory requirements to use ADR should be introduced;
- changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process;
- the potential for greater use of ADR processes and techniques by courts and tribunals, including by judicial officers; and
- whether there should be greater use of private and community-based ADR services and how to ensure that such services meet appropriate standards.[38]

1.13 In response to its Issues Paper, released on 26 March 2009, NADRAC received over 60 submissions from federal and state government departments and agencies, ADR providers, courts, tribunals and individuals. The report, *The Resolve to Resolve: Embracing ADR to improve access to justice in the federal jurisdiction,* was delivered in September 2009. It identifies strategies to remove barriers to justice and provide incentives for greater use of ADR in the federal civil justice system.

Civil Justice Review (Victorian Law Reform Commission)

1.14 In May 2004, the Victorian Attorney General, the Hon Rob Hulls MP, issued a 'Justice Statement' outlining directions for reform of Victoria's justice system. One objective was the reform of the rules of civil procedure in order to streamline litigation processes, reduce costs and court delays, and achieve greater uniformity between different courts.

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34 Ibid, ch 6.
35 Ibid, ch 12.
36 Ibid, ch 8.
37 National Alternative Dispute Resolution Advisory Council, *ADR in the Civil Justice System: Issues Paper* (2009), [1.3].
38 Ibid, [1.4].

1.15 On 4 September 2006 the Attorney General asked the VLRC to provide broad-ranging advice about civil justice reform. The Terms of Reference asked the commission to identify, among other things, 'the key factors that influence the operation of the civil justice system, including those factors that influence the timeliness, cost and complexity of litigation'.

1.16 The final report, *Civil Justice Review*, VLRC Report 14 (2008), was launched on 28 May 2008. The report suggests areas for future law reform and identifies changes which will reduce the cost, complexity and length of civil trials.

Effective and Affordable Civil Justice (British Columbia Justice Review Task Force, Civil Justice Reform Working Group)

1.17 In November 2006, the British Columbia Civil Justice Reform Working Group produced the report, *Effective and Affordable Civil Justice*. The Working Group was formed to 'explore fundamental change to British Columbia's civil justice system from the time a legal problem develops through the entire Supreme Court litigation process'.[39]

1.18 The report provides three key recommendations.[40] The first recommendation involves the establishment of a 'central hub' to provide information, advice, guidance and other services required to assist people in solving their own legal problems. The second recommendation is that parties personally attend a case planning conference before they actively engage the civil justice system beyond initiating or responding to a claim. The case planning conference would seek to address settlement possibilities and processes, and also seek to narrow the issues and determine procedural steps and deadlines for the conduct of litigation in the event that settlement is not possible.

1.19 The third recommendation has eight components and proposes a complete rewriting of the Supreme Court Rules. The Working Group recommended that the proposed rules:

- create an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality;
- abolish the current pleading process and instead adopt a new case initiation and defence process that requires the parties to accurately and succinctly state the facts and the issues in dispute and to provide a plan for conducting the case and achieving a resolution;
- limit discovery, while requiring early disclosure of key information;
- limit the parameters of expert evidence;
- streamline motion practice;
- provide the judiciary with power to make orders to streamline the trial process;

39 British Columbia Justice Review Task Force, Civil Justice Reform Working Group, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), Executive Summary.

40 Ibid, viii.

- consolidate all three regulations regarding the Notice to Mediate into one rule under the Supreme Court Rules; and
- provide opportunities for litigants to quickly resolve issues that create an impasse.[41]

Civil Justice Reform (Hong Kong Chief Justice's Working Party)

1.20 In February 2000, a Working Party was appointed by the Chief Justice of Hong Kong

> to review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed.[42]

1.21 After publication of an Interim Report and Consultative Paper in November 2001, a final report, *Civil Justice Reform*, was released on 3 March 2004.[43] It set out 150 recommendations in respect of the reforms to be introduced to civil proceedings of the High Court and the District Court of Hong Kong. These reforms came into effect on 2 April 2009, the underlying objectives of which are:

(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to civil proceedings before the Court;

(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;

(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;

(d) to ensure fairness between the parties;

(e) to facilitate the settlement of disputes; and

(f) to ensure that the resources of the Court are distributed fairly.[44]

Access to Justice (Lord Woolf's Report)

1.22 In 1994, the Lord Chancellor of Great Britain instructed the Master of the Rolls, Lord Woolf, to report on options to consolidate the existing rules of civil procedure in England and Wales. On 26 July 1996, Lord Woolf published his *Access to Justice Report* in which he identified a number of principles which the civil justice system should meet in order to ensure access to justice. According to Lord Woolf's Report, the system should:

(a) be just in the results it delivers;

(b) be fair in the way it treats litigants;

(c) offer appropriate procedures at a reasonable cost;

(d) deal with cases with reasonable speed;

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41 Ibid, vi.

42 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *Civil Justice Reform: Final Report* (2004), [1].

43 Ibid.

44 Hong Kong Special Administrative Region Government, *Civil Justice Reform* (2009) <www.civiljustice.gov.hk/eng/home.html> at 5 November 2010.

(e) be understandable to those who use it;

(f) be responsive to the needs of those who use it;

(g) provide as much certainty as the nature of particular cases allows; and

(h) be effective: adequately resourced and organised.[45]

1.23 The report was accompanied by draft rules of practice designed to implement Lord Woolf's principles by:

- setting out a detailed fast track procedure for cases up to £10,000, with a maximum timetable of 30 weeks;
- recommending guideline maximum legal costs at the top of the fast track of £2,500, excluding disbursements;
- proposing the use of pre-action protocols to encourage a more cooperative approach to dispute resolution and promote fair settlements, avoiding litigation wherever possible; and
- making detailed proposals to increase access to justice in key areas of litigation (medical negligence, housing, multi-party actions and judicial review).[46]

Themes

1.24 As a brief introduction to the key themes articulated throughout this Consultation Paper and informing the Inquiry, this section summarises the underlying rationale and development of the doctrine of discovery and provides a distillation of the tensions that are evident throughout.

Rationale

1.25 As noted by Professor Camille Cameron and Jonathan Liberman, discovery has 'a long history in common law systems', and its centrality to the fact-finding and decision-making processes 'have long been recognised'.

> The primary aim of discovery is to ensure that litigants disclose to each other all relevant, non-privileged documents, whether that disclosure helps or hurts their respective cases, so that they will know the case they have to meet and judges will have the evidence they need to do their job effectively.[47]

1.26 The doctrine of discovery derives from early Chancery practice.[48] The responsibility of providing discovery was described in a leading 19th century text on the subject, by Edward Bray:

> However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows,

45 Lord Woolf, *Access to Justice: Final Report* (1996), Overview, [1].

46 Lord Chancellor's Department (UK), 'Access to Justice—Lord Woolf's Final Report' (Press Release, undated, June 1996).

47 C Cameron and J Liberman, 'Destruction of Documents Before Proceedings Commence—What is a Court to Do?' (2003) 27 *Melbourne University Law Review* 273, 274.

48 Although its origins can be traced to civil law: Ibid, 276.

> believes or thinks in relation to the matters in question ... In fact, one of the chief purposes of discovery is to obtain from the opponent an admission of the case made against him.[49]

1.27 Bray explained that a party was entitled to discovery for the following purposes:

> to ascertain facts material to the merits of his case, either because he could not prove them, or in aid of proof and to avoid expense; to deliver him from the necessity of procuring evidence; to supply evidence or to prevent expense and delay in procuring it; to save expense and trouble; to prevent a long enquiry and to determine the action as expeditiously as possible; whether he could prove them *aliunde* or not; to facilitate proof or save expense.[50]

1.28 Common law processes were much more limited, and the methods for getting the evidence of facts in issue before the courts were 'most rudimentary'.[51] Equity helped 'to combat the rigidity of the law', in particular by coming to grant discovery in aid of proceedings on the common law side.[52]

> In chancery ... discovery was of the very essence of the bill. Every bill for relief in equity was, in reality, a bill for discovery.[53]

1.29 The key elements of Chancery's discovery procedure, as described by Bray, were to facilitate fact-finding, to save time and to reduce expense. The modern law of discovery reflects the same rationale:

> The truth-seeking purposes of discovery in the Court of Chancery continue to be a cornerstone of the modern discovery process. In addition to this truth-seeking function, early commentaries and cases show that parties were entitled to discovery in order to avoid the expense and delay that would result if they had to look for the documents themselves. Inclusion of discovery in the post-*Judicature Acts* rules of civil procedure was intended to reflect and advance the philosophy behind the Judicature Acts, especially to simplify procedure, to avoid trial by ambush and to increase the prospect of a court deciding a matter on the merits rather than on a technicality. Among the potentially beneficial attributes of the modern common law discovery process are: it assists the parties to prepare for trial; it facilitates settlement; it can (but often does not) reduce time and expense and provide relief for overcrowded court dockets; it may result in narrowing the issues in dispute; and it 'may prevent a party being taken by surprise at trial and enable the dispute to be determined upon its merits rather than by mere tactics'.[54]

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49 E Bray, *The Principles and Practice of Discovery* (1885), 1.

50 Ibid, 1–2.

51 W Holdsworth, *A History of English Law* (3rd ed, 1945), vol v, 281. William Blackstone identified such limitations as among the 'defects' of the common law, and specifically listed 'the want of a compulsive power for the production of books and papers belonging to the parties', and the significance of such evidence in 'mercantile transactions': W Blackstone, *Commentaries on the Laws of England* (1768), vol iii, 382–383.

52 W Holdsworth, *A History of English Law* (3rd ed, 1945), vol v, 332.

53 E Bray, *The Principles and Practice of Discovery* (1885), 5.

54 C Cameron and J Liberman, 'Destruction of Documents Before Proceedings Commence—What is a Court to Do?' (2003) 27 *Melbourne University Law Review* 273, 277–278.

1.30 The underlying rationale of fairness, even within the context of litigation which is adversarial, was identified by Lord Donaldson MR in *Davies v Eli Lilly & Co* in describing the nature of the right to seek discovery:

> The right is peculiar to the common law jurisdictions. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have *all* the relevant information, it cannot achieve this object.[55]

1.31 In the contemporary context the rationale of discovery as reflected in its history, noted above, is captured in s 37M of the *Federal Court of Australia Act 1976* (Cth), which articulates the 'overarching purpose' of civil practice and procedure in the Court:

> (1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
>
> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.
>
> (2) Without limiting the generality of subsection (1), the overarching purpose includes the following objectives:
>
> (a) the just determination of all proceedings before the Court;
>
> (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
>
> (c) the efficient disposal of the Court's overall caseload;
>
> (d) the disposal of all proceedings in a timely manner;
>
> (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.
>
> (3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

Tensions

1.32 There are several areas of tension that present challenges in this Inquiry. These arise between policy objectives, parties involved in civil litigation before federal courts, as well as with respect to the professional obligations owed by lawyers. For example, there is an inherent tension between the party requesting discovery, who seeks to ascertain facts material to the case, and the party giving discovery, who bears the burden of retrieving, reviewing and disclosing documents in response to discovery requests. This tension is reflected particularly in Chapter 3, which discusses the practice and procedure of discovery in federal courts.

55 *Davies v Eli Lilly & Co* [1987] All ER 801, 804.

1.33 There is also a tension between the key obligations owed by a lawyer, specifically between a lawyer's duty to a client—to represent and protect the best interests of a client—and the overarching duty to the court in the interests of the administration of justice. In a broader sense a tension also arises between the drive to reduce the public costs of justice through a reduction in the time that litigation occupies the courts and the right of a litigant to pursue their rights to achieve justice under the law.

1.34 There is also an overarching challenge that, as information technology has developed, so too has the exponential growth and storage of documents in an electronic format. This has required, in part, the development of document management policies and practices to respond to the voluminous nature of information capture. This creates a tension in practice between appropriate and legitimate destruction of documents in accordance with a document management system or policy, and the deliberate destruction of documents aimed at removing documents from the jurisdiction of the court.

1.35 The task in this Inquiry is to develop proposals and ultimately recommendations for reform that balances these tensions fairly and practically. The key tensions noted in this section are developed further throughout the chapters in this Consultation Paper and will inform the consultation process to follow.

Scope of the Inquiry

Terms of Reference

1.36 The Terms of Reference are reproduced at the beginning of this Consultation Paper. The ALRC is directed to consider four main issues:

- the law, practice and management of the discovery of documents in litigation before federal courts;
- ensuring that cost and time required for discovery of documents is proportionate to the matters in dispute;
- to limit the overuse of discovery, reduce the expense of discovery and ensure key documents relevant to the real issues in dispute are identified as early as possible; and
- the impact of technology on the discovery of documents.

1.37 In identifying law reform options to improve the practical operation and effectiveness of discovery of documents, the ALRC is directed to have regard to:

- alternatives to discovery;
- the role of courts in managing discovery, including the courts' case management
- powers and mechanisms to enable courts to better exercise those powers in the context of discovery;

- implications of the cost of discovery on the conduct of litigation, including means to limit the extent to which discovery gives rise to satellite litigation and the use of discovery for strategic purposes;
- costs issues, for example cost capping, security for discovery costs, and upfront payment; and the sufficiency, clarity and enforceability of obligations on practitioners and parties to identify relevant material as early as possible.

Matters outside the Inquiry

1.38 The term 'discovery' is often used in the context of civil court procedure to refer to the various ways in which one party to litigation is able to obtain information and documents held by other parties. It can encompass processes by which parties disclose relevant documents to their opponents and make those documents available for inspection. It may also encompass processes enabling one party to ask the other a series of questions, known as 'interrogatories', which the party under interrogation is required to answer, usually on oath or affirmation. The questions are designed to obtain admissions and again to apprise the interrogating party of the case to be met at trial.

1.39 In some jurisdictions, discovery may extend to documents in the possession of third parties. For example, under Order 15A rule 8 of the *Federal Court Rules* (Cth), the court may order that a person who is not a party, and appears to be in possession of any document which relates to any question in the proceeding, disclose the document to the party seeking discovery.

1.40 It is possible for an applicant to use discovery to assist in identifying potential respondents to a proceeding. In this context, discovery is 'preliminary' in the sense that it is obtained before a proceeding for substantive relief is commenced, and is intended to facilitate the commencement of such a proceeding. For example, Order 15A rule 3 of the *Federal Court Rules* provides specific procedures for persons to attend court for oral examination or to produce documents, for the purposes of identifying the proper respondent.

1.41 Moreover, there are several other procedures available under court rules which, although not strictly encompassed by the term 'discovery', further assist in defining the issues in dispute and obtaining evidence for trial. These include: procedures for the inspection and testing of property;[56] rules which facilitate the obtaining and tendering of expert evidence;[57] procedures which assist a party to obtain admissions from an opposing party prior to trial;[58] and the use of the subpoena process to compel the attendance of persons to give evidence at the trial or to produce documents either pre-trial or at the trial.[59]

1.42 The Terms of Reference limit the ALRC's Inquiry to the discovery of documents in litigation before the federal courts. The ALRC is therefore primarily concerned with the disclosure of documents for inspection by one party to another party in proceedings for substantive relief conducted in a federal court. Other discovery

56 *Federal Court Rules* (Cth) O 17 r 1.
57 Ibid O 10 r 1(xv).
58 Ibid O 18 r 2.
59 Ibid O 27A r 2.

procedures—such as interrogatories, preliminary discovery, discovery from non-parties or other means of obtaining information relevant to a proceeding—are not the central focus of this Inquiry.

1.43 However, consideration of options to improve the practical operation and effectiveness of discovery of documents in substantive proceedings may prompt discussion of discovery in its broader sense. For example, the ALRC has been asked to give particular consideration to alternatives to the discovery of documents. Where discovery, other than the exchange of documents between parties, is considered in this Consultation Paper, it is noted at relevant points.

Terminology

1.44 In this Consultation Paper, the terms 'discovery' and 'disclosure' are used on occasion to distinguish between different procedural requirements for the exchange of documents between parties to civil litigation, as explained below.

Disclosure

1.45 The term 'disclosure' is used to describe an obligation, falling on a party to proceedings, to provide documents to another party, which applies independently of any action by the other party and is not contingent on any orders or directions from the court. For example, the *Family Law Rules 2004* (Cth) impose a general duty of disclosure on the parties to a family law dispute, from the start of pre-action procedures for the case.[60] Outside of the family law context, in a number of other jurisdictions, parties may be obliged to disclose documents without any requirement for another party to request disclosure or the court to make such orders. For example, in Queensland, South Australia and the Northern Territory, parties are required to disclose documents within a certain number of days after the close of pleadings.[61]

Discovery

1.46 The term 'discovery' is used to describe the obligation imposed upon a party when another party to the proceeding requires that party to give discovery of documents, usually by filing and serving on that party a notice requiring discovery. In particular, the process of 'discovery' may involve the party requiring discovery to obtain orders of the court to serve a notice of discovery. For example, in the Federal Court, the obligation to making discovery is triggered by the service of a notice, with leave of the Court, pursuant to O 15 r 1 of the *Federal Court Rules*.

Lawyer

1.47 The term 'lawyer' is used for the purposes of this Inquiry to include—consistently with s 117 of the uniform *Evidence Acts*—barristers, solicitors and, unless specifically stated, lawyers with or without a current practising certificate.

60 *Family Law Rules 2004* (Cth) r 13.01.

61 *Uniform Civil Procedure Rules 1999* (Qld) Ch 7; *Supreme Court Civil Rules 2006* (SA) ch 6 pt 3; *Rules of the Supreme Court of the Northern Territory of Australia* (NT) O 29.

Legal ethical obligations

1.48 The term 'legal ethical obligations' is used in this Consultation Paper to reflect that ethical and legal rules relating to discovery practice are not mutually exclusive. It is used as an expression to refer to the more general professional and ethical duties placed on lawyers, over and above those specifically developed to govern legal practice, acknowledging the distinction often made between rules that are professionally binding on a lawyer—ethical rules—and rules that are legally binding—legal rules.

Organisation of this Consultation Paper

1.49 This Consultation Paper concisely addresses the questions set out in the Terms of Reference. It is divided into five chapters. This chapter provides an introduction to the Inquiry, including the background to the Inquiry, other relevant inquiries and a description of the reform process.

1.50 Chapter 2, Legal Framework for Discovery in the Federal Courts, considers the obligation on a party to discover documents to another party and the range of documents discoverable in civil proceedings in the federal courts. The chapter raises issues about the need for court control over the availability of discovery and limitations on the ambit of discovery in the federal courts. Legislative provisions, court rules, practice notes and significant cases dealing with the discovery of documents are also discussed.

1.51 Chapter 3, Discovery Practices and Procedures in the Federal Courts, examines civil practice and procedure for the discovery of documents in proceedings before the federal courts. Issues about the cost of a discovery process and its proportionality, in terms of the value of the documents sought in the context of the litigation, are explored. In particular, the use of technology in the process of discovering electronically-stored information is considered and the need for strong case management of the discovery stage in litigation are considered.

1.52 Chapter 4, Ensuring Professional Integrity: Practitioner Obligations and Discovery, consists of two parts. The first part begins with a discussion of the key sources of legal ethical obligations in Australia. It then examines the nature and extent of alleged discovery abuse and professional misconduct, including identifying the key legal ethical obligations such conduct breaches, using illustrative examples. A range of proposals are discussed aimed at pre-emptively avoiding such abuse and misconduct. The enforceability of ethical obligations through court and disciplinary procedures is also discussed. The first part of the chapter also examines the role and nature of legal obligations in a changing legal environment, in particular electronic discovery and the applicability of obligations outside traditional courtroom processes. The second part of the chapter examines existing educational requirements in relation to the legal ethical obligations owed by lawyers. It proposes a new approach to the education of lawyers in this area and highlights the need for cultural change.

1.53 Chapter 5, Alternatives to Discovery, considers pre-action protocols, pre-trial oral examinations and other processes that encourage early settlement, and the

narrowing of the issues in dispute prior to the commencement of litigation. The chapter draws on recent works by other law reform bodies, as well as practices and procedures in overseas jurisdictions.

Process of reform

Consultation processes

Advisory Committee

1.54 It is standard operating procedure for the ALRC to establish an expert Advisory Committee to assist with the development of its inquiries.[62] In this Inquiry, the Advisory Committee includes judges, senior officers of Australian Government agencies, academics and senior lawyers.

1.55 The Advisory Committee met for the first time on 19 August 2010, and will meet at least once more during the course of the Inquiry to provide advice and assistance to the ALRC. The Advisory Committee has particular value in helping the ALRC to identify the key issues, as well as in providing quality assurance in the research and consultation effort. The Advisory Committee will also assist with the development of reform proposals as the Inquiry progresses. However, the ultimate responsibility for the Report and recommendations remains with the Commissioners of the ALRC.

Community consultation and participation

1.56 Under the terms of its constituting Act, the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[63] One of the most important features of ALRC inquiries is the commitment to widespread community consultation—a hallmark of best practice law reform.[64]

1.57 The nature and extent of this engagement is normally determined by the subject matter of the reference. Areas that are seen to be narrow and technical tend to be of interest mainly to experts. Some ALRC inquiries—such as those relating to the protection of human genetic information, privacy and family violence—involve a significant level of interest and involvement from the general public and the media.

1.58 To date, consultations for this Inquiry have been held with a number of government agencies, academics, judges and members of the legal profession. The ALRC is based in Sydney but, in recognition of the national character of the Commission, consultations are conducted around Australia during inquiries, dependent on the nature of the matter under consideration and budget. Any individual or organisation with an interest in meeting with the Inquiry in relation to matters raised in this Consultation Paper is encouraged to contact the ALRC. A list of consultations is included as Appendix 1.

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62 A list of Advisory Committee members can be found in the List of Participants at the front of this Consultation Paper.

63 *Australian Law Reform Commission Act 1996* (Cth) s 38.

64 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005) 202.

1.59 There are several ways in which those with an interest in this Inquiry may follow its progress and participate. Individuals and organisations may express an interest in the Inquiry by contacting the ALRC by phone or email, or they can subscribe to the Inquiry e-newsletter via the website <www.alrc.gov.au>. Free download of consultation documents is available via the website, and those who wish to receive a free CD-ROM of the consultation documents may request them via an online web form, or by phone.

1.60 In this Inquiry the ALRC is producing a regular e-newsletter to keep stakeholders informed about progress on a regular basis, with a calendar of stakeholder consultations or other key events in the upcoming month, as well as a summary of consultations and other work in the past month, and links to relevant media releases, publications and other materials, such as the Access to Justice Taskforce's report. Each e-newsletter also links to the Inquiry blog, noted below. Any individual or organisation with an interest in the inquiry is encouraged to subscribe (via the ALRC website) to receive the e-newsletter, which is then delivered directly to their inbox.

1.61 For the duration of this Inquiry the ALRC is hosting a blog at http://talk.alrc.gov.au/. The blog offers interested stakeholders insight into particular issues the ALRC is considering as it conducts its review, and enables public discussion of those issues. The invitation to comment on blog posts is open to all. Individuals and organisations may also make written submissions to the Inquiry.

1.62 Finally, the ALRC maintains an active program of direct consultation with stakeholders and other interested parties, as well as including regular briefings to key staff in the Australian Government Attorney-General's Department.

Written submissions

1.63 With the release of this Consultation Paper, the ALRC invites individuals and organisations to make submissions in response to the specific questions and proposals, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.64 There is no specified format for submissions and they may be marked confidential if preferred. The ALRC prefers electronic communications and submissions, and strongly encourages stakeholders to make use of the online submission form available on the ALRC website. However, the ALRC will gratefully accept anything from handwritten notes to detailed commentary and scholarly analyses on relevant laws and practices. Even simple dot-points are welcome. Submissions will be published on the ALRC website, unless they are marked confidential.[65]

1.65 The ALRC appreciates that tight deadlines for making submissions places considerable pressure upon those who wish to participate in ALRC inquiries. Given the deadline for delivering the final report to the Attorney-General at the end of March 2011, and the need to consider fully the submissions received in response to this Consultation Paper, all submissions must be submitted on time—by **Wednesday 19 January 2011**.

65 Submissions provided only in hard copy might not be published on the website.

1.66 It is the invaluable work of participants that enriches the whole consultative process of the Commission's inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

> In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this Consultation Paper must reach the ALRC by **Wednesday 19 January 2011**.
>
> The ALRC encourages stakeholders to use the online submission form available at <www.alrc.gov.au/inquiries/discovery>.
>
> Submissions not marked confidential will be published on the ALRC website.

Stop Press—National Legal Profession Taskforce Interim Report

1.67 When this Consultation Paper was in press, as part of the National Legal Profession Reform Project the National Legal Profession Reform Taskforce, established by the Australian Government Attorney-General, at the request of the Council of Australian Governments, released its Interim Report on key issues and funding.[66] In May 2010, the National Legal Profession Taskforce released its draft National Law and National Rules for a three-month consultation period.[67] The National Law and National Rules are considered in Chapter 4 of this Consultation Paper. The proposals in the Interim Report were not available for consideration at the time of writing and will be considered in the Final Report in this Inquiry.

66 National Legal Profession Reform Taskforce, *Interim Report on Key Issues and Funding* (2010).
67 National Legal Profession Reform Project, *Legal Profession National Law: Consultation Draft* (2010).