



Australian Government
Productivity Commission

Access to Justice Arrangements

Productivity Commission Draft Report

April 2014

This is a draft report prepared for further public consultation and input. The Commission will finalise its report after these processes have taken place.

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

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Opportunity for further comment

You are invited to examine this draft inquiry report and comment on it by written submission to the Productivity Commission, preferably in electronic format, by **21 May 2014**, and/or by attending a public hearing.

Public hearing will commence on **2 June 2014**, with the venues to be advised. For those participating in the public hearings, the Commission would appreciate receiving advance copies of submissions or a brief summary of the main discussion points at least **2 working days** prior to the relevant hearing date.

The final report will be prepared after submissions have been received and public hearings have been held, and will be forwarded to the Australian Government in September 2014.

Further information on how to provide a written submission or register your attendance at the public hearings (as a participant or an observer) is available on the inquiry website: www.pc.gov.au/projects/inquiry/access-justice.

Commissioners

For the purposes of this inquiry and draft report, in accordance with section 40 of the *Productivity Commission Act 1998* the powers of the Productivity Commission have been exercised by:

Dr Warren Mundy

Presiding Commissioner

Angela MacRae

Commissioner

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

Terms of reference

I, David Bradbury, Assistant Treasurer, pursuant to Parts 2 and 3 of the Productivity Commission Act 1998, hereby request that the Productivity Commission undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law.

Background

The cost of accessing justice services and securing legal representation can prevent many Australians from gaining effective access to the justice system. For a well-functioning justice system, access to the system should not be dependent on capacity to pay and vulnerable litigants should not be disadvantaged.

A well-functioning justice system should provide timely and affordable justice. This means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level. A justice system which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs.

Scope of the Inquiry

The Commission is requested to examine the current costs of accessing justice services and securing legal representation, and the impact of these costs on access to, and quality of justice. It will make recommendations on the best way to improve access to the justice system and equity of representation including, but not limited to, the funding of legal assistance services.

In particular, the Commission should have regard to:

1. an assessment of the real costs of legal representation and trends over time
2. an assessment of the level of demand for legal services, including analysis of:
 - a. the number of persons who cannot afford to secure legal services but who do not qualify for legal assistance services, and
 - b. the number of pro bono hours provided by legal professionals

-
3. the factors that contribute to the cost of legal representation in Australia, including analysis of:
 - a. the supply of law graduates and barriers to entering the legal services market
 - b. information asymmetry
 - c. other issues of market failure
 - d. the structure of the legal profession in State and Territory jurisdictions
 - e. legal professional rules and practices
 - f. court practices and procedures
 - g. models of billing practices
 - h. the application of taxation laws to legal services expenditure, and
 - i. other features of the legal services market which drive costs
 4. whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute
 5. the impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services, including analysis of:
 - a. the ability of disadvantaged parties, including persons for whom English is a second language, to effectively self-represent, and
 - b. the extent to which considerable resource disparity impacts on the effectiveness of the adversarial system and court processes
 6. the economic and social impact of the costs of accessing justice services, and securing legal representation
 7. the impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes
 8. alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these, including analysis of the extent to which the following could contribute to addressing cost pressures:
 - a. early intervention measures
 - b. models of alternative dispute resolution
 - c. litigation funding
 - d. different models of legal aid assistance
 - e. specialist courts or alternative processes, such as community conferencing
 - f. use of technology, and
 - g. expedited procedures

-
9. reforms in Australian jurisdictions and overseas which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system, and
 10. data collection across the justice system that would enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these.

The Commission will report within fifteen months of receipt of this reference and will consult publicly for the purpose of this inquiry. The Commission is to provide both a draft and final report, and the reports will be published.

David Bradbury
Assistant Treasurer

[Received 21 June 2013]

Draft

Acknowledgments

The Commission acknowledges the assistance of the South Australian court system, which allowed the inquiry to survey users of South Australian courts.

This paper uses unpublished data from the Legal Australia-Wide Survey (LAW Survey). This survey was undertaken by the Law and Justice Foundation of New South Wales, and more details of the survey are provided in Coumarelos et. al (2012). The Commission acknowledges the Foundation for providing the survey data for use in the inquiry report; any errors in its use are solely the responsibility of the Commission.

The Commission acknowledges data provided by Comcare, the NSW Costs Assessment Scheme and a number of other stakeholders who provided useful information about litigation costs to the inquiry.

Finally, the Commission is particularly grateful to everyone who has given freely of their time to discuss with it the very wide range of matters canvassed in the terms of reference and looks forward to continuing that engagement through the hearing process and as the Commission finalises its report.

Disclosure of interests

The Productivity Commission Act 1998 specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions during an inquiry they must disclose the interests.

Dr Warren Mundy has advised the Commission that he is a Fellow of the Australian Institute of Company Directors and that he has not been involved in any way with the preparation of that organisation's submission to this Inquiry.

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Abbreviations and explanations

Abbreviations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACAT	ACT Civil and Administrative Tribunal
ACCC	Australian Competition and Consumer Commission
ADR	alternative dispute resolution
AFAs	alternative fee arrangements
AGD	Commonwealth Attorney-General's Department
AIJA	Australasian Institute of Judicial Administration
ALA	Australian Lawyers Alliance
ALRC	Australian Law Reform Commission
ALSWA	Aboriginal Legal Service of Western Australia
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
ATSILS	Aboriginal and Torres Strait Islander legal services
CALD	culturally and linguistically diverse
CIJ	Centre for Innovative Justice
CJC	Community Justice Centre
CLCs	community legal centres
CLE	community legal education
CLSIS	Community Legal Service Information System
CLSP	Community Legal Services Program
COAG	Council of Australian Governments
COAT	Council of Australasian Tribunals
DIISR	Department of Innovation, Industry, Science and Research

DoJ	Department of Justice
EIU	Early Intervention Unit
FDR	family dispute resolution
FTE	full-time equivalent
FVPLS	family violence prevention legal services
FWC	Fair Work Commission
HCLC	Hunter Community Legal Centre
HPL	Henderson Poverty Line
ILNP	Indigenous Legal Needs Project
IRIS	Indicator Reporting Information Service
LACs	legal aid commissions
<i>LAW Survey</i>	Legal Australia-Wide Survey
LECS	legal expenses contribution scheme
LEI	legal expenses insurance
LJF	Law and Justice Foundation
MRT	Migration Review Tribunal
NAAJA	North Australian Aboriginal Justice Agency
NACLC	National Association of Community Legal Centres
NADRAC	National Alternative Dispute Resolution Advisory Council
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NLA	National Legal Aid
OECD	Organisation for Economic Co-operation and Development
OLSC	Office of Legal Services Coordination
PC	Productivity Commission
PCO	protective costs order
PIAC	Public Interest Advocacy Centre
PILCH	Public Interest Law Clearing House
QCAT	Queensland Civil and Administrative Tribunal
QPILCH	Queensland Public Interest Law Clearing House
RLC	Redfern Legal Centre

RRR	regional, rural and remote
RRT	Refugee Review Tribunal
RTA	Road Traffic Accident
SMLS	Springvale Monash Legal Service
SRL	self-represented litigant
SSAT	Social Security Appeals Tribunal
TIO	Telecommunications Industry Ombudsman
VCAT	Victorian Civil and Administrative Tribunal
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission

Explanations

Billion	The convention used for a billion is a thousand million (10 ⁹).
Findings	<i>Findings in the body of the report are paragraphs highlighted using italics, as this is.</i>
Recommendations	<i>Recommendations in the body of the report are highlighted using bold italics, as this is.</i>
Requests for further information	<i>Information requests are paragraphs highlighted using italics, as this is.</i>
Meaning of ‘civil law’	<i>In this report, the term ‘civil law’ is used broadly and includes family law matters. It excludes criminal law matters.</i>

OVERVIEW

Key points

- There are widespread concerns that Australia's civil justice system is too slow, too expensive and too adversarial. But the notion of a civil justice 'system' is misleading. Parties can resolve their disputes in many ways, including through courts, tribunals and ombudsmen. Each differs in its formality, cost and timeliness. Such a complex system resists both a single diagnosis and remedy.
- While much focus is on the courts, and they are the central pillar of the justice system, much is done in the shadow of the law — knowledge of what might happen if a dispute ends up in court prompts many to resolve their disputes privately.
- Where disputes become intractable, parties have recourse to a range of low cost and informal dispute resolution mechanisms. But many people have difficulty in identifying whether and where to seek assistance — they either take no action or seek help from inappropriate sources.
- Providing people with basic information so that they can resolve their disputes privately and helping people connect with less formal mechanisms, such as ombudsmen, could significantly reduce the level of unmet legal need.
- Most parties require professional legal assistance in more complex matters. But the interests of lawyers and their clients do not always align — clients need to be better informed and have more options for selecting the tasks they want assistance with, and how they will be billed. Clients should also have independent and effective options for redress when professional standards fall short.
- Some disputes, by their nature, are more appropriately handled through the courts. While these disputes may be small in number, many individuals are poorly placed to meet the associated costs. Court processes in all jurisdictions have undergone reforms to reduce the cost and length of litigation. But progress has been uneven and more needs to be done to avoid unnecessary expense.
- The way in which parties interact with each other and with courts and tribunals also needs to change. The adversarial behaviour of parties and their lawyers can hinder the resolution of disputes or even exacerbate them. Changes to rules governing the conduct of parties and lawyers, and the way in which costs are awarded, would improve incentives to cooperate. Parties derive significant private benefits from using the court system; these benefits need to be reflected in court charges.
- Disadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes. Governments have a role in assisting these individuals. Numerous studies show that government funded legal assistance services generate net benefits to the community.
- Funding arrangements constrain the capacity of legal assistance providers to direct assistance to the areas of greatest benefit. This needs to change and, in some cases, funding needs to be redirected.
- More resources and more efficient and effective practices by legal assistance providers are required to better meet the legal needs of disadvantaged Australians.

Overview

The role of this inquiry

The Commission has been asked to undertake an inquiry into Australia's system of civil dispute resolution with a view to constraining costs and 'promoting access to justice'. There are many definitions of 'access to justice'. As Justice Sackville observed:

Like other catchphrases, such as 'fairness' and 'accountability' (if not 'democracy' itself), the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people. (2002, p. 19)

For the purposes of this inquiry, the Commission has used the term 'access to justice' to simply mean, 'making it easier for people to resolve their disputes'.

The complexity of the civil justice system makes it difficult to assess and design policies to improve accessibility and constrain costs. There is no civil justice 'system' in the way that we conceive of the criminal justice system. Rather, a range of options exist for parties who cannot resolve their disputes privately. These include the federal, state and territory courts, statutory tribunals and a proliferation of government and industry ombudsmen (figure 1). A growing number of organisations and individuals offering alternative dispute resolution services also form part of the civil justice mix. Each dispute resolution mechanism has its own process, which varies in formality, cost and timeliness.

Disputes span a wide range of areas and involve a variety of parties, or as Genn puts it, 'comprise a rag-bag of matters and participants':

There are disputes relating to the performance or non-performance of contracts involving businessmen suing each other, individuals suing businesses, and businesses suing individuals. There are claims for compensation resulting from accidental injury in which individuals sue institutions. There is the use of the courts by lenders who realize their security by evicting individual mortgage defaulters. Civil justice also involves attempts by citizens to challenge decisions of central and local government bureaucrats, a rapidly growing field that includes immigration, housing, mental health, child welfare, and the like ... Finally, there are the acrimonious and often heartbreaking struggles between men and women following the breakdown of family relationships as property and children become the subject of legal dispute. (1997, p. 160)

Figure 1 **The three major dispute resolution mechanisms: an overview**
2012-13

	Ombudsmen	Tribunals	Civil courts	
Number of institutions/ providers	73 Ombudsmen - National: 22 - States: 40 - Industry: 11	57 Tribunals - Commonwealth: 11 - States general: 4 - States specialist: 42	43 Courts - Commonwealth: 4 - States general: 21 - States specialist: 18	
Nature of service	- Receive and resolve complaints - Conduct inquiries into individual or systemic cases	- Administrative review - Civil dispute resolution - Binding decision	- Judicial dispute resolution - Binding decision - Some courts provide 'in-house' alternative dispute resolution services	
Volume of matters	Total 773 000 - Commonwealth: 267 000 - States: 150 000 - Industry: 356 000	Total 373 000 - Commonwealth: 71 000 - States general: 130 000 - States specialist: 172 000	Total 673 393 - Magistrates: 420 144 - District: 28 214 - Supreme: 28 309 - Probate: 65 787 - Federal: 5 277 - Family: 33 120 - Federal Circuit: 92 542	
Costs for disputant	No costs	- Tribunal fees - Expert fees - Cost of attendance - If represented - lawyers' fees	- Court fees - Lawyers' fees - Counsel fees - Expert fees - Cost of attendance - Risk of adverse costs award	
Funding arrangements	Cwlth	\$235 million	\$244 million	\$309 million
	States	\$137 million	\$229 million	\$517 million
	Industry	\$111 million	--	--

Differences in the personal resources and capabilities of users, and their perceptions about the system also influence accessibility. As the Law Council of Australia explained:

The ‘effective access’ enjoyed by individuals necessarily depends on a range of factors, including geographic location, economic capacity, health, education, cultural and linguistic variations, formal and informal discrimination, and other variable factors. (sub. 96, p. 28)

This inquiry has been prompted in large part by concerns that the civil justice system is too slow, too expensive, too complicated and too adversarial — these concerns have been reflected in many of the submissions received. While this might describe some aspects of the system, such broad based characterisations fail to capture the diversity and indeed strengths of Australia’s civil justice system.

The importance of a well-functioning civil justice system

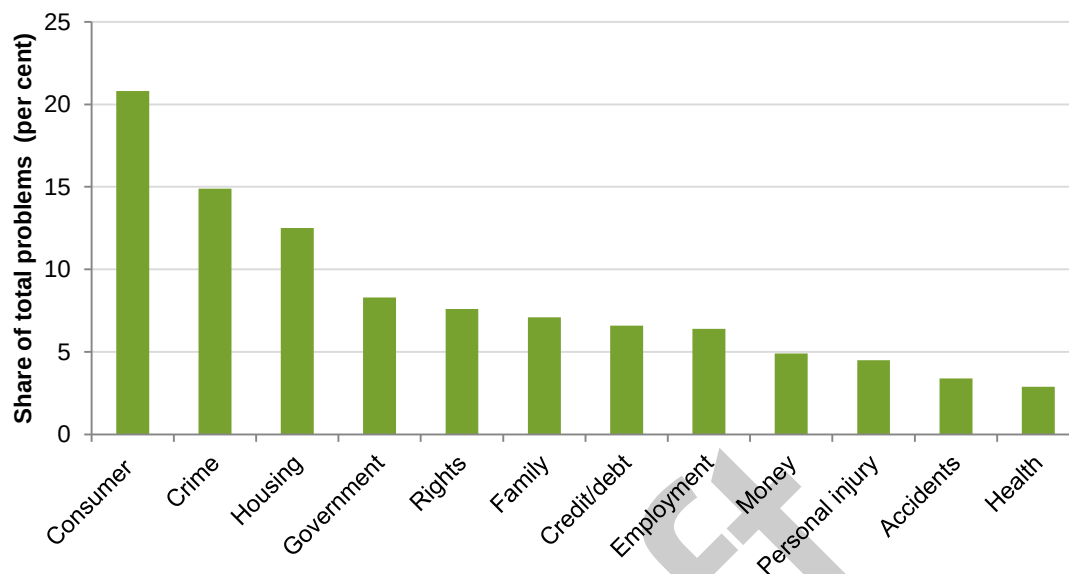
Civil disputes impact on a great many people

Civil disputes are relatively common. According to the most recent comprehensive survey of legal need, undertaken by the Law and Justice Foundation in 2008, close to half of respondents experienced one or more civil legal problems (including family law matters) over a 12 month period. The most prevalent problems related to consumer matters, housing and dealings with government (figure 2). By comparison, around 15 per cent of respondents experienced a criminal problem.

Legal problems were concentrated among a minority of respondents. Of those who experienced at least one civil problem, around 10 per cent accounted for more than half of those legal problems (figure 3).

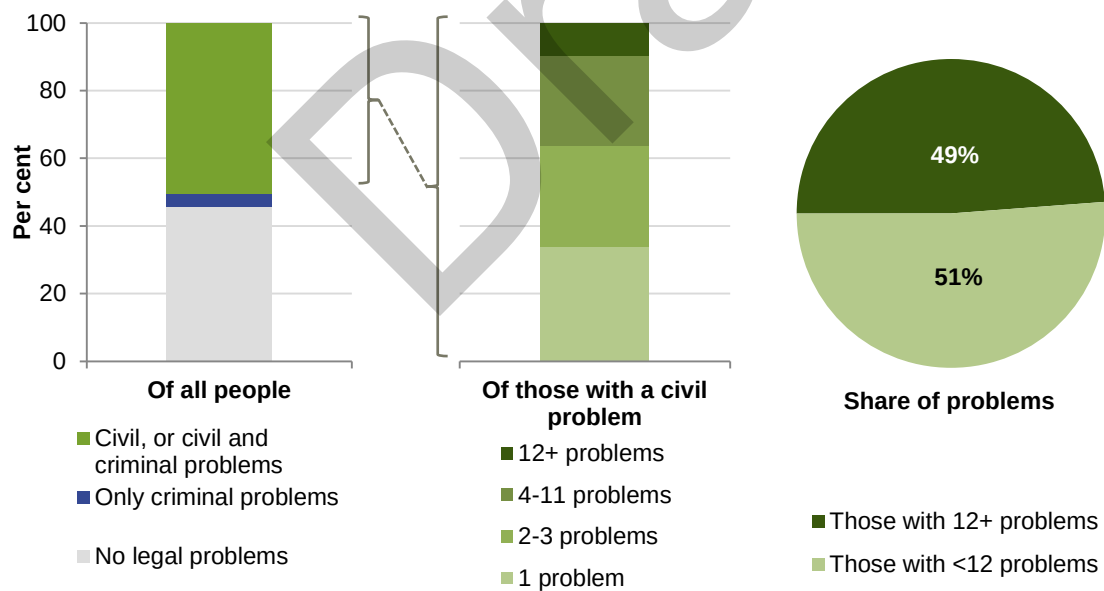
Many of the disputes experienced by individuals were substantial in nature. More than half of respondents who experienced at least one civil problem (including family law problems), considered the problem had a ‘severe’ or ‘moderate’ impact on their everyday life. Family disputes, including disputes relating to child custody and maintenance, were much more likely to be considered substantial (figure 4).

Figure 2 Composition of legal problems faced by Australians



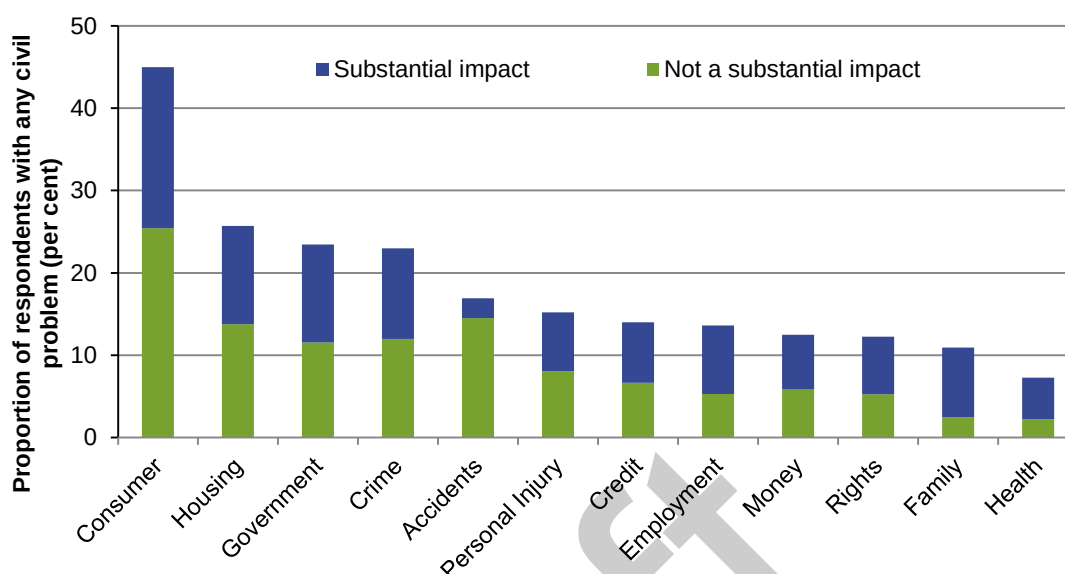
Data Source: Coumarelos et al. (2012).

Figure 3 The composition and concentration of legal problems



Data Source: Commission estimates based on unpublished LAW Survey data.

Figure 4 Prevalence of problems and severity



Data Source: Commission estimates based on unpublished LAW Survey data.

The role of government and private parties

The civil justice system exists to provide parties — be they individuals, business or other entities — with a means for asserting their legal rights and resolving their disputes.

But a well-functioning civil justice system serves more than just private interests — it promotes social order, and communicates and reinforces civic values and norms. A well-functioning system also gives people the confidence to enter into business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia’s economic performance.

To achieve these social and economic benefits, governments play an important role by providing the broad institutional framework for the civil justice system. Governments, through parliaments, make the law, and establish and provide funding for the courts, tribunals and statutory ombudsmen. They also set down the nature of disputes that these bodies will adjudicate and the rules that they will operate under.

The decisions of these bodies influence what occurs ‘outside the courtroom’ by providing a framework within which parties can privately determine their rights and responsibilities — sometimes referred to as bargaining in the ‘shadow of the law’. Knowledge about what might happen if a dispute ends up in court facilitates

voluntary (or at least non-judicial) resolution of many disputes that arise. Indeed, disputes are far more likely to be resolved privately than through courts or tribunals.

Working out which problems to tackle

There are a wide range of factors that undermine the performance of the civil justice system and the ability of parties to resolve their disputes efficiently and effectively. Poorly informed and equipped consumers, the subjective nature of legal services, the capacity of parties to bear risk, and the restriction of activities to particular individuals and institutions all impact on the functioning of the system.

The Commission has focused its attention on problems that — either by themselves, or in concert with other problems — impact significantly on the functioning of the civil justice system and, without government intervention, are likely to go unresolved. The Commission has considered whether the wellbeing of the community is likely to be improved in weighing up the range of possible responses to these problems.

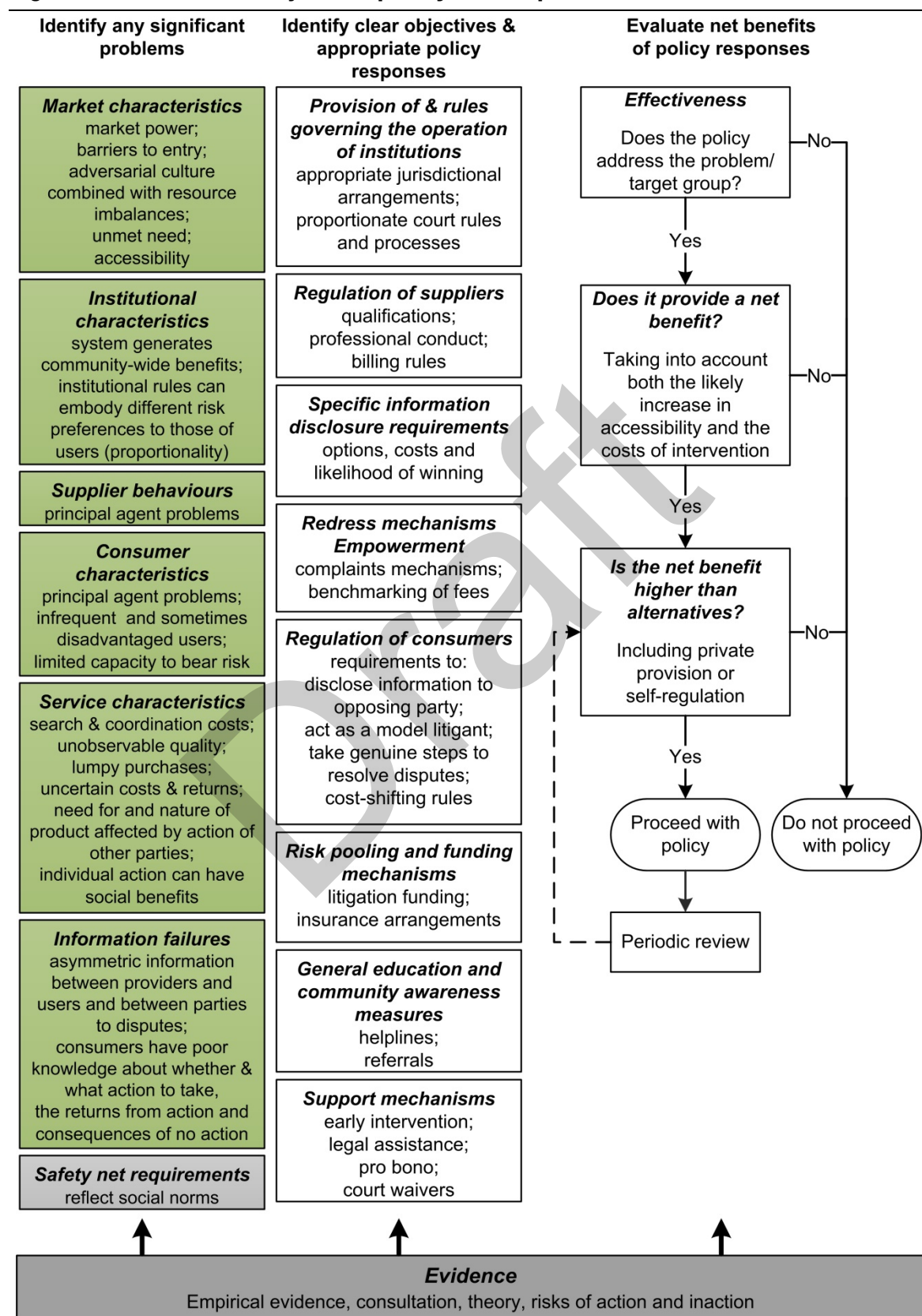
But improving the wellbeing of the community does not imply that all legal needs are met. In a world where funding is not constrained, government intervention to address legal needs would be justified where the benefits exceed the costs, taking into account the opportunity cost of the funds (the alternative use to which the funds would have gone). However, in a budget constrained environment, funding must be allocated to those activities that deliver the greatest benefit relative to their costs. That is, funding must be allocated efficiently.

The Commission has identified a number of measures to improve the accessibility of both the informal and formal aspects of the civil justice system. Even so, there will still be some circumstances in which the system will remain out of reach — either due to the nature of the dispute or the disadvantage faced by parties. Hence, the Commission has also examined:

- how consumers might be better equipped to deal with large and unexpected legal costs
- how best to assist disadvantaged Australians to access justice.

The framework the Commission has employed for considering how to improve the accessibility of the civil justice system is depicted in figure 5.

Figure 5 Access to justice policy development considerations



Problems common to informal and formal aspects

Many parties encounter a common set of problems regardless of whether they seek to resolve their disputes informally, such as through private mediation or ombudsmen, or through formal mechanisms such as tribunals and courts.

Consumers lack knowledge about whether and what action to take ...

Many people have difficulty identifying whether their problems have a legal dimension, and if so, whether and where to seek assistance. Experience is not readily transferable. For example, experience with a dispute about a faulty product leaves parties none the wiser about how to handle a family law dispute.

Interactions with the civil justice system often occur at times of personal stress — a family break up, as a defendant in a claim, following a traumatic injury or the financial failure of a business. Understandably, many turn to family and friends or other trusted parties such as doctors for advice. But for a great many, this is the only advice they seek. As a consequence, some parties are poorly informed about their legal rights and have little guidance about the practical steps they can take to resolve their disputes.

A lack of knowledge about whether and what action to take contributes to unmet legal need. The Commission's preliminary estimates suggest that around 17 per cent of people with a substantial civil problem take no action, or only consult an inappropriate adviser.¹

Disadvantaged individuals, such as those on government income support payments, many Aboriginal and Torres Strait Islander people, and people with disabilities, find navigating the system particularly difficult. They are less likely to take action, and more likely to rely on inappropriate sources of advice when they do.

A range of private and publicly funded providers seek to address these information shortfalls by offering services such as telephone advice lines and websites. But the lack of coordination among providers means that information and advice services (including those that attract government funding) are often duplicated and lack visibility.

Information about where to refer parties with legal problems needs to be simple and widely known. The Commission considers that each state and territory should have a single, widely recognised contact point for legal assistance and referral. Each

¹ These estimates are based on unpublished *Legal Australia-Wide Survey* data (see chapter 2).

service should be responsible for providing free telephone and web-based legal information within the jurisdiction, and should have the capacity to provide basic advice for more straightforward matters. They should also refer clients to other appropriate legal services where necessary such as local or specialist services. The *LawAccess* model in NSW provides a working template.

These services should prove effective in assisting those people who have the ability to resolve their own legal problems if provided with appropriate information and given some direction. However, disadvantaged Australians are likely to require additional assistance.

... and they find it hard to shop around for legal services

While many disputes can be resolved with some basic information and direction, where parties do need to engage the services of a private legal professional, they find it hard to shop around for services. The irregular need for services, combined with different billing arrangements and service offerings on the part of providers, means comparing services can be difficult and often inconclusive.

Even where consumers are given a ‘headline’ price, the Commission has heard that the ‘devil is in the detail’ with some consumers failing to understand key determinants of cost. While all jurisdictions require lawyers to provide cost estimates, some estimates have become impenetrable and have left consumers no better informed. Once consumers have engaged a lawyer, they still face significant uncertainty, since lawyers can and (sometimes unavoidably) do revise their cost estimates during the dispute resolution process.

The difficulties faced by consumers in shopping around for services (and switching lawyers should they prove dissatisfied) have contributed to consumers not being able to fully appropriate the benefits of an increase in the supply of lawyers in recent years. Making information available on the average costs that consumers might expect to pay when engaging a lawyer (by area of law and jurisdiction) would help reduce the uncertainty over legal fees that many consumers face — addressing a critical asymmetry of information between lawyer and client.

Placing an onus on lawyers to ensure that their clients understand upfront cost estimates (and any major changes to those estimates in the course of an engagement) would help address current problems with cost disclosure arrangements.

Consumers of legal services can find it hard to judge quality ...

The complicated nature of many legal services means that consumers find it difficult to judge the quality of the services they receive. Reputation can be important in solving this problem. Some consumers of legal services can gather information on the quality of lawyers through repeat transactions, while large corporations can rely on in-house legal advice to assess the quality of externally sourced services. But these options are not available to one-off users of legal services, such as many smaller businesses and individuals.

One way of overcoming problems with judging service standards is to provide all consumers with some assurance of a base level of quality, including through entry restrictions to the legal profession and professional conduct rules. These work relatively well, though a balance is required to ensure that restrictions intended to protect consumers do not act as barriers to entry. The Commission considers that there is scope to relax some restrictions and instead rely on economywide regulation in areas such as advertising and indemnity insurance.

A second response is to provide consumers with an avenue for recourse when quality falls short. Given the disparity in information and expertise between lawyer and client, dispute mechanisms need to be consumer friendly and robust. Some complaints bodies have relatively limited powers to investigate and discipline practitioners such as in relation to own-motion investigations. There is scope for some jurisdictions to expand the disciplinary and investigative powers of their complaints bodies, while maintaining an appropriately graduated approach to complaints.

... and whether services make them better off

Consumers not only lack the ability to judge when lawyers fail to provide services of a sufficient quality, they also have poor information about whether lawyers are over-investing in quality or quantity (providing gold-plated services).

Indeed, a number of factors encourage lawyers to do just that. For example, lawyers have a duty to their clients. While intended to overcome quality issues, this duty can create perverse incentives, with risk-averse lawyers ‘leaving no stone unturned’. Duties to clients can also mean that lawyers are less inclined to offer assistance for discrete tasks. Further, some billing arrangements reward inputs rather than outcomes — faced with the incentive of time-based billing, lawyers might take action of limited benefit to their client.

While the Commission does not consider it appropriate to limit time-based billing or indeed any other pricing structure, it considers that lawyers must be obliged to make clients aware of alternative billing arrangements. These obligations should operate in conjunction with obligations on lawyers to only seek remuneration for ‘fair and reasonable’ costs.

Big potential gains from early and informal solutions

Some individuals are deterred from pursuing action for fear that the process will prove too slow and costly. One third of individuals who chose not to act on a substantial legal problem cited a belief that it would be too costly as a reason for inaction. A similar share thought it would take too long.² These fears need not be realised. Parties have at their disposal an increasing number of low cost and timely informal mechanisms to help resolve disputes.

Ombudsmen provide a pathway for those concerned about costs

Many common disputes, such as those with telecommunications providers, banks and government agencies can be dealt with by industry and government ombudsmen. Ombudsmen mediate outcomes between parties and conduct investigations where necessary, obviating the need for legal representation. Complainants face no, or very low costs — government and industry typically pick up the tab, at around \$650 per dispute. Ombudsmen resolve matters quickly — 80 per cent of matters are resolved within one month and 97 per cent within two months.

Better directing people to ombudsmen (and other low cost and informal dispute resolution mechanisms), could significantly reduce the level of unmet legal need. But many ombudsmen (in particular those with specialised functions) tend not to be visible to those who might require their services. Creating a common registry, and requiring industry and government to inform dissatisfied complainants of their availability, would help to improve the visibility of these services.

Such measures could lead to a sizeable increase in caseload, and while ombudsmen are free of charge, they are not costless. Costs are ultimately passed to consumers (in the case of industry ombudsmen) and taxpayers (in the case of government ombudsmen). To the extent that complaints are an indicator of systemic issues — such as poor billing and communication practices — the level of disputation is

² Respondents could nominate more than one reason in the *LAW Survey*.

likely to fall over time as industry and government agencies internalise the costs of, and subsequently seek to remedy, poor practices. Even so, it is important that parties face incentives to resolve disputes in the most efficient manner possible.

Industry ombudsmen already face such incentives — members pay fees calculated according to the number of complaints received and the stage at which they were resolved. In contrast, government departments and agencies face relatively weak incentives both to avoid disputes, and encourage ombudsmen to respond in an effective and efficient manner.

There are measures that could be taken to mimic industry-type incentives for disputes involving governments. For example, large government agencies could be required to contribute to the cost of ombudsmen disputes to which they are a party.

Alternative dispute resolution can be effective, but not for all

Alternative dispute resolution (ADR) encompasses a broad range of facilitatory, advisory and determinative processes whereby parties can resolve disputes with the assistance of an impartial practitioner. These techniques are increasingly being recognised as a way for people to resolve disputes without recourse to traditional trial and hearing processes. ADR offers a number of advantages, including cost and time savings, provided both sides are willing to constructively engage in the process. In cases that already involve courts and tribunals, ADR can be used to narrow the issues in dispute and so minimise hearing times and avoid significant costs.

The Commission considers that there are a number of areas where there is potential to better target and encourage ADR use. In the context of court and tribunal proceedings, ongoing reforms are required to ensure that referrals to ADR occur in all appropriate cases and in ways that seek to tailor the form of ADR to the nature of the dispute.

Governments — be they Commonwealth, state, territory or local — are often party to disputes. Despite good results when deployed, ADR is not widely used by government bodies, save for a few key departments and agencies. Where ADR has been used successfully by government agencies, it has often been underpinned by the use of a dispute resolution plan. There would be benefit in all government agencies finalising and releasing tailored dispute resolution plans and employing ADR more extensively. The dispute resolution plan developed by the Australian Tax Office provides a template. This should be a priority for agencies involved in relatively common disputes, such as disputes over government benefits and licence

approvals. The Commission has previously identified ADR as a useful way for resolving local government regulatory disputes.

While ADR has proved effective in some circumstances, the Commission recognises that it is not an appropriate mechanism for resolving all disputes. Its use must be accompanied by safeguards that allow for litigation if settlement cannot be reached.

Problems in the formal system cast a long shadow

Governments, in granting courts and tribunals exclusive jurisdiction over some activities, have a responsibility to ensure these institutions operate as efficiently and effectively as possible. There are a number of improvements that could be made.

Tribunals have been accused of creeping legalism

Tribunals are responsible for a wide range of disputes, including administrative law matters, civil disputes and guardianship and anti-discrimination cases. They are intended to provide a low cost alternative to the courts by creating a forum where self-representation is the norm, and where parties generally bear their own costs irrespective of the outcome. Indeed, many tribunals include objectives around timeliness and cost in their enacting legislation. As the Council of Australasian Tribunals (COAT) noted:

Most tribunals operate under statutory exhortations to be quick, economical and inexpensive while observing principles of natural justice and procedural fairness. (sub. 98, p. 5)

However, some participants in this inquiry expressed concerns about ‘creeping legalism’ — with tribunals being seen by users as increasingly formal bodies. As the Springvale Monash Legal Service (SMLS) commented:

Tribunals are promoted as a user friendly, cost and time effective option in the dispute resolution process. SMLS believes that whilst this was the initial intention of the tribunal jurisdiction there has been a drift away from this ethos. (sub. 84, p. 9)

The use of legal representation is thought to be contributing to this process with some representatives conducting themselves as if they were in court. Some stakeholders have expressed concerns that lawyers are also bringing an adversarial tone to proceedings.

Where legal representation is used it increases the costs incurred by parties. A study undertaken by the Victorian Small Business Commissioner of small businesses

using Victoria's Civil and Administrative Tribunal found that the average cost of legal representation was just over \$8000. This was in addition to other costs such as staff time and travel.

Legal representation is already restricted in a number of tribunals and some stakeholders have advocated stronger enforcement of these restrictions. The Commission considers that some restrictions on representation in tribunals are appropriate and should be enforced more strictly.

However, the Commission also accepts that some degree of representation is inevitable and indeed desirable. For example, where representation would facilitate the identification and resolution of the issues, or where it might be required to facilitate fairness and equity, such as in specialist tribunals dealing with adult guardianship and mental health issues.

In cases where representation might genuinely be required, the Commission considers that representatives should be required to support the objectives of the tribunals in which they appear. This was recommended by the Administrative Appeals Tribunal (AAT):

The AAT's view is that there would be value in making explicit in its governing legislation not only the responsibilities of the AAT but also the responsibilities of parties and their representatives to help facilitate a review process that is fair, just, economical, informal and quick. (sub. 65, p. 12)

The key to ensuring compliance with stronger restrictions on representation is to ensure tribunals operate in the manner in which they were intended — providing an accessible and understandable forum for individuals to seek justice. Improved processes, including greater adoption of ADR and more user-friendly arrangements for self-represented litigants, would diminish both the need for, and value of, legal representation.

Court processes have been reformed but more could be done

Courts are the central pillar of the civil justice system. They provide an open forum where citizens may come to determine and enforce their legal rights and to establish and clarify the law. In performing these functions, courts need to balance competing tensions. Black described the tension faced by courts in the following way:

We should maintain the search for that elusive point of equilibrium at which the competing pulls of cost, speed, perfection and fairness are balanced in a way that produces substantial and accessible justice — not perfection, but nevertheless processes and outcomes readily recognisable as substantial justice according to law. (2013, p. 92)

Recognising the need to strike a better balance between accessibility and ‘perfection’, courts in all Australian jurisdictions have either initiated or been the subject of substantial reforms.

A central tenet of these reforms has been a shift away from traditional roles in which the court was reactive — where the judge was an umpire rather than a player in the process — and responsibility for the pace of litigation was left in the hands of the parties and their lawyers. In its place, there has been a move towards more active judicial management of cases with the court taking greater initiative in case preparation, including management of pre-trial processes and for the very few matters that proceed to trial, the trial itself.

While substantial reforms have been undertaken, progress has been uneven across jurisdictions and arguably court processes do not yet sufficiently ensure that unnecessary costs and delays are avoided. Litigation costs are one indicator that more remains to be done. In many jurisdictions these costs can easily run into tens of thousands of dollars in solicitors fees alone. Added to this are the costs of disbursements — such as court fees, fees for barristers and expert witnesses.

The Commission considers that well-targeted and appropriately employed case management can yield significant benefits in terms of improved efficiency and reduced cost and delay. The challenge is in getting the balance right by ensuring that case management processes do not generate their own unnecessary work for legal practitioners, court staff and judicial officers.

There is no ‘best’ model of case management, but it is possible to identify elements of case management that promote timely, fair and efficient dispute resolution. These include abolishing formal pleadings, tightly controlling the number of pre-trial appearances and strict observance of time limits. The case management processes employed by the Federal Court as part of its ‘Fast Track List’ provide a working example.

Independent of moves towards greater case management, particular aspects of court processes have also been reformed. Rules around discovery and expert witnesses — both of which have been identified as significant contributors to cost — stand out as two areas that have undergone significant change, although not all jurisdictions are as advanced on this reform process as others.

Greater judicial scrutiny in this area could help ensure that discovery efforts are proportionate to the matters at stake. This could be facilitated through restrictions on the availability of discovery, presumptions against standard discovery, and rules that expressly require the cost implications of making discovery to be considered at the time it is ordered. Judicial training on discovery management is important to

support judges to perform this ‘gate-keeper’ role, as is clear guidance to practitioners and the court about discovery options and alternatives.

Australian courts have been active in developing innovative reforms to improve the quality of expert evidence and reduce unnecessary costs and delay associated with its use. The Commission sees scope for broader adoption of some of these reforms — such as a requirement to seek directions before adducing expert evidence — and for greater use of other reforms, including single experts, court appointed experts and concurrent evidence. Use of these reforms can be promoted by clear guidance in practice notes.

Reforms to court processes are only a partial solution to the problems of disproportionate cost and delay. Any reforms need to be accompanied by better incentives for users and their legal representatives.

The system is adversarial, so there is little incentive to cooperate

Litigation has been compared to war, restricted only by the rules of the legal game. The adversarial behaviour of parties can hinder the resolution of disputes or even exacerbate them. Counterproductive behaviour can include:

- a lack of cooperation and disclosure, particularly at early stages of proceedings
- the use of procedural tactics, including to delay proceedings, where it is perceived to be in a litigant’s interest
- incurring unnecessary or disproportionate legal and other costs.

It has been suggested that a move to an inquisitorial system would address many of the issues raised in this inquiry. However, consideration of such a fundamental change to the underlying tenets of Australia’s legal system is beyond the scope of this inquiry.

Nonetheless, more must be done to ensure that the current adversarial system is more efficient and effective. The Commission considers that there are grounds for parties and their lawyers to be subject to requirements that facilitate the swift, proportionate and just resolution of disputes. Greater use should be made of pre-action protocols that if well targeted, and accompanied by strong judicial oversight, can help resolve disputes early by narrowing the range of issues in dispute and facilitating ADR.

Costs awards provide another mechanism for deterring parties from incurring unnecessary or disproportionate legal costs. These arrangements — which courts

use to determine whether and which parties should bear the costs following the outcome of a case — impact significantly on the conduct of parties.

Typically, in Australia, ‘costs follow the event’ and the successful party is entitled to payment for legal costs from the unsuccessful party, referred to as party-party costs. The amount of costs awarded is often calculated by reference to a ‘scale of costs’. Many are activity-based and so encourage lawyers to over-service and drive up the costs of litigation and the length of a trial. Parties have very little control over the amount of activity undertaken by their opponent and have little ability to predict their potential liability for costs.

The Commission recommends reforming arrangements for determining costs awards. In lower courts, fixed scales should be used to determine the amount of costs a party is entitled to be awarded. These fixed scales should prescribe costs amounts based on the stage of proceedings reached and the amount that is in dispute. In superior courts, it may be more appropriate to adopt a system of costs management, which requires parties to submit and agree upon costs budgets at the outset of litigation, and so cap the amount of costs that may be reclaimed by the successful party. Such a system is currently used in English and Welsh courts.

Currently, parties that are self-represented or represented pro bono are not eligible for an award for costs if successful in a case. This reduces their ability to meet their legal expenses, and creates asymmetrical incentives that favour their opponents. There is a strong argument for allowing these types of parties to be awarded the costs entitled to them according to the fixed scales outlined above.

Not all parties are on an equal footing

The effectiveness of the adversarial system is premised on parties being on an equal footing, but this is not always the case. Differences in the bargaining power of litigants are most evident when comparing the two extremes — self-represented litigants and well-resourced, repeat users of the system, such as governments and big businesses. If it is acknowledged that inequalities in bargaining power affect justice, it begs the questions: how might self-represented litigants be placed on a better footing; and how might the bargaining power of well-resourced litigants be kept in check?

When considering whether and how best to assist self-represented litigants, context is important. In some tribunals and lower courts, self-representation is the norm and poses few problems. However, self-represented litigants can be at a disadvantage in more adversarial settings such as higher courts.

As Faulks said, there are three ways to respond to self-representation, ‘... one is to get them lawyers, the second is to make them lawyers and the third is to change the system’ (2013, p. 2). The Commission considers that ultimately, the civil justice system needs to better accommodate self-represented litigants. Many of the changes that would benefit self-represented litigants would also benefit other court users.

Courts and tribunals have already made efforts to simplify forms and procedures and provide information to support self-representation. There is still scope to improve outcomes, but there are limits to the extent to which such measures can assist self-represented litigants, particularly in complex cases in higher courts.

Self-represented litigants in higher courts need more direct and personalised forms of assistance. Equipping judges and court staff through training and clearer rules and guidelines is essential to give them the confidence to assist self-represented litigants while meeting their obligations of impartiality. Duty lawyer schemes can help, but legal assistance with basic, discrete tasks that could be offered to self-represented litigants before their matter reaches court (or used to divert them away from the court system) also hold promise. Self-represented litigants should also be able to rely on assistance from non-lawyers, with appropriate protections in place.

In comparison to self-represented litigants, parties such as governments and big businesses carry a substantial degree of bargaining power — reflecting the economic resources at their disposal and greater experience and knowledge of the system as repeat users.

Special power also inheres in the nature of government itself; so judges expect high standards of competence, candour and civility from government parties and their lawyers. These expectations are typically embodied in model litigant guidelines, which impose a number of obligations including to avoid, prevent and limit the scope of legal proceedings wherever possible and, where not possible, to keep the costs of litigation to a minimum. The Commission considers that Commonwealth, state and territory governments should be required to act as model litigants.

But there are concerns that model litigant obligations lack enforceability, creating weak incentives for governments to comply. The Commission is seeking further views on how model litigant obligations can be made more effective in ensuring that governments conduct themselves in an appropriate manner.

Many large businesses have advantages similar to government agencies when involved in litigation with small businesses and individuals. Some have also raised concerns that large businesses are advantaged in disputes with government, where the latter is subject to model litigant obligations. The Commission seeks feedback

on whether the arrangements applying to government agencies in dispute should be extended to other parties with substantial bargaining power, what changes might be necessary, and how such arrangements should be enforced.

Prices do not always reflect the balance of private and public benefits

Private and public benefits are generated when parties engage in litigation. Private parties are given a forum to enforce claims and restrain the actions of others. On occasions, the wider community benefits from the clarification of the law and the development of precedents. Given the mixture of private and public benefits associated with court usage, it is appropriate that litigants bear a significant share of court costs through fees.

Court fees are not set according to a consistent framework. They vary widely, and provide a significant subsidy to many who do not require such assistance.

Whether measured as a share of the costs incurred by litigants or a share of the costs recouped by government, court fees in Australia are relatively low. Cost recovery through fee revenue ranges from 3 per cent in the Family Court of Australia to just over 50 per cent in the Magistrates Court of Victoria. By comparison, cost recovery in British courts is at around 80 per cent and there are intentions to move to full cost recovery by the end of 2014-15.

The Commission estimates that court fees currently comprise roughly one tenth of a party's legal costs. Consistent with this estimate, studies have found that court fees are not a significant source of financial concern to litigants:

... court fees are not the primary reason for the concerns about litigation costs raised in the literature and by interview participants in New South Wales. Indeed, none of these interviewees mentioned court fees specifically as an issue. (Marfording and Eyland 2010, p. 60)

Given the substantial private benefits that accrue to parties using court services, the Commission is recommending significantly increasing the level of cost recovery in most courts. Doing so, especially in litigation involving well-resourced litigants, would send a price signal to litigants to consider other suitable avenues for resolving their disputes and would provide a potential source of revenue for courts.

Significant increases in cost recovery would not be appropriate in all circumstances, such as in matters concerning personal safety or the protection of children, or where important test cases might otherwise not proceed. Fee waivers and reductions should be used to safeguard reasonable access to justice for financially disadvantaged litigants.

Increases in cost recovery would have implications for the resources of courts and raises additional questions about how increased revenue from fees should be used. The Commission has identified, and is seeking feedback on, a number of possible funding models for courts including:

- maintaining the existing funding and revenue arrangements
- reforms to appropriations, which may include the use of separate appropriations for judicial salaries
- a hypothecated model, where courts are funded through retained fee revenue and payments received from government to cover the costs of fee waivers.

Some public benefits are poorly accounted for

As noted above, some court decisions can benefit society by clarifying the law or the rights of particular groups and society has an interest in assisting individuals to bring such ‘public interest’ cases to court.

The Commission considers that it is appropriate for court fees to be waived in these circumstances, but also recognises that solicitors’ fees and the prospect of an adverse costs order also influence individuals’ decisions about whether to proceed with litigation in public interest cases.

Contributions from governments are already used to fund the legal costs of cases that are of public interest. For example, the Commonwealth Attorney-General’s Department provides funding where matters may resolve an uncertain area of law. Similarly, the Australian Tax Office provides funding for cases that may test or clarify the laws it uses to administer taxation.

Environmental disputes often have public interest elements in either clarifying the law or protecting local or community-wide environmental values. These cases often involve the environmental interests of groups affected by major projects. The Commission considers that there are grounds for government to play a role in helping to meet legal costs in environmental disputes involving matters of substantial public interest.

Protective costs orders (PCOs) provide another mechanism for assisting individuals to litigate public interest cases. PCOs provide parties with an upfront guarantee that they will not be subject to an adverse costs order if they are unsuccessful. The Commission considers that PCOs are appropriate in matters between individuals and government. To ensure that PCOs are consistent and fair, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

However, the Commission considers that PCOs are not suitable in public interest disputes between private parties. Instead, governments should use dedicated public interest and test case funds to pay for any adverse costs ordered against a public interest litigant. Rules for accessing these funds should be consistent with those governing access to PCOs.

The end of the quill pen — courts with 21st century technology

Technology is widely recognised as having the capacity to generate time and cost savings for the courts and their users. In his final report on the civil justice system in England, Lord Justice Woolf expressed the view that technology would:

... not only assist in streamlining and improving our existing systems and processes; it is also likely, in due course, itself to be a catalyst for radical change as well. (Woolf 1996, p. 284)

In the last decade, many Australian courts and governments have implemented significant reforms aimed at better utilising technology to make legal processes more efficient. Initiatives have been wide-ranging and include:

- allowing court documents to be filed and court fees to be paid electronically
- providing online access to court documents
- conducting procedural hearings through tele- and video-conferencing or tailored ‘virtual court’ applications
- utilising case management systems to better support efficient case flow management and performance reporting functions.

However, consultations and submissions to this inquiry suggest that investment in information technology has been uneven across jurisdictions and that the availability, quality and use of technology varies widely. The Commission considers that greater investment in technology is warranted given the potential benefits. A lack of resources appears to be the main barrier to the uptake of technology. The Commission’s proposal to increase court fees may provide some of the funds required. In this way, parties paying court fees would also benefit from a more efficient court system.

The balance between the formal and informal aspects of the system

Some participants in this inquiry have raised concerns that improving the accessibility of the formal system will see a ‘rush to the law’, but this need not be the case. By improving the accessibility and predictability of the formal system, the

threat of recourse to the system becomes more credible. This improves incentives for parties to resolve their disputes to their mutual benefit without calling on the formal system, which is often more time consuming and expensive.

This in turn leaves the courts and tribunals to focus their attention on those disputes that are truly intractable (where parties cannot identify a mutually beneficial outcome) and enables governments to redirect some of their scarce resources to those cases where there are strong public benefits and to assist those who are disadvantaged in accessing the system.

Indeed, analysis undertaken by the Commission reveals that of the people who currently take no, or inappropriate, action in response to a legal dispute, only a small share of their disputes would have required a court-based resolution. The large bulk could have been handled by ombudsmen and, to a lesser extent, tribunals.

Assisting consumers to cope with ‘lumpy’ costs

While the informal system can play a significant role, some disputes are more appropriately, or are only able to be, handled through more formal channels. While these cases are relatively infrequent, their costs can be large and unexpected. These costs, which need to be met upfront, combined with the risk of an adverse costs order, can represent significant barriers to accessing justice for litigants who lack (liquid) financial resources but have meritorious claims.

The capacity of individuals to deal with ‘lumpy costs’ is often thought as affecting the ‘missing middle’ — those on higher incomes are thought to be able to manage the costs, while those on lower incomes are thought to be covered by publicly funded assistance schemes such as legal aid.

But the problem is far more widespread. Preliminary estimates undertaken by the Commission suggest that in some jurisdictions less than 10 per cent of households would likely meet income and asset tests for legal aid, leaving the majority of low-and middle-income earners with limited opportunities for managing large and unexpected legal costs.

Unbundling legal services would help

‘Unbundling’ of legal services — a half-way house between full representation and no representation — is one way of making costs more manageable and predictable. Unbundling of legal services means that the lawyer and the client agree that the lawyer will undertake some, but not all, of the legal work involved. Sometimes

called ‘discrete task assistance’ or ‘limited scope representation’, it differs from traditional ‘full-service’ representation as clients perform some tasks on their own. Where clients cannot afford full representation they at least have the option of *some* level of assistance, rather than none at all:

... in giving potential consumers access to services from which they would otherwise be excluded, this approach also gives consumers greater control over an otherwise disempowering legal process — electing not just where, but how to spend what limited funds they have. (CIJ 2013, p. 31)

While this practice runs counter to the convention of engaging a lawyer for the duration of a legal problem — a convention that is supported by a range of professional conduct rules — the practice of unbundling has been a common feature of the legal assistance landscape for some time. Unbundling has also become more common in some sectors of corporate practice.

Changes to professional conduct rules are warranted to facilitate a shift towards greater unbundling of legal services.

Private sources of funding are important

Markets provide a range of mechanisms that allow individual litigants to spread the risks associated with large and unexpected legal costs across time and with other parties. While generally limited to monetary claims with reasonable prospects of success, private funding provides an important avenue for litigants to access justice.

One private funding arrangement involves lawyers billing on a ‘conditional’ basis. Typically no fee is charged if the legal action is unsuccessful and an ‘uplift’ percentage is added to the lawyer’s normal bill if the action is successful. This is in contrast to agreements where lawyers provide ‘damages-based’ billing, in which the lawyer receives an agreed percentage of the amount recovered by the client. While allowed in a number of overseas jurisdictions, this latter form of billing is prohibited in Australia due to concerns that it creates perverse incentives.

It is not clear that the perverse incentives inherent in damages-based billing are more pronounced than those embodied in conditional billing arrangements. Rather, some have argued that damages-based billing arrangements better align the interests of lawyers and their clients by removing incentives to over-service. There is an important caveat to this claim — in order for incentives to be aligned, clients need to be fully informed about the merits, and likely costs of pursuing their claim.

The Commission considers that the prohibition on damages-based billing should be removed, subject to comprehensive disclosure requirements, and seeks feedback on whether the share of damages should be capped.

While lawyers are not currently allowed to offer damages-based billing, no such restriction applies to third parties. Litigants can obtain funding from third party litigation funding companies, which provide funds in exchange for a share of the amount recovered and typically agree to pay any adverse costs ordered in the event of a loss. They also often manage disputes on behalf of clients, including coordinating class actions. The Australian market for litigation funding is small but well established — having operated for two decades. Funded cases typically relate to insolvency, large commercial claims and class actions.

Stakeholder views on third party litigation funding are mixed. Supporters highlight the access to justice benefits, particularly in class actions where litigation funders can level the playing field for litigants who are in dispute with well-resourced and experienced parties. Opponents consider that third party litigation funding increases the volume of litigation and can give rise to frivolous claims. While this may be possible, the Commission has not received evidence indicating that this is a current (or likely) problem, nor that current court and professional conduct procedures — combined with commercial incentives that arise from bearing the losses of unsuccessful cases — are inadequate to deal with any problems if they emerge.

On balance, the Commission judges that third party litigation funding can provide important benefits for access to justice. Nonetheless, there is a risk of improper conduct, both in relation to ethical and professional conduct and financial management (such as a funder not being able to meet its financial obligations in relation to costs orders in the event of a loss). The Commission considers that to guard against risks to consumers, litigation funders should be licensed as providers of financial products, subject to explicit ethical standards, and monitored by the Australian Securities and Investments Commission and the courts.

Does legal expenses insurance have a future?

Legal expenses insurance (LEI) is another mechanism to spread the risk of legal contingencies and provide protection against the costs of bringing or defending legal action. LEI operates like other types of insurance — customers pay a premium based on an insurer's assessment of risk, and their legal expenses are covered when required.

There are ‘before-the-event’ and ‘after-the-event’ LEI schemes. The former cover legal expenses of events that are yet to occur, while after-the-event policies cover future legal expenses of disputes that have already been initiated.

There have been attempts to establish LEI in Australia. A stand-alone legal insurance scheme established by the Law Foundation of NSW and GIO operated in NSW between 1987 and 1995 but did not prove viable. Uncertainty over legal costs is said to have inhibited uptake and made it difficult to design legal expense insurance benefits and premium levels:

A barrier to LEI in Australia has been the uncertainty over legal costs. The success of European LEI schemes, such as those in Germany, has been linked to their more predictable, fixed litigation costs. (ALRC 2000, p. 312)

These problems were compounded by a lack of appetite by Australians who failed to see the value of insuring against legal events.

There is better information available today that can be used to design legal expenses insurance premiums. Australia-wide surveys of legal need now provide important information on the propensity of different groups to experience legal problems, while reforms to cost awards outlined in this report would address a great deal of uncertainty around legal costs associated with adverse costs orders. More broadly, the insurance market has adopted more sophisticated methods for pricing risk since the inception of the original LEI back in 1987.

But even if information gaps could be addressed, and LEI offered, as has been the experience in Australia, some parties might not take full advantage of risk-spreading opportunities because they do not accurately perceive the existence of risk or because they are unfamiliar with the market’s potential for addressing the risks they face.

Is there a role for government in helping smooth legal costs?

Given the weak incentives outlined above, it is not clear that the market will offer legal expenses insurance. It has been suggested that a government-backed scheme is required and should be modelled on Australia’s Higher Education Contribution Scheme. The proposed legal expenses contribution scheme (LECS), would offer income-contingent interest-free loans and provide a tool for those that do not qualify for legal assistance to pursue cases of merit — particularly where monetary amounts are not involved.

Those who qualify for a loan would repay the Australian government by contributing a percentage of their income over the period of the loan. In cases where

there was a sufficient award of damages, the loan would be paid out following the outcome of the case.

The application of income-contingent loans to promote access to justice is already a proven concept, with similar arrangements to a LECS operating within some legal aid commissions. However, it has been suggested that a LECS could apply to a larger group of Australians and to a wider range of legal matters. Some of the advantages of the proposed LECS are that it would:

- apply to civil matters that are currently only ‘thinly covered’ by publicly funded legal assistance
- allow a longer period than offered by lawyers for applicants to make contribution payments (by spreading payments over a longer period of time the immediate financial burden would be reduced)
- improve equity by providing another avenue for the those who (just) miss out on government funded legal assistance to pursue cases of merit that do not involve monetary claims.

These benefits would not come without costs; indeed it is unlikely that any LECS program would be self-funding. There would also be questions about where to draw the line for eligibility. Accordingly, the Commission seeks feedback on the prospects of after-the-event insurance being offered by private providers, and in the absence of this, what role the government should play, if any.

Legal assistance services for disadvantaged people

Disadvantaged people face a number of barriers in accessing the civil justice system. These include communication barriers and a lack of awareness and resources. The disadvantages that these individuals face mean that they are both more susceptible to, and less equipped to deal with, legal disputes. Since these barriers are not just financial, even low cost remedies such as ombudsmen may prove inaccessible.

If left unresolved, civil problems can have a big impact on the lives of the most vulnerable. Many examples were provided to the Commission of spiralling problems when legal assistance was not provided. Unmet civil legal needs can also lead to criminal legal issues. Not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure.

Notwithstanding the reforms outlined in this report, the most vulnerable Australians may still find the system inaccessible and there remains a role for government in assisting these individuals to uphold their legal rights and resolve their civil (including family law) disputes.

What does the legal assistance landscape look like?

The legal needs of disadvantaged Australians are currently serviced by one of four government funded service providers, which offer a range of services, including information, advice and casework. Each of the four plays a different role in the legal assistance landscape (figure 6).

- Legal aid commissions (LACs) receive the majority of government funding and service most Australians who receive publicly-funded legal assistance. The LACs are independent statutory authorities (established under state or territory legislation). They provide legal assistance services in criminal, family and civil law matters.
- Community legal centres (CLCs) are community-based not-for-profit organisations. They play a distinct role in the legal assistance landscape assisting Australians who cannot afford a private lawyer but who are unable to obtain a grant of legal aid. Their primary focus is on civil (including family) law matters.
- Aboriginal and Torres Strait Islander legal services (ATSILS) are usually incorporated associations with Indigenous management committees. They focus on providing legal services to Aboriginal and Torres Strait Islander people in criminal, family and civil law matters.
- Family violence prevention legal services (FVPLS) specialise in family violence matters. Their aim is to prevent, reduce and respond to incidents of family violence and sexual assault among Aboriginal and Torres Strait Islander people.

Together, these four legal assistance providers received around \$730 million in government funding in 2012-13 (figure 7), which covered both criminal and civil matters. To put this in context, this represented around 0.14 per cent of total government spending in Australia.

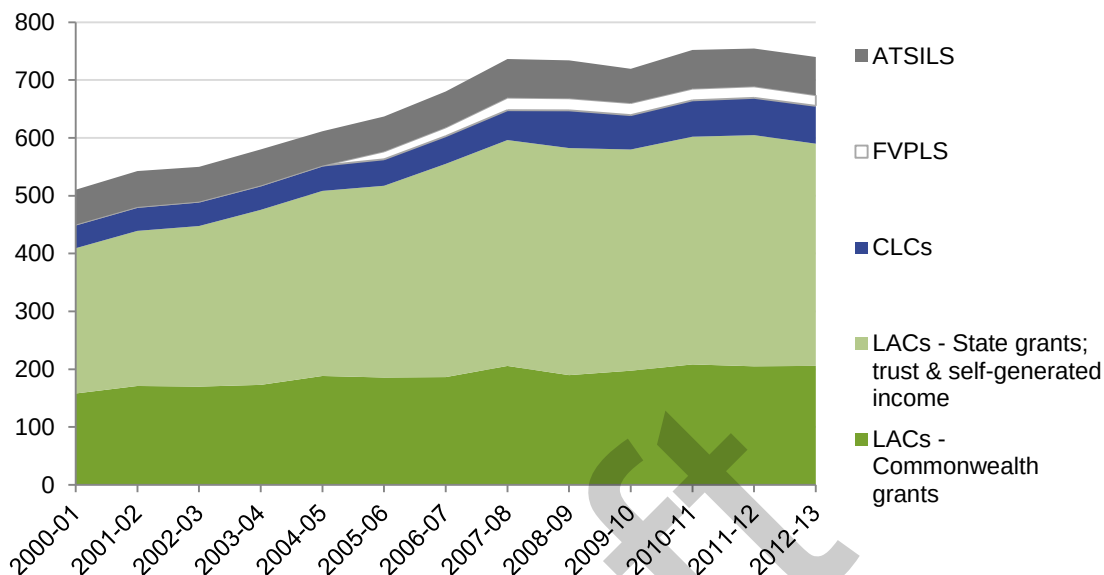
Figure 6 **The four government funded legal assistance providers**
2012-13

	Legal aid commissions (LACs)	Community legal centres (CLCs)	Aboriginal and Torres Strait Islander legal services (ATSILS)	Family violence prevention legal services (FVPLS)	
Where are they located?	8 LACs • In all states and territories • Metropolitan, regional and remote services including regional offices	200 CLCs • 140 funded by the Commonwealth • In all states and territories • Mainly in metropolitan and regional areas	8 ATSILS • One in each state, two in the NT, ACT serviced by NSW • Majority of outlets in regional and remote areas	14 FVPLS • In all states and territories except ACT and Tasmania • Service 31 high need regional, rural and remote areas	
Funding arrangements	Commonwealth	\$212.6 m	\$36.7 m	\$68.2 m	\$19.1 m
	State & territory ^a	\$366.5 m	\$30.9 m	--	--
	Other ^b	\$30.4 m	\$22.0 m	--	--
		National Partnership Agreement (NPA) and funding administered by the state and territory governments	Funding administered by LACs in all states except SA where provided through the Attorney-General's Department (SA). NT and ACT administered by the Commonwealth Government	Funding administered by the Commonwealth Government	Funding administered by the Commonwealth Government
What are their objectives?	• Provide access to assistance for the vulnerable and disadvantaged • Provide the community with improved access to justice and legal remedies	Contribute to access to legal assistance services for vulnerable and disadvantaged members of the community and/or those whose interests should be protected as a matter of public interest	Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people	Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault	
Who do they target?	• State and territory communities • Focus on vulnerable and disadvantaged people	• Local communities, except specialist CLCs who service their state/territory community • Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection	

^a Includes contributions from public purpose funds (PPFs).

^b For LACs, 'other' comprises self-generated income. For CLCs, 'other' includes fee income, philanthropic donations and other sources.

Figure 7 Criminal and civil legal assistance funding, 2000-01 to 2012-13
Millions, expressed in 2011-12 dollars



The private sector also assists disadvantaged Australians to access legal services through pro bono services. While this role is relatively small, it is nonetheless important.

Governments can intervene more effectively

The people who manage and work in the four legal assistance providers are highly committed to assisting their clients (as are the pro bono lawyers who freely provide their services). But the task they face is a challenging one — clients often have complex needs, requiring a holistic approach.

The capacity of legal assistance providers to assist disadvantaged Australians is constrained by a range of factors, many of which stem from the way in which legal assistance services are funded.

All four legal assistance providers play a role in meeting criminal as well as civil legal needs. While criminal and family violence matters make up 15 per cent of disputes (figure 2), a larger proportion of legal assistance resources are dedicated to these matters. For example, LACs dedicate around two thirds of their case work to criminal and family violence matters, and the casework of ATSILS is almost entirely criminal in nature (around 90 per cent). FVPLS focus almost exclusively on family violence matters. CLCs are more focused on civil matters, with about 80 per cent of their case work dealing with civil (including family) law matters. Minor

advice, which is not subject to the same funding constraints, is less skewed towards criminal matters.

Priority is given for criminal law issues not just because of the consequences these matters have on people's lives, but also because of the discipline provided by the courts to do so. Criminal courts can, and do, stay proceedings involving indictable offences where parties are unrepresented. No such discipline exists in the civil space.

One approach employed to deal with the funding tensions between the civil and criminal systems has been 'earmarking' or allocation of funding for a specific use. For example, Commonwealth funding for legal aid grants can only be used for Commonwealth law matters (largely family law matters).

Another approach would be to pool Commonwealth and state funding, and then separate funding for criminal and non-criminal matters. This would give legal assistance providers more flexibility to allocate funds across the full spectrum of civil — including family — law matters. They would be free to identify and target those areas of unmet need where assistance can yield the biggest return. This division would also allow providers to adopt a more holistic approach — many disadvantaged Australians have co-occurring civil legal problems, which can span both Commonwealth and state areas of law.

The distribution of funds could be better matched to need

Commonwealth funding for LACs is distributed between the states and territories based on a model that attempts to reflect legal need and the costs of providing services in particular jurisdictions. The distribution of resources within states is also informed by evidence on legal need and where other service providers are located.

In contrast, the way that funding has been allocated (and more recently withdrawn) to (and from) both specialist and generalist CLCs has been either ad hoc or based on history. No systematic efforts have been made to take account of legal need or the costs of service provision in determining the placement of CLCs or in allocating funding across centres.

Commission analysis of the current geographic distribution of CLCs revealed a mismatch between areas of greater disadvantage and the placement of centres. Analysis suggests that there are fewer generalist centres in some relatively disadvantaged regions, and a presence of centres in other relatively advantaged areas. These findings align with those of previous reviews and studies, which have sought to examine whether CLCs are servicing areas of high need. The Commission

also found that those centres located in more affluent areas tended to serve fewer clients with low incomes.

While CLCs remain important in meeting the legal needs of disadvantaged Australians, there needs to be a move away from the historically based distribution of funds. The model used to allocate Commonwealth funds for LACs could be used to allocate Community Legal Services Program (CLSP) funding to the states and territories. Each jurisdiction should then transparently allocate the funds to identified high-need areas.

One possible process for allocating this funding could involve a competitive tender, whereby potential providers indicate the level and type of services they could provide within the funding envelope for a given area. If they wished to, LACs could also compete. However, the Commission recognises that competitive tendering processes are only one of a number of methods for distributing funds across providers and seeks feedback on the merits of this and other methods for distributing funding. The Commission is mindful of traditional community involvement with CLCs and seeks feedback on how to ensure community ties are maintained.

There is scope to better target assistance services

While some forms of simple legal assistance, such as information and basic advice, are freely available to all Australians, eligibility tests apply to those seeking casework services. Eligibility tests typically involve a means, matter and merit test.

The means tests consider both the income and assets of parties and are intended to give an indication of a person's capacity to pay for (private) legal advice. The way in which income and assets tests are applied by LACs vary across states and territories, but on the whole it is stringent.

CLCs determine their own eligibility criteria, including means tests, but these tend on average to be more generous than those applied by the LACs. Not all target disadvantaged Australians. Given that both the distribution of CLCs is uneven across states and territories, and the eligibility tests vary across centres, access to legal assistance services could be determined by a person's postcode.

The Commission considers that the financial eligibility criteria for government funded individualised services provided by LACs and CLCs should be consistent and linked to an established measure of disadvantage. This would make the test more transparent and equitable.

This approach is consistent with aims embodied in the most recent National Partnership Agreement (NPA) on legal assistance services for ‘more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing, social exclusion’ (COAG 2010, p. 4).

The Commission recognises that social exclusion, while including income and financial poverty, extends to a wider range of life domains, covering employment, skills, health, disability and personal safety. This points to the need for eligibility tests to also take into account the impact of a legal problem on a client’s life and the flow-on effects to the justice system and other publicly funded services.

The Commission considers that the changes outlined above should be reflected in the forthcoming NPA. Specifically, the NPA should include an agreement between the Commonwealth and the state and territory governments on national core priority clients and aligned eligibility tests across legal assistance providers. This would largely overcome the problems with the current agreement, which operates as a national agreement on paper, but does not necessarily work as such in practice.

Even with better targeting of services gaps would remain

The Commission recognises that variations in the way eligibility criteria have been applied by the LACs reflects their funding circumstances.

While the Commission has made recommendations for reallocating funding towards higher priority areas, this alone will be insufficient to meet the civil legal needs of disadvantaged Australians.

Quantifying the gap is difficult. There is limited information on the cost of individual services and measures of people who are denied assistance offer little insight into the extent of existing service gaps — they capture clients who are denied assistance because they lack a meritorious claim, and fail to capture those who are discouraged from seeking any kind of assistance. The Commission seeks feedback on the extent of, and costs associated with, meeting the civil legal needs of disadvantaged Australians.

Culturally tailored services are essential but need improvement

Aboriginal and Torres Strait Islander people often have complex legal needs. The sizeable barriers they face in accessing legal assistance means that many civil disputes they experience go unresolved. Unmet needs can lead to larger and more complex legal problems. Some can escalate to criminal behaviours, further

cementing the longstanding over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

ATSILS and FVPLS provide culturally tailored services targeted to the needs of Indigenous people. LACs and CLCs also play an important role in meeting the legal needs of Aboriginal and Torres Strait Islander people, especially in areas that are not serviced by ATSILS or FVPLS and when a conflict of interest arises.

While the Commission considers that there are good grounds for government-funded culturally tailored legal assistance services, reforms are warranted to who funds services, how funds are distributed and ‘back of house’ operations to improve efficiency and effectiveness.

While funding is provided by the Commonwealth, the policies of state and territory governments can significantly impact on the demand for services provided by ATSILS and FVPLS. For example, changes to public housing authorities’ eviction policies have impacted on the demand for services in some jurisdictions. The Commission seeks feedback on whether the Commonwealth should expand future NPAs to include state and territory government funding for ATSILS and FVPLS.

There are currently different approaches to determining the distribution of the fixed funding envelopes for ATSILS and for FVPLS. The dichotomy is not dissimilar to the two approaches used to fund LACs and CLCs. The ATSILS funding model seeks to take account of differences in the legal needs of Indigenous communities and the costs of meeting those needs. In contrast, the FVPLS funding model is less formulaic. The reasons for targeting particular geographic areas over others, and the process for determining the amount of funds allocated to providers remains unclear.

The Commission recommends that the FVPLS funding model be revamped to incorporate regular, systematic and transparent analyses of needs, and to take account of differences in the costs of providing services. The latter is particularly important given the focus on servicing client groups in rural and remote communities. The Commission recognises that changes to funding arrangements would have implications at the provider level and invites feedback on how a reallocation of resources might best be managed.

A related factor impacting on the operations of FVPLS is the relatively small scale of some providers. Despite efforts to encourage greater regionalisation of services, with larger agencies working across multiple areas, around half of providers service a single high need area and operate on a very small scale. The poor quality of data collected by FVPLS has hampered the Commission’s assessment of how well these two competing approaches are working.

Pro bono plays a small but important role in bridging the gap

The private profession has a long tradition of providing legal services free of charge, and governments are keen for them to do more. But the role of pro bono services in assisting disadvantaged Australians to access justice is poorly understood.

Headline figures suggest lawyers provide an average of close to 30 hours each of pro bono service per year. But these estimates largely reflect efforts by lawyers in large law firms, who are more likely than lawyers in small firms and government agencies and in-house corporate lawyers to undertake formal pro bono work. Moreover, the bulk of pro bono work is undertaken for not-for-profit organisations rather than for disadvantaged Australians.

Placed in the broader context, the overall contribution of pro bono services is relatively modest. Expressed as a measure of the number of lawyers, pro bono from larger firms equates to around 3 per cent of the capacity of the legal assistance sector, and less than 1 per cent of the entire legal market.

Addressing the complex legal needs of disadvantaged clients can be challenging and not all private lawyers are well equipped to provide such services. Outside of the services they provide pro bono, many lawyers would have little exposure to ‘poverty law’ in their day to day work. Areas such as social security can be particularly complex.

Difficulty matching legal expertise with needs is but one of several barriers pro bono lawyers face. Other barriers include the capacity and culture of their workplaces, conflicts of interest between ‘paying customers’ and pro bono clients and a lack of practising certificates for retired or non-practising lawyers.

Some of these barriers are more easily addressed. Offering free practising certificates for retired and non-practising lawyers represents a simple and relatively inexpensive way of increasing pro bono services. Coordinator arrangements in Victoria provide a working example of how providing some positive affirmation that a conflict does not exist can help overcome fears that providing pro bono work — on, for example, immigration or income support matters — will come at the expense of future government contracts.

While compulsion is sometimes considered as a means of bolstering pro bono efforts, the Commission does not consider this approach to be appropriate. Providing pro bono is not ‘free’ — the lawyers involved give up their time, and partner organisations (such as CLCs or referral bodies) must use resources to coordinate, train and supervise pro bono lawyers.

Rather, the Commission considers that governments should promote the advantages to lawyers of providing pro bono services, such as training and experience. Law students provide a ready example of where the provision of pro bono services can be mutually beneficial. Where government funds are used to encourage or facilitate pro bono effort, outcomes should be regularly and independently evaluated.

Steps to better understand how the system is functioning

It is widely acknowledged that data on the civil legal system leaves much to be desired and previous reviews have identified the need to build an evidence base to monitor the system and guide policy reform. The Commonwealth Attorney-General's Department considered that:

... data collection in relation to the justice system ... remains an issue. Statistics are inconsistently collected and reported, and significant gaps remain. (2009, p. 72)

The Commission concurs with these views. The absence of data has hampered policy evaluation and caused a reliance on qualitative assessments. The dangers with this approach were highlighted by Genn who remarked:

The discourse is anti-empirical. It does not need information, although it does incorporate atrocity stories that support any particular matter under discussion. What is discussed becomes what is known. The mythology is developed and elaborated on the basis of war stories told and repeated. (1997, p. 169)

Much needs to be done to improve the nature and quality of data collection in the civil justice landscape and the Commission has identified a number of areas throughout this report where data would be particularly valuable. Governments should work together to develop and implement reforms to collect and report data that have common definitions, measures and collection protocols. Outcomes based standards to measure service effectiveness and the capacity to link de-identified records should be a priority given their value in policy evaluation.

Summary of the Commission's main proposals

The following table represents a brief summation of the reforms proposed and does not include all of the Commission's draft recommendations. It is intended to provide an accessible summary. The draft recommendations themselves should be relied on to provide details in each of the areas specified. The full set of draft findings, draft recommendations and information requests is provided in a separate section of the overview. Figures in brackets refer to the draft recommendation numbers.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
Many problems permeate both the informal and formal aspects of the system		
<i>Consumers lack knowledge about whether and what action to take</i>		
For most individuals and businesses, legal problems arise irregularly. They can lack information on their legal rights and responsibilities, what action to take, or who to consult. A number of organisations currently provide legal information and referral services, which contributes to fragmentation and duplication.	Each jurisdiction should have a centralised source of legal information, advice and referrals. The sponsoring organisation needs to be highly visible and be responsible for providing services across a range of telephone, online and print media. (5.1)	Individuals and businesses will be able to access information from a single entry point to determine whether they have a legal problem and be referred to an appropriate service to resolve their legal issue. Consolidation of current services provides potential for reallocation of existing funding to higher priority areas.
<i>Consumers find it hard to shop around for legal services</i>		
The irregular, subjective and uncertain nature of legal services means that consumers find it hard to shop around and cannot easily compare value for money.	A central online portal, which provides consumers with information of typical prices for a range of legal services should be made available in each jurisdiction. (6.3)	Consumers will be better informed about potential costs prior to engaging a legal professional. Better access to information will improve consumer choice and reduce the transactions costs of engaging legal services providers. Ultimately, greater information may lead to lower prices.
While legal service providers are required to provide an estimate of costs upfront, these can be poorly understood and expected costs can change depending on the nature of litigation. Consumers do not know if the cost estimate is likely to be accurate or reasonable.	Legal service providers should ensure that consumers understand the billing information presented and are informed of any changes when additional services are required. (6.1-2)	This will ensure that consumers are better informed about the expected and ongoing costs of their legal representation. This regulatory change should improve the competitive functioning of the legal service market, ultimately reducing costs to consumers.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
<i>Quality is hard to judge</i>		
As one-off users of legal services are common, it is often difficult for them to judge quality.	While existing entry restrictions ensure a high standard, training should be modernised and in some instances profession-specific restrictions such as those on advertising and indemnity insurance should be removed. (7.1-3)	Quality of service provision should increase through improved training. Consumers will directly benefit from having resolution options better matched to their dispute. There is potential to lower the regulatory burden on legal professionals in some areas.
<i>Consumer redress options need to be more effective</i>		
The powers of complaints handling bodies need to be strengthened to ensure consumers of legal services are protected from wrongdoing.	Complaints bodies in each jurisdiction should have consistent investigatory powers and more disciplinary powers in relation to consumer matters. (6.6-8)	By providing consumers an effective avenue for redress, this will ensure legal service providers have appropriate incentives to deter wrongdoing. This allows complaints bodies to exercise their functions more efficiently and effectively.
Big potential gains from early and informal solutions		
<i>Ombudsmen provide a pathway with negligible cost to complainants</i>		
Many consumers are not well informed of the services that ombudsmen offer in resolving disputes. In some cases, the small scale of ombudsmen can contribute to a lack of visibility.	Government and industry should raise awareness of ombudsmen, including among providers of referral and legal assistance services. Governments should look to rationalise the ombudsmen services they fund to improve the efficiency of these services. (9.1-2)	Raising the profile of government and industry ombudsmen would promote relatively low-cost dispute resolution options. Greater visibility and use of ombudsmen could reduce the level of unmet legal need.
There is potential to resolve some disputes involving government agencies before they reach ombudsmen.	Government agencies should be required to contribute to the cost of complaints lodged against them. (9.3)	Government agencies will have incentives to resolve disputes quickly and efficiently, and make more use of internal dispute resolution options when it is more efficient to do so.
<i>Alternative dispute resolution can be effective but not for all</i>		
More legal problems could be resolved through alternative dispute resolution processes.	Courts should continue to incorporate the use of appropriate alternative dispute resolution in their processes and provide clear guidance to parties about alternative dispute resolution options (8.1, 8.5,12.1)	Adopting processes that facilitate greater use of alternative dispute resolution will lower costs and lead to faster resolutions.
Consumers who have disputes with government often do not know how the dispute will proceed and what the resolution process entails. Not all government agencies fully exploit opportunities to use alternative dispute resolution when it is appropriate to do so.	All government agencies should develop dispute resolution management plans that facilitate clear communication and use of low cost alternative dispute resolution mechanisms, where appropriate. (8.2)	Consumers will be better informed of dispute resolution processes with government agencies, including options for resolving disputes through means other than litigation. This will also facilitate transparency within government and make agencies more accountable.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
Aspects of the formal system contribute to problems in accessing justice		
<i>Tribunals have been accused of 'creeping legalism'</i>		
Tribunals are intended to be a low cost, less formal and more timely way to resolve disputes compared to courts. Outcomes do not always align with these objectives.	Tribunals should enforce processes than enable disputes to be resolved in ways that are fair, economical, informal and quick. Restrictions on legal representation should be more rigorously applied. (10.1-2)	Parties to disputes will be able to access justice through tribunals in the way they were intended. Improved processes will diminish the need for, and value of, legal representation.
<i>Court processes have been reformed, but more could be done</i>		
Court processes have significantly changed to improve the efficiency of the litigation process, but there is scope for further reform.	All courts should examine their processes to ensure that they are consistent with leading practice in relation to case management, case allocation, discovery and use of expert witnesses. (11.1-6, 11.8-10)	Adoption of leading practice processes will streamline the court system, thereby reducing costs and time associated with litigation.
<i>The system is adversarial so there is little incentive to cooperate</i>		
The adversarial nature of most court-based dispute resolution means parties and their representatives have few incentives to cooperate or facilitate the early transfer of information.	Courts should facilitate and promote options for the early exchange of critical documents. (11.7)	Facilitating early exchange of information has the potential to reduce the costs and time associated with some litigation processes. It will also help determine whether alternative dispute resolution may be appropriate.
Parties do not always fully exploit opportunities to resolve their disputes before or during the litigation process.	Where appropriate, costs awards by courts should take into account whether a dispute could have been resolved prior to litigation. (13.1)	This will create incentives for parties to take genuine steps to resolve disputes early through low-cost and efficient means.
Parties have little control over the amount of activity undertaken by their opponent and, as a result, little ability to predict potential liability for costs.	Lower-tier courts should award costs based on fixed scales. Higher-tier courts should introduce processes for cost management and capping. (13.2-3)	Parties will have greater certainty about their potential cost liability and have more information on which to base their litigation decisions.
Restrictions on costs awards reduces the ability of self-represented litigants and parties who are represented pro bono to meet their legal expenses and reduces their opponents' incentives to cooperate.	Self-represented litigants and parties represented who are pro bono should be eligible to seek an award for costs, subject to the cost rules of the relevant court. (13.4-5)	This change will remove distortions in the incentives faced by differently resourced parties in making decisions about whether to settle or continue litigation.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
<i>Not all parties are on an equal footing</i>		
Some parties, including many self-represented litigants, do not understand the processes involved in undertaking litigation and appearing in court.	Courts and tribunals should further develop plain language forms and guides, and should assist self-represented parties to understand time-critical events. (14.1)	Developing such resources will reduce complexity associated with accessing the court system, and will give parties a clearer understanding of the process. In some cases, this will involve reassessing existing case management processes to improve outcomes where self-represented litigants are involved.
Power imbalances mean that less experienced and/or resourced parties can be disadvantaged in disputes with government and their agencies.	Governments and their agencies should be subject to model litigant guidelines. More effort is needed to ensure that model litigant guidelines are adhered to. (12.2)	Supporting less-resourced parties will promote fairness and equality before the law. There are potential cost savings for governments by more fully exploiting opportunities to resolve disputes as early as possible.
Self-represented litigants can be disadvantaged.	Self-represented litigants should be better assisted by judges and court staff; consistent rules and guidelines are needed to give them the confidence to assist, while remaining impartial. Lawyers who deal with self-represented litigants also require clearer guidelines on how to simultaneously meet their duties to their client and to the court. Clearer rules on when assistance can be sought from non-lawyers are also required. (14.2-3)	Self-represented litigants will be better supported in the court and tribunal systems. Clear guidelines and rules can make case management more responsive to self-represented litigants.
<i>Prices do not always reflect the balance of public and private benefits</i>		
Court and tribunal fees do not reflect the private benefits to users of the court system and do not provide an appropriate signal for parties to attempt to resolve disputes through alternative means in the first instance.	Court and tribunal fees should be set to recover a relatively high proportion of costs depending on the characteristics of parties and the dispute. Fee waivers should continue to be provided to disadvantaged litigants. (16.1-4)	Higher and differentiated fee structures will provide parties with an incentive to resolve disputes informally, and increase the fiscal sustainability of courts and tribunals, while still providing a safety net. Extra fee revenue has the potential to improve court and tribunal services.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
<i>Some public benefits are poorly accounted for</i>		
Some disputes that have significant public interest considerations do not proceed to litigation because parties have concerns about liability for adverse costs orders.	Courts should grant protective costs orders to parties involved in matters against governments, which are considered meritorious and in the public interest. Courts should outline and adhere to criteria to ensure that these orders are applied in a consistent and fair manner. (13.6)	Extending the use of protective costs orders for cases against governments will ensure matters in the public interest are formally determined. This may also improve incentives for governments to consider early resolution, if appropriate.
While formal resolution of cases with public interest elements can benefit broader society, these benefits are not realised if the costs of litigation are too high for private parties.	Governments should establish a public interest litigation fund to pay for any costs awarded against public interest litigants. (13.7)	Legal disputes that are determined to be meritorious and in the public interest would be insured against adverse costs awards. It is anticipated that the public interest litigation fund would be funded by costs awards from successful cases.
<i>Greater use could be made of technological innovations</i>		
Opportunities to use technology in the court system to improve access to justice have not been fully exploited.	Courts should examine opportunities to use technology to facilitate more efficient and effective interactions with users, reduce administrative cost and support improved data collection and performance measurement. (17.2)	Improving the use of information technology will improve accessibility and case management. Increases in court fees could be used to fund upgrades to information technology systems.
<i>Assisting consumers to cope with 'lumpy' costs</i>		
<i>Unbundling legal services would help</i>		
Legal services are generally provided on a 'full-service' basis with limited opportunity to purchase discrete task assistance.	Governments, in collaboration with legal services providers, should develop a single set of rules to offer consumers the option of purchasing unbundled assistance. (19.1-2)	Consumers can choose which legal services they want, and can access services from which they would otherwise be excluded.
<i>Private sources of funding are important</i>		
Not all consumers can afford the upfront costs of legal actions. While some forms of billing alleviate this, restrictions on damages-based billing mean some meritorious claims may not be pursued.	Governments should remove the restriction on calculating lawyers' fees as an agreed share of the amount recovered through legal action, for most civil matters. (18.1)	Removing these restrictions can encourage legal professionals to take on more cases. This may lead to more litigation but only where legal professionals consider a case to have merit.
Litigation funders are not appropriately regulated. This leaves consumers at risk of potential default.	Litigation funders should be regulated as licensed financial services providers, subject to ethical standards and monitored by the Australian Securities and Investment Commission and the courts. (18.2)	Regulating litigation funders will safeguard consumers from potential defaults or serious misconduct.

<i>Current problem</i>	<i>Proposed reform</i>	<i>Main benefits of change</i>
Legal assistance services for disadvantaged Australians		
<i>There is scope to improve how governments intervene</i>		
The capacity of legal assistance providers to assist disadvantaged Australians is constrained, including by funding arrangements. Access to legal assistance grants for civil matters is highly restricted.	Governments should ' earmark' a specified amount of legal assistance funding for civil matters. (21.1)	Access to legal assistance for civil matters will be improved. This may assist in preventing legal problems from escalating. This in turn will reduce costs to the justice system, and the community more broadly.
<i>The distribution of funds could be better matched to need</i>		
The Community Legal Services Program funding model does not link needs with services and is not responsive to demographic changes or changes to need.	The Commonwealth Government should reform the Community Legal Services Program funding model to be more responsive to legal need and resources should be reallocated accordingly. (21.4)	Legal assistance services will be better targeted to areas of need and the funding model will be able to adapt to changing needs. Reallocation of existing funding will deliver better value for money.
<i>There is also scope for better targeting of services</i>		
Eligibility criteria for legal assistance are not consistently applied.	Eligibility for grants of legal aid should take into account the client's circumstances and the impact of the legal problem on the client and the community more broadly. (21.2)	Eligibility tests would be more transparent and equitable. Services would be better targeted towards disadvantaged Australians.
<i>Culturally tailored services are essential but need improvement</i>		
There is unmet need for legal assistance among Aboriginal and Torres Strait Islander Australians, particularly in civil and family matters.	Funding for Family Violence Prevention Legal Services, should be allocated to areas of 'highest need' and the funding allocation model revised to reflect differences in need and service cost across geographic areas. (22.2)	For Aboriginal and Torres Strait Islander Australians, access to justice for civil matters will improve as services are better targeted to fill services gaps and are more efficient.
<i>Pro bono can play a small but important role in bridging the gap</i>		
There are limitations on the quantity and effectiveness of lawyers seeking to provide pro bono services.	Where possible, barriers should be removed by adopting conflict of interest coordinators, and by all jurisdictions allowing free practising certificates limited to pro bono provision. Pro bono providers should be required to evaluate their programs. (23.1-2, 23.4)	The provision of pro bono services will be improved by making the best use of the available capacity of volunteers within the legal profession.
Steps to understand how the system is functioning		
Evaluation of informal resolution services, formal institutions and legal assistance services is poor and does not provide a robust evidence base to determine what is working and where improvements can be made.	All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data that can be used for policy evaluation and research purposes. (24.1-2)	Improving the reliability and quality of data collected about the sector's activities will facilitate robust policy evaluation, lead to more evidence-based policy, and help better target government spending.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

List of findings, recommendations and information requests

Chapter 2: Exploring legal needs

DRAFT FINDING 2.1

Based on the most recent data, around 17 per cent of the population had some form of unmet legal need that related to a dispute that they considered substantial.

DRAFT FINDING 2.2

Informal dispute resolution mechanisms such as ombudsmen could be better employed to address a significant share of unmet legal need, potentially reducing the proportion of the population with unmet legal need from 17 per cent to less than 5 per cent.

Chapter 5: Understanding and navigating the system

INFORMATION REQUEST 5.1

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

DRAFT RECOMMENDATION 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

INFORMATION REQUEST 5.2

Information is sought on the costs and benefits of adopting the legal problem identification training module (being developed by the Commonwealth Attorney-General's Department and Department of Human Services) more widely among non-legal workers who provide services to disadvantaged groups.

Feedback is also sought on which agencies' staff should receive this training and whether funding should be provided to cover training costs.

INFORMATION REQUEST 5.3

The Commission seeks feedback on how best to facilitate effective referrals for legal assistance between organisations responsible for human service delivery, and, where appropriate, greater information sharing across departments and agencies.

Chapter 6: Information and redress for consumers

INFORMATION REQUEST 6.1

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

DRAFT RECOMMENDATION 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

DRAFT RECOMMENDATION 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

DRAFT RECOMMENDATION 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- ***This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.***
- ***The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.***

INFORMATION REQUEST 6.2

How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?

INFORMATION REQUEST 6.3

The Commission is seeking views on the appropriate 'hosts' for central online resources with information about legal fees — should they be hosted by each jurisdiction's Attorney-General's department, legal services commissioner (or equivalent) or legal aid commission? Could this resource exist alongside a 'directory' listing of firms who are willing to advertise their prices through, say, a law society website?

How could information on quality of service elements best be gathered and reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be 'hosted' by governments, professional associations or independent providers?

DRAFT RECOMMENDATION 6.4

In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).

- Lawyers should be required to provide access to this information within five days of the request.***
- The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.***
- Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.***

DRAFT RECOMMENDATION 6.5

Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).

- Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.***

DRAFT RECOMMENDATION 6.6

Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).

- ***This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.***
- ***Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.***

DRAFT RECOMMENDATION 6.7

As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.

DRAFT RECOMMENDATION 6.8

The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

INFORMATION REQUEST 6.4

The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:

- *consumers are aware of complaints avenues and using them*
- *resolution of disputes and investigations is timely and the sanctions imposed proportionate*
- *consumers and lawyers are satisfied with the outcomes of complaints processes?*

Chapter 7: A responsive legal profession

DRAFT RECOMMENDATION 7.1

The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- *the appropriate role of, and overall balance between, each of the three stages of legal education and training*
- *the ongoing need for the ‘Priestley 11’ core subjects in law degrees*
- *the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education*
- *the relative merits of increased clinical legal education at the university or practical training stages of education*
- *the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.*

INFORMATION REQUEST 7.1

Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there ‘best practice’ jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

DRAFT RECOMMENDATION 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

- *Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.*

DRAFT RECOMMENDATION 7.3

State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.

INFORMATION REQUEST 7.2

Does the inability to operate as a limited liability partnership represent a significant cost to, or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?

INFORMATION REQUEST 7.3

To what extent would harmonising accounting standards and mutually recognising audits between jurisdictions reduce the compliance burden on firms from maintaining trust accounts in each jurisdiction? Are there alternative ways to ' earmark ' interest earned from the account as arising in particular jurisdictions? Is it possible to develop funding formulas to redistribute funds if national trust accounts are adopted? If so, what should these formulas be based on — legal activity or legal need in each jurisdiction?

INFORMATION REQUEST 7.4

How should money from 'public purposes' funds be most efficiently used?

INFORMATION REQUEST 7.5

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

Chapter 8: Alternative dispute resolution

DRAFT RECOMMENDATION 8.1

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

INFORMATION REQUEST 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

DRAFT RECOMMENDATION 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

DRAFT RECOMMENDATION 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

DRAFT RECOMMENDATION 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

DRAFT RECOMMENDATION 8.5

Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

DRAFT RECOMMENDATION 8.6

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

Chapter 9: Ombudsmen and other complaint mechanisms

INFORMATION REQUEST 9.1

Given the difficulty in estimating the individual costs of the various functions of some ombudsmen and complaints mechanisms, the Commission seeks feedback on whether the estimates it has derived can be further refined. The Commission also seeks feedback on the costs of ombudsmen undertaking systemic reviews.

DRAFT RECOMMENDATION 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

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- *more prominent publishing of which ombudsmen are available and what matters they deal with*
 - *the requirement on service providers to inform consumers about avenues for dispute resolution*
 - *information being made available to providers of referral and legal assistance services.*

DRAFT RECOMMENDATION 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

DRAFT RECOMMENDATION 9.3

In order to promote the effectiveness of government ombudsmen:

- *government agencies should be required to contribute to the cost of complaints lodged against them*
- *ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded*
- *government ombudsmen should be subject to performance benchmarking.*

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

Chapter 10: Tribunals

INFORMATION REQUEST 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

DRAFT RECOMMENDATION 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

DRAFT RECOMMENDATION 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

INFORMATION REQUEST 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

INFORMATION REQUEST 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

INFORMATION REQUEST 10.4

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

INFORMATION REQUEST 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

Chapter 11: Court processes

DRAFT RECOMMENDATION 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- ***the abolition of formal pleadings***
- ***a focus on early identification of the real issues in dispute***
- ***more tightly controlling the number of pre-trial appearances***
- ***requiring strict observance of time limits.***

DRAFT RECOMMENDATION 11.2

There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction.

The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).

INFORMATION REQUEST 11.1

The Commission seeks feedback on the most appropriate body for coordinating analysis and evaluation of the different case management approaches and techniques available to Australian courts.

DRAFT RECOMMENDATION 11.3

The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.

DRAFT RECOMMENDATION 11.4

Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

INFORMATION REQUEST 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.

DRAFT RECOMMENDATION 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available***
- courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly***
- court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate***
- courts should be expressly empowered to make targeted cost orders in respect of discovery.***

INFORMATION REQUEST 11.3

The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

DRAFT RECOMMENDATION 11.6

All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently.

All jurisdictions should ensure that, at a minimum, these checklists cover:

- scope of discovery and what constitutes a reasonable search of electronic documents***
- a strategy for the identification, collection, processing, analysis and review of electronic documents***

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- *the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)*
 - *a timetable and estimated costs for discovery of electronic documents*
 - *an appropriate document management protocol.*

DRAFT RECOMMENDATION 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

INFORMATION REQUEST 11.4

The Commission seeks feedback on the impact of the pre-disclosure requirements in section 26 of the Civil Procedure Act 2010 (Vic) on the conduct of litigation in that jurisdiction.

DRAFT RECOMMENDATION 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- *a requirement on parties to seek directions before adducing expert evidence*
- *broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.*

DRAFT RECOMMENDATION 11.9

Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:

- *a single joint expert or court appointed expert would be appropriate in a particular case*
- *to use concurrent evidence, and if so, how the procedure is to be conducted.*

DRAFT RECOMMENDATION 11.10

All courts should:

- *explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia*

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- ***facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.***

Chapter 12: Duties on parties

INFORMATION REQUEST 12.1

The Commission seeks feedback on the effectiveness of current overarching obligations imposed on parties and their legal representatives in litigation processes. In particular, how might the detection of non-compliance and the enforcement of these obligations be improved?

DRAFT RECOMMENDATION 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

INFORMATION REQUEST 12.2

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

DRAFT RECOMMENDATION 12.2

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

INFORMATION REQUEST 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

INFORMATION REQUEST 12.4

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

INFORMATION REQUEST 12.5

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

INFORMATION REQUEST 12.6

The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?

Chapter 13: Costs awards

DRAFT RECOMMENDATION 13.1

Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.

DRAFT RECOMMENDATION 13.2

In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:

- ***the stage reached in the trial process***

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- *the amount that is in dispute.*

For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.

Fixed scales of costs should reflect the typical market cost of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories.

DRAFT RECOMMENDATION 13.3

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

DRAFT RECOMMENDATION 13.4

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

INFORMATION REQUEST 13.1

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

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

The Commission is interested in any other options that could be examined.

DRAFT RECOMMENDATION 13.5

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

DRAFT RECOMMENDATION 13.6

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

DRAFT RECOMMENDATION 13.7

Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.

These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.

INFORMATION REQUEST 13.2

The Commission invites comment on the most appropriate arrangements for the governance and funding of a public interest litigation fund (PILF), including:

- *appropriate mechanisms and criteria to govern access to the fund*
- *whether the PILF should be established as a new entity, or integrated into existing legal assistance funds or bodies.*

Chapter 14: Self-represented litigants

INFORMATION REQUEST 14.1

What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?

DRAFT RECOMMENDATION 14.1

Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.

- ***All court and tribunal forms should be written in plain language with no unnecessary legal jargon.***

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- ***Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case. Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.***
 - ***Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.***

DRAFT RECOMMENDATION 14.2

Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.

Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.

INFORMATION REQUEST 14.2

There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

INFORMATION REQUEST 14.3

How widespread are problems around conflicts of interest for providers offering unbundled services? Do provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from discrete, one-off forms of advice from assistance services and if so, how might this best be done?

DRAFT RECOMMENDATION 14.3

Governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants.

Chapter 15: Tax deductibility

DRAFT RECOMMENDATION 15.1

The Commission recommends that no change be made to existing tax deductibility of legal expenses.

Chapter 16: Court and tribunal fees

DRAFT RECOMMENDATION 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- *in cases concerning personal safety or the protection of children*
- *for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.*

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

DRAFT RECOMMENDATION 16.2

Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:

- *whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body*
- *the amount in dispute (where relevant)*
- *hearing fees based on the number of hearing days undertaken.*

INFORMATION REQUEST 16.1

The Commission invites views on the most appropriate means of determining fee contributions to indirect costs, based on the economic value at stake, in cases where a monetary outcome is not being sought, such as a major planning dispute.

DRAFT RECOMMENDATION 16.3

The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.

DRAFT RECOMMENDATION 16.4

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

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

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

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

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

INFORMATION REQUEST 16.2

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

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

The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

Chapter 17: Courts — technology, specialisation and governance

DRAFT RECOMMENDATION 17.1

Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.

DRAFT RECOMMENDATION 17.2

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

INFORMATION REQUEST 17.1

The Commission seeks views on how best to enable courts to identify their technological needs and service gaps, and promote work practices that maximise the benefits of available technologies. In particular, the Commission seeks views on whether, and to what extent, this involves greater use of court information technology strategic plans and/or greater coordination and leveraging of technology solutions across and within jurisdictions. Investment in which types of technologies, including those to better assist self-represented litigants, would be most cost effective? What are the likely costs of addressing the different technological needs of different courts?

DRAFT RECOMMENDATION 17.3

Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.

INFORMATION REQUEST 17.2

The Commission seeks feedback from stakeholders on the extent to which existing jurisdictional arrangements for planning and environment matters present problems for access to justice in those Australian jurisdictions lacking a specialist environment court, and cost effective options for improving current arrangements.

INFORMATION REQUEST 17.3

The Commission seeks feedback from stakeholders on whether changes to current court administration arrangements are desirable to facilitate more efficient and effective court operations.

INFORMATION REQUEST 17.4

The Commission seeks input on the most appropriate mechanism for funding courts and allocating fee revenue. Options to consider may include:

- *maintaining existing funding and revenue arrangements*
- *reforms to appropriations, which may include use of separate appropriations for judicial salaries*
- *a hypothecated model where courts are funded through retained fee revenue (with fees set by the government) and payments received from government in lieu of fees that have been waived. Alternatively, such a model could allow courts to set their own fees and levels of expenditure.*

Chapter 18: Private funding for litigation

DRAFT RECOMMENDATION 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- ***The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.***

INFORMATION REQUEST 18.1

The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:

- *Is the 25 per cent limit on uplift fees for conditional billing appropriate? What are the benefits and costs of changing this limit?*
- *Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration be given to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?*

DRAFT RECOMMENDATION 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

Chapter 19: Bridging the gap

DRAFT RECOMMENDATION 19.1

The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- ***how to define the scope of retainers***
- ***the liability of legal practitioners***
- ***inclusion and removal of legal practitioners from the court record***
- ***disclosure and communication with clients, including obtaining their informed consent to the arrangement.***

DRAFT RECOMMENDATION 19.2

The private legal profession should work with referral agencies to publicise the availability of their unbundled services.

INFORMATION REQUEST 19.1

The Commission seeks feedback on the prospects of legal insurance being offered by private providers and whether there are any public policy impediments to such an offering.

INFORMATION REQUEST 19.2

The Commission seeks feedback on the strength of the case for a Legal Expenses Contribution Scheme and views on any relevant design features, including what legal expenses should be covered and whether it should be limited to particular matters.

INFORMATION REQUEST 19.3

The Commission seeks feedback on whether there are any policy barriers that unnecessarily obstruct not-for-profit provision of legal services.

Chapter 21: Reforming the legal assistance landscape

DRAFT RECOMMENDATION 21.1

Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

INFORMATION REQUEST 21.1

The Commission seeks views on whether the above demarcation of funds would be sufficient to ensure that appropriate resources are directed towards non-criminal, non-family law matters.

DRAFT RECOMMENDATION 21.2

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

DRAFT RECOMMENDATION 21.3

The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

INFORMATION REQUEST 21.2

The Commission seeks views on the appropriate relationships between legal aid rates and market rates for the provision of legal services. What might be the cost of altering the relationship between the two rates?

DRAFT RECOMMENDATION 21.4

The Commonwealth Government should:

- ***discontinue the current historically-based Community Legal Services Program (CLSP) funding model***
- ***employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions***
- ***divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.***

INFORMATION REQUEST 21.3

The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

INFORMATION REQUEST 21.4

The Commission seeks feedback on the extent of, and the costs associated with, meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

DRAFT RECOMMENDATION 21.5

The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

Chapter 22: Assistance for Aboriginal and Torres Strait Islander people

DRAFT FINDING 22.1

Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

INFORMATION REQUEST 22.1

The Commission seeks views on the most appropriate model for engagement between governments and Indigenous-specific legal assistance services. Practical examples of successful models and the lessons from implementation are also sought.

DRAFT RECOMMENDATION 22.1

The Commonwealth Government should:

- establish service delivery targets (as currently apply to Aboriginal and Torres Strait Islander legal services (ATSILS)) within service plans for family violence prevention legal services (FVPLS)***
- develop and implement robust benchmarks with ATSILS and FVPLS to better measure performance. These agreed benchmarks should be a consideration in framing the administrative data collection for ATSILS and FVPLS.***

DRAFT RECOMMENDATION 22.2

The Commonwealth Government should allocate funding for both Aboriginal and Torres Strait Islander legal services and family violence prevention legal services in accordance with differences in need and service costs across geographic areas.

INFORMATION REQUEST 22.2

The Commission seeks feedback on how the funds determined in draft recommendation 22.2 should be distributed across providers and how the relatively small scale of some providers affects the efficiency and effectiveness of services. Would there be benefits from further amalgamation of services and if so, how might this process be brought about?

DRAFT FINDING 22.2

The policies of state and territory governments can impact significantly on demand for services provided by Aboriginal and Torres Strait Islander legal services and family violence prevention legal services. Given these services are funded by the Commonwealth Government, there are poor incentives for state and territory governments to consider the ramifications of their policy changes on demand for these Commonwealth funded services.

INFORMATION REQUEST 22.3

The Commission seeks feedback on whether the National Partnership Agreement on Legal Assistance Services should include state and territory government funding for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services to provide a greater incentive for state and territory governments to consider the impact of changes in state or territory based policies on the demand for these services. Are there other ways this could be achieved? Where state and territory governments do not provide funding, or only provide limited funding, what role should they play in influencing service delivery and reporting requirements?

DRAFT RECOMMENDATION 22.3

While recognising there are significant challenges to addressing unmet need for Indigenous language interpreters, the Commonwealth and state and territory governments should agree and implement the proposed national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of the National Partnership Agreement on Remote Service Delivery.

INFORMATION REQUEST 22.4

The Commission seeks information on the level of funding required to expand interpreter services to meet some or all of the gap in Indigenous interpreter services.

DRAFT RECOMMENDATION 22.4

The Commonwealth Government should:

- ***undertake a cost-benefit analysis to inform the development of culturally tailored alternative dispute resolution (including family dispute resolution) services for Aboriginal and Torres Strait Islander people, particularly in high need areas***
- ***subject to the relative size of the net benefit of such a service, fully fund these services***
- ***encourage government and non-government providers of mainstream alternative dispute resolution services to adapt their services so that they are culturally appropriate for Aboriginal and Torres Strait Islander people (where cost-effective to do so).***

INFORMATION REQUEST 22.5

The Commission seeks information on the cost of a culturally appropriate Indigenous-specific alternative dispute resolution (including family dispute resolution) service(s), particularly in 'high need' areas. Views on the appropriate engagement model and governance arrangements are also sought.

INFORMATION REQUEST 22.6

The Commission seeks information on the cost-effectiveness of earlier and more pro-active engagements by government agencies with Aboriginal and Torres Strait Islander clients who are at risk of disputes with government.

Chapter 23: Pro bono services

DRAFT RECOMMENDATION 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.

Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.

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- ***For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.***

INFORMATION REQUEST 23.1

Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents, that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?

DRAFT RECOMMENDATION 23.2

The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

INFORMATION REQUEST 23.2

The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?

INFORMATION REQUEST 23.3

The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?

DRAFT RECOMMENDATION 23.3

Any pro bono targets used by governments as incentives in tender arrangements should remain flexible. Reporting required for pro bono targets should be clear and simple.

INFORMATION REQUEST 23.4

The Commission is seeking views on the most efficient form of pro bono targets. How should they be expressed (in hours, dollars or some other means)? How do the reporting requirements of the two current targets (one for the Commonwealth and the other for Victoria) compare in terms of limiting compliance costs?

DRAFT RECOMMENDATION 23.4

The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers should be contingent upon regular, robust and independent evaluation of the services provided.

INFORMATION REQUEST 23.5

The Commission is seeking views on methods to implement data collection on pro bono services without increasing unnecessary reporting burdens. Are there ways to better utilise existing sources? Can reporting be standardised? Are there existing social impact metrics (or categories of outcome) that should be adopted? How would data collection best be done in a systemic manner? Who should collect the data?

Chapter 24: Data and evidence

DRAFT RECOMMENDATION 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- ***adopting common definitions, measures and collection protocols***
- ***linking databases and investing in de-identification of new data sets***
- ***developing, where practicable, outcomes based data standards as a better measure of service effectiveness.***

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

DRAFT RECOMMENDATION 24.2

As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.

INFORMATION REQUEST 24.1

The Commission seeks feedback on where a data clearinghouse for data on legal services should be located. Such a clearinghouse needs to be able to coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. It should also have some expertise in linking, using and presenting data, especially administrative data. Ideally, the clearinghouse should also have experience in liaising with legal service providers and different levels of government, have an understanding of the operation of the civil justice system and understand the principles behind benchmarking.

DRAFT RECOMMENDATION 24.3

The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.

1 What is this inquiry about?

A well-functioning civil justice system underpins social cohesion and economic activity. It is critical for managing disputes between individuals, families, businesses and governments.

Australia's modern civil justice system encompasses more than just the courts, and includes ombudsmen, tribunals and alternative forms of dispute resolution. The importance of the system is reflected in both the volume and the subject of claims. There were around 2 million finalised civil disputes in the year ending 30 June 2012, covering relationships, education, employment, money, debt, injury, health, housing and dealings with government.

Access to the justice system is not only important for individuals, but for the community as a whole. As Genn said:

... the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. (2010, p. 3)

There have been numerous inquiries on access to justice.³ Justice Sackville, a former Federal Court Judge, lamented that:

At almost any given time in Australia, there is an inquiry under way into access to justice or consideration is being given to the latest report on the subject. (2011, p. 231)

Some of the inquiries were broad-ranging, while others focused on a single issue or a narrow set of issues. But despite the many reviews and efforts by courts and governments to improve the ability of Australians to access justice, concerns remain. The Chief Justice of Western Australia, Wayne Martin, recently said:

The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. ... In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance. (2012a, p. 3)

³ See for example: AGD (2009); AJAC (1994); ARLC (2000); Senate Legal and Constitutional Affairs References Committee (2009); Senate Legal and Constitutional References Committee (2004); VLRC (2008).

While many concerns focus on the costs of accessing services and securing legal representation for disputants, the cost to governments of providing access to justice has also been of increasing concern.

An accessible civil justice system also implies dispute resolution processes that are widely available, well understood, and timely. But here too, there are concerns about failings in the system.

It is against this backdrop that the Australian Government asked the Commission to undertake a broad-ranging inquiry into Australia's system of civil dispute resolution with a focus on constraining costs, and promoting access to justice and equality before the law. The Commission has been requested to make recommendations on the best way to improve access to the civil justice system and equity of representation including, but not limited to, the funding of legal assistance services. The full terms of reference are set out at the front of this report.

The terms of reference include a number of key concepts which set the scope and boundaries of this inquiry, including: 'access to justice'; 'equality before the law'; and 'Australia's system of civil dispute resolution'. These key concepts are explored in the following sections.

1.1 What is 'access to justice'?

There are many definitions of 'access to justice'. The phrase is often used as an unobjectionable, all encompassing, worthy aim or ideal. For example, Sir Jack Jacob said:

We must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, as to promote harmony and peace in society, lest they fester and breed discontent and disturbance. In truth, the phrase itself 'access to justice' is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged. (Genn 1997, p. 168 citing Jacob 1978, p. 417)

Access to justice can mean different things to different people. As Justice Sackville observed:

Like other catchphrases, such as 'fairness' and 'accountability' (if not 'democracy' itself), the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people. (2002, p. 19)

Ultimately, access to justice is defined by its two elements — access and justice. 'Access' is the ability to approach or make use of something. It is independent of need. In this context, access requires that people are able to approach and use the

justice system to resolve their disputes. Barriers that could inhibit access to the justice system include:

- the absence of mechanisms to enforce rights in certain circumstances
- the costs of accessing the system
- the complexity of the system and the law which underpins it
- delays.

Barriers to access can also arise from the traits of the people seeking access, including their personal resources, capabilities and perceptions about the system. As the Law Council of Australia said:

The ‘effective access’ enjoyed by individuals necessarily depends on a range of factors, including geographic location, economic capacity, health, education, cultural and linguistic variations, formal and informal discrimination, and other variable factors. (sub. 96, p. 28)

‘Justice’ is what people are seeking access to. But the term resists easy definition. Justice Sackville (2013) reflected on the continuing philosophical quest to define what justice means, and concluded that justice can be easier to recognise than to define. Indeed, the concept of justice takes on different meaning depending on whether it is viewed through a philosophical or legal lens.

In the legal context — the setting for this inquiry — justice typically denotes the administration of the law according to prescribed and accepted principles. It follows that access to justice implies that all individuals have a fair opportunity for their rights to be determined according to these principles (box 1.1).

Importantly, access to justice is no guarantee of a successful *outcome* from the process. As the Australian Law Reform Commission (ALRC) emphasised in its report *Managing Justice: a Review of the Federal Civil Justice System*:

Access to *justice* can only ever mean, in broad institutional and systemic terms, relatively equitable access to the legal process. Access to the system is no guarantee of a successful outcome from the process, and thus is no guarantee of litigant satisfaction in all cases. (2000, p. 90)

The Commission’s view is that a just outcome is likely to be associated with fair and transparent processes — confidence in the integrity of the process instils confidence in the outcome reached. For example, the ALRC (2000, p. 91) argued that a justice system that overemphasises cost, speed and efficiency at the expense of fair, open, dignified and careful processes, may not deliver ‘true justice’.

Box 1.1 Access to justice — many aspects, many definitions

Definitions of access to justice touch on a number of elements. One such element relates to 'who' should be able to access justice:

There is perhaps no more fundamental question in the whole machinery of civil justice than that of 'access to justice'. This is a concept, which although highly emotional, even evocative, envisages that justice should not be the privilege of the few but should be brought within the reach of all citizens in society and should be made available to all of them on the basis of equality, equity and fairness. (Jacob 1982, pp. 60–61)

A second element relates to 'what' is being accessed. It is generally agreed that individuals should have access to the legal system to resolve their civil disputes — both in principle, and at a practical level:

... the concept is most clearly articulated as concerning the link between a person's formal right to seek justice and the person's effective access to the legal system or legal remedies. (Law Council of Australia, sub. 96, p. 27)

To the enthusiastic reformers of the late 1960s and the 1970s, the principle of 'access to justice' ... implied that affirmative steps had to be taken to give practical content to the law's guarantee of formal equality before the law. (Sackville 2002, p. 20)

However, views on what constitutes the 'system' can differ:

The term 'access to justice' means different things to different people. For some, the subject centralises the issue of overcoming the procedural barriers within the court system itself. (Schetzer, Mullins and Buonamano 2002, p. 65)

It is now well accepted that access to justice does not involve only enhanced access to the formal processes of civil courts. There is a range of well utilised informal, dispute resolution options available for federal civil disputes, with agencies also generally educating the community about dispute resolution and dispute prevention. (ALRC 2000, p. 90)

... in line with new waves of reforms to establish a variety of preventative and early intervention strategies, the concept of access to justice has successively extended beyond access to the formal justice system to additionally include access to legal information and education, non-court-based dispute resolution and law reform. (Coumarelos et al. 2012, p. 207; Macdonald 2005)

Some policymakers also consider that access to justice extends to the capabilities of individuals to deal with their disputes:

Access to justice should include resilience: reinforcing and enhancing the capacity of people to resolve disputes themselves. (AGD 2009, p. 2)

A further element relates to the distinction between access to processes, versus outcomes:

At its most basic it is about access to procedures for making rights effective through state-sponsored public and fair dispute resolution processes. It implies equal access to authoritative enforceable rulings and outcomes that reflect the merits of the case in light of relevant legal principles. It does not imply that laws are necessarily just, but that individuals have a fair opportunity for their rights to be determined according to the prevailing promulgated rules. (Genn 2010, p. 115)

The Commission is seeking to make recommendations that, if implemented, will help people resolve their disputes by improving the capacity and capability of the justice system, and Australians' access to the system. The Commission cannot and will not be reviewing the merits of decisions made by individual courts, tribunals and ombudsmen.

Is 'equality before the law' the same as 'access to justice'?

The terms 'equality before the law' and 'access to justice' are sometimes used interchangeably. However, the phrase 'equality before the law' seems to have a more universal meaning than access to justice.

Equality before the law is generally associated with being treated with formal or procedural equality according to existing law.

The procedural aspect of the rule of law, often referred to as equality before the law, requires everyone to be treated equally according to whatever law exists ... Equality before the law is a requirement for general application of law to all, but not for legal uniformity or the absence of classifications. It makes no particular claims about what the content of law should be. (The Laws of Australia 2012, sec. 21.10.280)

Some argue that safeguarding equality before the law requires addressing barriers.

The goal of equality before the law is that all Australians have equal access to legal advice and representation and to the courts and tribunals that decide disputes. Essentially this means that any barriers which prevent people from enforcing their rights should be removed. It also implies that the institutions that define and uphold the law are not biased against particular groups within the community. (AJAC 1994, p. 27)

Equality before the law and access to justice begin to take on a similar complexion as both are concerned with overcoming barriers.

For the purposes of this report, the Commission considers that access to justice incorporates equality before the law.

Access to justice — the ideal and the reality

Access to justice represents a powerful ideal, but is the ideal achievable? Justice Sackville said:

The implicit promise contained in the catchphrase [access to justice] is that the law and the legal system are capable of achieving the goal of access to justice, if not in the short term then ultimately. The implication is that a just society will be prepared to find the resources required to achieve the goal of access to justice. (2011, p. 232 quoting Sackville 2004, p. 86)

Resources available to the civil justice system and its users are limited and, as such, efforts to improve and promote access to justice involve tradeoffs. In considering these tradeoffs, the metaphor of the justice system as a motor vehicle is often used (Martin 2012a), allowing questions to be asked such as: should the ‘Rolls Royce system’ be traded for a more efficient vehicle? Should alternative ways to fund the fuel be explored, or should the focus be on improving the car’s fuel efficiency? Should some procedural fairness be traded for more efficient outcomes?

Given limited resources, it is important to understand what is being traded off — for example, if more resources are dedicated to improving access to justice, *by how much* are barriers reduced? And does this make society as a whole better off? But this raises a further question — how can success in achieving access to justice be measured? Justice Sackville identifies this measurement problem:

The problem is that there has never been, and it is unlikely that there ever will be, a measurable baseline against which to determine success or failure in eliminating or reducing the well-documented barriers to access to justice. ... Is it possible to assess the extent of the improvements? Can ‘legal needs’ ever be fully satisfied? Given that resources are limited, what should be the priorities? Who should determine the priorities? (2011, p. 14)

The next chapter looks at the relationship between access to justice, legal needs and unmet need. Chapter 4 examines the role of a well-functioning civil justice system in making society as a whole better off by promoting economic, social and environmental outcomes.

1.2 What is ‘Australia’s system of civil dispute resolution’?

The Commission has been asked to examine Australia’s system of *civil* dispute resolution, and to do so requires a working definition of what the system covers. The simplest way to understand what falls within the civil system is to think about what falls outside — civil disputes are not concerned with criminal actions.

A dispute can be thought of as a disagreement that has escalated — parties are unwilling and/or unable to resolve a disagreement among themselves, so they seek access to the dispute resolution system. The legal encyclopaedia *The Laws of Australia* states that a ‘dispute’ refers to:

... overt and contested claims between two or more parties over differing interests, principles and processes. A dispute arises when a perceived wrong or injury has been voiced to another who is believed to be responsible and capable of providing a remedy,

and the claim is rejected. (The Laws of Australia 2010, sec. 13.1.10 citing Felstiner et al. 1981)

Civil disputes concern the rights and responsibilities of private individuals, businesses and governments. They generally involve one party seeking remedial action from a wrongdoing party. For example, a person in a property dispute with his or her local council must bring an action of his or her own accord; the state will not intervene to do it. In contrast, criminal acts involve prosecution and punishment by the state for particular offences deemed to be against the community. More formally, a ‘private civil action’ is defined as:

An action brought in civil law by a party or a number of parties, dealing with the private rights of the citizens. Private civil actions are distinguished from criminal law actions and other actions governed by public law which deal with offences against society as a whole. For example, actions for trespass and negligence are civil in nature whereas prosecutions for murder and rape are criminal actions. (Lexis Nexis 2011)

Disputes covered by this inquiry include those between individuals and businesses (individual-to-individual, individual-to-business, and business-to-business), and those between individuals/businesses and governments and their instrumentalities. Businesses should be taken broadly to include not-for-profit organisations.

This inquiry is primarily concerned with disputes rather than transactional services such as conveyancing, the preparation of contracts or the preparation of wills. Also, the Commission is less concerned with disputes between well-resourced parties such as large companies and governments, unless features of these disputes affect the system more broadly.

The confluence of civil and criminal matters

While the terms of reference clearly direct the Commission to consider the workings of the civil system, the distinction between civil actions and criminal prosecutions is not always clear. Former High Court Chief Justice Murray Gleeson (2006) argued that the dividing line is becoming increasingly blurred.

While it may be easy to identify the difference at the extremes — criminal process aims to punish; civil process aims to compensate — there is a large and increasing grey area in between. For example, civil penalty provisions are increasingly used as a regulatory enforcement option. In Australia, competition regulation and environmental law are examples of law enforcement through civil sanctions.

The interplay between civil and criminal law seems most apparent in the area of family law. A person who inflicts family violence may be subject to a protection

order and/or to criminal prosecution (under state or territory criminal law, or federal criminal law) (ALRC 2010). Physical and sexual assault are clear examples; they are family violence for the purpose of obtaining a protection order, and they are crimes in all jurisdictions.

Mental health law also traverses the criminal and civil systems (McSherry 2008; Wood et al. 2011). Mental health can also be an underlying cause of matters that manifest themselves in the civil justice system.

The Law Council of Australia goes beyond arguing that the dividing lines are not always clear and contends that the criminal and civil justice systems are inextricably linked. Examples of interactions between the systems provided by the Council include:

- the capacity of the courts to hear civil law matters is restricted by the need to ensure prompt hearing of criminal matters
- property, consumer and family law disputes can often take on a different dimension, particularly where criminal behaviour or violence is alleged
- changes to court processes, including altered listing systems, immediately impact on the availability of judicial resources for criminal matters and vice versa
- [Legal Assistance Commissions], [Community Legal Centres] and [Aboriginal and Torres Strait Islander legal services] allocate their finite resources between the jurisdictions
- many lawyers, especially those in regional areas, work in both the civil and criminal spheres — possible changes to work practices, including staffing, business and administrative structures, cannot be assessed without recognising the impact on criminal law practices. (sub. 96, p. 26)

These interactions largely reflect the competition for resources between civil and criminal matters. The Commission limits its consideration of the criminal justice system to exploring the resourcing interactions between the criminal and civil justice systems.

Not just courts — tribunals, ombudsmen, and alternative dispute resolution

Australia's civil justice system offers various avenues and mechanisms to prevent and resolve disputes. For this report, the Commission uses the terms 'civil justice system' or 'civil dispute resolution system' to refer to the full array of judicial, administrative review, and community and court-based alternative dispute resolution (ADR) services across states, territories and the Commonwealth. This

extends to information and advice, and the use of industry ombudsmen (to deal with complaints in areas such as banking and telecommunications).

1.3 The Commission's approach

Consistent with the terms of reference and its own legislation, the Commission has sought to examine the system of civil dispute resolution afresh, drawing on the many past reviews of access to justice where appropriate. Importantly, this inquiry develops a system-wide perspective; or in other words, 'attempts to fit the various parts of the access to justice jigsaw together', something that is considered to have been lacking (Sackville 2011, p. 16).

The Commission's assessment of current arrangements and the proposed reform recommendations are predicated on improving the wellbeing of the community as a whole. This involves taking into account users (and potential users) of the civil justice system, providers of services, and taxpayers. The Commission's approach is set out in more detail in chapter 4.

In preparing this report, the Commission actively sought input from stakeholders.

- After receiving its terms of reference, the Commission released an issues paper inviting public submissions and highlighting particular matters on which it sought information. To date, 152 submissions have been received and placed on the inquiry's website. A full list of public submissions is in appendix A.
- The Commission consulted with a range of interested parties to obtain an overview of the key issues, including a number of initial visits with key stakeholders. During a visit to the United Kingdom, the Commission took the opportunity to discuss the operation of justice systems within that jurisdiction and the range of justice reforms being undertaken. A list of people and organisations that the Commission met with is set out in appendix A.
- To gain a better understanding of various key issues, the Commission also held roundtable discussions with key stakeholders on the topics of legal assistance services, alternative dispute resolution, the legal profession, self-represented litigants and court processes.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

2 Understanding and measuring legal need

Key points

- 'Legal need' is defined as problems for which a legal remedy exists that individuals cannot resolve effectively by their own means. Unmet need is defined as a situation where a person is unaware that they have a legal right, or where they would like to defend a right, but do not as they cannot access legal advice for various reasons.
- Legal problems in Australia are widespread. The *Legal Australia-Wide (LAW) Survey* indicates that 50 per cent of respondents experienced one or more legal problems (criminal or civil) over a 12-month period. An Australia Institute survey found that around a third of survey respondents experienced a civil legal problem in the previous five years.
- The four most prevalent legal problems identified in the *LAW Survey* were related to consumer disputes, crime, housing and government. Aboriginal and Torres Strait Islander Australians are more likely to face legal problems in the categories of rights, government and health, while Culturally and Linguistically Diverse Australians are more likely to experience legal problems in health matters, but less so in many other problem types.
- Of those with a civil legal problem, about 23 per cent had a criminal legal problem and around 10 per cent had a family legal problem.
- More than half of the respondents with a civil problem said that at least one of their legal problems had a 'severe' or 'moderate' impact on everyday life. Multiple legal problems were also common — 10 per cent of respondents (excluding those with only criminal problems) accounted for more than half of all legal problems.
- The *LAW Survey* indicates that the most common ways of dealing with legal problems are via agreement with the other side, not pursuing the matter further, or seeking other agencies to act to resolve the matter (such as government agencies).
- Based on *LAW Survey* data, the Commission estimates that around 17 per cent of Australians have some form of unmet legal need, usually as a result of consulting an inappropriate, non-legal adviser to resolve a legal problem. Better directing parties to appropriate informal dispute resolution mechanisms, such as ombudsmen, could facilitate the resolution of many disputes and potentially reduce this proportion to less than five per cent.
- There is little information around legal needs and unmet need of businesses. One survey conducted in 2010 found that 20 per cent of small businesses had experienced a dispute in the previous 5 years and most were satisfied with the dispute resolution options available.

Knowing what the legal needs of Australians are is critical to understanding what problems or barriers (if any) they face when they seek to access the civil justice system. But what is legal need and how can it be measured? This chapter explores what legal need is and how it relates to ‘access to justice’ (section 2.1) and ways to measure it (section 2.2). Section 2.3 looks at how many Australians experience legal need based on a range of different surveys conducted about this question. Section 2.4 discusses the concentration and the characteristics of those most likely to experience legal problems. How Australians resolve legal problems, and the extent to which legal needs remain unmet, is examined in section 2.5.

2.1 What is legal need?

Understanding the nature and extent of legal need is both an important and challenging first step in considering the accessibility of the civil dispute resolution system.

As Genn and Patterson observed, the concept of legal need is subjective in nature:

... concepts such as ‘the unmet need for legal services’ or even the question of what is a ‘legal problem’ do not lend themselves to easy analysis ... In fact, the prevailing orthodoxy is probably that both of them are subjective in nature and are not open to objective verification. ... to assert that one has a need for legal services is not to make a statement of fact as to make a subjective value judgment. Necessarily, such judgments are open to challenge. No amount of fieldwork, therefore, could establish the ‘true’ extent of the need for legal services. (2001, pp. 3-4)

People can have problems for which a legal remedy exists. These are called ‘justiciable problems’. Genn’s *Paths to Justice* defined a justiciable event as:

... a matter experienced by a respondent which raises legal issues, whether or not it was recognised by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system. (1999, p. 12)

But, as noted by Dignan, justiciable problems are a measure of risk of a legal problem, but not necessarily a measure of legal need.

A ‘legal problem’ refers to a situation in which knowledge of, or use of legal services could be expected to lead to better outcomes and improved welfare for the citizen, compared to what would be expected to occur if such services were not used and/or the citizen lacked knowledge of his or her legal rights. (Dignan 2004, p. ix)

Just because someone has a ‘justiciable problem’ does not mean that they will necessarily seek the assistance of a lawyer, a mediator, or the courts. Rather, civil

justice problems can be dealt with in any number of ways — people can resolve some problems themselves, seek the advice of others with relevant expertise but who do not have legal training, or seek formal legal assistance. As Currie points out, the concept of ‘need’ in civil justice is more complex than in criminal justice because of the many possible responses.

Unlike being charged with a criminal offence, civil justice problems may be dealt with in a variety of ways. ... This variety of circumstance is what makes defining unmet need precisely so difficult. It is not as simple as in criminal justice matters where one can be said to have a legal problem if he or she is arrested and must appear in court to answer the charge. (Currie 2007, p. 3)

But as noted, in the *Ontario Civil Legal Needs Project*, this does not mean that civil legal needs are less important than criminal legal needs:

It is important to address the myth that civil legal needs, because they are diverse, are somehow less important to people or have less impact on society than criminal legal needs. Disputes over custody of children, wrongful dismissal, eviction from housing, powers of attorney, or consumer debt may affect individuals, families, and communities in deep and lasting ways. (2010, pp. 9–10)

Dignan defined ‘legal needs’ as the legal problems that people cannot resolve effectively by their own means. It is based on the view that if a person finds a satisfactory non-legal solution then they cannot be said to have been denied access to legal services (and so takes out of the equation problems that may have a legal dimension but are resolved another way). As Dignan said:

Legal need is really only of interest insofar as it generates a need for legal services. (2004, p. viii)

That said, determining what is a ‘satisfactory non-legal’ solution gives rise to its own difficulties (section 2.5).

Context is also important in any assessment of legal need. How legal problems are handled typically reflects the nature and importance of the problems, including their expected impact. Some legal issues have little or no impact on peoples’ lives and may not be important for people to resolve, while others can be highly disruptive to peoples’ lives. For example, if someone was to purchase a low value faulty product they could resolve the issue by talking to the retailer (and if that was unsuccessful, not pursue it any further). On the other hand, health problems arising from an accident or working conditions could have a significant impact on someone’s life.

That said, unmet legal needs can escalate so they become disruptive to the day-to-day lives of people. For example, if someone were to ignore or fail to understand the terms and conditions of a housing contract, then failing to resolve

the dispute could eventually result in the person's eviction and render them homeless.

Johnsen (1999) suggested that the second condition that defines legal need is that the improvement brought about by the resolution of the problem should lead to improved welfare of the individual. The degree of seriousness (or adverse impact) of a justiciable problem is therefore important when thinking about legal need.

But determining what is 'serious', and what is not, is again far from straightforward as perceptions of seriousness differ, and the impact that a legal problem has on somebody's day-to-day life can be difficult to assess, particularly if there are other issues that are also affecting their wellbeing.

The Commission defines 'legal need' as problems for which a legal remedy exists that parties cannot resolve effectively by their own means. It excludes problems for which parties have sourced appropriate solutions, which may be outside the formal legal system, or that parties have for good reasons chosen not to resolve. Consistent with the intention to focus on areas which are likely to generate the greatest benefits for the community, the Commission proposes focusing on legal problems that have, or are likely to have, a moderate or severe impact on a person's everyday life or a business' routine operations or profitability.

What then is 'unmet legal need'?

Having defined legal need, arriving at a definition of unmet legal need is more straightforward. The Hughes Royal Commission on Legal Services in Scotland said:

When we speak of unmet need we are concerned about instances where a citizen is unaware that he has a legal right, or where he would prefer to assert or defend a right but fails to do so for want of legal services of adequate quality or supply. (Genn and Paterson 2001, p. 5)

The Commission defines 'unmet legal need' as legal need that has either gone unaddressed or has been addressed based on inappropriate advice.

2.2 How can legal need be measured?

There are relatively few measures of legal need in Australia. One potential measure is the use of legal services, which provides insights into expressed legal need and the pathways people take to resolve legal problems. However, information on legal service use does not shed light on unmet need or problems not identified as having a legal solution (Coumarelos et al. 2012, Currie 2007). As Currie said:

Need is frequently treated as synonymous with expressed demand. However, demand is only one type of unmet need that appears in the form of people queuing up at a service agency requesting assistance. Unmet need viewed as demand is a limited view ... People with problems deserving of assistance may not seek assistance, or if they do, may not find effective assistance. Consequently, demand is not a valid and reliable measure of need. (2007, p. 2)

In an attempt to better understand unmet legal need, legal needs studies have been developed and undertaken in a number of countries — including the United States, England, Wales, Scotland, Ireland, New Zealand and Australia (Pleasence, Balmer and Sandefur 2013). The studies measure the incidence of justiciable problems that arise in everyday life and gather information about the actions (or inaction) that people take when they have a problem with a potential legal remedy. As Coumarelos et al. (2012) said:

Such surveys have examined the prevalence of different types of legal problems, the actions people take to resolve these problems and the outcomes they achieve. By building a picture of the nature of legal problems and the pathways to their resolution, these surveys have aimed to inform, and ultimately enhance, the provision of legal services and access to justice. (p. 1)

In the context of a legal need survey, the first step to measuring legal need is to define a set of problems for which a remedy exists in civil law and then determine the frequency with which such problems occur. The second step involves controlling for the level of seriousness (to ensure that the problems satisfy some threshold level of seriousness). Legal need surveys typically attempt to cover problems that involve a certain minimum level of legal need.

Most legal need surveys recognise that legal solutions are not always the most appropriate route to solving legal problems.

2.3 How many Australians experience legal need?

Two surveys of legal need have been undertaken in Australia — the *Legal Australia-Wide (LAW) Survey* and a survey by the Australia Institute. Both surveys show that legal problems are widespread. Another study — which examines legal need amongst Aboriginal and Torres Strait Islander Australians — is also presently being conducted, with some early results already available.

The Legal Australia-Wide Survey

The *LAW Survey* conducted by the Law and Justice Foundation of New South Wales (covering all jurisdictions) found that during 2008, 50 per cent of

respondents experienced one or more legal problems in the previous 12 months. The survey covered criminal as well civil legal problems, but excluded events with legal implications (or transactional services), such as purchasing or selling a house or making a will (box 2.1).

Box 2.1 **About the LAW Survey**

The *LAW survey* involved 20 716 telephone interviews with household residents aged 15 years or over across Australia. Within each state/territory, quota controls were used to achieve a demographic profile in the sample that reflected the population profile. The survey was administered between January and November 2008.

Respondents were asked about their experience of a total of 129 specific types of 'legal' problems that were categorised into 12 broad problem groups — accidents, consumer, credit/debt, crime, employment, family, government, health, housing, money, personal injury and rights. The survey assessed:

- the prevalence of legal problems
- the nature of legal problems
- the strategies used in response to legal problems
- the advice received for legal problems
- the finalisation of legal problems
- the outcomes of legal problems.

Problems were categorised into two groups based on their level of severity — substantial problems (those problems identified by respondents as having a severe or moderate impact on everyday life) and minor problems (those problems with a slight or no impact).

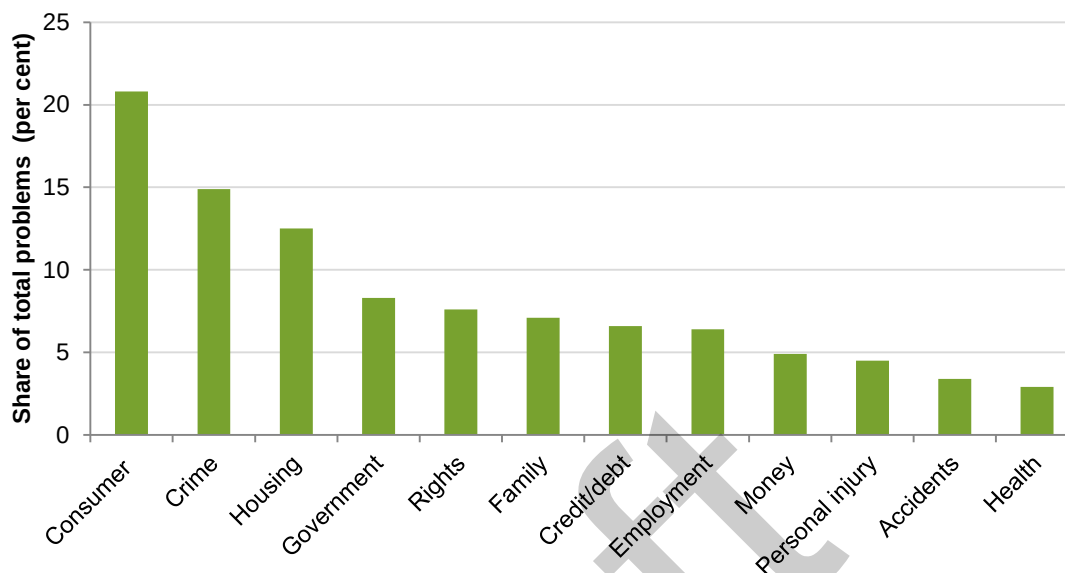
Source: Coumarelos et al. (2012).

Disputes, severity and disputants

The four most common legal problem groups were consumer disputes, crime, housing and government (figure 2.1).

Just over half (55 per cent) of the respondents with legal problems said they had had either a moderate or severe impact on their everyday life. The most common adverse consequences reported from legal problems were income loss or financial strain (29 per cent), stress-related illness (20 per cent) and physical ill health (19 per cent) (Coumarelos et al. 2012).

Figure 2.1 **Composition of legal problems faced by Australians^a**
2008



^a Consumer (problems relating to goods and services, financial institutions); Crime (offender or victim); Housing (neighbours, rental agreements, loans); Government (fines, payments/allowances); Rights (including non-work related discrimination due to age, race, gender, religion and disability, and unfair treatment by police); Family (children and relationships); Credit/debt (including breaches of government income support payments, rent payments, loan payments and credit card debt); Employment (unfair dismissal, redundancy, pay and condition, discrimination, harassment, victimisation or mistreatment); Money (business investment, wills/estates); Personal injury; Accidents; Health (including mental health, long term illness or disability and clinical negligence).

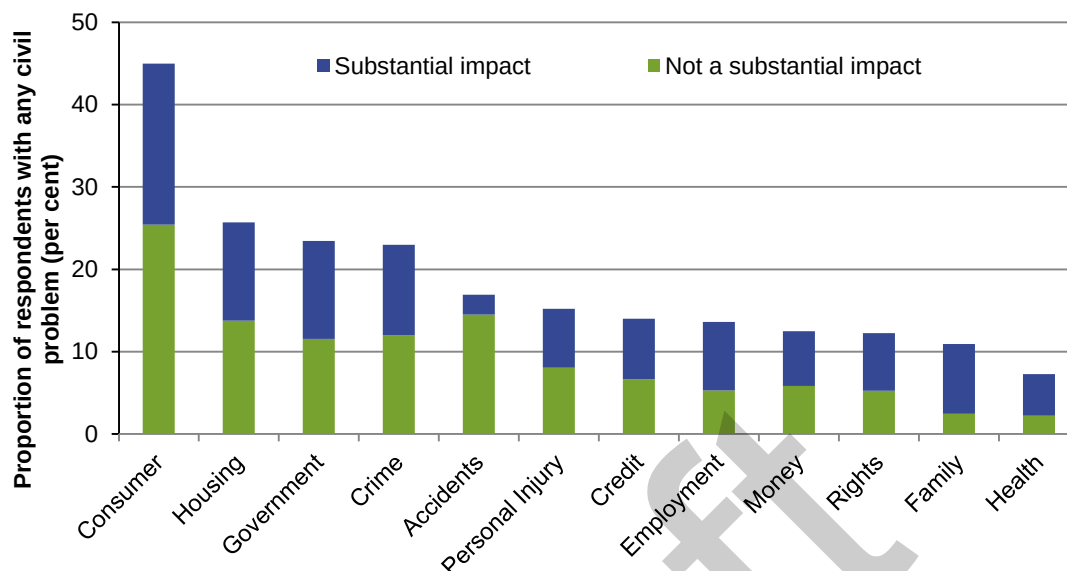
Data source: Coumarelos et al. (2012).

Analysis of the *LAW Survey* data undertaken by the Commission found that of the more than 10 000 respondents to the survey who had a legal problem, less than nine per cent had *only* criminal problems. Of those remaining, 77 per cent did not have *any* criminal problems and 23 per cent had both criminal and non-criminal problems.

Of the sample with either only civil matters (including family), or both civil and criminal matters, 57 per cent said they had a substantial problem — problems rated as having a moderate or severe impact on everyday life.

Some problems were more likely to be reported as substantial (family, health and employment) than others (accidents, consumer and government) (figure 2.2).

Figure 2.2 Prevalence of problems and severity^a
Proportions of respondents with any civil problem



^a Where respondents have more than one instance of the same problem, the most severe impact is reported. 'Substantial' is defined as problems reported by respondents as having a 'moderate' or 'severe' impact on everyday life. Criminal problems are included for those respondents that also had civil/family problems.

Data source: Commission estimates based on unpublished *LAW Survey* data.

For non-criminal substantial matters, the most common disputes were with employers, telecommunications companies, and present or former partners (table 2.1).

Table 2.1 Top 10 categories of disputants^a – substantial civil and family problems^b
Per cent

<i>Other side to the dispute</i>	<i>Per cent of problems</i>
Employer/boss/supervisor	9.9
Telecommunications company	9.5
Spouse/partner or ex-spouse/partner	9.2
Government department/agency	8.0
Neighbour	7.6
Local council/government	5.8
Other business person/organisation	4.4
Other relative	4.4
Health or welfare person/organisation	4.3
Bank/building society/credit union	4.2

^a Accounts for 67 per cent of disputes — there were an additional 15 categories of less than 4 per cent that are not reported in the table. See question A1 of the *LAW Survey* for details of possible responses. ^b Weighted.

Data source: Commission estimates based on unpublished *LAW Survey* data.

Australia Institute survey

A more recent, albeit more contained survey of legal need, was conducted by the Australia Institute. The survey looked at non-criminal legal matters amongst 1001 adult Australians and found that around one in three survey respondents had experienced a civil legal problem in the previous five years. The most commonly reported legal problems were:

- being treated unfairly by a business, including banks, phone companies, tradesmen, and retail outlets (12 per cent)
- a dispute with a tenant, real estate agent or neighbour (8 per cent)
- a dispute with an employer over pay, conditions, workplace safety or overtime (7 per cent)
- divorce, a dispute over child custody or support payments, or arguing with family members over inheritance (5 per cent).

One in four respondents said they had sought legal advice for their legal problem.

The Indigenous Legal Needs Project

Researchers from James Cook University are currently undertaking the *Indigenous Legal Needs Project (ILNP)*, a national study of Indigenous civil and family law needs. When complete, the ILNP will cover 32 remote, regional and urban Indigenous communities in the Northern Territory, Victoria, Queensland and Western Australia, in addition to earlier work already conducted in New South Wales (sub. 105).

In the three jurisdictions where analysis of ILNP has been completed (Northern Territory, New South Wales and Victoria), legal needs were identified in the following areas:

- child protection — governments' handling of child removal
- tenancy — including disputes over repair and maintenance, rent, overcrowding and eviction
- discrimination — mostly in the services sector such as in health care and police, or in shops
- social security — problems with underpayments or overpayments
- credit, debt, and consumer law issues — including problems related to mobile phone contracts and car purchases and repairs

-
- neighbourhoods — disputes related mostly to noise, fences or boundaries and animals
 - victims' compensation and wills — issues in relation to wills mainly revolved around superannuation, burial and child custody arrangements (sub. 105).

The Small Business Dispute Resolution survey

There are relatively few sources of information around the legal needs of businesses. One source is a survey examining disputes and dispute resolution of small businesses commissioned by the then Department of Innovation, Industry, Science and Research (DIISR 2010).

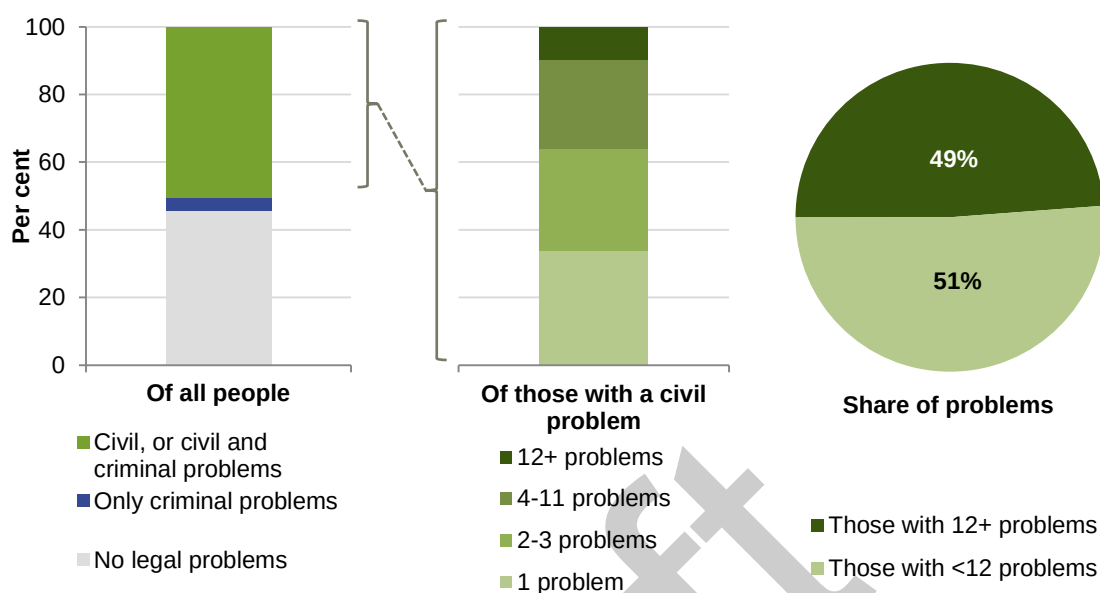
The survey found that 20 per cent of small businesses had experienced some form of dispute during the five years prior to June 2010. Of these, around half (nine per cent of businesses) had a dispute where they had taken legal action, involved a third party or considered such action (termed a 'severe' dispute). Of those with severe disputes:

- 65 per cent were about payment for goods and services
- 30 per cent of disputes related to contracts (excluding payments, retail tenancy and franchising issues).

2.4 Is there clustering of legal problems?

Multiple legal problems are common — around 22 per cent of respondents to the *LAW Survey* said they had experienced three or more legal problems during the previous year. And, legal problems are concentrated among a minority of respondents — 9 per cent accounted for 65 per cent of legal problems reported (Coumarelos et al. 2012).

Excluding from the *LAW Survey* sample those respondents with criminal *only* problems, the Commission found that around 10 per cent of respondents — those with 12 or more legal problems — accounted for almost half of the legal problems (figure 2.3). Around 75 per cent of respondents had 5 or fewer problems, 90 per cent had 11 or fewer problems, 99 per cent had 56 or fewer problems.

Figure 2.3 The composition and concentration of legal problems^a

^a Share of problems includes criminal problems faced by people who also have civil problems. Civil problems include family problems.

Data source: Commission estimates based on unpublished *LAW Survey* data.

The *LAW Survey* also found that legal problems tend to cluster in three combinations:

- ‘consumer, crime, government and housing’ problems
- ‘economic and family’ issues — credit/debt, family and money problems
- ‘rights and injury/health’ issues — employment, health, personal injury and rights problems (Coumarelos et al. 2012).

Some demographic groups were also more likely to experience particular legal problems:

- women were more likely (relative to men) to have health-related problems, but less likely to have credit/debt or personal injury problems
- accidents, crime, personal injury and rights problems peaked between 15-24 years while credit/debt and family problems peaked between 25-44 years of age
- Aboriginal and Torres Strait Islander Australians were more likely to have problems in the categories of ‘government’, ‘health’ and ‘rights’
- those with disabilities were more likely to have a legal problem (relative to those who do not have a disability)
- single parents and the unemployed were more likely to experience legal problems in many different problem types but especially in ‘credit/debt’, where both groups were twice as likely to experience a problem (relative to other

family types, and those that are employed or not in the labour force, respectively)

- those living in disadvantaged housing were more likely to have legal problems, especially in the categories of ‘credit/debt’ and ‘health’
- those whose main language was other than English (treated as an indicator of cultural and linguistic diversity) were more likely to have legal problems in the category of ‘health’, but less likely to have legal problems overall
- those whose main income was a government payment were more likely to have a legal problem, especially family, government and health problems (Coumarelos et al. 2012).

Looking across the jurisdictions, people living in South Australia and the Australian Capital Territory were slightly less likely to experience a legal problem compared to other jurisdictions, while those in the Northern Territory were slightly more likely to experience a problem. (There was no significant difference between the other states.)

2.5 To what extent is there unmet legal need?

The way that Australians respond to disputes or problems is likely to be shaped by:

- their personal capabilities and perceptions (including perceptions about the costs of taking action)
- the availability of information and advice and knowledge of where advice and assistance can be sought
- the effect of the problem on their everyday lives.

Based on the *LAW Survey*, the nature of the legal problem strongly influenced the response to it. Australians experiencing money and family problems were most likely to take action, while those experiencing personal injury, crime, accidents and family problems were most likely to seek advice when taking action. Those experiencing substantial legal problems were more likely to take a greater number of actions and reported seeking higher levels of advice.

The *LAW Survey* found that there was no ‘rush to law’. The most common ways of dealing with legal problems were:

- via agreement with the other side (30 per cent)
- not pursuing the matter further (30 per cent)
- via the decisions or actions of other agencies, such as government bodies, insurance companies or the police (15 per cent).

Of those respondents who experienced a substantial non-criminal legal problem, 20 per cent used a legal adviser. Just nine per cent of Australians with a minor legal problem sought the help of a legal adviser.

The Commission found that the most common responses for not taking any action or seeking advice (for substantial non-criminal matters), was that ‘it would make no difference’ and ‘it was too stressful’ (table 2.2). A lack of action in and of itself does not equate with unmet need. Indeed, it could represent a completely rational response where pursuing action would not be welfare enhancing.

For example, 24 per cent of those reporting substantial civil legal problems nominated the reason ‘it wasn’t very important’ for not taking action. This seems at odds with declaring the problem to be ‘substantial’. That said, it may be the case that the reasons given are imprecise, and that looking at the combination of reasons for not taking action provides a better picture for understanding the decisions made.⁴

Table 2.2 Reasons for taking no action and advice for substantial civil and family matters

<i>Reason for no action or advice^a</i>	<i>Proportion of responses</i>
	Per cent
Make no difference	51
Too stressful	44
Would take too long	39
Problem resolved quickly	38
Cost too much	38
Bigger problems	33
Didn’t know what to do	31
Didn’t need information/advice	29
Not very important	24
Damage relationship with other side	23
Your fault or no dispute	23
Other reason	16

^a Respondents can nominate more than one reason for no action or advice.

Data source: Commission estimates based on unpublished *LAW Survey* data.

Also, in some cases, pursuing action is not always possible, such as where the party at the other side of the dispute cannot be identified. Similarly, ‘taking action’ might not always result in legal needs being met — for example, someone seeking the

⁴ Respondents are able to nominate multiple responses for not taking action. For example, two-thirds of those that said ‘it wasn’t very important’ also nominated that action would make no difference, and nearly half (45 per cent) nominated that they ‘had bigger problems’.

advice of their doctor regarding legal problems that do not have a medical dimension.

Hence, any estimate of unmet legal need necessarily involves some judgment about whether the wellbeing of an individual is enhanced by their course of action (or lack of action). Accordingly, the Commission sought to estimate unmet need by looking at problems or disputes that are ‘substantial’ in nature and where there was a failure to get legal or other appropriate advice to resolve the problem (box 2.2).

It is difficult, however, to get a measure of unmet legal need where individuals have sought to resolve problems without appropriate (legal or non-legal) advice from survey data alone. Parties may be satisfied with the outcome that they achieve, but equally the substantial nature of the problem may mean that they cannot evaluate what a fair outcome is, and may even have failed to resolve the problem without realising it. For these latter reasons, substantial problems that have been resolved without appropriate advice are defined as having unmet legal need, but are separately identified due to their uncertain nature (figure 2.4).

Most legal problems are not substantial in nature, and as such were not considered to have unmet need. Of those with substantial problems, consulting an inappropriate adviser was by far the most common trigger of unmet legal need (figure 2.4).

Recalling the observation made by Genn and Patterson (2001), measures of legal need (and hence unmet legal need) involve subjective value judgments. Necessarily, such judgments are open to challenge. Different judgments about the relevant set of problems to consider or the appropriate advice would yield different estimates of unmet need:

- taking into account minor (in addition to substantial) legal problems would increase the estimated level of unmet need
- conversely, judgments that all advice is appropriate advice would reduce the estimated level of unmet need.

The Commission explores these and other judgments that affect estimates of legal need in box 2.2.

Box 2.2 Estimating unmet need — how to define cases of unmet need

For the purpose of estimating unmet need, the Commission defined cases of unmet need where people:

- have not taken action in response to a *substantial* legal problem because it was too stressful, would take too long, had bigger problems, cost too much, didn't know what to do; or
- have taken action in response to a *substantial* legal problem by only seeking advice from advisers in a non-related field (such as advice from a doctor about a consumer dispute).

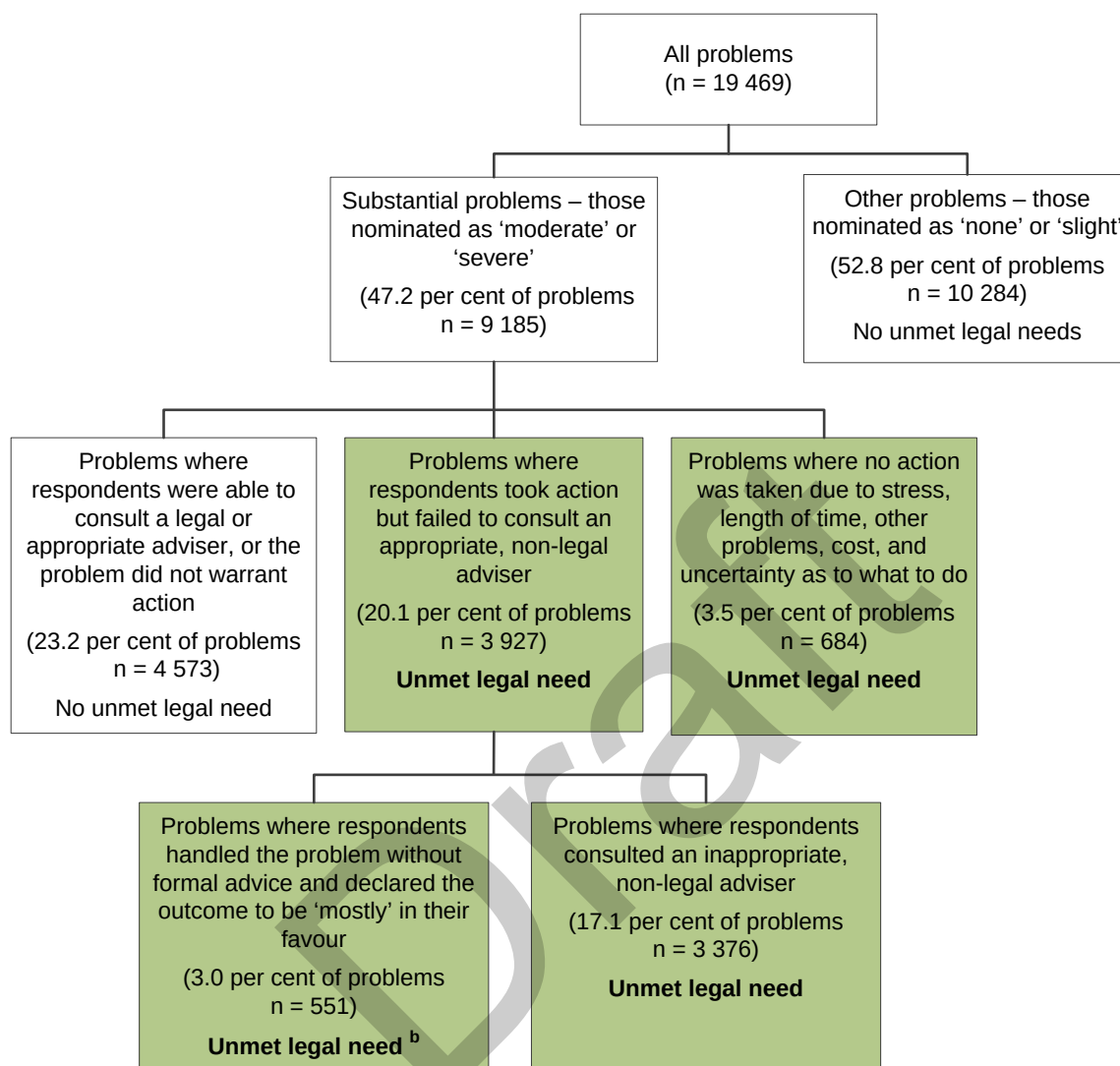
The Commission's selected appropriate advisers, based on the type of problem, are set out below.

Selected appropriate advisers by problem type

<i>Problem type</i>	<i>Appropriate adviser(s) in addition to lawyers</i>
Accidents	Doctors
Consumer	Ombudsmen and department of fair trading (or equivalent)
Credit	Financial advisers
Crime	Police
Employment	Unions, supervisors, employment agencies
Family	(None other)
Government	Government
Health	Doctors
Housing	Government
Money	Financial advisers
Personal injury	Doctors
Rights	Educational institutions and teachers in the case of bullying

The Commission has chosen not to use measures of subjective satisfaction as part of the definition of unmet need for two reasons:

- the *LAW Survey* only provides information on satisfaction for resolved cases — those cases that are still ongoing have no information regarding satisfaction.
- satisfaction is strongly correlated with the outcome of the dispute being in the respondent's favour, which is more likely if the respondent consulted an appropriate adviser. Satisfaction could therefore be interpreted as not whether the individual was well equipped to resolve a dispute, but rather whether the outcome was favourable.

Figure 2.4 Identifying unmet need^a

^a Weighted numbers of problems are presented – rounding may mean that groups do not sum to totals.

^b Whether this group constitutes unmet need is discussed in greater detail in box 2.3.

Data source: Commission estimates based on unpublished *LAW Survey* data.

Unmet need by type of problem

The legal problem areas with the highest level of unmet legal need (based on the Commission's definition) are consumer problems, government problems, crime problems and housing problems (table 2.3). Most unmet need in these areas results from respondents taking action to resolve a problem by consulting an inappropriate adviser.⁵ There is also a sizable minority of cases where there is unmet need due to

⁵ Note that if a respondent approaches an inappropriate adviser who directs them to an appropriate adviser, then this is not counted as unmet legal need.

lack of action for those reasons discussed above. (Some additional discussion around the scale and type of unmet legal need identified is presented in box 2.3.)

Table 2.3 Unmet need by problem type^a

<i>Problem type</i>	<i>Unmet need due to no action for specific reasons^b</i>	<i>Unmet need by wrong adviser</i>	<i>Total unmet need</i>	<i>Share of all instances of unmet need</i>	<i>Share of problems</i>	<i>Share of unmet need less share of problems</i>
	no. problems	no. problems	no. problems	%	%	ppts ^c
Accidents	16	124	140	3.0	6.9	-3.9
Consumer	151	1 132	1 282	27.8	21.4	6.4
Credit/debt	49	253	302	6.5	5.2	1.3
Crime	103	350	452	9.8	15.3	-5.5
Employment	61	322	382	8.3	6.1	2.2
Family	21	326	347	7.5	5.7	1.8
Government	76	515	590	12.8	9.8	3.0
Health	50	67	117	2.5	2.8	-0.3
Housing	52	334	386	8.4	10.5	-2.1
Money	17	165	182	4.0	5.3	-1.3
Personal injury	14	77	91	2.0	5.9	-3.9
Rights	75	264	339	7.3	5.0	2.3
TOTAL	684	3 927	4 612			

^a Columns and rows may not sum to total due to rounding and weighting of responses. ^b That is, took no action because it was 'too stressful', 'would take too long', 'cost too much', or 'didn't know what to do'.

^c Percentage points.

Data source: Estimates based on unpublished LAW Survey data.

Some problem types are more likely to result in unmet need than others. The far-right column in table 2.3 shows the 'disproportionality' between the incidence of particular types of legal problems and the incidence of unmet legal need. For example, consumer problems appear disproportionately susceptible to unmet need as they comprise 21.4 per cent of problems, but comprise 27.8 per cent of problems with unmet legal need. In contrast, accident problems are less susceptible to unmet need; comprising 6.9 per cent of problems, but only 3 per cent of the instances of unmet need.

Box 2.3 **Is every instance really unmet legal need? Is every instance of unmet legal need the same?**

The *LAW Survey* data provides quantitative evidence around the disputes that people face and the actions taken to resolve them, but there is little information more broadly about the qualitative nature of the disputes. It could be the case that some problems and disputes identified are not truly legal problems in nature. For example, a large proportion of the 'Housing' disputes are complaints about neighbours, which may or may not have a legal dimension.

There is also a question as to whether the unmet need identified is truly unmet. While those consulting the wrong adviser are less likely to receive help in a number of areas — including 'court/tribunal proceedings or preparation', 'formal mediation, conciliation or dispute resolution sessions', 'negotiating with the other side', 'talking to or writing to another professional or agency', 'legal documents such as letters, complaints or agreements', and 'other paperwork' — *relative* to those that consult the 'appropriate' adviser, they still may feel that they have received sufficient assistance.

It is difficult to classify unmet need amongst those that did not seek advice for substantial problems, but handled the problem without formal advice and declared the outcome to be 'mostly' in their favour. Of the 3927 substantial problems where an appropriate adviser was not consulted, around 550 of these (three per cent of all problems) had an outcome considered by the individual to have been 'mostly in their favour', and was often characterised as being finalised by direct agreement with the other party, or with the other party doing what the individual wanted (including not pursuing the matter further).

However, given that these are 'substantial' problems, the individual may not understand the full extent of their problem, nor be able to evaluate a fair outcome without using an appropriate adviser. Indeed, if the problem has not been resolved properly, then they may still have unmet legal need.

It is also difficult to establish whether some cases of unmet legal need are more severe than others. For example, one individual's substantial instance of a problem could be more severe than that of another's, but the data can only show that they are both 'substantial'. Also, someone may have two legal problems that are both evaluated as substantial, yet one could be more severe than the other.

Unmet need by person

Based on the *LAW Survey* data, around 17 per cent of the population or just over a third of those with any legal problem experienced some form of unmet legal need. Excluding those with only criminal problems makes little difference to these proportions.

DRAFT FINDING 2.1

Based on the most recent data, around 17 per cent of the population had some form of unmet legal need that related to a dispute that they considered substantial.

Amongst those with any civil problem, Commission analysis based on the *LAW Survey* data has identified some characteristics that are associated with unmet legal need in general:

- women are more likely to experience unmet legal need relative to men
- those on means-tested government payments are more likely to experience unmet legal need (relative to those not receiving such payments)
- Indigenous Australians are more likely to experience unmet legal need (relative to non-Indigenous Australians)
- those with unmet legal need are more likely to have a disability (relative to those without a disability)
- those with unmet legal need are more likely to be unemployed⁶ (relative to employed)
- those whose main language was other than English were more likely to experience unmet legal need relative to those whose main language was English
- remoteness does not seem to be important in explaining unmet legal need.⁷

Informal pathways for addressing some unmet legal need

While many of the problems reported in the *LAW Survey* can be defined as unmet legal need, some of them can be resolved without legal assistance through informal dispute resolution mechanisms such as ‘alternative dispute resolution’ (ADR), ombudsmen and with the assistance of government agencies. To illustrate this point, the Commission looked at unmet need for each of the dispute types with a view to identifying the informal dispute resolution mechanisms that could be employed (box 2.4).

⁶ This is still true even when the employment class of legal problems (which is heavily correlated with unemployment) is omitted from the analysis.

⁷ The *LAW Survey* also finds that remoteness is not associated with having a legal problem in general (Coumarelos et al. 2012), but other studies have found that remoteness is a barrier to accessing justice, such as Coverdale (2011). This may suggest that remoteness is a barrier in accessing justice for particular areas, but not necessarily in general.

Box 2.4 **Informal dispute resolution mechanisms for addressing unmet need**

Informal dispute resolution mechanisms exist for many of the identified instances of unmet legal need. Some of the more common problems and informal dispute resolution pathways include:

- the Australian Competition and Consumer Commission, ombudsmen and offices of fair trading for consumer problems (the most common unmet legal need)
- ombudsmen, at both the federal and state level, for many government-related problems
- government agencies offer an avenue to resolve disputes around neighbours and public housing, while tribunals and the Financial Ombudsman Service offer a mechanism to resolve mortgage issues relating to private housing
- the Fair Work Ombudsman offers informal dispute resolution for many employment problems
- in the first instance, the Child Support Agency and family dispute resolution practitioners represent a pathway to resolve many family issues
- 'rights' based problems (which include discrimination and harassment) can be addressed through the human rights commissions at the federal and state level
- credit and debt unmet legal need may be resolved by the use of the Credit Ombudsman Service.

In addition, there are tribunals that people with legal problems can use to try and resolve their disputes. Tribunals can involve costs, but often to a lesser extent than seeking redress through the court system (chapter 9). A more detailed discussion around the problem types with unmet legal need, and the informal dispute resolution mechanisms likely to be useful in resolving the disputes is provided in appendix B.

While there is a diversity of unmet legal need, both in terms of the type of problem experienced by individuals and the demography of individuals with unmet need, many of the disputes detailed in the *LAW Survey* do have some informal dispute resolution mechanism. However, the data indicate that use of these mechanisms is often limited. For example, the *LAW Survey* indicates that only two per cent of problems were resolved with the use of an 'ombudsman or complaint handling body' (Coumarelos et al. 2012, p. 140).

How much unmet need could be met by the pathways discussed above?

Assuming that unmet need can be addressed by informal mechanisms in this way, the next question is how much unmet legal need would then be left? Making this assumption includes a number of prerequisites: namely that there are no other barriers, such as a lack of capabilities, or other factors such as location, to gaining

access to the informal pathways, and that the pathways themselves have the capacity to meet the additional demand.

Based on a ‘best-case’ scenario — where unmet need can be satisfied by these informal mechanisms — the proportion of the population with any civil problem and unmet legal need is reduced from 17 to less than five per cent. While it should be recognised that this is based on an optimistic interpretation of the effectiveness and resources of informal pathways, it does indicate that informal pathways could play a significant role in reducing the incidence of unmet legal need. (appendix B considers alternative cases, including different assumptions around those that took no action to resolve their problem and different proportions of problems that could be solved through the informal dispute resolutions mentioned so far.)

DRAFT FINDING 2.2

Informal dispute resolution mechanisms such as ombudsmen could be better employed to address a significant share of unmet legal need, potentially reducing the proportion of the population with unmet legal need from 17 per cent to less than 5 per cent.

Unmet need of businesses

An analysis of unmet demand for dispute resolution mechanisms was carried out in the Small Business Dispute Resolution survey (DIISR 2010). This analysis looked at whether firms were satisfied with the available dispute resolution mechanisms available to them (rather than the outcomes themselves), and whether the firm felt that more mechanisms were needed.

Unmet demand was defined as partially or fully unmet based on whether firms felt satisfied with their available dispute resolution mechanisms, and whether they felt more mechanisms were needed.⁸ Based on this methodology, less than one per cent of firms had fully unmet demand, while close to another three per cent had partially unmet demand. Compared to individuals, the incidence of unmet legal need amongst small businesses appears to be much lower. (The different combinations and incidence of satisfaction and desire by small business for dispute resolution mechanisms is reproduced in appendix B.)

More information on the informal dispute resolution mechanisms is presented in chapter 8 (ADR) and chapter 9 (ombudsmen), while initiatives to improve the public’s understanding of these dispute resolution mechanisms are explored in chapter 5. The next chapter addresses accessibility of the civil legal system in detail.

⁸ This is different to the discussion about individuals earlier in the chapter, which specifically addressed satisfaction with the outcome of disputes.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

3 How accessible is the civil justice system?

Key points

- There can be a number of barriers that deter or frustrate parties attempting to resolve their legal disputes, including financial costs, delays in obtaining an outcome from legal processes, and difficulties in understanding and navigating a complex legal system.
- Individuals who do not act on a legal problem due to concerns about costs, time or complexity tend to be dissatisfied with the outcome.
- The financial costs of accessing justice vary greatly between avenues for dispute resolution.
 - Informal dispute resolution processes, such as ombudsmen, are available at little or no cost to disputants.
 - While the evidence surrounding the financial costs of alternative dispute resolution is limited, what is available suggests that early settlement provides parties with significant cost savings.
 - Tribunals are relatively inexpensive in many cases. However, out-of-pocket expenses are much higher in tribunal matters involving legal representation.
 - Courts are normally the most expensive avenue, with costs increasing in superior courts and for disputes that progress further through court proceedings.
- The timeliness of dispute resolution has remained the same or improved in most jurisdictions over the past decade.
 - While ombudsmen appear to resolve matters quickly, there is less evidence to support the notion that tribunals offer timely resolution of disputes.
 - Magistrates' courts and the Federal Circuit Court provide significantly faster outcomes than their superior court counterparts, although this could in part be a reflection of the complexity of matters being dealt with.
- There is a strong consensus that the civil justice system is complex and difficult to navigate.
 - Sources of complexity identified include: the law itself; court processes, procedures and forms; the conduct of lawyers; and a lack of knowledge of the available avenues for dispute resolution.

While the financial costs of taking legal action receive the bulk of attention, they are just one of several barriers individuals and businesses face in accessing justice. Delays in obtaining an outcome and difficulties in understanding and navigating a complex legal system can also frustrate a party's access to justice.

These barriers can prevent individuals and businesses from taking action to resolve their legal problems, and there is some evidence to suggest many are worse off for their inaction. The Commission estimates, based on unpublished *Legal Australia-Wide Survey (LAW Survey)* data, that individuals were ultimately dissatisfied with the outcome in almost 60 per cent of substantial legal problems where no action was taken due to barriers of cost, time or complexity.

Understanding where these barriers arise in the civil system is fundamental for informing and targeting reform. While the notion is simple, the task is not. Just as the nature of disputes and avenues for resolving disputes vary, so too do the barriers faced by parties. Indeed, there appear to have been very few attempts to measure the magnitude of barriers to accessing justice in Australia.

This chapter seeks to fill this information gap. It examines the financial costs associated with various stages in the dispute resolution process, and how costs can influence a disputant's decisions (section 3.1). It then discusses the timeliness of the civil justice system and the impact of delays on parties (section 3.2). Finally, section 3.3 analyses the complexity of the system, particularly its effect on the capability of parties to respond to legal problems and seek assistance.

3.1 How much does it cost to resolve civil disputes?

There are widely held views that accessing justice through the civil legal system is beyond the financial reach of 'ordinary' Australians. A recent survey by the Australia Institute found that 83 per cent of respondents believed that only the very wealthy can afford to protect their legal rights (Denniss, Fear and Millane 2012). When commenting on their own circumstances, less than half of the respondents to the survey said that they could afford a good lawyer if they had a serious legal issue.

The costs of seeking resolution through the courts are seen as particularly prohibitive. Queensland Public Interest Law Clearing House (QPILCH) observed:

The issue of costs is a clear barrier to effective access, particularly to access the courts ... Failure to access the courts is not limited to the very poor, but is also difficult for many wage earners. The increasing cost of litigating a dispute, including the cost of legal assistance and any potential cost orders made against unsuccessful parties, creates a significant barrier to access to justice, particularly at the superior court level. (sub. 58, p. 3)

It is worth noting that out-of-pocket legal expenses are not the only financial costs incurred by parties in disputes. A study of disputes involving small businesses found that other costs, such as the opportunity cost of time and effort, were generally considered by businesses to be larger than their out-of-pocket expenses (DIISR 2010).

That said, actual evidence in the form of comprehensive estimates of litigation costs in Australia is elusive. In estimating the financial costs of accessing the civil justice system, the Commission has had to draw on a variety of sources, including past studies and data submitted by government agencies and other stakeholders to this inquiry. With the assistance of the South Australian courts, the Commission has also conducted a survey of court users (appendix C).

Basic initial legal advice can be free ...

Individuals seeking basic legal advice have several options. They can contact one of the many freely provided telephone advice lines (chapter 5). All legal aid commissions provide one-off free legal advice. Advice sessions generally last for around 20 minutes. While this does not allow for detailed legal advice about complex matters, lawyers can provide basic advice and assist with completing forms.

Similarly, many lawyers in the private sector will undertake an initial consultation of up to 30 minutes free of charge. For example, all law firms participating in the Law Institute of Victoria's referral service agree to provide a free 30 minute enquiry interview. Individuals can use this interview to determine with a solicitor the nature of the legal issue, discuss the available options and receive an estimate of the costs of proceeding with the matter.

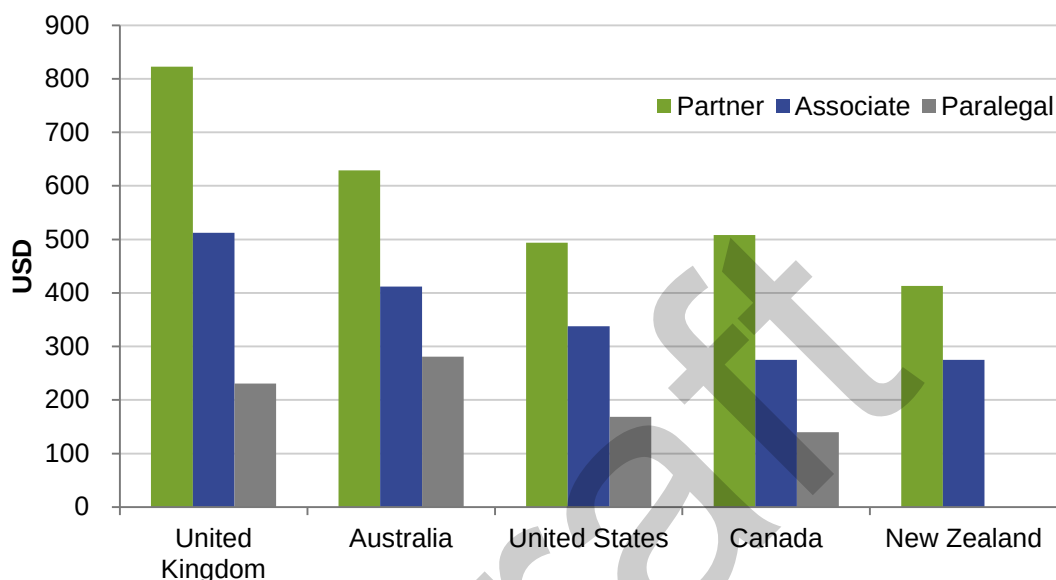
... but those who require ongoing assistance will face significant costs

Beyond these basic information services, free, or highly subsidised legal assistance is generally only available to those experiencing significant disadvantage (chapter 21). The majority of people who obtain legal services do so from lawyers in the private market.

Solicitors generally charge their clients on a time basis (chapter 6). Hourly rates vary depending on the location and seniority of the lawyer. Some evidence suggests that partners typically charge more than \$600 per hour, while associates charge around \$400 per hour (figure 3.1). To put this in perspective, the average full time employee in Australia earns around \$34 per hour (ABS 2012). As one senior lawyer

remarked in the course of this inquiry, ‘I couldn’t afford my own services.’ Hourly billing rates in Australia also appear higher than in similar countries, with the exception of the United Kingdom (figure 3.1).

Figure 3.1 International comparison of median billing rates^a
By countries and type of legal professional, 2011-12 US dollars per hour



^a Sample sizes were 362 for partners, 657 for associates and 182 for paralegals for United Kingdom; 60, 57 and 14 for Australia; 15 898, 16 409 and 7119 for the United States; 640, 715 and 650 for Canada. Sample sizes were 11 and 31 for partners and associates in New Zealand, with no data collected for paralegals.

Source: TyMetrix (2013).

However, hourly rates are not an ideal measure of the costs of accessing justice. While clients may be billed on an hourly basis, they are ultimately seeking to resolve their disputes. As such, they are more likely to be concerned with the total cost of achieving a legal outcome, rather than the hourly rates charged by lawyers. Measuring legal costs incurred per dispute may be a more appropriate way to assess the financial costs of accessing justice.

Ombudsmen can provide low or no cost resolution of some disputes

One relatively low-cost avenue for resolving disputes is through ombudsmen (chapter 9). Many common disputes, such as those with telecommunications providers, banks and government agencies, can be dealt with in this way. Complainants generally face no direct costs, with government (taxpayers) and industry meeting the costs of the service. The informal nature of the complaints process is structured so that individuals do not require legal advice or representation and so can avoid private legal fees.

Tribunals can resolve simple, low-value disputes at a low cost ...

Tribunals are intended to provide a low-cost alternative to courts and have been assigned jurisdiction to hear a range of civil disputes, including consumer, tenancy and building matters. Many tribunals discourage or limit the use of legal representation in order to keep proceedings informal and low cost (chapter 10). Where parties self-represent, out-of-pocket costs are typically contained to those that individuals or businesses incur in preparing their own case, along with application fees.

In low value disputes, these direct, out-of-pocket expenses tend to be relatively small. A study of the cost to small business disputants in Victoria's Civil and Administrative Tribunal (VCAT) found that average direct costs were less than \$270 in disputes under \$10 000 (VSBC 2014). However, when accounting for the indirect costs of lower value disputes — such as the cost of staff time and attending hearings — the average total cost to disputants was around \$1500.

... but are more expensive for disputes of greater value and complexity

Although tribunals primarily deal with small disputes and encourage self-representation, some deal with larger, more complex disputes. The VCAT study revealed that the costs of resolving these disputes can be much higher (VSBC 2014). Parties involved in high value disputes in tribunals appear to use professional representation much more frequently — in 70 per cent of disputes over \$20 000 in VCAT — adding considerably to the cost of resolving disputes (table 3.1). The indirect costs to small businesses also tend to be higher for larger disputes.

When account was taken of staff time, travel and other expenses, overall costs were in the order of \$9000 for disputes between \$10 000 and \$20 000, and \$25 000 for disputes over \$20 000.

In other tribunals, legal representation is common, or even encouraged. For example, the NSW Dust Diseases Tribunal hears quite complex cases and so parties are typically represented by a solicitor or barrister (Dust Diseases Tribunal 2012). Similarly, disputes under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) involving Comcare — usually resolved in the Administrative Appeals Tribunal (AAT) — often involve representation. These types of cases typically involve large compensation amounts and can require testimony from expert medical witnesses. Legal costs in these cases are typically higher than in most tribunal matters, and resemble amounts incurred in court proceedings.

Table 3.1 Legal costs in selected tribunals when legal representation is used

In 2012-13 dollars

<i>Tribunal</i>	<i>Year</i>	<i>Description</i>	<i>Sample size</i>	<i>Mean</i>	<i>Median ^b</i>
NSW Dust Diseases Tribunal ^a	2006	Plaintiff	52	\$43 094	n.a.
	2007	Plaintiff	37	\$48 356	n.a.
VCAT	2013	Small business	58	\$8 180	\$2 789
AAT (SRC Act matters)	2013	Comcare	25	\$55 205	\$44 894
	2013	Applicant	11	\$19 655	\$14 941

^a Converted to 2012-13 dollars using price deflators from ABS (2013a). ^b n.a. – not available.

Sources: Productivity Commission estimates using data from NSW Government (2007), the Victorian Small Business Commissioner (2014), and data supplied by Comcare on SRC Act matters in the AAT .

Litigation in the courts tends to be the most expensive

Litigation in courts is generally the most expensive means for private parties to resolve their disputes. Costs incurred in litigation can include fees paid to solicitors, court fees and disbursements (such as fees to barristers and expert witnesses). Previous studies have found that the average costs of litigation vary between courts, and tend to be higher in more superior jurisdictions (Matruglio 1999a; Worthington and Baker 1993).

The costs of litigation can also vary within the same court. The distribution of costs across cases is skewed, with a long tail comprised of a few cases that are very expensive (Matruglio 1999a, 1999b; Worthington and Baker 1993). The tail appears to be longer and more pronounced in superior jurisdictions where protracted and expensive disputes are more common.

To obtain more up-to-date estimates of legal costs, the Commission has drawn upon a number of sources, including data from:

- a major insurance company, outlining legal costs in compulsory third party (CTP) claims in 2009 and 2010 in various jurisdictions
- the Senior Master's (Funds in Court) Office of the Supreme Court of Victoria, detailing the costs of cases involving serious personal injury in Victoria's Supreme Court in 2009 and 2010
- the survey of court users in South Australia conducted by the Commission
- the NSW Costs Assessment Scheme, detailing amounts contained in original costs assessment applications by clients (client-practitioner), practitioners (practitioner-client), and by parties where costs orders have been made (party-party).

The findings from more recent data obtained by the Commission (table 3.2) support similar conclusions to those found in existing literature, with legal costs higher, on average, in superior courts, and the distribution of costs exhibiting a ‘long-tail’ of particularly expensive cases.

Table 3.2 Estimates of average legal costs
From various sources, in 2012-13 dollars^{a b}

<i>Source</i>	<i>Year</i>	<i>Description</i>	<i>Sample size</i>	<i>Mean</i>	<i>Median</i>
Various jurisdictions (CTP claims)	2009	Plaintiff	2 697	\$28 060	n.a.
	2009	Defendant	2 697	\$16 613	n.a.
	2010	Plaintiff	2 714	\$24 812	n.a.
	2010	Defendant	2 714	\$15 815	n.a.
Supreme Court of Victoria	2009	Plaintiff	82	\$60 671	n.a.
	2010	Plaintiff	48	\$59 340	n.a.
SA Magistrates Court	2013	n.a.	28	\$7 921	\$5 000
SA Supreme and District Courts	2013	n.a.	13	\$166 141	\$50 000
NSW Costs Assessment Scheme	2012	Client-prac	248	\$50 322	\$15 531
	2012	Prac-client	464	\$29 772	\$12 539
	2012	Party-party	714	\$84 418	\$41 432
	2013	Client-prac	275	\$58 556	\$21 132
	2013	Prac-client	504	\$45 047	\$15 640
	2013	Party-party	728	\$89 456	\$37 455

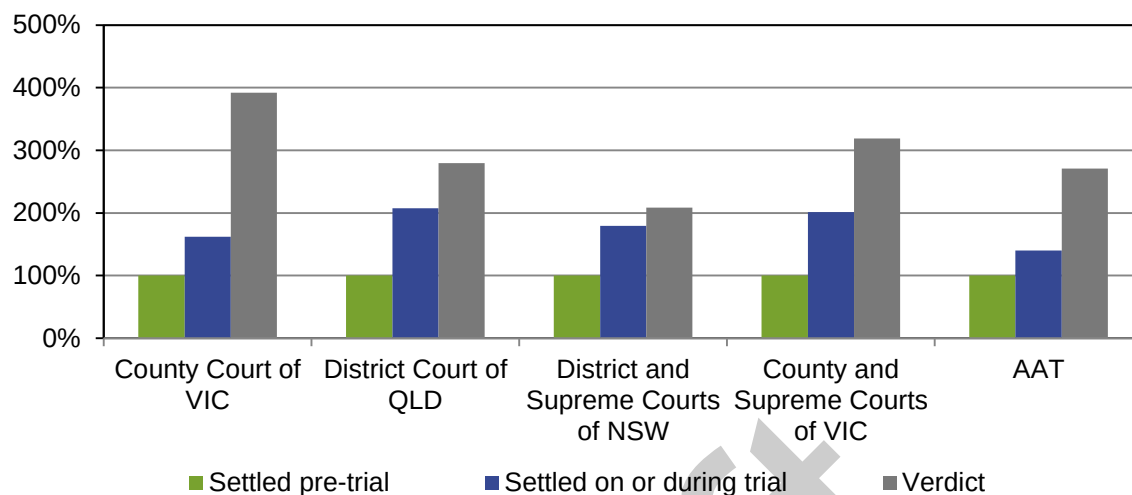
^a Converted to 2012-13 dollars using price deflators from ABS (2013a). ^b n.a. – not available.

Sources: Productivity Commission estimates using CTP claims data supplied by a major insurer, data from serious personal injury cases supplied by the Senior Master's (Funds in Court) Office of the Supreme Court of Victoria, survey data collected by the Commission in the South Australian courts (appendix C), and data from costs assessment applications supplied by the NSW Costs Assessment Scheme.

... and costs grow as cases progress

Studies have identified a number of factors that increase costs in litigation. One factor that has been consistently shown to strongly drive legal costs is the stage of litigation at which a case is resolved. In one study, legal costs were 50 to 200 per cent higher in cases that settled during trial — and almost 400 per cent greater in cases that went to verdict — when compared to cases that settled before trial (Williams and Williams 1994). These findings were echoed in Worthington and Baker (1993) and Fry (Nd), who also found that settling before trial, and reducing the number of court events, significantly reduces costs. The available evidence also suggests that similar growth in costs occurs in tribunal matters as they progress (figure 3.2). These findings underscore the cost savings of resolving disputes early and of effective case management processes (chapters 8 and 11).

Figure 3.2 Estimated growth in legal costs as cases progress^a
As a percentage of pre-trial costs, from various data sources



^a For matters in the AAT, cases were categorised as resolved by withdrawal, settlement or went to hearing.

Sources: Productivity Commission estimates using data from Worthington and Baker (1993), Williams and Williams (1994), and data supplied by Comcare on SRC matters in the AAT.

How do costs compare with the amounts at stake?

The terms of reference for this inquiry ask the Commission to analyse whether the costs charged for accessing the civil justice system and for legal representation are generally proportionate to the issues in dispute. Disproportionate costs are frequently cited as a potential barrier to accessing justice. As Dennis (2005) has previously argued, a rational individual may have little reason to access a dispute resolution process where the cost of doing so substantially erodes the value of any compensation received.

A number of submissions to the Commission have argued that legal costs can be disproportionate to the amounts in dispute:

In the [Small Business Development Corporation's] experience, the cost of seeking legal advice would be too great in relation to the value of the dispute for many small businesses. (sub. 76, p. 9)

... the cost of protracted litigation in the Federal Family Law Courts is beyond the capacity of the average family law litigant. It is the experience of Legal Aid NSW that the costs can be disproportionate to the issues at stake. (sub. 68, p. 31)

The financial cost of resolving a dispute, where it can be estimated, is often not proportional to the matters at stake. There is no proportionality regarding the financial costs of dispute resolution to the matters at stake. Rather, financial costs of dispute resolution are proportional to the relative strength and bargaining power of the parties to the dispute. (QPILCH, sub. 58, p. 12)

Much of the available evidence would suggest that legal costs in disputes in Australia are a small share of the amount in dispute (table 3.3). However, a concern with the principle of proportionality is that the complexity of a case — and hence the amount of legal work required — may not increase in direct proportion with the amount that is in dispute. Disproportionate costs may therefore be more frequent in disputes of lower amounts (relative to higher amounts). Because most of the available data has been sourced from matters involving compensation claims, where the amounts in dispute are relatively large, the extent of disproportionality may be understated.

Table 3.3 Average proportion of legal costs to the amount in dispute ^a

For selected courts and tribunals, by type of party

	<i>Year</i>	<i>Applicant</i>	<i>Defendant</i>	<i>Total costs</i>
		%	%	%
NSW District Court	1993	27	28	55
Victorian County Court	1993	32	30	62
NSW Supreme Court	1993	20	14	34
Victorian Supreme Court	1993	15	14	29
Dust Diseases Tribunal	2006	15	n.a.	n.a.
Dust Diseases Tribunal	2007	12	n.a.	n.a.
CTP claims (various jurisdictions)	2009	13	8	20
CTP claims (various jurisdictions)	2010	14	9	22
VCAT (small businesses) ^b	2013	74	n.a.	n.a.
South Australian Magistrates Court	2013	68	n.a.	n.a.

^a n.a. – not available. ^b Figure presented for VCAT under applicant includes both applicants and defendants

Sources: Worthington and Baker (1993); Victorian Small Business Commissioner (2014); Productivity Commission estimates using data from NSW Government (2007), unpublished data supplied by a major insurer, and the Commission's survey of court users in South Australia.

Worthington and Baker (1993) previously found that legal costs, as a percentage of the amount awarded, decrease as the amount in question increases. These conclusions also appear to be supported by the Commission's analysis of serious personal injury cases in the Supreme Court of Victoria (table 3.4).

The disproportionality of costs in lower value disputes appears to be borne out by the available contemporary data. For example, the Commission's survey of court users found that legal costs in disputes in the South Australian Magistrates Court on average comprised 67 per cent of the amount in dispute (table 3.3). Similarly, the survey of small business disputes in VCAT found that while direct costs on average were low compared to the amount in dispute, indirect costs were much less proportional. In smaller claims, the indirect costs of resolving the dispute often exceeded the amount in dispute, while the average cost across all disputes was 74 per cent of the amount at stake.

Table 3.4 Legal costs as a proportion of amount awarded in personal injury cases ^a

By dispute amount and type, from the Victorian Supreme Court in 2009 and 2010

<i>Amount in dispute</i>	<i>Medical negligence</i>	<i>Transport accident</i>	<i>Workplace injury</i>	<i>Other</i>	<i>Total</i>
	%	%	%	%	%
\$0 to \$250 000	14	16	26	23	19
\$250 000 to \$500 000	14	8	21	7	11
\$500 000 to \$750 000	12	5	n.a.	0	5
\$750 000 to \$1 000 000	15	6	n.a.	18	8
Greater than \$1 000 000	5	5	6	5	5
Total	6	7	20	13	7

^a n.a. – not available.

Source: Productivity Commission estimates using unpublished data from the Senior Master's (Funds in Court) Office of the Supreme Court of Victoria.

The proportionality of costs in disputes over deceased estates has also been subject to recent examination by Vines (2011). In this research, costs were defined as disproportionate when they were at least 25 per cent of the value of the estate in question. It was found that costs were disproportionate in close to half of the cases from New South Wales and over one third of the cases from Victoria.

Have legal costs increased over time?

The terms of reference for this inquiry ask the Commission to have regard to an assessment of trends in the real costs of legal representation over time. Such analysis is constrained by a lack of accessible and comparable sources of data on legal costs across different time periods. The data on litigation costs made available to the Commission thus far have generally only covered periods of one to two years, preventing any conclusive findings regarding changes in costs over time. Without consistent and periodic collection of data it is unlikely that such an assessment can be made. The use of data and evidence in the civil justice system is discussed further in chapter 24.

How do the financial costs of accessing justice impact on individuals?

Financial costs can discourage disputants from acting on their legal problems

The relatively high costs of taking action do not just impact on tribunal and court users. These costs discourage many Australians from seeking a remedy to their legal problems. According to Commission estimates using unpublished data from the

LAW Survey, a belief that action would be too costly was a reason for inaction in one third of substantial civil legal problems that were not acted on. A lack of action due to costs was most prevalent in legal problems involving credit and debt, money or health issues.

For small businesses, concerns about costs appear to be similarly prevalent in decisions about whether to act on disputes. A 2010 survey found that of the 20 per cent of small businesses that had experienced a dispute in the past five years, roughly a third had experienced potentially serious disputes but avoided escalation due to concerns about potential costs (DIISR 2010).

Financial costs can prevent those who do take action from seeking professional advice or representation

Legal costs also appear to shape people's decisions about what assistance to seek when responding to legal problems. In 40 per cent of substantial legal problems where the individual took no action or only consulted friends and family for advice, individuals cited concerns about further action or advice costing too much as the reason for not taking further action (Commission estimates from *LAW Survey* data). Once again, this was most common in problems involving credit and debt, money or health issues.

Even where legal disputes are pursued in the courts, legal costs are an important factor for some parties in deciding whether to seek representation. In its survey of South Australian court users, the Commission found that a third of respondents did not have a lawyer represent them at any stage during their case. A similar rate of self-representation in the courts was estimated by the Commission using unpublished data from the *LAW Survey*. According to the South Australian survey, just under half of these self-represented parties cited an inability to afford representation or lack of access to legal aid as the most important reason for their decision to self-represent.

Following a survey of its clients, the Small Business Development Corporation found that concerns about costs also deter businesses from seeking legal advice:

... in general small businesses cannot afford these services, and as a result, will attempt to resolve the dispute themselves or by using advice from other, potentially inappropriate, resources. There is also a perception amongst small business owners that these services are out of their reach financially ...

Under half of small business respondents who had a dispute sought legal advice. One of the main reasons given for not seeking legal advice when dealing with a dispute or issue was cost ... (sub. 76, p. 9)

Those taking action through formal channels may settle or withdraw due to costs

Legal costs also impact on the decisions of individuals as litigation progresses through the courts. The Commission's survey of court users in South Australia found that roughly a third of those who decided to settle or withdraw their case cited concern about legal costs as important in their decision.

For those able to afford representation, the decision to settle to avoid escalating legal costs is often based on legal advice. Roughly 70 per cent of those with legal representation who settled because of concerns about costs also reported advice from their lawyer as an important factor in their decision.

There is also some evidence to suggest that some parties accept settlement terms that are much less than they believe they are entitled to in order to avoid rising legal costs. Only a relatively small proportion — less than 20 per cent — of those who settled due to costs concerns reported that the settlement offer they received was close to what they wanted.

3.2 How long does it take to resolve disputes?

Some legal disputes are complex and may necessarily take some time to resolve. But when the system is slow to resolve even relatively simple disputes, individuals can be deterred from taking action. Those that are undeterred may face a higher burden in resolving their disputes. As a legal maxim suggests, 'justice delayed is justice denied'.

Ombudsmen perform well on timeliness but tribunals are slower

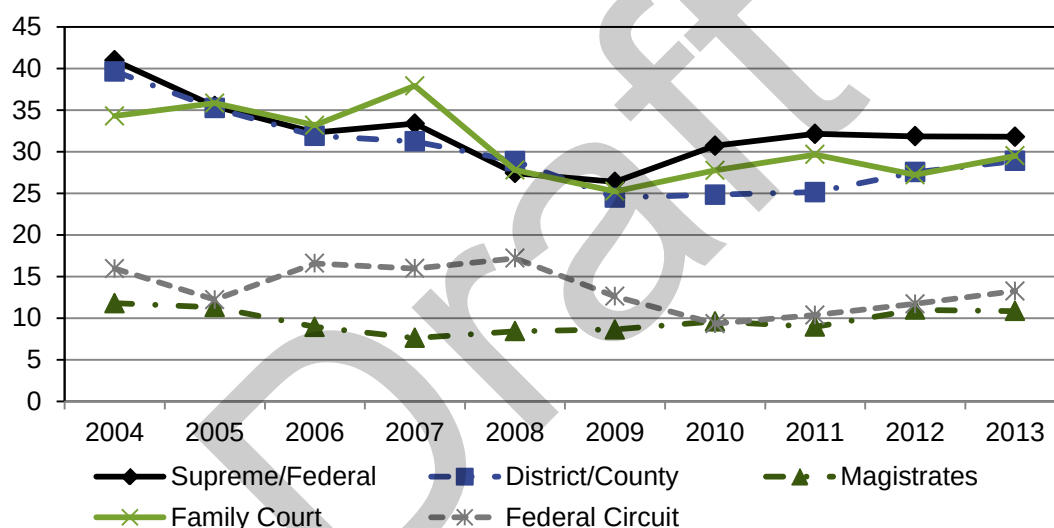
Data presented to the Commission suggest that ombudsmen resolve matters quickly — 80 per cent within one month and 97 per cent within two months (ANZOA, sub. 133).

While most tribunals operate under statutory exhortation to be quick, submissions to this inquiry expressed concern regarding delays in accessing justice through tribunals (Consumer Action Law Centre, sub. 49, p. 11). The extent to which these concerns about delays are borne out in the data is mixed. While there is a lack of consistent reporting on timeliness from tribunals, most that provide timeliness data report that at least 50 per cent of disputes are resolved within six months. The Commission has estimated a weighted average time to finalisation of roughly three months across all tribunals (chapter 10). However, in some more complex cases, the average time taken to resolve a dispute can be as long as six years.

Lower-tier courts provide more timely resolutions than superior courts

The timeliness with which courts deal with disputes varies greatly with the superiority of the court. Magistrates' Courts and the Federal Circuit Court resolve a majority of their cases within six months (SCRGSP 2014). Roughly a tenth of cases in these courts take more than 12 months to finalise (figure 3.3). In contrast, in superior courts — such as Supreme Courts and the Federal Court — this share is closer to a third of cases. These differences in timeliness will at least partially reflect differences in the complexity of cases, but may also be explained by differences in court practices, procedures and rules.

Figure 3.3 Percentage of pending caseloads older than 12 months
For non-appeal cases, by court level



^a Pending caseloads were averaged across all jurisdictions for each court level. It should be noted that states and territories are not identical in their allocation of civil cases between their court levels.

Data source: SCRGSP (2009, 2014).

The time taken to resolve court-based disputes is often longer than users expect. In a survey of users in the family law courts, one of the areas of improvement identified was the time taken to resolve matters, with only 63 per cent of applicants and 56 per cent of respondents saying the matter took the time they were expecting (Family Court of Australia and Federal Circuit Court of Australia 2011).

There is evidence that most courts have been increasing their clearance of cases and that timeliness is improving (SCRGSP 2014). In some jurisdictions, improvements have been substantial. For example, the Commission has estimated that the share of backlogged civil cases older than 12 months has decreased from over 40 per cent to around 25 per cent across New South Wales courts over the past decade.

How do delays in the justice system impact on users?

People may avoid acting on legal problems due to the potential for delays

Concerns about delays can contribute to unmet legal need. The *LAW Survey* revealed that more than a third of individuals who chose not to act on a substantial legal problem cited a belief that it would take too long as a reason for inaction (Coumarelos et al. 2012). Further, among those whose only action was to consult family or friends, roughly 40 per cent said that consulting a different source would have taken too long. Commission analysis of unpublished data from this survey suggests that a lack of action due to concerns about delays is most prevalent in legal problems involving rights, consumer or credit and debt issues.

Delays can have adverse consequences

Delays in a legal process can impact adversely on parties. For example, a delayed process for determining an accident compensation claim may leave the injured person without a means of funding their long-term care and support. Similarly, family law cases concerning a division of assets or payments of child support are not timely if the legal process leaves a parent without the means to support the child or children at the centre of the dispute.

The Consumer Action Law Centre provided examples of cases where delay imposed direct financial costs on disputants:

Delay has very real tangible and intangible costs for our clients. Even in industry ombudsman schemes (which are free for consumers), a dispute over a debt will cost the consumer as interest continues to accrue on the amount owing while the dispute is being dealt with. This can be a significant amount where there are delays in hearing the dispute.

Similar problems arise in VCAT. For small civil claims, there is typically around a six month delay between applying to VCAT and having a case heard. In a recent case, Consumer Action assisted a client in relation to a defective vehicle which involved an eleven month delay between the time our client stopped using the defective car to the time a favourable result in VCAT was achieved. In the meantime our client had access to another car which was loaned to her, but was not large enough to fit all of her children. (sub. 49, p. 11)

While delays can lead to other financial costs, as in the example above, it is important to note that the time taken to resolve disputes does not typically affect the direct legal costs to consumers associated with a dispute. Rather, it is the stage at which a dispute is resolved and the number of court events involved that directly impact on legal costs (Frynd; Williams and Williams 1994; Worthington and

Baker 1993). Hence, a case that goes through a number of court stages, such as pre-trial conferencing, hearing and final verdict, will likely have similar legal costs regardless of whether those court stages are 12 weeks or 12 months apart.

Delay in some cases can force parties to settle or withdraw

The frustrations associated with delay can force some parties to withdraw from the civil justice system. This was illustrated in the Commission's study of court users in South Australia — over a quarter of parties that settled or withdrew their cases reported frustration with the legal process as the reason for doing so. Two thirds of these parties had disputes which had been in the court system for at least 12 months before ultimately settling or withdrawing. Very few of these parties reported being satisfied with the settlement offer they received.

3.3 How complex is the civil justice system?

The civil justice system is undoubtedly complex

Any system or set of rules can be defined as complex if it consists of many components, often with intricate arrangements or interactions. A system can also be described as complex when it contains more information than one can easily process (Zack 2007).

There are examples of complexity across the entire civil justice landscape, spanning both its informal and formal elements:

[Public Interest Advocacy Centre] often receives inquiries from individuals who need assistance in navigating a complex legal system. Informal dispute resolution mechanisms can also be complex, reducing the ability of individuals to deal directly with their own legal needs, and increasing delays. (sub. 45, p. 9)

While positive attempts have been made by courts and various public sector agencies to simplify the civil dispute resolution system and make it 'user-friendly' for consumers, the [NSW Young Lawyers] Committees are of the view that the system remains, overall, complex, and may be difficult to navigate in the case of lay parties or self-represented litigants. (sub. 79, p. 8)

As a result, few Australians consider that they understand the system intended to promote and protect their rights. A survey of the Australian public found that 88 per cent of respondents believe that the legal system is too complicated to understand properly (Denniss, Fear and Millane 2012).

Complexity stems from many factors

There are many sources of complexity, including the law itself:

[Public Interest Advocacy Centre] believes that the way civil laws are drafted certainly contributes to the complexity of the law ... (sub. 45, p. 9)

Our laws are many, complex, specific to areas of law, and vary from jurisdiction to jurisdiction. Accordingly, they are often difficult to navigate. (Consumer Action Law Centre, sub. 49, p. 13)

Court processes and procedures are also seen as being complex:

In the standard adversarial system there is a voluminous set of rules of evidence of great detail and complexity. They present an obstacle course for parties and their lawyers. (Christopher Enright, sub. 10)

Legal Aid NSW notes that both the Family Law Court and Federal Circuit Court rules are complex and that there are different rules, forms and procedures for each jurisdiction. This creates additional difficulties for self-represented litigants and legal practitioners. (sub. 68, p. 32)

Lawyers too, are thought to contribute to complexity:

Legal practitioners may contribute to complexity of matters by engaging in, for example, large requests for discovery or seeking to adjourn matters which may cause unnecessary delay and expense (NSW Young Lawyers Committees, sub. 79, p. 8)

One source of complexity that is more readily avoidable relates to court forms. Surveys by the family law courts have previously shown that court forms were the area of lowest satisfaction among users, especially amongst non-lawyers (Family Court of Australia and Federal Circuit Court of Australia 2011). Among those surveyed, roughly a third of non-lawyer court users responded that court forms were not clear or easy to understand. This view was also expressed in submissions to the inquiry:

Of the small minority of small businesses surveyed who had been to a Court or a Tribunal to resolve their business-related disputes ... approximately half reported being confused by the forms and found the whole experience daunting and overwhelming. (SBDC, sub. 76, p. 10)

Many of our clients struggle with court forms and timelines. Many of our clients also experience difficulty in understanding the law ... Court forms are often not simple or useable. Knowing the correct form to use is half the battle. The use of legal terminology can confuse, especially those from non-English speaking backgrounds. While these forms do contain guidance notes, a person would have to be legally trained to source and interpret the rules to which they refer. (QPILCH, sub. 58, pp. 3, 12)

Choice is another factor driving complexity:

... the various different avenues that can be pursued to resolve disputes vary enormously as to their ‘user-friendliness’ ... The fact that there are so many potential avenues to pursue, depending on the problem, is itself a factor that increases the complexity for those wanting to resolve a civil dispute. (Maurice Blackburn, sub. 59, p. 5)

A contributing factor to complexity is the number of choices on offer. More choice offers benefits, as it improves the set of potentially good options; providing search costs are minimal, more choice should never be a bad thing. However, there is growing evidence that too much choice is costly to human decision-makers. The greater the range of options, the greater the chances of overlooking the best option, and since potential losses weigh more heavily than potential gains, this can make for a fearful decision-maker. (Reeson and Dunstall 2009)

While some sources of complexity may be hard to capture quantitatively, complexity can be assessed to some extent through its impact on users.

How does complexity impact on users?

Complexity can prevent people from taking action or seeking assistance

Complexity makes it less likely that individuals will take action to resolve legal problems when they arise. When faced with a complex system to navigate, people often exhibit behaviours and decisions which may ultimately not be in their best interest, such as:

- putting things off and leaving their problem unresolved
- sticking with the default option, even if it is not the best
- avoiding making a decision altogether
- being readily confused and prone to misleading advice (Reeson and Dunstall 2009).

Complexity exacerbates feelings of helplessness and the perception that little can be done to fix a legal problem. Consequently, people are less likely to know how best to resolve their legal problems:

... many people do not realise what their rights are or that a cause of action exists and they may be unaware of available avenues for redress or agencies who can assist, or both ... (NSW Young Lawyers Committee, sub. 79, pp. 8–9)

A lack of awareness of legal rights — and the avenues of legal assistance and advice available when rights are transgressed — is relatively common (chapter 5).

The Commission has estimated, using unpublished *LAW Survey* data, that not knowing what to do was cited as a reason for inaction in an estimated 30 per cent of substantial civil legal problems which were not acted on in 2008. This reason was most common in legal problems involving health, employment, credit and debt or rights.

Disadvantaged Australians appear the worst placed to navigate the complexities of the civil justice system:

The lack of simplicity and usability in the legal system affects vulnerable and disadvantaged members of society the most. (QPILCH, sub. 58, p. 3)

Further, some stakeholders suggested that aversion to complexity can become entrenched, contributing to future inaction:

The complexity of the law and legal processes is a general barrier to avoiding or resolving legal problems early. Research has consistently shown that people can feel intimidated or overwhelmed by legal problems. Behaviour becomes generational. People who do nothing when faced with a legal problem are far more likely to continue to do nothing when faced with a new legal problem, and their families are far more likely to do nothing when faced with a legal problem. (Legal Aid NSW sub. 68, p. 65)

Complexity makes it more difficult and costly to resolve problems when action is taken

Those who are not dissuaded from seeking resolution to legal problems are still adversely affected by complexity. Complexity reduces the capability of individuals to address legal issues themselves — increasing the stress and effort required to solve their problems — and increases the need to seek advice from others:

The simpler the process, the less capacity is needed of an individual to negotiate the process on their own. The more complex the system, the more people will require assistance, including those who may have some degree of education ... Legal Aid NSW suggests that the level of unmet legal need reflects ... the increasing complexity of the law ... The complexity is such that navigation of this legal framework will require legal advice and advocacy. (Legal Aid NSW, sub. 68, pp. 20–21)

Increased complexity also makes it more difficult and time consuming for legal practitioners to understand the law themselves. As described by Rural Law and Justice:

... the growing complexity of laws is requiring a greater level of specialist expertise, which is placing pressure on practitioners to take on work in areas they lack proficiency. (sub. 20, p. 6)

The consequence of this is that lawyers must either spend greater resources providing services, thereby increasing the cost, or lower the quality of their services.

This reduces individuals' access to legal services. One participant in this inquiry ventured an estimate on the extent to which complexity had raised costs:

Troublingly, the increased complexity of litigation has led to an increase in the cost of cases across all courts by 78 per cent in real terms from 1998 to 2008. (Michael O'Keeffe, sub. 69, p. 3)

The complexities and stresses of litigation also take a toll on parties. Sixty per cent of small business disputants in VCAT reported their dispute as having an adverse impact on their level of work-related stress. Many also reported the dispute as taking a toll on their health and wellbeing, or the performance of their business. Similar findings were echoed by the Small Business Development Corporation, which in its survey of its clients found:

... of those who said they had experienced a dispute; almost half reported that it was detrimental to their personal relationships. The vast majority of those also reported that the dispute was detrimental to their health, wellbeing and personal financial position. (sub. 76, p. 8)

These findings highlight the personal and non-financial impacts to individuals, including legal professionals, that can arise from engaging with a complex justice system.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

4 A policy framework

Key points

- A well-functioning civil justice system underpins social cohesion and economic activity by protecting the personal, contractual and property rights established in law. It also provides a deterrent to, and redress for, violation of these rights, through efficient and effective mechanisms to determine and enforce civil penalties.
- Governments play an important role in the civil justice system. They:
 - make laws and regulations, and establish and fund the courts, tribunals and ombudsmen that make up the institutional infrastructure
 - regulate the legal services market to improve market outcomes
 - fund access to justice to establish precedents and assist disadvantaged parties who would otherwise not be able to access justice.
- Governments can also affect the demands on the civil justice system by: ensuring clarity in laws and regulations; setting expectations of behaviour; and taking into account the potential impact on the civil (and criminal) justice system when designing laws, regulations, and social expenditure programs.
- The main objective of the civil justice system should be to improve the wellbeing of Australians by:
 - providing access to least cost avenues for dispute resolution and facilitating the quick resolution of disputes at the earliest opportunity
 - enabling the provision of a range of legal services that are proportionate to the problems experienced, easy to access and understand, and treat people fairly
 - promoting affordable services, so that access to justice is equitable regardless of people's personal, social, or economic circumstances and background.
- Effectiveness, in the context of civil justice, requires that disputes are resolved and the law is upheld.
- Efficiency requires that: civil justice is provided through the least cost avenues for dispute resolution; the market for legal services is competitive; consumers are well informed; quality standards are proportionate and enforced. Also, that public funding, including for legal assistance services, is allocated to the activities and cases that provide the greatest benefit relative to their cost.
- When deciding where to spend taxpayers money in the civil legal system, governments should take into account the full range of costs and benefits, including the value of establishing precedents, the impact on individual's circumstances, and the effects on other publicly funded services.

The underlying objective of any reform of the civil justice system should be to improve the wellbeing (or quality of life) of Australians.

This chapter provides the Commission's framework, or approach, to assessing whether policy changes are likely to improve the wellbeing of the community as a whole (taking into account users and potential users of the civil justice system, service providers and taxpayers). The framework provides guidance on how the Commission has assessed policy changes in the context of improving the efficiency and effectiveness of the civil justice system, as well as looking at the vexed question of how to allocate taxpayer funds to maximise the wellbeing of the community given the resources available and alternative uses.

The framework presented in this chapter guides the analysis and development of policy throughout the remainder of the report.

This chapter begins with a brief discussion of the contribution of the civil justice system and access to justice to economic activity, and social and environmental outcomes valued by the community (section 4.1). It then outlines the role of governments in setting the institutional infrastructure for the civil justice system, regulating the market for legal services, and funding legal assistance for disadvantaged Australians (section 4.2). The third section sets out the considerations for assessing whether the current civil justice system is, and proposals for change are, efficient and effective (section 4.3).

4.1 The role of the civil justice system

A well-functioning civil justice system is important for society ...

The civil justice system shapes social and economic activity by establishing and enforcing legal rules. As Genn said:

The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. (2010, p. 3)

Much of what Australians value about a well-functioning justice system takes place 'behind the scenes'. When the justice system functions well, it allows Australians to determine their rights and responsibilities and provides an incentive for individuals and businesses to comply with laws and regulations. For example, a well-functioning system gives people the confidence to enter into personal and business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia's economic performance.

When people are confident that returns from engaging in activities are protected this promotes economic growth and encourages innovation:

Well-functioning judiciaries guarantee security of property rights and enforcement of contracts. Security of property rights gives agents incentives to save and invest, by protecting returns from these activities. A good enforcement of contracts stimulates agents to enter into economic relationships, by dissuading opportunistic behaviour and reducing transaction costs. This has a positive impact on growth through various channels; it promotes competition, fosters specialisation in more innovative industries, contributes to the development of financial and credit markets and facilitates firm growth. (OECD 2013, p. 2)

A civil justice system that offers a range of dispute resolution mechanisms can also aim to ensure that the transaction costs of legal redress are minimised. This in turn means that resources can be allocated towards their highest valued use.

... and for safeguarding rights and ensuring accountability

Justice systems that work well also protect individuals from infringement of their rights by others (individuals, companies or government), provide recourse for individuals to object to the actions of government and ensure governments are accountable (AGD 2009).

The ability of individuals to enforce their rights can have profound impacts on a person's wellbeing and quality of life. For example, it can mean that someone who has sustained injuries due to the negligence of others can seek recompense for impairment and/or their reduced income generating capacity. As the Law Council of Australia said:

If a person suffers a civil wrong or is subject to government decisions affecting their rights, they are entitled to enforce their rights through litigation or a fair and transparent review process. If citizens cannot enforce their legal rights, those rights are effectively taken away, leading to wrongful transfer of assets, money and other property. (sub. 96, p. 31)

For laws and legal rights to be more than words there needs to be commitment to the law and mechanisms for clarifying and enforcing the law. The mechanisms for resolving disputes must also be accessible. That said, knowing what could happen if a dispute ends up in court or a tribunal can also facilitate voluntary (or at least non-judicial) resolution of many disputes. In Australia, disputes are far more likely to be resolved privately than through courts or tribunals.

Well-functioning justice systems can also promote social order and facilitate the peaceful resolution of disputes. To the extent that the law reflects the community's

expectations and desires, the courts communicate and reinforce civic values and norms in their decisions and publication of their decisions.

To ensure access to justice, all individuals and businesses must have fair and equitable access to legal redress, regardless of their circumstances. As the Attorney-General's Department said:

Difficulties in accessing justice reinforce poverty and exclusion. Maintaining a strong rule of law is a precondition to protecting disadvantaged communities and helping people leave poverty behind. (AGD 2009, p. 2)

4.2 Civil justice and the role of government

Governments are important players in Australia's civil justice system. They:

- make laws and regulations and establish most of the institutions that make up the 'legal infrastructure'
- regulate the market for legal services
- provide legal assistance for dispute resolution.

Governments are also major consumers of legal services.

Governments provide the institutional infrastructure

Governments shape the civil justice system by making laws which outline rights and responsibilities ('the rules') that guide economic and social activity. As Genn said:

The civil law maps out the boundaries of social and economic behaviour while the courts resolve disputes when they arise. (2010, p. 3)

Laws and regulations affect many aspects of Australians' lives:

- Specific and generic regulations establish the rules for the way that businesses can operate. The laws and regulations are largely designed to protect the rights of consumers, workers, the natural environment, and investors — with rights reflecting society's preferences.
- Individuals and civil society organisations are also regulated by a range of laws and regulations that restrict their activities. Most restrictions aim to protect the rights of others by assigning responsibilities that reflect socially agreed acceptable behaviour. Examples include noise restrictions in residential areas, and animal control and building restrictions that reflect neighbourhood values.

Governments also provide formal and informal avenues for enforcement (‘the tools’) when rights and responsibilities are violated. Genn, using a metaphor from Tamanala (2004), said:

If the law is the skeleton that supports liberal democracies, then the machinery of civil justice is some of the muscle and ligaments that make the skeleton work. (2010, p. 4)

A range of bodies have regulatory powers, including local governments, state and Commonwealth agencies and their independent regulators. These bodies generally provide for dispute resolution outside the civil justice system, and turn to the formal system only when required (see, for example, the Enforcement Pyramid (ANAO 2007)).

The Australian Constitution assigns responsibilities between the levels of government. Governments establish and fund the courts, tribunals, and statutory ombudsmen. They work with industry and business groups to establish industry funded ombudsmen to address disputes for that specific industry. The nature of disputes that different legal bodies will adjudicate, and the rules by which they operate, are also established by the relevant government. For example, consumers are required to consider alternative options for resolution prior to litigation in Commonwealth jurisdictions.

The decisions of courts, tribunals and ombudsmen have an influence ‘outside the courtroom’. Their determinations provide a framework within which parties determine their rights and responsibilities — known as bargaining in the ‘shadow of the law’ (Mnookin and Kornhauser 1979). Genn (2010) spoke about the courts being a vehicle for sending messages quietly and significantly contributing to social and economic wellbeing.

The establishment of clear precedents is an important part of the common law approach to justice. It allows the courts to apply the law, while the process of appeal to higher courts provides for these interpretations to be corrected, the clarification of precedents and the development of the law more generally. Access to higher courts, and in some cases the Supreme Courts in the states and territories and the High Court for the Commonwealth, is important for access to justice.

Regulators of the market for legal services

Legal services constitute advice about rights and responsibilities under the law, and representation of individuals, businesses and other organisations in disputes. Parties to a dispute can choose from a wide range of providers which offer various services — from the local solicitor providing advice on drawing up a will to a Queen’s Counsel representing a party in the High Court. But a well-functioning market for

legal services which can facilitate choice is predicated on government establishing a robust institutional framework. In Australia, the majority of legal services are delivered through private practice overseen by regulations imposed by government to safeguard consumers and the community more broadly.

Consumers face a number of potential disadvantages when engaging with legal services providers. Many consumers are infrequent and inexperienced users of legal services and comparing providers is expensive and often inconclusive. Consumers also rely on legal professionals to diagnose their needs and identify the services they require. However, the quality of service provided is difficult for consumers to judge, so many rely on reputation. Providers also have superior knowledge of the likely cost and outcome of any action they take, and can use this knowledge to ‘over service’ and extract higher revenue from consumers.

These consumer protection aims — both in terms of overall quality of the profession and preventing providers from taking advantage of consumers in individual transactions (chapters 6 and 7) — are typically the reasons that governments often go beyond the protections enshrined in consumer law and impose additional regulation on legal service providers.

Like most other markets, which deliver social services and have broader public benefits, government involvement in the market for civil legal services is important to correct for ‘market failures’ and to provide consumers with the confidence to use legal services. That said, it is important for government to demonstrate that market interventions will improve market outcomes and overall community wellbeing.

Funding to support access to justice

Public as well as private benefits arise when disputes are resolved

There can be public benefits as well as private benefits from dispute resolution.

Public benefits arise as formal determinations in courts contribute to the development of the law. Other parties with similar disputes understanding what is likely to happen in a formal determination can assist in earlier resolution of disputes and save considerable private and public transaction costs. Also, public resolutions (including precedents) act as a deterrent to unlawful behaviour by demonstrating that the civil justice system is effective in upholding the law.

That said, public funding of cases is not necessary to establish a precedent. The private benefits alone are very often sufficient for the party to take action. However,

if such resolution would not occur unless funded by the government, public benefits or *positive externalities* can provide the justification for public funding. However, such funding decisions need to be warranted by the return to the community relative to the opportunity cost of the funding.

Public benefits can also arise where failure to resolve disputes imposes costs on other social services (such as where employment is lost), or other people (as can be the case in family violence). For example, a person who breaches tenancy rules may find themselves homeless which can exacerbate health problems and domestic violence, and they can have difficulty retaining employment. While these outcomes have significant personal costs for the person involved, they can also increase the need for a range of social services. Where such *negative externalities* arise from failure to address a dispute or provide timely advice, government funding of legal services will be in the public interest if the benefits to the community exceed the costs to the community.

Actions to uphold the fundamental rights of individuals can also result in public benefit. The benefit to individuals involved can be clear, such as when a person faces deportation. The public benefit from the protection of rights is living in a ‘fair and just’ society.

Funding services that will not be provided by the market

For most goods and services, a competitive market will satisfy demand, with prices limiting demand to the cost of providing the service. However, there can be substantial ‘gaps’ in the market for legal services where ‘for-profit’ providers have little or no incentive to provide services or where the cost of providing a service is prohibitive, such as with homeless people needing services who have little, if any, capacity to pay.

The cost can be prohibitive for two related reasons — the level of demand in a location, and the cost of providing the required service. Many specialist services need a relatively high volume of clients to sustain their business. Demand may fall well short of this level in some locations. Some locations also incur higher costs due to distance. Some services are higher cost, or more difficult to staff, because cultural and linguistic skills are needed. If left to the market, legal services may not be provided in some areas, such as rural, remote or low income locations, or to groups who have special needs.

The information problems set out above can be more profound where individuals have cognitive problems or language barriers. The complexity of the system and/or its lack of alignment with cultural norms for some groups in the population can

result in individuals not fully understanding their rights. Without providing public support it is unlikely that such people would be able to access the system.

Further, legal services are not services that people normally want to buy; rather they do so because of need, and often in response to circumstances beyond their control. In the absence of government support, some Australians would not be able to access legal services due to financial constraints arising from a lack of liquid assets (Alvarez and Lippi 2012). As with health and education services, the provision of a basic safety net can be argued on equity grounds. It may also be justified on efficiency grounds if there are externalities as discussed above.

Figure 4.1 summarises the role that governments play in aiming to ensure that Australians have access to appropriate services for dispute resolution and quality legal services, and that such services are affordable.

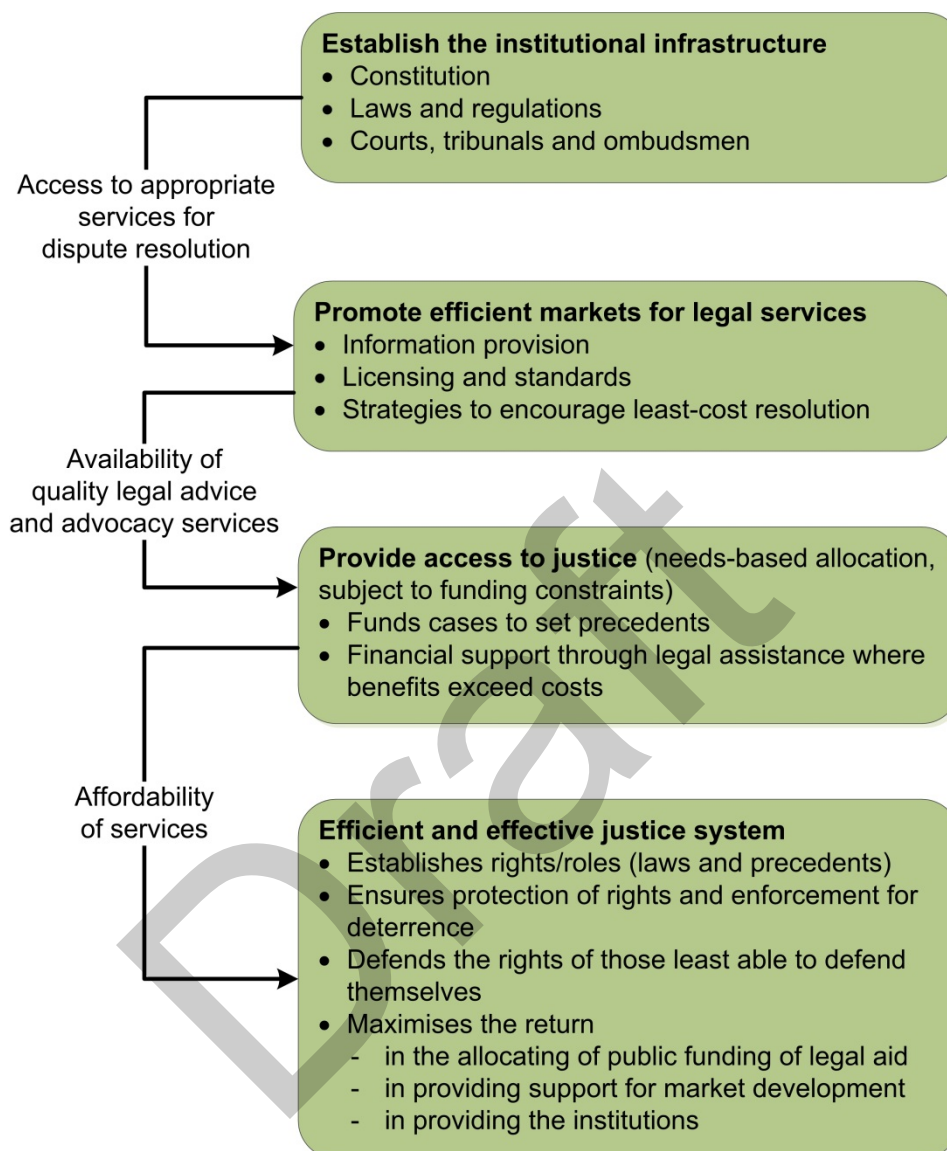
4.3 Promoting an efficient and effective civil justice system

While there are valid rationales for governments to intervene in the civil justice system, policy makers need to demonstrate that such interventions can be expected to improve outcomes. That is, the benefits to the community from a new policy, program or regulation need to outweigh the costs of the intervention. Such a test should be undertaken when: developing new or reforming existing laws and regulations; establishing or altering the various institutions and their roles and responsibilities; designing regulations to improve market conduct; and allocating funding across the range of legal assistance provided.

As noted earlier, the objective of any policy change should be to improve the wellbeing of Australians. In line with this, the Attorney-General's Department proposed that the overarching objective of the civil justice system could be that it:

... contributes to the wellbeing of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law.
(sub. 137, p. 6) [italics in original]

Figure 4.1 Governments are key players in the civil justice system



The effectiveness of the system in ‘contributing to the maintenance of the rule of law’ should be central to ‘fostering social stability and economic growth’. Taking the system as a whole, the objective would be achieved if the following three goals were satisfied. Namely, that the system:

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

An effective system is required first and foremost to uphold the rule of law. To do so, the system must be acceptable to the Australian public, whose behaviour it seeks to regulate. Both laws and the system that upholds them must be accepted if society is to flourish.

Efficiency requires that resources are allocated in a way that not only minimises the cost of anything produced (productive efficiency), but also that resources are used where they are most valued and give the greatest net benefit to the community (allocative efficiency). Allocative efficiency is inherent in the last two of these three goals — as this is about allocating resources, whether it is to reform or maintain the infrastructure of the system or to direct funding for legal assistance to where it will deliver the greatest benefit.

In making proposals for reforming the civil justice system to improve the efficiency and effectiveness of the system, the Commission has tested its recommendations against these three goals.

Does the system uphold the law?

Reforms to uphold the law could be required when:

- institutions need strengthening to be able to enforce the law or establish precedents
- laws need reforming. This could include obsolete laws governing business practices that are no longer relevant or laws that have been shown to be ineffective or otherwise not achieving their purpose.

The Commission has sought to identify issues where this might be the case and where failure to uphold the law imposes major costs on society.

There is, however, a more subtle issue that needs to be taken into account when considering the need for reform — that the sense of legitimacy, credibility and trust in the legal system held by the community (the ‘social licence’) is not weakened. The Commission has sought to identify practices that significantly undermine the social licence, such as governments not behaving as model litigants or legal professionals not effectively communicating information to clients, and to ensure that any recommendations for reform strengthen, or at least do not erode, this social licence.

The Attorney-General’s Department proposed a number of specific objectives for the civil justice system that, in addition to other goals, make a clear link between the

social acceptance of the civil justice system and its ability to uphold the law. These specific objectives are for the civil justice system to:

- solve problems before they become disputes
- resolve disputes quickly and at the earliest opportunity
- treat people fairly and ensure legal processes are just
- provide equitable access irrespective of personal, social or economic circumstances and background
- value the wellbeing of those who use it
- be confident that the civil justice system is built on, and continuously informed by, a solid evidence base (sub. 137).

The Commission endorses these specific objectives. However, from an efficiency perspective it is important that they are applied with some care to achieve the social licence at least cost.

Cost-effective and appropriate legal services?

An appropriate service is one that meets the legal needs of the individual, business or community organisation. To be efficient the service must be appropriate as well as effective and provided at least cost.

Some of the objectives for the civil justice system set out by the Attorney General's Department are important for reducing the cost of resolving disputes, notably solving problems before they become disputes and resolving disputes quickly. Other actions that can assist in reducing the need to use the formal system, and hence the cost, are establishing clear precedents and ensuring the public is well informed about their responsibilities as well as their rights.

While these actions appear sensible at a 'system' level, they may be less relevant for some parts of the system. For example, a long and complex process to establish a precedent can be warranted if it then provides guidance for compliant behaviour in the future. While there is no single 'check list' that can be used to assess the efficiency of each part of the system, the Commission considers that government intervention and funding may deliver the greatest benefit through:

- maximising user understanding — investing in better information services for consumers to understand their rights and promote greater understanding of the legal system, its processes and the costs involved

-
- taking the least cost approach to dispute resolution — providing incentives for internal resolution of government and business complaints, encouraging more use of alternative dispute resolution techniques, and ensuring frivolous and vexatious litigation is screened before hearings commence
 - focusing financial support — delivering legal assistance to disadvantaged people most in need (see below) and exploring alternative funding options for other people facing large costs relative to their capacity to pay to fund their litigation.

Is funding prioritised to maximise returns?

Given the resource constraints faced by all governments, it is not a sufficient test that the benefits of funding exceed its costs. Rather, funding must be prioritised to the areas with the highest return.

Returns need to be viewed broadly in terms of community wellbeing

As the wellbeing of society is a complex concept, it is useful to apply some rules of thumb to assessing the likely net benefit. There are several ‘wellbeing’ frameworks that can be utilised (box 4.1). Each of the frameworks point to the importance of taking both social and economic costs and benefits into account.

As a conceptual framework for considering the impacts of a policy, wellbeing is a good place to start. But given the measurement challenges inherent in applying a formal cost-benefit analysis to non-market activities and social impacts⁹, the analysis is often limited to an assessment of:

- which side of the ledger each direct and indirect impact of the policy occurs — a cost or a benefit
- whether each impact is relatively large or small — which depends on the size of the impact and the number of people affected
- the timing of each impact — whether it is immediate, in the near future or the relatively distant future
- the distributional impact — who benefits and who pays the costs, and the merit of this distributional impact.

If one side of the ledger is not clearly greater than the other then further analysis is required, including quantification of the impacts most amenable to measurement.

⁹ Non-market activities include household work and volunteering. Social impacts encompass changes in mental and physical health, relationships, freedoms and self-esteem.

Box 4.1 Wellbeing frameworks — assessing the benefits from policy

Wellbeing is a complex and multi-dimensional concept.

The Organisation for Economic Co-operation and Development's (OECD) *How's Life?* framework for measuring wellbeing identifies three pillars for understanding and measuring wellbeing — material living conditions; quality of life; and sustainability. Under each category are a range of indicators that can be used to assess how a country is performing in the various things that have been found to matter for people's overall life satisfaction and happiness. The OECD does not assign weights to the various indicators, recognising that countries have different value systems and an indicator that might be a policy priority in one country may not be as important in another.

Indeed, taking a broad cost-benefit approach to policy evaluation is challenging as it involves making value judgments about what is important to the individuals (knowing that people value outcomes differently) that make up society. Further, many of the dimensions of wellbeing are broad and intrinsic outcomes, in particular, can be difficult to measure.

The Australian Treasury has also developed a wellbeing framework as a descriptive tool to provide context for public policy advice. The framework is built on elements of Sen's capabilities framework. Treasury identifies five dimensions that directly or indirectly have important implications for wellbeing.

- The set of opportunities available to people.
- The distribution of those opportunities across the Australian people.
- The sustainability of those opportunities over time.
- The overall level and allocation of risk borne by individuals and the community.
- The complexity of choice facing individuals and the community.

This framework provides a broad context for considering policy options and highlights the importance of trade-offs between and within dimensions. This is particularly important when considering which potential reforms across the broad spectrum of government funded activities in the civil justice system will deliver the most value by avoiding harm at the least cost.

Sources: OECD (2011); Treasury (2011).

Taking a wellbeing approach does not imply that all needs are met. In a world where funding is not constrained, government intervention to address needs would be justified where the benefits exceed the costs, taking into account the opportunity cost of the funds (the alternative use to which the funds would have gone). However, in a budget constrained environment, funding must be allocated to those needs that deliver the greatest benefit relative to the cost of meeting the needs. That is, funding must be allocated efficiently.

Applying the framework

While the three questions set out above can be used to assess the performance of the current system, they can also be applied to any proposed reforms (changes) to the current system. That is, will the change:

- better uphold the law?
- provide more cost-effective and/or more appropriate services?
- better target legal assistance to increase the net benefit delivered by the funding?

In answering these questions the Commission has sought to:

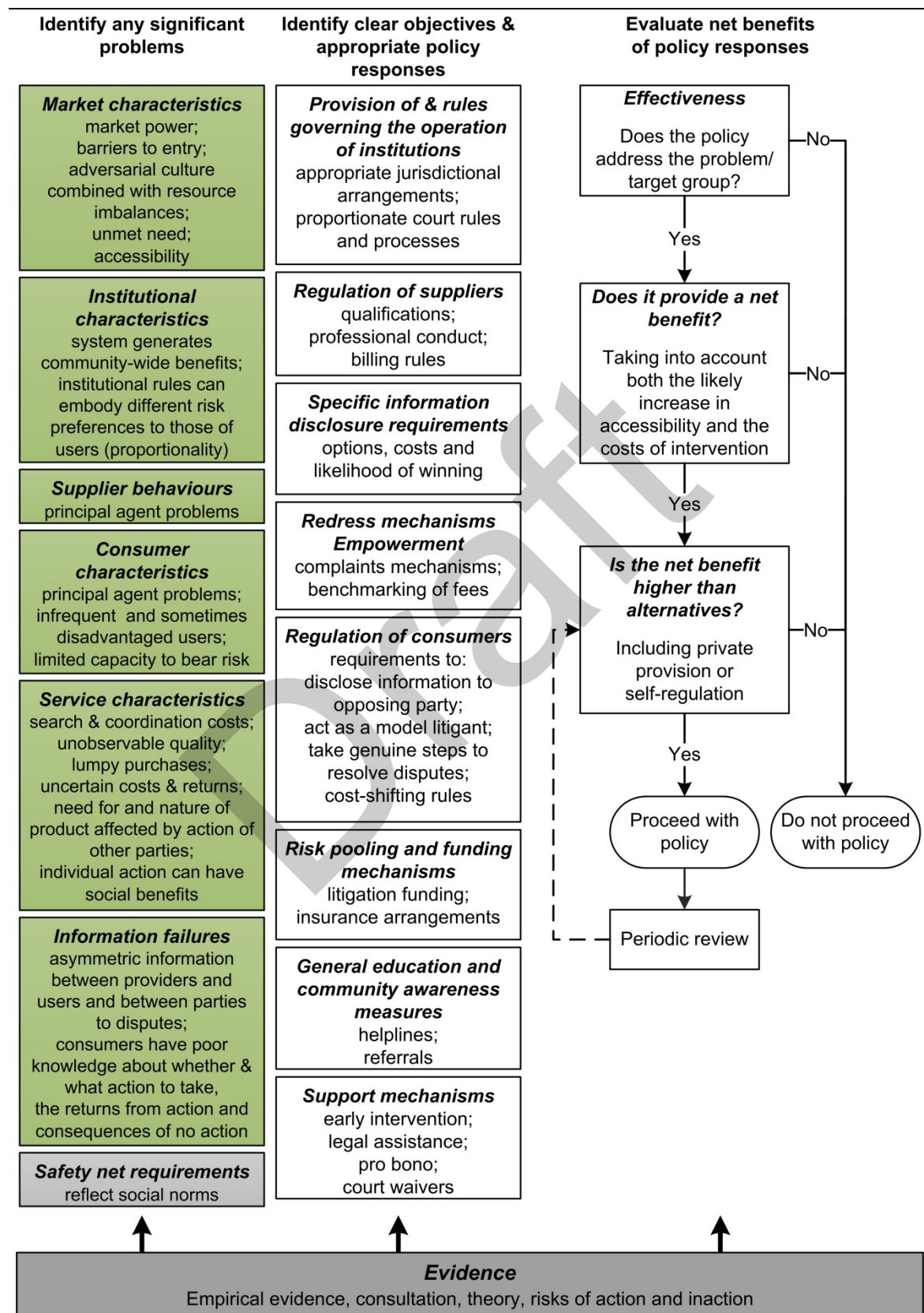
- address problems that are large enough to justify government involvement that are amenable to reform. Given the substantial costs associated with developing, implementing and administering government policy, it is important to target government resources to those areas which could benefit most
- articulate clear objectives to underpin the development of targeted policies and reduce the risk of unintended impacts, including on the social licence to operate
- reflect an assessment of efficiency and effectiveness of the different options, including the likely costs and benefits for the community as a whole
- utilise extensive stakeholder and community consultation, accompanied by transparent analysis
- where the evidence is insufficient to identify a clear recommendation, to seek further information, and where appropriate to embed periodic reviews into all policy changes to check that they are achieving their objectives.

The Commission has drawn on existing data and analysis as well as the information provided in consultations and submissions to assess whether there are options to improve the cost-effectiveness and appropriateness of the system. In the absence of empirical evidence on the functioning of the current system, proposals for improvements to the system have to rely more on qualitative analysis, which can be affected by the strength of different views. The challenges to this inquiry due to the lack of systematic empirical data on the functioning of the system are highlighted throughout the draft report and are discussed in detail in chapter 24.

The approach followed in this inquiry is summarised in figure 4.2.

As can be observed, the relationship between the systemic issues identified and policy responses is not straight forward. Policy responses that may be effective in one area can lead to unintended consequences in others (such as the interaction between the civil and criminal justice systems, and between the civil justice and social welfare systems). This needs to be taken into account when considering the impact of policy reforms.

Figure 4.2 Good policy development process



Source: Adapted from PC (2010).

Given the intense competition for limited government resources in the access to justice arena and more broadly among the provision of social services, the rest of the report draws heavily on this framework to balance competing interests in the development of policy recommendations.

Draft

5 Understanding and navigating the system

Key points

- Many Australians find the law and the civil justice system difficult to understand and to navigate. Many also have difficulty identifying whether a problem has a legal dimension. As a result, legal problems can remain unresolved and there is a risk that advice may be sought from a source that is less well informed.
- Community legal education plays an important role in making Australians more aware of their legal rights and obligations, and providing them with knowledge to better navigate the legal system. It can also provide people with the skills and knowledge to prevent legal problems from occurring. More needs to be done to understand the reach and effectiveness of community legal education strategies.
- Legal health checks are another tool used to help identify legal problems for both individuals and private businesses. But again, there is limited evidence about how useful they are in identifying legal problems and whether the information they provide is being used to refer people to appropriate services.
- Information (including telephone advice lines, web-based portals and brochures), basic advice, and referral services are provided by both public and private providers. But fragmentation of effort means that services (including those that attract government funding) are often duplicated and lack visibility. Information on what to do, and where to go, can become out-of-date as the law, and the roles of legal providers and institutions evolve and change.
- A visible single entry point or gateway for legal assistance and referral in each jurisdiction would make it easier for people to navigate the legal system and increase the likelihood of the community becoming familiar with where to go for assistance. This has the added advantage of reducing duplication of information provision — allowing resources of legal assistance providers to be directed to other activities which assist clients.
- Advice is often sought by individuals from non-legal advisors such as the police, doctors or financial advisors. This demonstrates the importance of making appropriate referrals when legal problems are first detected.
- Many disadvantaged Australians have complex legal and non-legal needs. Greater collaboration between legal and non-legal organisations through better co-ordinated 'joined-up' human services can help ensure effective client outcomes. Training of non-legal workers is necessary in order for them to detect legal problems and subsequently make suitable referrals.

‘Knowledge’ and ‘understanding’ (together with capacity and capability), are said to be key pre-requisites to access to justice (Buck and Curran 2009; Denniss, Fear and Millane 2012). Yet many Australians find the civil justice system difficult to understand and navigate. The Law Council of Australia, commenting on the complexity of the law in Australia and the justice system, said:

This complexity and the sheer breadth of knowledge required about the law and how it is applied presents significant challenges to those who seek to navigate the system. (sub. 96, p. 51).

Kirby, the Executive Director of the Victorian Law Foundation, also said:

The complexity of the law means that many people find this material impenetrable — too complicated, too long and with too many assumptions about prior knowledge. This is further complicated when the reader finds the legal system intimidating or struggles with basic literacy. (2011, p. 16)

National Legal Aid suggested that the legal system can appear so ‘daunting’ that people are discouraged from finding a resolution to their legal problems:

The legal system, regardless of the forum, may also appear complex and daunting for many people who may in usual circumstances be reasonably competent at self-expression and protecting their rights. However, when faced with what appear to be procedural complexities and a requirement for reasonable precision in submitting documentary information, these same people may opt for a ‘do-nothing’ approach and accept the adverse consequences of not having a matter adequately resolved. (sub. 123, pp. 25–26).

People can also have difficulty recognising that a problem has a legal dimension. In this context, any past experience with problems of a legal nature and dealings with the civil justice system are often not readily transferable. For example, experience with a dispute about a faulty good provides little insights on how to handle a family law dispute.

Interactions with the civil justice system often occur at times of personal stress — resulting from a family break up, being a defendant in a claim, following a traumatic injury or experiencing the financial failure of a business. Understandably, many turn to family and friends or someone else they can trust, such as a doctor, for advice. But for many people, this may be the only advice they seek. As a consequence, some Australians are poorly informed about their legal rights and where to go to resolve their dispute.

This chapter explores a number of questions:

- how can people be better equipped to recognise when a problem has a legal dimension? (section 5.1)

-
- how accessible is information and advice about how to resolve disputes? (section 5.2)
 - what strategies are in place to ensure Australians receive appropriate advice about legal problems? (section 5.3)

5.1 Understanding when problems have a legal dimension

Knowing that a problem has a legal dimension (that it is a ‘justiciable problem’) is an important first step to finding the ‘right’ avenue or pathway for resolving a problem or dispute. But as the Public Legal Education and Support Taskforce said:

... the role of the ‘legal’ in a problem or a situation is rarely well understood. Despite the importance of the legal in, for example, relationship breakdown, illness, loss of a job, buying or renting property, or in debt problems, it is common for people to fail to identify how the law can be used. The legal may even be regarded as unhelpful or treated with suspicion. (PLEAS Taskforce 2007)

In a similar vein National Legal Aid referred to the experiences of clients of Legal Aid Commissions (LACs) whereby:

... an individual may have a significant legal need but not be aware that the legal need actually exists. Indeed, there are circumstances where an individual does not become aware of a legal need — the resolution of which would have a significant impact upon their life — until their attention is drawn to relevant legal information. (sub. 123, p. 10)

These observations are consistent with survey findings which indicate that many Australians lack knowledge about their rights and what action to take when legal problems arise. They are also confused by the complexity of the legal system.

- A survey by the Australia Institute showed just under 30 per cent of respondents were not aware of their rights under the law. The survey results also revealed that close to 90 per cent found the legal system too complicated to be understood properly. Around a fifth reported that they would not know how to get help if they had a legal problem (Denniss, Fear and Millane 2012).
- The results of the *Legal Australia Wide (LAW)* survey show that in just over a fifth of problems where no action was taken in response to a legal problem the reason was respondents did not know what to do (Coumarelos et al. 2012).

Personal networks are often used as a means of resolving legal problems with Australians commonly seeking advice on legal problems from relatives or friends. As Coumarelos et al. (2012) said:

These findings indicate the potential benefits of improving legal literacy not only among those who are likely to experience legal problems, but also among the broader community, who may be asked for advice. The value of these established informal personal networks could be enhanced by improving public legal knowledge, so that any advice obtained from relatives or friends is better informed. (p. 211)

The Commission estimates (based on unpublished *LAW Survey* data), show around 17 per cent of Australians with substantial legal problems have unmet legal need because they either take no action or consult an adviser that has insufficient legal expertise (chapter 2).

These findings suggest there are potential benefits to individuals and the community in improving general public legal knowledge among Australians.

Disadvantaged groups have lower levels of knowledge

Balmer et al. (2010) found that members of more vulnerable disadvantaged groups tend to have lower capabilities, that contributes to lower levels of legal knowledge than other sections of the community. In particular, having low income, low levels of education, a disability or long-term health condition, mental illness, and living in rented housing were all found to be strongly linked to lower levels of knowledge about legal rights and processes.

The evidence also suggests that members of disadvantaged groups are less likely to choose well informed advice-seeking strategies and more likely to have knowledge, skills and confidence gaps (Buck, Pleasence and Balmer 2008).

While the *LAW Survey* found that people with low education levels and whose main language was not English report low rates of legal problems, it suggested that this ‘may reflect a failure to recognise legal problems, due to poor knowledge or an unwillingness to admit to legal problems’ (Coumarelos et al. 2012, pp. 237–238).

This finding suggests potential benefits may accrue from education initiatives targeted at particular disadvantaged groups.

Knowledge and capability also appears to be an important factor in determining outcomes when people use strategies other than legal advice to resolve problems. Balmer et al. (2010), using the English and Welsh Civil and Social Justice Survey (CSJS), concluded that having legal knowledge was a critical factor in achieving positive outcomes in circumstances where individuals tackled legal issues themselves.

Coumarelos et al. (2012) concluded from the *LAW survey*:

The finding that ignoring legal problems results in poorer outcomes underlines the importance of empowering people to act to resolve their legal problems. This finding adds further weight to the argument that legal information and education strategies could play a critical role in mobilising people to resolve their legal problems, by helping them to identify their legal rights and to locate relevant advice services. (p. 43)

Community legal education

Community legal education is about making people more aware of how the law affects them (in terms of their rights and obligations) and providing them with knowledge about the legal system so they are confident to deal with problems and gain access to justice. It is not about giving people detailed knowledge about the content of the law because as Hon Chief Justice French put it:

In the end, a degree of complexity is an inescapable aspect of the law. Although simply stated laws use ordinary English words assembled in a readable way, their simplicity cannot reduce the diversity of circumstances to which they may have to be applied. (2013, p. 5)

But, as stated by the Law Council of Australia, community legal education can help people better deal with the complexity of the system:

The most effective means of dealing with complexity in the legal system is to enable greater access to community legal education and legal assistance services, to assist people in better understanding their options for resolving their legal problems. (sub. 96, p. 36)

Legal education can also equip people with skills so they can take preventative action and avoid legal problems. The National Association of Community Legal Centres (NACLC) described community legal education as an ‘important intervention/prevention strategy’ that is:

... one of the most effective ways to help people avoid civil disputes is to provide legal education to the community. (sub. 91, p. 37)

One example of legal education aimed at preventing legal problems is the Youth Legal Service in Western Australia. This service provides a law education program to young people aged between 10 and 18 years on a wide range of issues that potentially have legal implications. Information on planning and budgeting is provided with a view to helping young people avoid debt-related disputes (NACLC, sub. 77).

In addition, community legal education can assist people to make better decisions, anticipate problems, and give them the confidence to act more quickly when problems occur and deal with issues more effectively. Commenting on their

community legal education, the Legal Services Commission of South Australia said that it:

... ensures that people have the knowledge, confidence and skills needed to deal with legal problems. The Legal Services Commission provides people with awareness, knowledge and understanding of rights and legal issues, as well as the confidence and skills to deal with problems. Equally important, people are assisted to recognise when they may need support, what sort of advice is available, and how to go about getting it. Focus is on the early stages to help people avoid problems, act more quickly when problems do occur and deal with problems more effectively by knowing when and where to get expert help. (sub. 93, p. 15)

Who provides community legal education?

Community legal education initiatives are predominantly provided by publicly funded legal assistance providers. Legal Aid Commissions (LACs) have a requirement in their service delivery models and have statutory obligations to deliver legal education. Under the National Partnership Agreement on Legal Assistance Services (NPA), LACs are required to provide preventative legal services, defined as those:

... that inform and build individual and community resilience through community legal education, legal information and referral. (COAG 2010, p. 4)

Most Community Legal Centres (CLCs) also provide community legal education.

Government departments responsible for consumer affairs, law schools, industry associations and chambers of commerce, also provide legal education initiatives. Industry associations play an active role in making businesses aware of their legal obligations, such as their Occupational, Health and Safety (OHS) obligations in the workplace.

How is community legal education delivered?

There are many forms of community legal education. Some initiatives are smaller in scale and targeted at particular communities or legal issues. For example, an education kit *What's The Law? Australian Law for New Arrivals* was developed in response to the need to better inform newly arrived migrants about their legal rights and responsibilities in Australia. The kit is designed for teachers to use in English as a second language classes for new arrivals and covers topics such as driving, tenancy, child protection, contracts and family violence. More than 400 English as a Second Language (ESL) teachers have been trained to use the kit (Legal Services Commission of South Australia sub. 93; National Legal Aid sub. 123).

Others are aimed at building the legal capability of the community more broadly. For example, through teaching students about the civil justice system and dispute resolution. As Ardill (2002, p. 3) observed, ‘there is an important distinction between providing particular legal information for use by individuals or community groups and promoting an underlying public awareness of the legal system’.

Community legal education is delivered in a number of ways, including through face-to-face information sessions, via workshops and seminars, and through outreach to remote communities. Social media and web-based services are increasingly being used to deliver community legal education (box 5.1).

Box 5.1 Examples of community legal education initiatives

Community legal education spans a wide variety of legal issues and target groups and is delivered using a range of different media. For example, the Youtube clip *Think B4 U Click* was developed by the Women’s Legal Services NSW to inform people in Indigenous communities on the dangers of cyber bullying, how victims should respond and how the law can assist. The clip features definitions of cyber bullying behaviours and the personal experiences of victims and is designed to provide people with sufficient information and support to enable them to recognise cyber bullying behaviours and take appropriate action to prevent its escalation (sub. 77).

The Women’s Legal Service in Tasmania launched its *Girls Gotta Know* mobile phone app in April 2013 which provides legal information to women aged 14 to 24 years. The mobile app and a dedicated website provides information to young women on a broad range of legal issues including employment, housing, personal relationships, family violence, consumer issues and debt, online security and cyber bullying (sub. 48).

Staff at the Northern Rivers Community Legal Centre use a radio program to deliver information sessions to Indigenous communities on issues such as family law rights in public spaces, credit and debt, youth services and domestic violence (sub. 77).

The Central Australian Aboriginal Legal Aid Service conducts regular community legal education and outreach clinics in remote communities to facilitate the early identification and resolution of legal issues (sub. 89).

Another example are workshops run to assist Aboriginal and Torres Strait Islander women who are the victims of family violence (box 5.2).

Box 5.2 The ‘Sisters Day Out’ program – talking about family violence

The Sisters Day Out program is run by the Aboriginal Family Violence Prevention and Legal Service (FVPLS) Victoria. It targets Aboriginal and Torres Strait Islander women in communities across that state.

Each workshop includes a range of well-being activities such as hairdressing, massage, manicures, dancing and exercise activities as well as a presentation and general discussion about family violence issues.

Women experiencing family violence can privately consult FVPLS Victoria solicitors or counsellors during the day.

The workshop also provides an opportunity for local community agencies, both mainstream and those specific to Aboriginal and Torres Strait Islander people, to set up information booths and engage with participants in a relaxed and supportive environment. According to FVPLS Victoria:

... this interaction assists to break down some of the barriers that prevent Aboriginal and Torres Strait Islander women from accessing services.

The day succeeds in strengthening and facilitating cultural and wider intergenerational family ties, while simultaneously educating people about what constitutes family violence and what help is available — from both mainstream agencies and Aboriginal-specific services (sub. 99, p. 13).

The Sisters Day Out program was developed by FVPLS Victoria six years ago. 80 events have been delivered in 38 locations across Victoria with over 5500 Aboriginal women attending the program.

Source: AFVPLS Victoria (sub. 99).

Teaching children about dispute resolution as a basic life skill

The National Alternative Dispute Resolution Advisory Council (NADRAC) argued that young Australians should learn dispute resolution skills and techniques for resolving disputes that cannot be dealt with quickly. NADRAC recommended that the Years 3-10 *Australian Curriculum on Civics and Citizenship* incorporate aspects of dispute resolution and conflict management.

Teaching such concepts and utilising dispute resolution skills through Years 3-9 entrenches an awareness of the proper and healthy nature of dispute. This includes an awareness that dispute, civilly handled, can usually be resolved, and that all citizens can behave in a way that will aid resolution. Young citizens can learn to recognise that if a dispute is unlikely to be resolved quickly or early there are techniques available to assist them to find resolution that does not necessarily involve judicial interaction or formalised processes. (sub. 109, p. 8)

Disputes are part of everyday life. As such, knowledge about how to resolve disputes should form part of basic life skill training, as it is an important aspect of

being a citizen in a democratic society. This points to the importance of teaching dispute resolution skills as part of the school curriculum.

In the publication *Draft Years 3-10 Australian Curriculum: Civics and Citizenship* it states that:

The curriculum also offers opportunities for students to develop a wide range of general skills and capabilities, including an appreciation of diverse perspectives, empathy, conflict resolution, collaboration, negotiation, self-awareness and intercultural understanding. (ACARA 2013, p. 4)

The Commission supports the teaching of dispute resolution skills and pathways as part of the national curriculum for primary and secondary students as a way of improving general community knowledge about dispute resolution.

But how effective is community legal education?

A number of submissions highlighted the economic benefits of community legal education as a preventive measure. For example, the Legal Services Commission of South Australia said:

Education and access to information support the community's ability to be self-reliant in terms of understanding and protecting their individual rights. Education and information services also assist people to take the most appropriate path through, or away from the justice system to resolve their issues. This results in potentially large efficiency savings and improved justice outcomes. (sub. 93, pp. 15–16)

The Law Council of Australia highlighted the benefits to individuals:

Community legal education is a powerful mechanism enabling people to identify and confront their legal problems at an early stage, before they become overwhelming. (sub. 96, p. 76)

A number of participants also suggested that initiatives targeted to the needs of particular groups are effective, with many publicly funded community education initiatives tailored with this in mind. For example, education initiatives provided by legal assistance providers are often targeted at those with relatively low levels of legal literacy including migrants, youth and members of Indigenous communities (Central Australian Aboriginal Legal Aid Service, sub 89).

A community that better understands their rights and dispute resolution options should benefit in terms of fewer disputes occurring and speedier resolution of disputes. Further, resolution of disputes before they escalate can reduce the demand for other government services.

Despite this understanding there has been little in the way of evaluations undertaken of the effectiveness of community legal education. Those evaluations that have been undertaken are limited in scope. Curran observed that the evaluations that have been undertaken to date:

... do not actually look at the quality, detail of knowledge or capacity developed by participants in CLE [Community Legal Education] or impact on participants of the CLE or community development undertaken. Often the CLE measurement is about the number of sessions held or number of participants attending rather than quality of presentation style or impact. (2012, p. 65)

That said, evaluating community legal education initiatives is far from straightforward. It is difficult to know what the outcome would have been in the absence of the initiative, and often there are a range of factors at play that makes it difficult to assess of effectiveness. As the Public Legal Education and Support Taskforce Report prepared in the United Kingdom said:

PLE [public legal education] projects seek to influence knowledge, attitudes and behaviour. These are complex outcomes which require the collection of data to assess changes in attitudes, abilities, confidence and actions over time. Such evaluation is costly and difficult, and it is therefore not surprising that very little has been done. (2007, p. 20)

In the past innovative approaches to community legal education (and other information and advice services) have not been well documented. This situation is changing with initiatives such as the development by the NACLC of the Community Legal Education and Reform Database, which is located on their website. The database facilitates greater information sharing on community legal education projects and examples of best practice. The database informs people working in the legal assistance sector of projects currently being undertaken across Australia by jurisdiction, area of law, project audience and method of delivery. The storing of historical information on projects already completed since 2011 also allows staff to leverage off work previously undertaken.

The NACLC has also been actively involved in the development of *CLE Made Easy* kits that are targeted at assisting both lawyers and non-lawyers working in CLCs to conduct effective CLE work. The information kits provide guidance on key elements of CLE including: assessment of needs, evaluation, principles of adult education, methods and strategies, partnerships and collaboration, and accountability and compliance requirements.

While the Commission considers that community legal education initiatives can provide an effective mechanism for helping Australians to understand whether their problems have a legal dimension, more needs to be done to understand the reach

and effectiveness of community legal education strategies, particularly for those initiatives which attract government funding.

Evaluations of community legal education projects should be documented and shared among organisations operating within the sector. The NACLC database could be extended and used as a learning network with results from evaluations and pilot projects made available for the sector to draw on. The Commission suggests building post-implementation evaluations into new community legal education initiatives.

The NPA on Legal Assistance Services (chapter 20) supports a ‘holistic approach to the delivery of services’ by the four key publicly funded legal assistance providers. This would involve the providers working together to ensure community legal education initiatives in each state and territory are meeting areas of need, and that initiatives are not overlapping or duplicating. The Legal Assistance Forums required under the NPA for improving coordination and better targeting of services between legal assistance service providers should also assist this objective (this issue is discussed further in chapter 21).

Legal check-ups and screening tools

Legal health checks and screening tools are another way of identifying whether people have ‘justiciable’ problems. Rather than applying a traditional ‘legal model’ of information gathering, which relies on the client knowing their need and instructing their adviser, legal health checks adopt a ‘medical model’ of assessing and diagnosing legal need (Garlick 2010). As Justice Connect (sub. 104) put it, health checks are generally a form with a basic ‘tick box’ series of questions to enable legal and non-legal professionals to identify a client’s legal issues and direct the client to an appropriate response.

Legal health checks are often tailored towards identifying the legal problems of particular groups. For example, legal health checks are used by the Homeless Persons’ Legal Clinic (HPLC) in Queensland to determine whether homeless people seeking assistance have other problems that need to be addressed (box 5.3).

Box 5.3 Legal health checks at work

The Homeless Persons' Legal Clinic (HPLC) in Queensland developed a Legal Health Check in 2009 as a legal needs diagnostic tool. Rather than simply respond to self-identified needs of clients, the legal health check enables lawyers and community workers to collaboratively provide targeted, timely and appropriate legal assistance on the matters likely to have the greatest impact for the client.

The legal health check operates as:

... a structured interview tool for pro bono lawyers; a resource for community workers to identify and prioritise the legal needs of their clients; and a menu for clients to maximise their choice by understanding which issues the lawyers can assist with (QPILCH, sub. 58, p. 29).

The questions in the legal health check cover legal issues connected to disadvantage such as fines and debts, crime, housing and tenancy, and family matters. The HPLC also deals with issues related to homelessness, including those surrounding alternative decision-making bodies such as the Public Trustee, and child protection issues (Lavery 2013).

The content of legal health checks can be changed according to the group being targeted, such as clients of mental health outreach clinics (information and advice is focused on health system practices) and migrants and refugees (information is focused on car loans and insurance).

In New South Wales, *Law Check Up* is used as a screening tool to assist community and health workers to identify and diagnose legal problems for members of disadvantaged groups and subsequently make appropriate referrals. The screening tool covers legal issues related to: debt or unpaid fines, income support payments, housing, the workplace, relationships, discrimination or harassment, immigration, the police, accidents, and being a victim of violence.

In Tasmania, checklists and information are provided by the Women's Legal Service on 'how to stay legally healthy'. This is more of a self-help tool which provides information to individuals about their rights and legal responsibilities as their circumstances change during their life.

There are certain events that most people face in life, such as entering or exiting a relationship, buying, selling or renting a house, the death of a loved one and possibly being questioned or arrested by the police. By being informed and by following some simple steps you can be prepared for these life events, even the unexpected ones. (Women's Legal Service Tasmania 2013, p. 4)

In the ACT, a 'legal health' checklist is provided by Legal Aid ACT which provides information to individuals on wills, powers of attorney, insurance, and financial and legal advice (Legal Aid ACT 2013).

Private lawyers, legal firms and solicitors offer legal health checks that are targeted at individuals, as well as small and medium businesses. The business legal health checks inform private businesses about a range of legal responsibilities including:

-
- providing a safe working environment — ensuring employees and managers are aware of the impact of bullying and harassment behaviours, victimisation and discrimination in the workplace, and other psychosocial hazards such as occupational violence and fatigue
 - complying with appropriate legislation in relation to recruitment — ensuring applicants are given equal opportunity to apply for positions
 - providing appropriate employment conditions to employees — including appropriate remuneration under awards, enterprise agreements and employment contracts, leave entitlements, superannuation and workers' compensation
 - risk management — ensuring businesses have professional indemnity insurance, appropriate insurance coverage for workers and customers or clients, as well as product liability insurance
 - commercial leasing and tenant's rights and entitlements
 - relationships with trade creditors and debtors — guarantees for trade accounts, supply or agency agreements, terms of payment for invoices and debt collection procedures
 - awareness of mandatory or voluntary standards, or codes of practice
 - business structuring and personal asset protection.

In some cases, government and the private sector have worked in partnership to develop screening tools. For example, development of the Detection Of Overall Risk Screen (DOORS) tool was funded by the Australian Government, but it is applied by professionals in the family law system to identify safety risks for people, particularly to those families exposed to family violence and child abuse. The screening tool covers how the parties involved in a separation are coping, manages conflict between parents and monitors the safety of children and parents. Over 2500 copies of DOORS have been distributed to family law practitioners (AGD, sub. 137).

Insights into the effectiveness of legal health checks and screening tools

Studies into the effectiveness of legal health checks are relatively limited, tend to be qualitative in nature, and are focused on their capacity to determine the legal needs of particular disadvantaged groups.

That said, the limited qualitative evidence available suggests that legal health checks can be a useful resource for lawyers and non-legal professionals in identifying legal problems and tailoring legal advice (particularly for lawyers

working across areas of law that they are not familiar with) (AGD, sub. 137; QPILCH sub. 58). The Attorney-General's Department said:

... legal health checks, work to best effect when they are delivered early, by an individual who is trained in holistic problem identification and able to accurately refer an individual to the appropriate service. (sub. 137, p. 18)

The Law Council of Australia argued that the efficacy of legal health checks is:

... significantly limited by the lack of availability of assistance funding and the reluctance on the part of many in the community to retain a lawyer to resolve any issues which are identified. (sub. 96, p. 76)

INFORMATION REQUEST 5.1

The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.

Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?

5.2 Information and advice for resolving disputes

Once legal problems have been identified, the next step involves connecting people to appropriate sources of information and advice.

Self-help resources

Self-help resources, such as the use of internet websites, books, leaflets and other self-help guides, are widely available in Australia from both private and publicly funded providers (box 5.4).

Box 5.4 Self-help resources are readily available

Legal information is widely available from a number of sources. Legal information and factsheets are provided in plain English and in various languages.

- For example, the LawAccess website in New South Wales provides plain language legal resources in over 30 languages. The website is targeted at people with the capacity to self-help and includes practical guides aimed at assisting people with a legal problem who are representing themselves. In 2012-13, there were over 423 000 website visits to LawAssist (Legal Aid NSW, sub. 68).

Information on legal problems and their potential ramifications is also available on the websites of LACs and CLCs, the Attorney General's Department, the Australian Competition and Consumer Commission, the Commonwealth Ombudsmen, the Financial Ombudsman Service and the Telecommunications Industry Ombudsman.

- For example, the Attorney General's Access to Justice Website (www.accesstojustice.gov.au) provides an internet based central online portal for information, resources and referrals. Information on legal responsibilities of small and medium enterprises are provided on the websites of industry associations and chambers of commerce in various jurisdictions.

Self-help kits are made available to people to assist in responding to particular legal matters. For example, LACs and CLCs provide self-help kits on legal matters, such as personal injury claims, situations where individuals have a debt of \$50 000 or less, dismissals from work, preparing affidavits for the Magistrates Court and understanding rights with neighbours on issues (such as boundary fences and disputes over large trees). In the case of debt, the self-help kit provides advice on how to respond to a claim from a creditor who takes legal action including the various legal processes that need to be followed subsequently if an individual wishes to defend themselves.

Commission estimates using unpublished *LAW Survey* data show that self-help resources such as websites and self-help guides were used in response to around a fifth of all civil law problems. These resources were more often used in the areas of family, government, employment, housing and money legal problems (and less often used for accidents and personal injury problems). Those who used self-help resources found the information available to be either 'fairly or very helpful' in relation to just under two thirds of all legal problems.

For self-help resources to be useful they need to be accessible, easily understood and able to be translated into practice. They also require constant updating to take account of any changes in the law.

Having a number of organisations involved in developing and disseminating self-help resources can lead to duplication of effort. This suggests that scope exists to streamline the development and dissemination of self-help resources. The

Commission considers that this be done as part of recommendations to consolidate information, referral and basic advice services.

But even easily accessible, understandable and translatable self-help resources will only benefit some. Self-help resources tend only to be appropriate for people who have the capacity to deal with their own legal problems or have problems that are more easily solved. As Legal Aid NSW observed:

Australian and international research has consistently identified that the most vulnerable are less likely than others to have the skills and psychological readiness to achieve legal resolution on their own or with minimal assistance. These clients will require more intensive support beyond information, education, advice and minor assistance. (sub. 68, pp. 58–59)

Differences in the use of self-help resources may be related to factors such as capabilities of individuals, geographic isolation or lack of awareness about where to access self-help.

Self-help resources tend to be used by some groups more than others. For example, Commission estimates using unpublished *LAW Survey* data reveals that a higher proportion of those on higher incomes are more likely to use self-help (relative to those on lower incomes). A higher proportion of those with four or more legal problems (which included a civil problem) used self-help relative to those with fewer problems. Conversely, a smaller proportion of those aged more than 65 years used self-help relative to people in other age groups. A smaller proportion of those living in remote communities and those from culturally and linguistically diverse back grounds used self-help resources.

A study by Lawler, Giddings and Robertson (2009) found that people who use legal self-help kits have more advanced educational and employment experiences. Similarly, the study by Balmer et al. (2010) concluded that self-help strategies were more viable for people with higher levels of knowledge.

Coumarelos et al. (2012), on reviewing the evidence also said:

Self-help strategies also appear to be more viable options for people with high levels of legal capability, such as more educated, articulate people. Disadvantaged people often fall outside this group. In particular, self-help strategies may be ill suited for people with poor legal knowledge, people with limited literacy, language and communication skills, and people with multiple or complex legal problems. (p. 44)

While self-help resources might not be appropriate for those who lack the capability or experience to resolve more complex problems, they might enable parties to play a larger part in resolving their legal disputes when complemented by other strategies, such as unbundled legal services. Coumarelos et al. (2012) also noted:

There has been a trend in recent years towards consumers playing a larger part in their own legal service delivery and towards the ‘unbundling’ of legal services as a means to facilitating self-help ... In terms of tasks, non-routine legal work involving the exercise of substantial discretion appears to be less suited to self-help ... self-help legal strategies will sometimes be incapable of providing complete legal solutions and may be more effective as components of a suite of services. (pp. 213–214)

So far, trends towards greater unbundling of services have largely been contained to the legal assistance and corporate sector. However, the Commission considers that unbundling privately provided legal services could play an important role in improving access to justice. Unbundled legal services are discussed further in chapter 19.

Basic advice and referral services

A number of privately and publicly funded providers offer basic advice and referral services. These services are intended to provide rudimentary guidance for people on how to resolve their legal disputes. Where specialist legal expertise is required, people are typically referred to either a publicly funded or private provider.

Telephone helplines are operated by legal assistance providers to provide basic advice on a range of legal problems. Some restrictions are placed on the nature of advice that is provided. For example, the Legal Aid NSW website indicates that assistance is not provided in relation to business and commercial matters; conveyancing; intellectual property, trademarks and patents; taxation matters; workers compensation; local planning and development issues (Legal Aid NSW 2014). Victoria Legal Aid has a similar set of restrictions displayed on its website which also includes not providing assistance on defamation and pay disputes (Victoria Legal Aid 2014).

Legal assistance providers also offer face-to-face, email and outreach services. Individuals are given a one-off free legal advice for around 20 minutes by staff from legal aid offices and are informed as to whether they may be eligible for further assistance or a grant of legal aid for a lawyer to represent them. CLCs provide similar information and advice services but on a smaller scale.

Law societies operating in all jurisdictions, apart from Tasmania, provide a solicitor and law firm referral service to the public. In some cases (New South Wales, South Australia, Victoria and Western Australia), law societies provide the names of up to three law firms for members of the public to contact. In many cases the nature of the legal problem experienced by an applicant is matched with the expertise of solicitors and law firms.

With the exception of Western Australia, Tasmania and the Northern Territory, states and territories also provide an online service. At the time of preparation of the draft report, Western Australia was in the process of designing their web-based service. Some online services are more sophisticated than others. For example, the ACT Law Society website is able to provide users with options by area of law, law firm type (e.g. private, incorporated legal practice, community legal centre), and main language spoken.

The Northern Territory Law Society also provides a ‘First Interview Scheme’ where members of the public get a 30 minute consultation for \$99 with law firms and solicitors who have opted to participate in the scheme (Law Society Northern Territory 2014). Law societies also provide a referral service for pro bono legal assistance for people who have applied for and been refused legal aid assistance and who satisfy means assessment criteria that apply for the service (Graduate Careers Australia 2013b).

To be effective, telephone services need to be staffed by people with relevant communication skills who have sufficient legal knowledge to provide advice (NPBRC 2013d). Telephone-based advice services can offer a range of benefits — they can provide assistance to people living in remote communities and allow for a higher volume of cases to be handled at a reduced cost compared with face-to-face service delivery.

Users of telephone advice lines and other basic advice services are generally satisfied with the assistance provided. The *LAW Survey* results show that where advice was sought from LawAccess NSW the advice was rated as either very or fairly helpful for 86 per cent of problems where the service was used. This compares with 81 per cent of problems where advice was sought from private lawyers, 70 per cent of problems where advice was sought from Legal Aid and 63 per cent of problems where advice was sought from CLCs.

It is difficult to make comparisons on satisfaction with providers given that the type of advice sought from different service providers could vary. For example, respondents may be more likely to seek advice in relation to particular legal problem types from one provider rather than another. Note also that responses for satisfaction with LawAccess NSW are drawn from a very small sample — possibly reflecting the general lack of awareness of the service by respondents from New South Wales. The services provided by LawAccess NSW is discussed in more detail later in the following section.

Surveys of users undertaken on behalf of LACs also show relatively high levels of user satisfaction. For example, a survey of clients conducted by Legal Aid NSW in

2013 found that 95 per cent of clients were very satisfied with the response they received from clerical staff responsible for providing legal advice and 88 per cent were satisfied with advice provided by solicitors. Around 60 per cent found the services provided by solicitors were better than expected while 16 per cent found the services to be lower than expectations. Common reasons given for why the service was lower than expected were that the advice was ‘too difficult to understand’ or advice was ‘incomplete’ (Taverner Research 2013).

A survey of client satisfaction conducted for Legal Aid Victoria in 2012 found similar results with 84 per cent of clients being extremely satisfied with legal advice services provided (Colmar Brunton 2012).

Information and advice services — where to from here?

Information about where to refer people with legal problems needs to be presented as simply as possible, distributed widely and provided efficiently. The Commission considers that each state and territory should have a widely recognised single entry point or gateway for legal assistance and referral. The single entry point should provide:

- telephone and web-based legal information
- a preliminary diagnosis of the legal problem, including providing basic advice for more straightforward matters
- suitable referral to appropriate legal services (for a more complete legal diagnosis) or to other human services.

A single entry point that uses a central telephone service to provide legal information, referrals and advice using a 1300 or 1800 number supported by a website would make it easier for people to navigate the system. It would also increase the likelihood of the community becoming familiar with the entry point.

An important component of a central telephone service is being able to provide effective triage (assessment of severity of legal problems) and appropriate referral. As Coumarelos et al. (2012) put it:

The usefulness of legal hotline services will depend in part on their ability to provide effective triage and referral. Ideally, legal hotlines should be able to make appropriate referrals both for problems that require specialist legal expertise and for people who are likely to have difficulty understanding and following telephone advice. Legal hotlines may often provide only a first step towards legal resolution and may represent only one of a raft of strategies required to provide holistic justice throughout the community. (p. 215)

The service should also take the lead on developing and disseminating other self-help resources, such as hard copy booklets and information packs and a consolidated list about the type and location of services available. A single source of information and advice has the potential to release scarce resources for a range of organisations that currently provide these services (including Legal Aid Commissions and Community Legal Centres) and would help ensure that the community has access to the most up-to-date legal information. Some participants expressed concern that websites and information sheets were not always factually correct or up-to-date (for example, NSW Young Lawyers Committees, sub. 79).

Where necessary, these resources could either be developed in consultation with, or adapted by specialist legal assistance providers to ensure that they meet the needs of vulnerable groups within the community.

The LawAccess NSW model (box 5.5) provides a working template. It is a joint initiative of the NSW Department of Attorney General and Justice, Legal Aid NSW, Community Legal Centres NSW, the Law Society of NSW and the NSW Bar Association, and acts as a central contact point for legal information, referrals and basic advice. The LawAccess NSW model is recognised as a world leader in its integrated approach.

Referral to face-to-face services for legal advice, duty services and representation is a key element of the success of the Law Access NSW model (sub. 68). But telephone and web-based legal advice services will not be appropriate for the needs of all clients — particularly for those with complex needs and problems.

When users call LawAccess NSW staff can refer them to private solicitors through the Law Society Solicitor Referral Services (but not to specific law firms or private legal practitioners), to a publicly funded legal assistance provider or specialist legal or related service. Alternatively, an in-house lawyer can provide legal advice over the telephone. One of the advantages of a service such as LawAccess NSW is that it can provide timely advice where callers require a quick response (for example, where immediate action is needed to avoid escalation of a problem or someone is at risk of harm).

Box 5.5 About LawAccess NSW

LawAccess NSW is a free state government sponsored telephone service that provides legal information, advice and referrals for people who have a legal problem in New South Wales.

The service helps customers find the information and services that are best able to assist them with legal problems and questions. LawAccess NSW can provide:

- legal information over the telephone
- written information
- a referral to another legal or related service
- in some cases, access to a lawyer to provide basic legal advice over the telephone.

LawAccess NSW is available to all NSW residents but is particularly aimed at people who have difficulty accessing traditional community and government legal services, including people living in regional and isolated areas and people with disabilities or a long term health condition.

LawAccess NSW maintains a referral database of assistance services and includes: government organisations, community legal centres, court and tribunal registries, alternative dispute resolution services, not-for-profit organisations, and human services organisations.

LawAccess NSW also provides a website which provides information about the law and legal issues. It has been created to empower users to find information about their legal problem through a single search regardless of the source of the information. Information provided on the website is monitored to ensure that it is relevant and up-to-date.

In 2012-13, LawAccess NSW answered 202 000 telephone calls, provided 22 000 legal advice sessions and made 113 000 referrals to legal assistance services (including Legal Aid NSW) (Legal Aid NSW, sub. 68).

LawAccess NSW also hosts a website titled LawAssist which provides information and practical guides for people who want to represent themselves on legal disputes such as debts and small claims, car accidents, fines and employment rights.

Source: LawAccess NSW (2010).

LawAccess NSW uses a number of performance indicators to ensure its services are delivered efficiently and effectively. In 2013, 94 per cent of its customers reported they were very satisfied with the service they received. Further around 93 per cent were satisfied with the amount of time taken between initial contact with the service and when a lawyer called them back (IRIS Research 2013).

But despite its success, there is very low public awareness of LawAccess NSW. The *LAW survey* results show only 1 per cent of respondents from New South Wales were aware of the existence of the service (where respondents were asked to supply

the names of legal assistance services unprompted). This compares with over 40 per cent of respondents who were aware of legal aid services unprompted (Coumarelos et al. 2012).

In their review of legal assistance services conducted in 2012, the NSW Government recommended that LawAccess NSW implement a targeted promotional campaign to raise awareness of its services — particularly among organisations that dealt with disadvantaged and vulnerable people in the community (NPBRC 2013d). This underscores the importance of educating the community about changes in service delivery models along with the need to more heavily promote the existence of a single point of contact service.

Victoria Legal Aid's (VLA) Improved Client Access and Triage project (iCAT) also aims to deliver holistic assessment, streamlined access and legal assistance, and best practice referral for potential VLA clients. According to VLA, the iCAT project will benefit clients by providing them with:

- a clear first point of entry to VLA from anywhere in the state
- a more consistent response from VLA no matter where they live or who they speak to
- targeted referrals to the most appropriate help within or outside VLA based on both legal and non-legal assessment
- reduced need to retell their story by reducing referral fatigue (sub. 102).

DRAFT RECOMMENDATION 5.1

All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template.

Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.

5.3 Referring people to appropriate sources of advice

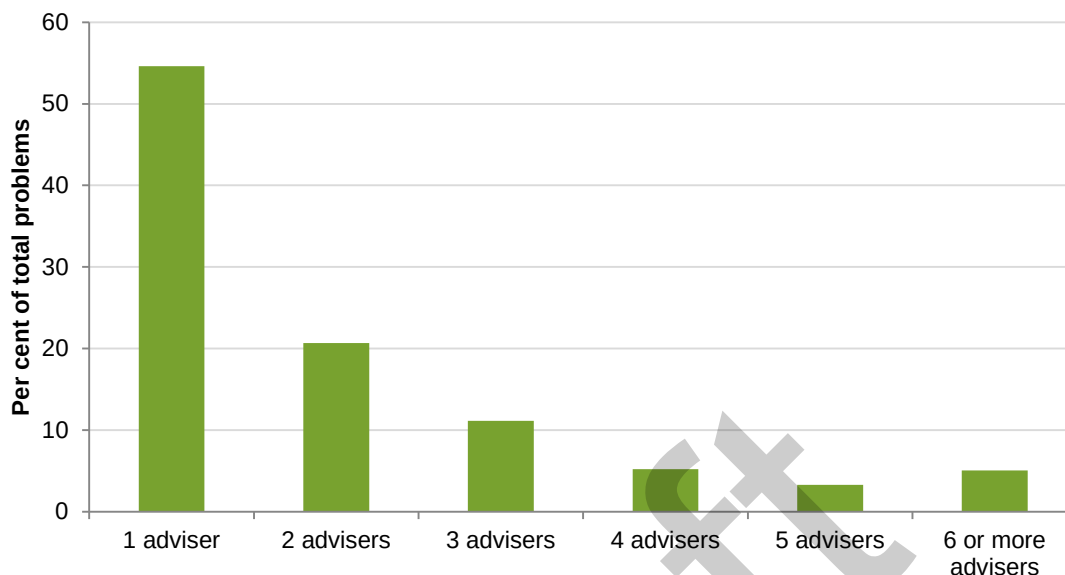
As discussed earlier in the chapter, many Australians do not know where to go for advice regarding problems or disputes which could have legal ramifications. Often they seek information from non-legal advisors including someone they have regular contact with, or someone they feel they can trust, such as their local doctor or the police.

The *LAW Survey* results show advice was sought from a health or welfare adviser (including doctors, health care service providers, psychologists or counsellors, social welfare workers and health or welfare advisers) for 27 per cent of legal problems experienced. Legal advice was also sought from financial advisers (including accountants and insurance brokers) and government welfare agencies and other departments (Coumarelos et al. 2012).

The evidence suggests that ‘who’ people turn to for advice depends on their individual circumstances and other needs. For example, the authors of *No Home, No Justice?* found that people at risk of homelessness or newly homeless turned to family and friends, schools, doctors and housing workers for advice. But as people became more entrenched in persistent homelessness they were more likely to contact the police and Supported Accommodation Assistance Program services (Forell, McCarron, and Schetzer, 2005).

The evidence also suggests that people rarely seek assistance from more than one source. Commission analysis of unpublished *LAW Survey* data found that those with a civil problem who sought formal advice only consulted one service or adviser in 55 per cent of problems (figure 5.1).

Figure 5.1 Number of advisers consulted for civil problems
Proportion of number of advisers consulted (where advice was sought)



Data source: Commission estimates based on unpublished LAW survey data.

Non-legal sources of advice are often the first and only ‘port of call’ for people facing legal problems. This highlights the importance of making correct referrals.

The implication of this is that ideally, the first service or adviser approached should connect the client with the legal service they require. (Clarke and Forell 2007, p. 3)

The Attorney-General’s Department also spoke about the importance of a ‘seamless transition’, particularly for disadvantaged people and people with multiple needs:

Seamless transition is particularly important to ensure individuals do not stop from seeking help due to constantly shifting from provider to provider without obtaining any real assistance (otherwise known as ‘referral fatigue’). This is particularly pertinent to those who have multiple needs, who may lack the resilience to persist with help-seeking in the face of multiple issues. Use of referral protocols may assist to ensure a seamless transition and facilitate an individual’s ability to access assistance for their problems. (sub. 137, p. 21)

While the authors of the *LAW survey* report provided similar findings.

Inappropriate referrals can result in ‘referral fatigue’, where people become increasingly more likely to ignore new referrals and to abandon the matter. (Coumarelos et al. 2012, p. 39)

The Attorney-General’s Department suggested in their submission that referral protocols may assist in ensuring that people receive the right assistance for their legal problems (sub. 137). One of the features of the *no wrong number, no wrong door approach* was a common referral database with a list of available services

(both legal and non-legal) by service type and location. Such a database would be a key component of the single contact point for legal assistance and referral discussed earlier (AGD 2009).

But not all non-legal workers are well equipped to help people with their legal problems, or know where to refer them so they can get the help they need. Broad based initiatives to improve legal literacy, including for community workers, as well as having in place a well-known single entry point for legal assistance and referral will help in this regard.

Training non-legal workers to detect problems that clients are experiencing that might have a legal dimension (for example, debt problems, problems paying fines and housing problems) and ensuring they provide clients with the details of the single entry point is one way of ensuring effective client referrals. The results of the LAW Survey suggested that:

... non-legal professionals and services could be effective points for disseminating up-to-date legal information. For example, they could be suitable points for advertising useful first ports of call for legal advice, and for disseminating legal information packages on the types of legal problems that are relevant to their field. (Coumarelos et al. 2012, p. 218).

The authors of the *LAW survey* report note that doctors and health professionals in Australia already undertake training regarding the mandatory reporting of child abuse and they would be well placed to identify other legal issues, such as work-related injury and experiences with domestic violence (Coumarelos et al. 2012).

There are a number of initiatives currently targeted at improving the training of non-legal workers. For example, the Civil Law Division of Legal Aid NSW has developed a DVD titled *Law for everyday life*. The DVD is targeted at community workers or ‘problem noticers’ and is used in conjunction with an extensive range of Law for Community Workers seminars (NSW Legal Aid, sub 68). Similar initiatives are taking place in the United Kingdom where Law Centres are providing training on legal matters to community workers aimed at helping them become ‘problem spotters’.

The Attorney-General’s Department is also currently working in collaboration with the Department of Human Services (DHS) to develop a training module for DHS staff to identify legal problems and make meaningful referrals to legal assistance services (sub. 137).

INFORMATION REQUEST 5.2

Information is sought on the costs and benefits of adopting the legal problem identification training module (being developed by the Commonwealth Attorney-General's Department and Department of Human Services) more widely among non-legal workers who provide services to disadvantaged groups.

Feedback is also sought on which agencies' staff should receive this training and whether funding should be provided to cover training costs.

The importance of outreach services

Outreach services — defined as a proactive approach to contact clients or potential clients to relay information, advice and assistance — can play an important role in identifying legal problems and making legal information available to groups who are unlikely to be reached by more general education initiatives.

Information provided in outreach services can be tailored (both in terms of the language used and in the way information is presented) to particular groups in the community. As Curran said:

Good educational pedagogy shows that for some people they need information to be provided in a variety of formats to suit how they absorb or process information. This is why there is a need for provision of community development and community legal education in communities based at places where those members of the community are likely to congregate or seek help. (sub. 92, p. 8)

Legal Aid NSW provides extensive outreach services through its 21 offices and 164 outreach locations. Around four fifths of outreach locations are based in regional locations. The location of outreach services are based on the extent of legal need, existing use by vulnerable target groups and accessibility.

Outreach service locations include homeless services, medical services for Aboriginal and Torres Strait Islander people, Aboriginal community organisations, Migrant Resource Centres, Neighbourhood Centres, Settlement Centres, Centrelink, courts and correctional facilities. Around a third of outreach services in New South Wales are based in community centres, 16 per cent are located in Aboriginal services and a quarter are found in courts and tribunals (NSW Legal Aid, sub. 68). Outreach services are commonly used by legal assistance providers to assist more disadvantaged clients who reside some distance from where their offices are located. Outreach services can target a particular demographic or vulnerable group (such as Indigenous Australians, migrants, people with a disability or homeless

people) or a particular geographic area that has high concentrations of disadvantaged people. Outreach services can also focus on providing assistance for particular types of law.

Outreach may be provided in person or via the assistance of technological devices to more remote regions. Technology based outreach provides offer potential for servicing a broader range of clients which can be delivered at a lower cost. Outreach can deliver a number of benefits to individuals including earlier intervention to help identify and resolve legal problems.

Outreach services (and the relationships developed as part of these services) are being used to build the legal knowledge of agencies so they are better able to spot legal problems and refer people. Legal Aid NSW (sub. 68) said that its civil law outreach at the Mt Druitt Aboriginal Medical Service and family law outreach services at 'The Shed' (a men's suicide prevention service in Mt Druitt) had resulted in health professional spotting legal problems earlier and making appropriate referrals.

Integrated service delivery offers scope for greater collaboration

Addressing the legal needs of disadvantaged Australians requires more than effective referral services as their legal problems often coexist with other social, economic and health issues (Azpitarte 2012; Saunders 2011; Scutella, Wilkins and Kostenko 2009).

A number of legal advocates and academics have drawn attention to the finding that the complexity and clustering of multiple legal problems experienced by more disadvantaged Australians may require a more holistic approach to achieving a solution through greater interaction between legal and non-legal services.

The multiple legal and non-legal problems faced by people with a disability indicate that they may require both legal assistance and broader non-legal support in order to achieve complete resolution of their legal problems (Law and Justice Foundation of New South Wales 2012, p. 3)

The Victorian Council of Social Services (VCOSS) observed that:

A notable feature of the community services landscape is the complexity of some of the issues facing some of the more vulnerable groups in our community. Complex and multi-faceted problems require a coordinated and integrated response from the services system. Addressing the critical legal needs of vulnerable and disadvantaged community members is an important part of this response. (sub. 132, p. 9)

Many submissions pointed to the importance of having integrated service delivery to address the legal and non-legal needs (which are often intertwined) of disadvantaged Australians (ADG sub. 137; Justice Connect sub. 104; NSW Legal Aid sub. 68; VCOSS sub. 132).

The literature also suggests that addressing legal problems in isolation with other problems for disadvantaged people is often an inadequate response and a more holistic approach is required (Clarke and Forell 2007; Coumarelos et al. 2012).

Instead of solving a legal problem and often seeing the client continue in the situation that gave rise to the problem, a holistic approach holds the promise of a more fundamental and permanent change in circumstances. (Buckley 2010, p. 11)

Integrated service delivery can mean co-locating different services (such as legal, social and health services) so that clients can be transferred to other services within the one location (allowing for seamless service delivery and providing a more ‘client-focused approach to resolving problems’). Examples include:

- The West Heidelberg Community Legal Service in Victoria. This service delivers an integrated model of assistance in partnership with Banyule Community Health and has done so for over 30 years. Lawyers and community health centre staff work together to resolve legal problems and any underlying causes that may have resulted in the legal problem.
- Homeless Persons Legal Services — which are situated in community centres around Australia where homeless people congregate for food, shelter and support. The Melbourne Homeless Persons Legal Clinic employs a social worker as well as lawyers. According to Allens-Linklater ‘it is often impossible to obtain effective legal remedies for clients in isolation from their complex and ongoing social problems, so being able to address both sets of usually overlapping and interrelated needs simultaneously leads to far better outcomes’ (sub. 111, p. 3).

Integrated services can also mean the use of referral networks and formal agreements between separate services. The Cooperative Legal Service Delivery program, which covers most of regional New South Wales, is an example. This program includes legal services providers, private lawyers, non-legal service providers and community groups working together to assist disadvantaged people in regional areas (chapter 21).

A number of different strategies have been used in the United Kingdom and the United States to integrate legal assistance service delivery.

- Community Legal Advice Centres in the United Kingdom were set up as ‘one-stop shops’ combining social and welfare legal services, including

community care, debt counselling, housing support, employment assistance and welfare advice.

- In the United States there are Medical-Legal Partnerships. This healthcare delivery model incorporates legal assistance as an integral part of the healthcare team. Health professionals work together with lawyers to identify and address legal issues that impact on patients. The model ensures that legal and non-legal problems can be addressed quickly and holistically.

Commenting on the medical-legal partnerships, Schulman et al said:

Front-line healthcare providers are uniquely situated to triage and screen for social determinants of health that are particularly responsive to preventive legal interventions. In doing so, providers and lawyers not only stave off circumstances that contribute to more serious health issues or exacerbate existing disease, but can even move yet farther ‘upstream’ to address care and benefits systems that improve health even more effectively (2008, p. 779).

Pursuing a holistic approach to solving legal problems is challenging. Establishing and building relationships between agencies that provide legal, health and social services requires planning, co-operation, resources and time. As Curran said:

... such work with non-legal service providers increases the demand for services and needs proper resourcing. The positive side of this assistance however is that some of the most vulnerable people in our community get legal help that they would otherwise be unable to access. Such work also reduces stress on individuals, ill health and can save the courts and legal system money in the longer term. (sub. 92, pp. 6–7)

In her submission Curran alerted to the shortcomings of current funding models, which make it difficult to achieve this objective. Curran suggested that legal assistance providers and agencies who have responsibility for delivering human services need to work together more strategically and flexibly in order to deliver better outcomes for clients (sub. 92).

INFORMATION REQUEST 5.3

The Commission seeks feedback on how best to facilitate effective referrals for legal assistance between organisations responsible for human service delivery, and, where appropriate, greater information sharing across departments and agencies.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

6 Information and redress for consumers

Key points

- Many consumers find assessing the costs of legal services daunting, complex, and uncertain. The information asymmetry between lawyer and consumer is the principle reason for regulation of billing practices.
- While the 'billable hour' remains predominant, lawyers charge for their services in a range of ways, including event-based billing, capped and fixed fees.
- Much of the work for billing reform has been done, although some jurisdictions have made more progress than others.
- Banning any particular fee structure would inhibit market innovation. Instead, consumers should be empowered through meaningful transparency requirements.
 - Transparency could be achieved through online reporting of the range of costs and types of billing offered by legal practitioners.
 - Guidance from costs assessors on what could be considered as 'fair and reasonable' costs could improve certainty for providers, and (anonymous) publication of past cost assessments could assist consumers.
- While reform to billing practices can improve outcomes for consumers 'up front', there remains a need for complaints processes when disputes arise between legal practitioners and consumers.
- Each state and territory has a body charged with receiving complaints about legal practitioners. The Commission considers that, to provide adequate protection for consumers, the powers of complaints bodies need to be strengthened, and recommends that complaints bodies should:
 - have the power to place restrictions on a lawyer's practising certificate while that lawyer is under investigation.
 - be equipped with the same investigatory powers regardless of the source of a complaint, including when conducting investigations on their own motion.
 - have disciplinary powers in relation to 'consumer matters', which are disputes between clients and lawyers about service cost or quality.

When consumers feel they need formal legal advice, they face a daunting prospect of dealing with an apparently arcane legal system for an unknown, and potentially prohibitive, fee. These consumers can find it hard to assess the quality of the legal practitioner they engage and whether they are getting value for money.

There are regulations designed to protect individual consumers. Broadly, these regulations aim to provide up front information on costs to the consumer, or provide avenues for complaint should consumers have issues that arise after they have engaged a lawyer.

This chapter discusses the rationales for specific protection for consumers of legal services (section 6.1), lawyers' billing practices and their regulation (section 6.2) and the need for further reform (section 6.3), as well as complaints processes (section 6.4). There are also a range of regulations targeted at the general quality of legal services providers relating to their education, training and entry into the profession which are covered in chapter 7.

6.1 Why do consumers need protecting?

In any market, there can be examples of 'bad apples' — instances where service providers have engaged in conduct that exploited consumers. However, in some markets the very nature of the product or service puts consumers at a disadvantage relative to suppliers who are better informed or may face perverse incentives. In such markets, government intervention is warranted to 'level the playing field' to ensure that mutually beneficial trades occur.

In the context of legal services, there are aspects of the behaviour of both consumers and suppliers that point to a core flaw ('market failure') in the relationship between the two — an imbalance of information about the nature and quality of services provided.

An imbalance of information favours the providers

As is common with a variety of professional services, the 'product' that lawyers sell is their knowledge. The opaque, complex and technical nature of many legal services means that, while consumers may be able to place a value on the benefit they have received from the outcome of a legal service, they cannot judge whether the quality of services they received met their needs. In some instances, the consumer may not be able to judge the quality at all.

Further, the outcome of engaging a lawyer's services — whether 'win', 'lose' or 'compromise' — is affected by a wide range of factors, including the underlying facts and applicable laws, the conduct (and expertise) of the counter-party and even the particular mediator, arbitrator or judge involved. This makes the consumer's attempts at judging quality even harder.

Indeed, in many cases the consumer must rely on their lawyer to accurately diagnose their needs and identify the services required. In economics, such products are termed 'credence goods' (Dulleck and Kerschbamer 2006), and are typically related to services such as those provided by doctors and mechanics, where the consumer is aware of a problem, but not its exact nature or solution. In addition to the general information imbalance, clients' circumstances can further hinder their ability to fully understand the services and charges being provided to them. General levels of education can affect a client's ability to understand the legal process and 'monitor' the necessity of each of the lawyer's actions.

Even for a given level of education, clients in some situations can be less likely to monitor legal costs. For example, someone engaged in an emotion-charged child custody dispute may be unlikely to dispassionately evaluate the costs and benefits of each component of the legal services they receive. Instead, being in a traumatic situation, they may simply seek to pursue an outcome. As such, while they may take advice in order to find a 'good' lawyer, once the lawyer has been engaged they seek their outcome at nearly any cost. These vulnerable consumers effectively face a greater information asymmetry.

Effects of information asymmetry

The lack of information on the part of consumers can give rise to several problems. For those contemplating legal action, difficulty in even gauging a rough range of costs, particularly for first time litigants, can discourage them from engaging legal advice. As such, it is not only the quantum of *actual* costs that might cause people to choose not to engage a lawyer, but also the *perception* of cost, a point noted by the Centre for Innovative Justice:

... this is as much to do with the fear of the unknown — of what legal costs *might* be, given so much uncertainty is attached; as well as perceptions of the legal market as designed only to service the 'big end of town'. (2013, p. 9)

Faced with a lack of information, and the risk of engaging a low quality provider, consumers may not be willing to pay high prices for legal services. In theory, this could mean that prices are not sufficient to sustain high quality providers in the market, with the end result 'a low volume, low quality, low price market' sometimes referred to as 'adverse selection' (Decker and Yarrow 2010, p. 31).

Professional regulation relating to education and certification (chapter 7) seeks to avoid this problem by setting and maintaining a quality standard for service providers. In the case of some consumers, repeat transactions or general awareness of the legal market can give rise to reputations for providers that would also avoid adverse selection issues.

More difficult to avoid is the ‘principal-agent’ problem. The ‘principal’ (the consumer), hires an informed ‘agent’ (their lawyer) to act on their behalf and would like their agent to make the same decision they would have made with the same information. But the agent may take advantage of the information imbalance to meet their own objectives:

Asymmetry of information can exacerbate problems of access by creating opportunities for discriminatory charging by suppliers who can take advantage of consumers lack of knowledge by supplying more of their service than necessary, or a service with higher quality inputs than necessary and/or higher prices. (UK LSB 2011, p. 8)

In addition to over-supplying, the lawyer could also under-supply services (by altering the quantity and quality of devoted resources) or provide the appropriate level of service, but overcharge for it.

Unlike some other professions where the identification of the services needed and their supply are provided by different suppliers (for example an architect and a builder), the diagnosis of issues and legal services to resolve them are typically directed by one provider (sometimes with ‘subcontracting’, for example a solicitor engaging a barrister). This compounds the difficulty for the client:

... when a party to a dispute consults a lawyer, the latter will usually diagnose the legal problem, suggest a remedy and implement it. In such circumstances, a lawyer motivated solely in terms of financial gain may be tempted to suggest an expensive remedy in the knowledge that he/she will receive a higher fee for providing that remedy. By definition the client is not in a position to judge whether the remedy is the only one possible or even if it is likely to be successful. In the economic literature on the professions this is often described as giving rise to ‘supplier-induced demand’. (Stephen 2004, p. 3)

This ‘information asymmetry’ has long been regarded as a principle basis for the regulation of legal services. However, as this justification rests on the difference in information between provider and client, it is important to recognise that not all clients will have the same level of information.

Different consumers have different levels of information

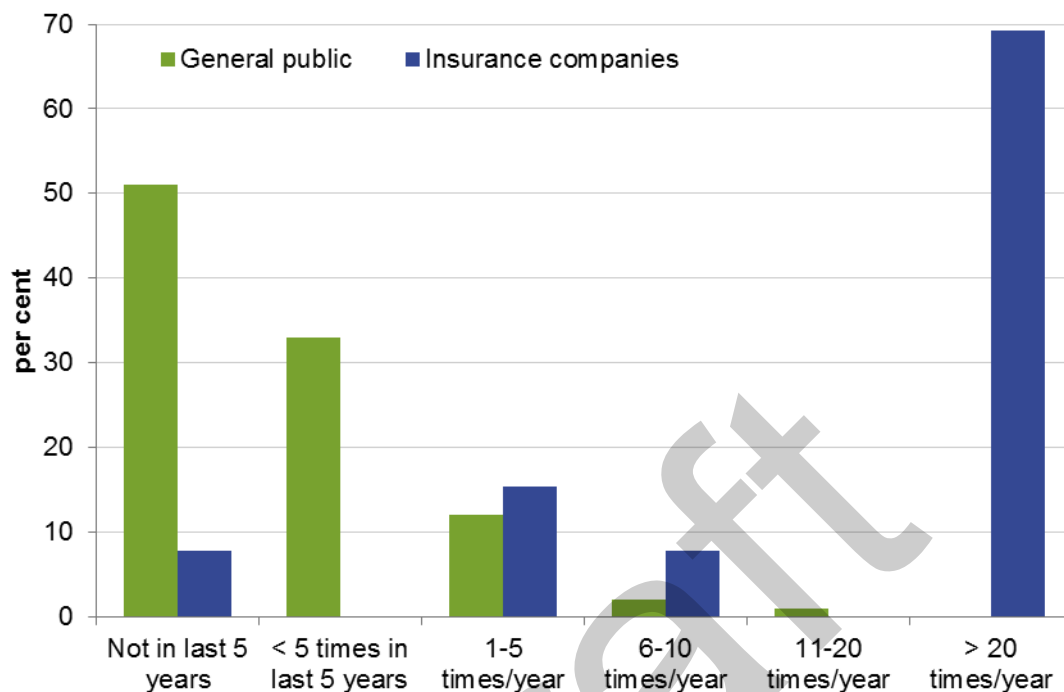
As discussed in chapter 7, the market for legal services is a broad but connected series of sub-markets. The market can vary based on the parties, and the issues, or areas of law in contest. The underlying facts, complexity of the applicable laws, the processes of resolution, services provided and nature of clients can vary widely — for example, ranging from an intellectual property dispute between two corporations to a disadvantaged party using legal aid to contest a family law matter. Even within a given area of law, clients can have different levels of knowledge and capabilities of understanding legal and financial issues.

As the rationale for regulation rests on the consumer's lack of information, different consumers would benefit from different regulation. Attempting to set a single level of information for all cases will not be effective as it does not target the actual information imbalance. On the other end of the spectrum, attempting to regulate at a granular level where each client, in each income bracket and for each area of law, has different protections is an exercise in false precision, as well as a substantial informational and administrative burden on regulators and the regulated alike. The middle ground is best — regulation that broadly differentiates between client types, and ensures that information is understood, but does not rely on complicated and prescriptive standards.

At the broadest level, a distinction can be drawn between regular users (such as large businesses) and many individuals who rarely interact with the formal legal system. Indeed, existing regulations in most jurisdictions provide exemptions for 'sophisticated' clients, and under the proposed *Legal Profession Uniform Law* (discussed below) agreed to by Victoria and NSW, the exemption applies to 'business and government' clients. Those who regularly interact with the legal profession can compare across different practitioners from their own experience, and leverage some 'buying power' in order to obtain value for money. And, in many cases, the staff of large companies that procure legal services are themselves lawyers. On the other hand, those who rarely interact with the profession (and do so in their personal time, not as their core business) may only rely on recommendations or anecdotes.

While not directly applicable to the Australian market, overseas evidence supports this delineation between user types. For example, a survey conducted for the Competition Authority of Ireland in 2003 showed a clear difference, with individuals engaging solicitors rarely and insurance companies engaging them often (figure 6.1).

Figure 6.1 Companies are more experienced litigants than individuals
Use of solicitors by general public and insurance companies in Ireland, 2003



Data source: Indecon International Economic Consultants - London Economics (2003).

Not all individuals would face the same information imbalance as typical retail clients. For example, an experienced lawyer seeking representation is unlikely to face serious information imbalances. On the other hand, the concept of 'retail' clients should not be limited to individuals. In particular, many small businesses share the characteristics of individual retail clients, such as a lack of understanding of the full nature of a legal problem, that may make them vulnerable to legal issues (SBDC, sub. 76, p. 5). Therefore, any consideration of addressing the information imbalances for vulnerable groups of clients should also consider small business issues.

At the time their dispute arises, most retail consumers of legal services are unlikely to be well versed in the options to resolve their dispute, the choice of legal service providers, and their relative costs. An alternative (and complement) to regulation designed to protect consumers is to arm them with more information.

Searching for better information is difficult

For many products, consumers are able to improve the information that underpins their decisions at low cost, either by personal experience, or by searching for information to compare products. For example, some products (such as milk and bread) are small, frequently purchased and similar, meaning consumers can readily compare price and quality. Other products are not purchased frequently, but can be assessed against objective criteria (such as the screen size and resolution of a television), and can easily be compared before a purchase.

In the case of legal services, addressing information deficiencies is not such a simple task. Compared to other products, legal services are a relatively uncommon and typically non-repeated purchase for most individuals. And, outside of ‘transactional’ matters such as conveyancing, there can be substantial variation between duration and complexity of cases, even in similar areas of law. As such, hourly rates may not provide consumers with adequate, let alone full, information about the likely costs of the services they are buying. Further, client confidentiality prevents market participants from gaining knowledge about the prices paid by others in the market. The Centre for Innovative Justice identified the lack of centralised information as an issue that impedes consumers’ ability to compare prices:

... no source of consolidated information exists for legal consumers regarding what or how firms charge – even in a generic or de-identified form. Accordingly, consumers have almost no way of comparing like services with like, of knowing whether there are alternate charging models on offer, or of ascertaining whether they have received or been quoted value for money. This contributes to the fear and uncertainty around costs that one practitioner consulted by the CIJ has suggested is as much of a problem associated with legal costs as the final figure itself. (2013, p. 14)

In the absence of centralised resources, finding information is costly, time consuming, and likely to yield disparate information that is difficult to compile and compare. Faced with undertaking a costly search for relatively little gain, people will instead rely on potentially imperfect proxies such as pre-existing relationships or word of mouth. This may be especially true in instances where the legal action is not ‘optional’ and the client’s need for immediate representation outweighs concerns of value for money. For example, urgent and important matter such as child custody or housing or matters where the client is the defendant.

Commission estimates based on unpublished *LAW Survey* data verified this tendency for consumers to rely on referral and relationships, rather than conducting an objective search. It showed that for a large share of problems, clients were referred to a legal adviser either by someone they knew (22 per cent) or another (legal or non-legal) professional (19 per cent), or personally knew the legal adviser

(19 per cent). Conversely, relatively few consumers relied on a telephone book or internet search (12 per cent) or advertising (only 3 per cent) to find a legal adviser.

The cost of conducting an effective search to compare prices and services between lawyers effectively vests market power in the first lawyer that a client sees:

... the higher the search cost the less willing the client will be to seek a second option, and thus the greater the monopoly power of the first lawyer visited. The search cost (expended by the client for each new lawyer that the client visits) is only applicable to visiting a lawyer for the first time: returning to a previously-visited lawyer is costless. (Daughety and Reinganum 2013, p. 12)

6.2 The current approach to billing is changing

Billing practices still focus on the billable hour ...

While billing practices vary between legal firms, the most prevalent — and perhaps infamous — form of billing is time-based, widely referred to as ‘the billable hour’. A longstanding practice, the billable hour is predicated on the notion that the best available measure of a lawyer’s output is a dollar rate applied to the amount of time spent working on a client’s matter. It is possible that billable hours can be an appropriate measure, provided that:

- the dollar rate is an accurate measure of the value of the time;
- time is the most accurate measure available of the quality (or value) of the work (that is, the effort required to complete a given task); and
- the time is recorded, and attributed to an individual matter, accurately.

However, even where these conditions are met there are substantial downsides to using billable hours (box 6.1). These relate to incentives for over-servicing, rewarding inefficiency and lack of certainty and transparency for clients:

Billable hours provide a simple and familiar means of calculating fees, but ignore whether the lawyer’s work actually furthers the client’s interests. Lawyers who bill on an hourly basis have limited incentives to engage in case planning and have a specific incentive to adopt defensive (over-) servicing and strategies. Even in the absence of fraud, clients run the risk of having to pay for inefficient lawyering, costs incurred in training junior lawyers, turnover and ‘aggressive’ time recording. More generally, billing methods based on billable hours provide clients with little or no predictability about cost. Without further information, clients (especially unsophisticated clients) have no capacity to check whether the services for which they are being charged were necessary to the matter and efficiently performed. (Parker and Ruschena 2012, pp. 3–4)

Box 6.1 The pitfalls of the billable hour

While time-based billing can affect clients' costs, it also creates certain pressures on lawyers, affecting their behaviour:

... junior lawyers labor under the strong and consistent impression that the value of their work is assessed primarily on the basis of the fees that they earn. ... Lawyers who perceive that their firms are only interested in revenue production may feel a direct pressure to bill and a reduced motivation to deal with their case efficiently. (Parker and Ruschena 2012, p. 43)

The factory environment of the law firm reinforces the ethos that time is money and one cannot waste time on tasks that cannot be billed. ... The demands of hourly billing and the pressure of law firms not to waste time on irrelevant matters such as discussing costs has prevented lawyers from communicating such vital issues to a client. (Mark 2007, p. 5)

Beyond the effect on the client, the billable hour also has an effect on the internal working of law firms:

Hourly billing has severely altered the legal working environment, often with detrimental effects. Hourly billing is now used by firms to measure the utility of an employee - hours now decide salary levels, raises, promotions and bonuses – driving up billable hours at an unreasonable rate. ... Two years ago only 12% of the profession were working more than 50 hours a week. Today the number of practitioners working 50 hours or more has increased to twenty nine percent (Mark 2007, p. 1)

... the lawyer's capacity to generate income (for herself and for her firm) may be the only means of assessing whether he or she is good at the job. ... The pressure that this places on lawyers is all the more acute because lawyers' compensation varies with management's assessment of the lawyer's contribution to the firm, and in many cases this is assessed mainly by whether the lawyers reached their billable hour targets (rather than the quality and quantity of the actual work provided to the client). (Parker and Ruschena 2012, p. 622)

The impact that these pressures can have on the mental health and overall wellbeing of lawyers within firms was also noted by the Chief Justice of Western Australia:

The literature is replete with complaints from young practitioners about the unsatisfying nature of legal work in a time billing environment. High levels of dissatisfaction are evident in surveys, computer blogs and in the high number of young lawyers who leave the profession. The emphasis upon the production of billable hours creates a working environment which, as I have noted, discourages professionalism and reduces work satisfaction to unacceptable levels. Clever young lawyers are leaving the profession in droves, or shifting to corporate, government and NGO roles where their motivation is provided, and their performance assessed by outcomes other than the production of billable hours. High levels of depression and substance abuse have also been detected amongst legal practitioners. (Martin 2010, p. 18)

Lawyers have a 'fiduciary' (trust) relationship with their clients, that gives rise to several duties to the client, including that they act 'as promptly as reasonably possible', and also require that the lawyer be diligent in acting in the best interests

of the client.¹⁰ This requirement to be diligent, coupled with a desire to ensure the best outcome for the client, and a risk aversion borne of fear of incurring liability or complaint if the case is not conducted perfectly, can all be reinforced by the incentives provided under time-based billing. The end result can be lawyers exploring every ‘rabbit hole’ of the case, with little regard for the expediency, cost and added benefit of doing so.

This tendency to explore all options (safe in the knowledge that the cost of time will be recovered from the client), combined with clients that may be adamant that their perceived rights be enforced (a view that may not accord with likely legal outcomes), can inflame and extend disputes:

... disputants with fiery emotions should be very wary of engaging lawyers carrying a can of accelerant, a match and a dedication to booking billable hours. (Mair 2010, p. 4)

Further, time-based billing does not take into account the relative efficiency of different lawyers to complete a given task. In doing so, it leads to perverse incentives wherein:

... quantity of work is appreciated far more than quality. Under an hourly billing system the lawyer who takes the most time on a matter is rewarded, as the number of hours billed is greater than the lawyer who does his work quickly and efficiently. (Mark 2007, p. 2)

While lawyers are better placed to manage risk, often having more information than the client relating to the likely duration of a case and (in larger firms) able to pool the risk across their caseload, the billable hour shifts the risk relating to the costs of the case away from the lawyer and onto the client. As others have noted in the context of court costs scales, using the billable hour puts consumers in a position few would regard as desirable in other industries — tantamount to handing a builder ‘carte blanche’ in the costs of building a house:

There is also now a total disconnect between the cost scales which are charged on an activity basis and the actual costs, since most lawyers now calculate costs on a time charge basis. This puts litigants in the position of not knowing how much they will recover and having no fixed cost basis with which to negotiate with their lawyers. They are left in the position as if they were building a house on a cost plus contract rather than a fixed price contract, which most prudent people would not dream of doing. (Cannon 2009, p. 5)

Despite these well-known faults, and long discussion of the ‘death of the billable hour’ (see, for example, Glater (2009)), it appears to be a slow, and as yet incomplete, death. There may be many reasons for this, including culture and

¹⁰ See for example New South Wales Professional Conduct and Practice Rules 2013 (Solicitors’ Rules), rule 4.1.3.

tradition within a legal profession that is slow to adjust. Clients may also see billable hours as ‘safe’ (‘the devil they know’) and prefer them to new methods. Further, there are likely to be cases where, if recorded and valued accurately, the billable hour may remain the best available option for valuing and charging for a lawyers work. This may particularly be the case in complex or rare matters where estimating a fixed fee in advance with any degree of accuracy is difficult.

... But alternatives to the billable hour are emerging

While the billable hour is dominant, other innovative forms of pricing are emerging. Annual surveys of the legal services market have shown the proportion of respondents who used hourly billing for 90 per cent or more of their legal spending fell from 77 to 59 per cent between 2010–2013 (Allens, sub. 111). The use of so-called ‘alternative fee arrangements’ (AFAs) have been driven by large, typically corporate, clients seeking value from large law firms and using their buying power to leverage preferred forms of pricing (Allens, sub. 111). Some AFAs incorporate elements of time-based billing (box 6.2).

Over time, the usage of AFAs has spread beyond corporate clients. For example:

- Slater & Gordon introduced fixed fees in its family law practice in Victoria in 2011 (Slater & Gordon 2011), with other states following later. Other family law practices also offer fixed and event-based fees.
- Shearer Doyle (sub. 21) offer most services for civil and family law matters on a fixed fee basis.
- Some firms in the entertainment industry (for example Kays & Hughes Entertainment Lawyers) offer fixed quotes for services other than litigation. These include important day-to-day activities of the industry such as drafting contracts and (uncontested) intellectual property matters (CIJ 2013).

The Legal Services Commission of Queensland (2013b) survey of billing practices for medium to large law firms also provides some evidence of wider uptake of AFAs. Respondents were asked whether they ‘always’, ‘sometimes’ or ‘never’ used various billing practices and the results provided the following insights.

- Interim billing was common — 79 per cent of firms reported they sometimes used this method and a further 17 per cent always used it.
- Fixed fees were also common — with over 70 per cent of firms sometimes offering a fixed fee ‘menu’ for standard tasks or tailored to client needs.

- However, time-based billing was still prevalent — half of firms sometimes used time-based billing and a further quarter always used it; moreover, roughly half of respondents never used hybrid fees or value pricing.

Box 6.2 Alternatives to traditional time-based billing

There are a variety of 'alternative fee arrangements' emerging in legal markets both in Australia and overseas.

- *Blended fees*: where the differing hourly rates for all staff working on a matter are 'blended' together to create a single hourly fee to charge the client.
- *Capped fees*: hourly fees billed at the normal rate, with an aggregate total maximum that the client would have to pay for a particular matter.
- *Contingent fees*: or 'damages-based fees' are contingent on success of the matter being handled, and typically calculated as a percentage of the amount recovered.
- *Conditional billing*: where some or all of the lawyers' fees depend on success in the matter. In this form of billing, the lawyer's fees are calculated in a normal (time-based) manner, sometimes with an uplift to compensate for risk (discussed further in chapter 18). Notable subsets of conditional billing are:
 - *No win no fee*: where all of the fee depends on success in the matter.
 - *Pain Share/Gain Share*: where part of the lawyer's fees are at risk if the matter is not successful — effectively a 'no win some fee' arrangement.
- *Fixed fees*: where a single price is set to handle an entire matter from start to finish. Notable subsets are:
 - *Event-based billing*: a set amount is charged for certain events, stages or milestones met.
 - *Hybrid*: a combination of fixed and time-based fees.
 - *Value pricing*: fixed fees agreed at the outset of a matter, that focus on the work done and the value to the client, rather than the time spent.
- *Interim billing*: a bill that covers only a part of the legal services the firm was engaged to provide. In lengthy matters, use of interim bills can assist in reducing 'bill shock' and may help the client to better manage their payments.

Sources: Hew et al. (2013), Allens (sub. 111).

Arriving at an AFA estimate for more complex matters can involve detailed assessments of the legal cost and duration of an 'average' matter. While some routine tasks might lend themselves to quantification more easily, the assessment of past billing data and converting probabilities into financial metrics may not be an area of expertise for some law firms, and can require further work by the firm:

There are additional transaction costs associated with planning, agreeing and then providing legal services under AFAs. For example, considerable resources must be expended by the law firm scoping work and defining assumptions in order to be able to

properly manage the risk associated with proposing a fixed fee to a client where there is uncertainty associated with the work that will ultimately be required to be completed in the matter. (Allens, sub. 111, p. 14)

Under fixed fee arrangements the lawyer also shares in some of the risk of longer-running complex disputes (as opposed to time-based billing where the client typically bears the risk). These factors can explain some reluctance on the part of firms to whole-heartedly adopt AFAs.

Nonetheless, moving to AFAs offers benefits, and the changes in the legal market reflect this. Adoption of AFAs can provide substantial benefits to clients in terms of improved value, certainty and transparency (a fixed fee is substantially easier to understand than a multi-tier time-based fee). Importantly, there are also benefits to law firms. Firms can offer AFAs to differentiate themselves from more traditional firms, and this may potentially capture additional clients and improve their revenue. Some commentators have also pointed to a potential reduction in complaints about billing, as increased certainty and ease of communication reduces the risk of ‘bill shock’:

... remember that without our clients we have no reason to exist as lawyers. We must find out not only what our clients need, but also what they want — and then provide it to them in a way they can appreciate. When that happens, fees are not an issue and client complaints about billing are not a problem. (Poll 2010)

Others also commented on the benefits of reduced stress from less intense scrutiny (by lawyers and clients) on recorded hours:

There is so much focus on the number of hours you put down. If you bill a lot, you will be thought of very highly. There was a lot of angst at the end of the month ... You had to speak to clients to make sure they were happy. It was never a pleasant thing to do.

A lot of that just goes away [with fixed fees] because you both have certainty at the start. There is no pressure or stress. (Ford 2012, p. 1)

The regulation of billing is undergoing some reform

The problems identified above suggest there is cause for regulation of lawyers’ billing practices to rectify information imbalances and to protect consumers. Indeed the profession has long been regulated in recognition of the potential for such issues. Recently, the regulation of the legal profession was the subject of a concerted reform effort, the *National Legal Profession Reform* project (discussed in chapter 7). While the reform stalled before national agreement was reached, there has nonetheless been some changes to billing regulation within some jurisdictions.

Before examining the existing (and evolving) regulation however, it is important to know the ‘goal posts’ — that is, what should effective regulation of billing practices look like?

Characteristics of effective regulation

As discussed in chapter 7, good regulatory practice ensures that regulation is appropriately targeted at an identified problem, is the best available solution for that problem, and does not cause unnecessary or disproportionate regulatory burdens.

In the context of the issues specific to legal services markets, this has several implications. First and foremost, the regulation should be targeted at the issue of information imbalance. As discussed above, granular specification of different levels of information by different types of client in different areas of law is unworkable. Instead, a broad delineation between up front requirements for typical ‘retail’ (such as individuals and small businesses) and ‘sophisticated’ (such as corporations) clients, with higher regulatory requirements for retail clients, offers a practical balance.

One issue this presents is that small firms, who typically have the least capacity to handle regulatory burdens (PC 2013d), are also more likely to deal with small clients:

... in a sample of 585 solicitor firms 37% of gross fee income in 2001 was from private individuals and 42% from private sector and public sector organisations. Indeed for the solicitors firms in the largest size category (by number of partners) these figures were 21% and 57% respectively. On the other hand, 72% of the business of sole practitioner firms was for private clients. Private clients accounted for 81% of the business of firms with 2 to 5 partners. (Stephen 2004, p. 7)

This potentially disproportionate burden on small law firms could be remedied by applying proportional regulation — ensuring that the level of disclosure varies with the amount at stake (the bill). This means that the majority of small clients may only need a brief, standard form disclosure document, while those who face substantial bills would need more substantial (and potentially more tailored) disclosure.

Too much disclosure can actually frustrate the regulatory objective of improving the consumers level of information and understanding:

It is our experience that the Costs Disclosure regime, under which lawyers provide clients with lengthy disclosure documents and costs agreements, can act as a barrier to client’s understanding of costs. This is because clients treat these documents in the same way as other consumer contracts that they are asked to sign — that is they rarely read them. (Shearer Doyle, sub. 21, p. 4)

Regulatory requirements for costs disclosure should focus on brief, clear and easily understood documents, rather than ironclad, litigation proofed, sub-clause-filled costs disclosure tomes that may protect the lawyer from any eventuality while being inaccessible to the client. It is important that the objective, ensuring that the client is adequately informed, is not forgotten. As such, some clients may need more explanation than others to ensure that they have understood what has been presented to them. A discussion between lawyer and client should be sufficient to fill any gaps, but the onus should be placed on the lawyer to be satisfied that their client understands the range of cost outcomes they could face.

Therefore, effective billing regulation should have the following features:

- a delineation between broad types of consumers, based on their typical level of familiarity with legal matters and the market for legal services
- levels of disclosure that vary with the quantum of the bill
- standard form disclosures for smaller amounts
- brief, clear language
- a focus on ensuring the client's understanding.

Consumer protection issues in the legal market are well-known. Accordingly, there have been ongoing attempts to regulate lawyers' billing practices.

Billing reforms have taken place, but jurisdictional differences remain

Although billing regulation is largely similar across jurisdictions, reforms in some have introduced differences. Table 6.1 compares the regulation across jurisdictions in relation to some key features, such as whether sophisticated clients are treated differently and the means for ensuring that clients understand the costs disclosures provided to them.

Following a failure to achieve agreement from all jurisdictions in the *National Legal Profession Reform* project, Victoria and New South Wales have announced that they will move ahead with the *Legal Profession Uniform Law* ('uniform law'), covering roughly 70 per cent of Australian lawyers. In announcing the scheme, the Victorian and New South Wales Attorneys-General noted that they 'hope that other jurisdictions will decide to join the scheme once they have had the chance to see it in operation' (Smith and Clark 2013). The scheme is anticipated to commence in New South Wales and Victoria on 1 July 2014.

In brief, the features of the uniform law, beyond the existing laws in those states, as they apply to billing include:

- a new obligation on law firms to only charge ‘fair and reasonable’ legal costs
- at present (as is also the case in Queensland), no costs disclosure is required for matters expected to cost less than \$750. Small firms and sole practitioners can also use short, standard-form costs disclosure as an alternative to full disclosure where total costs are not likely to exceed \$3000.

Table 6.1 **Billing regulation: uniform law compared to other jurisdictions**

	<i>New South Wales and Victoria (Legal Profession Uniform Law 2014)</i>	<i>Other states and territories</i>
<i>Retail and sophisticated clients differentiated?</i>	Yes, ‘commercial and government’ clients exempt	Yes, sophisticated clients exempt from requirements
<i>Bills required to be fair and reasonable?</i>	Positive obligation on practice to ensure costs are fair and reasonable	Only ex post ^a
<i>Threshold for client understanding disclosure</i>	Practice must take ‘reasonable steps to satisfy itself that client has understood’	Written in clear language, oral if the practice is aware the client is unable to read
<i>Requirements for ongoing disclosure</i>	After any significant change, including to costs	Yes, ‘any substantial change’
<i>Minimum dollar threshold for disclosure</i>	No disclosure if costs less than \$750, simplified standard disclosure if costs below \$3 000	No disclosure if costs are not likely to exceed \$1 500 (\$750 for Queensland)

^a If there is no costs agreement, nor schedule of costs, then only fair and reasonable costs can be recovered by a lawyer seeking payment under dispute. Additionally, the costs agreement can be set aside if challenged by the client and the supreme court (or tribunal) is satisfied that it was not fair and reasonable.

Sources: *Legal Profession Uniform Law Bill 2013* (Vic), *Legal Profession Act 2007* (Qld), *Legal Profession Act 2008* (WA), *Legal Practitioners Amendment Act 2013* (SA), *Legal Profession Act 2007* (Tas), *Legal Profession Act 2006* (ACT), *Legal Profession Act 2006* (NT).

The Australian Consumer Law also applies to lawyers

In addition to specific legal profession regulations in each jurisdiction, the operations of lawyers as they interact with consumers is also governed by the Australia Consumer Law (ACL),¹¹ which applies Australia-wide.

There are a number of provisions of relevance to lawyers (Qld LSC 2013d) including those governing: consumer guarantees; component pricing; misleading and deceptive conduct; unconscionable conduct; unfair terms in standard form contracts and undue harassment or coercion (for example, in collecting outstanding fees).

¹¹ Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Unlike legal-specific regulation, the ACL is not enforced by legal services commissions (or their equivalent). Instead, enforcement is conducted by the Australian Competition and Consumer Commission and state Offices of Fair Trading (or their equivalent). This does not prevent the legal and competition regulators from sharing information or agreeing to refer complaints — for example, the Queensland Legal Services Commissioner and Office of Fair Trading have a memorandum of understanding setting out their respective roles (Qld LSC 2013d).

Such information sharing should ensure that appropriate actions are brought by the relevant regulator. However, given one set of circumstances can lead to action either under the ACL or by complaints bodies (below), there is also the risk of duplicated effort by the regulators. Therefore, the current arrangement may not be the most efficient way of regulating lawyers' conduct.

INFORMATION REQUEST 6.1

Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?

6.3 Some reforms are required to protect consumers

There has been substantial consideration of the value of reform to billing practices as part of the *National Legal Profession Reform* project (ACIL Tasman 2010; COAG CRIS 2010). Despite this, there remain differences between jurisdictions that can impact on the wellbeing of the consumers of legal services.

As noted above, the predominant and traditional method of legal billing, the billable hour, brings with it significant incentive issues that can impact on the performance of the lawyer, the price the consumer pays, and the level of risk and uncertainty that the consumer faces. Thus a threshold question in examining regulation is if the billable hour has a continued role in the future of the legal services market.

Kill billable hours?

While the billable hour has many flaws, there may be some circumstances where it remains the best available option to approximate the value of legal services. Indeed there may be some clients who value the use of time-based billing.

Further, while the legal market is evolving and testing the appeal of various different forms of billing, it is important for both clients and law firms to have a ‘back stop’ of the billable hour, to enable comparisons with new measures and as a ‘known’ option to revert to. Attempting to reform one ‘cog’ of the legal system (client’s bills) without addressing other parts of the system, particularly the manner in which costs orders are calculated (chapter 13), could lead to unforeseen and undesirable outcomes, which may be exploited by some to obtain benefits not related to the value of legal services.

Finally, as noted above, some of the existing AFAs involve a component of time-based billing, so attempting to ban particular forms of billing may unnecessarily inhibit innovative billing practices.

Therefore, the Commission does not support banning the use of time-based billing. Instead, the Commission considers that, with better-informed consumers, the legal market will be able to evolve to a point where the billable hour is used not because it is the traditional method, but because it has found a niche where it is the most appropriate method.

A greater focus on the consumer is needed

Legislation in all jurisdictions includes a requirement that costs disclosure be written in ‘clear language’. However, this does not provide assurance that every client has understood (or read) what is presented to them.

The existence of requirements for written disclosure, and lawyers’ efforts to comply with them, do not always translate to the client receiving (or understanding that they received) a cost estimate. In a survey of disputants in the South Australian courts, the Commission asked respondents if their lawyer provided them with an initial estimate of legal costs for their case. Of those respondents represented by a lawyer, only around 40 per cent reported receiving a costs estimate. Beyond any potential breaches of disclosure regulation, these figures may also illustrate cases where written disclosure requirements were not effective as a means of communicating costs estimates to clients, who (as noted above) may be daunted by long legal documents and simply ‘sign on the dotted line’.

Further, as noted in chapter 13, less than half of respondents represented by a lawyer at trial reported that they were provided with an estimate of the extent of potential adverse costs awards for which they could be liable. In part, this may be due to the variability in costs awards, which limits lawyers' ability to deliver an accurate estimate. Adoption of the Commission's draft recommendations in chapter 13 would reduce this variability, and improve the ability for lawyers to provide their clients with accurate estimates of potential adverse costs awards.

As noted above, s174(3) of the uniform law proposed for Victoria and New South Wales goes further than written disclosure and requires that the lawyer ensure the client has understood the disclosure:

... the law practice must take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of action for the conduct of the matter and the proposed costs.

While such a change may be difficult to regulate at times, at the very least it encourages lawyers to engage with their clients in a manner that ensures informed consent, rather than simply 'ticking a box' by handing over a possibly weighty disclosure document. The Commission favours the uniform law's approach, as it attempts to address the core of the information imbalance in a manner that accounts for differences between consumers. This approach should apply to both the lawyer's own billing and estimates of potential adverse costs awards.

DRAFT RECOMMENDATION 6.1

In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.

The Commission appreciates that such an approach may introduce an additional regulatory burden on law firms in communicating with their clients, and documenting that communication (in case of complaint). However, such time is likely to be a valuable investment on several grounds for those law firms who do not already engage in such communication. First, having a clear discussion may help to clarify the expectations of both client and lawyer, and limit misunderstandings that could cause issues later. Second, ensuring that the client has actually understood the costs disclosure (rather than simply signing a lengthy document) may also assist in preventing 'bill shock', and in doing so, may limit client complaints. Additionally, if firms find that such communication is excessively time consuming, it may be a sign that their billing structures may be too

complex. This could prompt the use of simpler fee mechanisms (such as fixed fees) which would reduce the burden on the lawyer to explain them.

A need for a national billing regulation?

As noted in chapter 7, the legal services market is made up of many sub-markets. The ‘typical’ client and the degree of information imbalance they face will also vary according to the area of law (a corporate merger as against an immigration appeal) and demographic factors (levels of education and income). Ensuring that the specific information imbalances of individuals are addressed is best done through the mechanism identified in draft recommendation 6.1. Such an approach suggests that there may be limited need for jurisdictional differences in billing regulation.

As noted above, attempts at implementing a *National Legal Profession Reform* package have stalled, with New South Wales and Victoria agreeing to implement the uniform law themselves. While the Commission does not advocate uniformity for its own sake, and understands jurisdictions genuine concerns regarding the exact standards proposed for uniformity, it considers that protecting consumers of legal services is one area where cooperation in delivering minimum standards is warranted.

As is the case with general consumer protection under the ACL, the Commission considers that jurisdictions should cooperate to adopt uniform rules on costs disclosure and billing. Notably, the Commission is not suggesting here that the entirety of the National Profession Reform package be adopted, merely those aspects that provide for the adequate protection of consumers (such as an upfront requirement on law firms that costs be fair and reasonable).

DRAFT RECOMMENDATION 6.2

Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.

Improving comparability and reducing search costs for consumers

Outside of transactional services, no two legal engagements will be identical. It is difficult to compare any two legal matters with perfect accuracy, but that does not mean consumers would not benefit from using more information to obtain rough boundaries and rules of thumb about what is fair and reasonable pricing:

Certainly, consumers would prefer to know at the outset, rather than after a costs dispute, whether costs were in fact fair and reasonable, with comparable examples available. ... it is desirable that greater sources of information be developed for consumers. These sources should include data not just about what and how practitioners *can* charge, but what, in reality, they *do* charge — including, for example, what range of figures was considered reasonable by costs assessors in different types of matters in different areas of law. The inclusion of an opportunity for consumers to rate lawyer affordability may also be useful. (CIJ 2013, p. 15)

The public availability of such information would greatly improve the information base of consumers, allowing them to at least question their lawyer if the cost of services appears to be significantly above the ranges provided. In order to do so, the information must be accessible to consumers, both in terms of the ease of finding, and in comprehending, the information.

Examples of such services exist online, but to date are limited in scope. For example ‘rocketlegal’ provides an online clearing house service. It invites consumers to (confidentially) submit a legal matter, and lawyers (who have opted to join the service) respond with fixed price quotes. The client can then compare quotes, examine the ratings of the lawyer (from past clients) and select a lawyer. While this appears to be a valuable service, there may be some consumers who are reluctant to engage a lawyer purely based on online interactions (preferring face-to-face interaction), and there may be limited participation from lawyers.

Another mechanism that could enable better comparisons would be a requirement that a central online resource be made available for consumers in each jurisdiction. As noted above, exact comparisons are fraught with difficulty. As such, any online resource should only include a range of costs (expressed as typical hourly rates and average durations and fixed fees and other fee structures where applicable) for typical matters. Importantly, this information would be aggregated by area of law and jurisdiction — providing consumers with an average range of costs for the service they are seeking.

This online resource would not require that every firm advertise fixed costs for a range of matters, nor would they be required to offer services within an identified range of costs. Instead, such an aggregated resource merely equips consumers with the ability to gauge if the quote they receive from a lawyer is inordinately expensive relative to other (anonymous) suppliers. Where a quote appears relatively high, this may be for good reason — for example, the matter is complex or the lawyer is particularly skilled. It would be up to the lawyer to explain these reasons to the client, and then up to the client to decide if the quote represents good value.

In addition to the aggregate fee information, the resource could also indicate to consumers which fee structures are typically offered for a given type of legal matter. This could encourage uptake of AFAs, by publicising their availability and enabling comparisons by consumers.

DRAFT RECOMMENDATION 6.3

State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.

- ***This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.***
- ***The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer which structures.***

INFORMATION REQUEST 6.2

How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?

One issue with an online resource is where it should be ‘hosted’. This needs to strike an appropriate balance between a well-known (or easy to find) site that consumers will think of when attempting to engage a lawyer, and one that is independent from the profession and seen as ‘trustworthy’ by consumers. The site also needs to draw on sufficient data to make the reported ranges meaningful. This suggests that sites should be jurisdiction (rather than town or city) based, and that disaggregation for certain areas of law will not be appropriate, for example where there are very few specialist providers in a given jurisdiction. The accessibility of online material to all potential consumers of legal services is another issue. The eventual host of the online resource may also need to consider some manner of making localised (jurisdiction-based) hard copies available for perusal at easily accessible venues such as libraries or legal aid offices. A central government-hosted source would not preclude law practices (or law societies) from making billing information transparent on their own online ‘directories’.

Over time, such directories could develop to incorporate anonymous feedback from (verified) past users of the law firms. This option could allow a form of ‘consumer rating’ that may provide a guide to quality. Such concepts have been suggested by members of the legal sector, including by the Chief Justice of Western Australia:

Another way we can address these problems is by providing better consumer information ... TripAdvisor is a website we are all familiar with. You can see what other people say about a hotel or restaurant you might be considering. Why do we not have the same for law firms? Why do we not enable people to swap information? (2014, p. 12)

Quality ratings can be implemented in a variety of ways. Allowing ‘free form’ comments would be difficult to meaningfully aggregate, could introduce subjectivity (with ratings biased depending on the result of cases) and may need to be moderated in case disgruntled customers simply use the site to ‘hit back’ at their lawyers. A ‘star rating’ system of important variables (such as quality of communication and timeliness of action) could be developed that would allow aggregate, anonymous results of value to prospective consumers. Only users who had engaged the relevant legal service provider should be allowed to enter a rating, and overall rating would only be published once a ‘critical mass’ of reviews had been reached, to prevent individual users unduly gaming the outcomes.

Despite the potential pitfalls in such ‘star ratings’ they are used in a range of settings, including assessing the quality of service provided by medical specialists in the United States.¹²

INFORMATION REQUEST 6.3

The Commission is seeking views on the appropriate ‘hosts’ for central online resources with information about legal fees — should they be hosted by each jurisdiction’s Attorney-General’s department, legal services commissioner (or equivalent) or legal aid commission? Could this resource exist alongside a ‘directory’ listing of firms who are willing to advertise their prices through, say, a law society website?

How could information on quality of service elements best be gathered and reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be ‘hosted’ by governments, professional associations or independent providers?

¹² The ‘healthgrades’ service asks patients to assess the quality of service of medical specialists in the United States against a range of criteria of importance to patients, such as time spent waiting for an appointment, ability to listen to and answer questions, ability to explain medical conditions and appropriate time spent with patients.

Online resources can assist consumers *ex ante*, as they can compare the (expected) costs and choose a lawyer accordingly. However, another issue is the possibility for bills to increase once the client has engaged a particular lawyer. As noted above, there can be many valid reasons for substantial increases, including the behaviour of a counter-party in choosing to challenge a matter or not, and unexpected aspects of the case requiring additional work (for example calling in expert witnesses). Nonetheless, having run a number of cases across a range of matters, most lawyers are better placed than clients to provide a reasonable approximation of the overall costs of a matter, having considered the range of reasonably possible outcomes.

Given the natural variability in costs in some cases, attempting to enforce a situation where the client only pays the original estimate would be tantamount to mandating fixed fees, and would not be appropriate to all cases (in fact, those cases that lend themselves to fixed fees are less likely to vary from the original estimate).

However, that is not to say that all cost increases in the course of a matter are justified — some may reflect the ‘principal-agent problem’ identified above and involve work that was of marginal value, or even unnecessary. As such, it is important that regulators are able to respond to genuine overcharging. While the comparison of the original estimate with the final bill is not sufficient evidence of overcharging on its own, it can provide some useful insights to regulators.

This data already exists, and is retained by law firms in formal correspondence offering quotes and delivering final bills to consumers (and in some cases, interim bills or variations to bills may also have been recorded). The Commission considers that this cost information should be available to complaints bodies where an instance of overcharging has already been found as a result of investigating a complaint. After having found overcharging, the complaints body could obtain the cost information from law firms, within a specified time (such as five days). Lawyers would only be required to hand over initial estimates and final bill amounts, on a confidential basis. It would be up to firms to choose the manner to convey the information — either in tabulated data form, or as copies of the original correspondence and bills (with parts, but not the totals, redacted if they saw fit).

Complaints bodies could then use the cost information to examine if the complaint was a ‘one off’ (and thus more likely due to natural variance in the legal matter), or if it represented part of a broader pattern of charging by the lawyer. This, in turn, could provide a basis for the complaints body to initiate and own motion investigation to examine the lawyer’s billing practices.

DRAFT RECOMMENDATION 6.4

In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).

- ***Lawyers should be required to provide access to this information within five days of the request.***
- ***The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.***
- ***Any initial conclusions drawn from the cost information can contribute to an own motion investigation if the complaints body deems that one is warranted.***

While this information will assist complaints bodies in addressing overcharging after it has occurred, the Commission supports an upfront requirement on firms that bills be fair and reasonable, as in the uniform law. However, there remains the question of exactly what constitutes fair and reasonable. The legislation provides some guidance, noting that regard must be given to a range of factors such as the complexity and urgency of the matter, the time spent, the level of skill of the lawyer involved and the quality of the end product, among other things.¹³ However, this does not answer the question of what a fair and reasonable bill would look like.

One source of information that is, as yet, unpublished is the decisions of costs assessors where costs agreements have been challenged by clients. Costs assessors are experienced lawyers appointed by the court on a part-time basis to determine if costs are fair and reasonable in the event of a challenge.¹⁴ Following an application by a client, costs assessors have the ability to set aside a cost agreement if they determine that the agreement is not 'fair or reasonable', subject to the legislative guidance noted above.

Publication of cost assessor decisions may give rise to some concerns regarding privacy and commercial confidentiality, these could be allayed by anonymising

¹³ See, for example, *Legal Profession Uniform Law Application Bill 2013* (Vic) s. 172(2).

¹⁴ For example, in New South Wales, under section 1 of Schedule 5 of the *Legal Profession Act 2004* (NSW), only Australian legal practitioners with at least 5 years' experience can be appointed by the Chief Justice as costs assessors.

details or providing aggregate data. Publication of these decisions (except where exceptional circumstances prevent it), categorised by broad dispute type, could provide consumers, practitioners and other costs assessors with useful guidance on the range of costs that are considered reasonable. For some consumers, publication could provide broad guidance of what level of overall costs they should expect, especially for those contemplating a challenge or complaint relating to their bill. For lawyers, observing past decisions may provide guidance on billing practices (for example, if it is reasonable to charge for photocopying, and if so, what should the charge be).

Such publication has been previously recommended by the Chief Justice of New South Wales (2013), who also noted that decisions (and their reasons) should be published in compatible formats to allow for comparison and aggregation. It is important that this is not done in a way that discourages alternate forms of billing — for example costs assessors requiring information from firms in terms of billable hours (when they were actually charged as a fixed fee) risks entrenching the use of billable hours in the name of reducing administrative costs (CIJ 2013).

In addition to publishing decisions, there would also be value in costs assessors developing and publishing guidelines regarding how charges would be assessed, what sort of charges would be included and excluded and if different weights are applied to different sorts of work. Again, the concept of publishing cost assessment guidelines is not new, having been recommended by the Chief Justice of New South Wales (2013), and also put forward by a former president of the Law Society of New South Wales, who suggested that the guideline could cover multiple areas, including:

- would any items be generally excluded?
- if three solicitors in the law practice meet to discuss a matter, how will this item be dealt with? Would a routine discussion attract only the cost of one solicitor?
- how should photocopying charges be dealt with?
- how does an Assessor determine what is a fair and reasonable time to undertake a task (eg. Reading a lengthy affidavit or drafting a document)?
- can a solicitor charge for re-reading? (Westgarth and Balachandran 2011)

Similarly, the Chief Justice of New South Wales (2013) suggested that the publication of costs assessors' decisions be coupled with the development and promulgation of guidelines for assessors relating to what items should be allowed for party/party assessments (as distinct from solicitor/client assessments), including such items as office overheads (phone calls, photo copying), research time and filing fees.

In addition to introducing uniformity in cost assessment decisions, the publication of past decisions and of guidelines could have the effect of ‘bringing forward’ the fair and reasonable requirements — if lawyers have a greater ex ante concept of what is fair and reasonable, they are likely to align their behaviour accordingly in order to avoid cost challenges.

DRAFT RECOMMENDATION 6.5

Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).

- ***Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.***

Fostering alternative fee structures

As noted above, pressure from corporate clients (combined with innovation from firms themselves) was one of the initial forces behind the adoption of AFAs. To build on this, there may be some scope to leverage on the buying power of another large purchaser of legal services, namely governments:

Entities that have a large legal spend and an interest in access to justice, such as governments, should foster a greater use of price certainty through their own legal arrangements, purchasing legal services on a fixed fee or ‘value’ basis to encourage the wider use of this approach. (CIJ 2013, p. 19)

However, as in the general market, time-based billing will sometimes be appropriate. Further, those law firms that typically have government as clients are the same firms that have large corporations as clients. The Commission is sceptical of the marginal effect that clauses in government contracts will have in driving the adoption of AFAs by firms who primarily deal with individuals. Just as there may be some cases where the billable hour is the most appropriate billing option, equally, not all matters are suited to fixed fees. For matters with a large degree of uncertainty, firms may only be willing to take fixed fee work if a large premium is built into the fee, increasing the overall cost to the client. Given the potential to increase costs in some areas, the use of fixed fee services by government should not be a universal, nor mandatory requirement.

Nonetheless, engaging firms that offer AFAs may be of direct value to government simply in terms of controlling its own legal services expenditure in certain matters. The Commission considers that the choice of fixed fees (or other AFAs) is an

appropriate (but not necessarily determinative) factor for governments to contemplate in their legal services purchasing programs.

6.4 Complaints avenues for legal service consumers

Regulations that clarify the upfront ‘rules of engagement’ between lawyers and clients can go some way in preventing wrongdoing by lawyers and protecting consumers, but not all disputes can be avoided. There is a range of disputes between consumers and lawyers and a range of bodies to handle them. While complaints bodies are generally able to respond to complaints, there may be a need for additional powers in order to enable them to do so effectively.

Characteristics of disputes with lawyers

Commission estimates based on unpublished *LAW Survey* data found that just over 1 per cent of respondents experienced a dispute relating to lawyer services.¹⁵ Though this is a relatively small group, around 30 per cent of these problems were reported as having a severe impact compared to around 18 per cent for other civil problems. This may be because a large sum of money is involved, or because the dispute with the lawyer compounds the original problem that led the consumer to seek legal advice.

When respondents were asked how the problem was finalised, almost 30 per cent did not pursue the matter, 22 per cent reached direct agreement with the lawyer and 17 per cent did what the lawyer wanted. Only a small number were finalised with assistance: 4 per cent through a complaint body; 6 per cent through another agency; and 3 per cent through formal mediation.

As with other disputes, informal resolution is often appropriate, meaning that few disputes escalate to formal complaints, however it is important that consumers have a formal means of redress if needed. This is especially true for disputes between lawyers and clients because of the information imbalance described above. Many clients have limited knowledge about legal services and may not be aware that the lawyer’s behaviour is inappropriate. Moreover, clients may have relatively limited experience interpreting rules and managing conflicts, giving lawyers an opportunity to behave strategically. For example, if a dispute arises about a bill, the lawyer could threaten legal action against their client or hold a lien over all documents

¹⁵ Around 260 of the 20 716 respondents said yes when asked if, in a twelve month period, they ‘had any problems or disputes related to inadequate services or any disputes related to the cost of services from a lawyer’.

received, potentially making it very difficult for the client to change lawyers until fees are paid. Poorly informed consumers may be particularly vulnerable to such tactics.

Where respondents to the *LAW Survey* did not act to resolve the problem, the most common reasons given were that it would make no difference, cost too much, that information or advice was not needed, or that they did not know what to do. While these reasons come from a limited sample, they suggest consumers are not fully aware of the complaint avenues available to them. Even when consumers do seek help from a complaints body, many factors can influence whether the assistance will be effective.

A framework for handling complaints effectively

Complaints about lawyers can potentially be dealt with in many ways. However, not every manner of dealing with complaints is equally effective — the design of a complaints body can make an important difference to effectiveness and outcomes for consumers. The NSW Law Reform Commission (NSW LRC), in its report *Scrutiny of the Legal Profession: Complaints Against Lawyers* (1993), outlined a set of ‘best practice’ principles for handling complaints about lawyers (box 6.3).

These principles remain highly relevant to considering the effectiveness of complaints bodies. Nonetheless, the Commission considers that a few important additions are warranted.

First, the NSW LRC noted that complaints handling bodies needed a ‘flexible range of sanctions and remedies’. In addition to these reactive tools for responding to breaches there is also a need for appropriate proactive tools to detect and investigate issues. Complaints bodies can encourage improvements in legal practice over time if they have the power to initiate and conduct own motion investigations and systemic reviews. As noted in relation to law reform activities, legal aid commissions and community legal centres are in a position to identify and act on systemic issues, particularly those affecting disadvantaged Australians (chapter 21). Similarly, complaints bodies should be able to act on repeated complaints against a particular law firm, or an increase in certain forms of misconduct.

Second, while the primary role of a complaints body is to facilitate consumer redress, this should not come at the expense of a large regulatory impost on lawyers. Specifically, complaints bodies need to have the discretion to rapidly finalise investigations where the complaint is straightforward, invalid or vexatious.

Box 6.3 Best practice principles for handling complaints about lawyers

- **Independence and impartiality** — public confidence in the integrity of the system requires that the system must be free from even the appearance of bias, external influence, conflicts of interest or impropriety.
- **Recognition of the multiple aims of a professional disciplinary system** — redressing the complaints of users of legal services, as well as protecting the general public interest by ensuring that individual legal practitioners comply with the necessary standards relating to honesty, diligence and competence, and maintaining the ethical and practice standards of the whole legal profession at a sufficiently high level.
- **Accessibility** — the complaints system must be widely accessible to potential complainants. This involves effective access to information, assistance, officials and institutions relevant to the process, with minimal disincentives imposed by time, cost or complexity.
- **Efficiency and effectiveness** — prompt and thorough investigation of all disciplinary matters; consensual dispute resolution of appropriate complaints; a flexible range of sanctions and remedies; the availability of education, counselling and assistance for lawyers to prevent or minimise poor practice; continuous monitoring of the system; and coordination among the various agencies with responsibility for regulating the conduct of lawyers.
- **Procedural fairness** — both complainants and legal practitioners to be treated with fairness and justice in the investigation, hearing and determination of complaints.
- **Openness and accountability** — subject to the need for confidentiality in certain circumstances, as many elements of the system as possible should be open to the public and on the record, and reasons for decisions must be provided. Non-lawyers must meaningfully participate at all levels of the process to ensure that different experiences and perspectives are represented, and to assure complainants that the system is not operated solely by and for lawyers.
- **External scrutiny and review** — the existence of one or more agencies with ‘watchdog’ or oversight responsibilities provides an important means of guarding against bias, arbitrariness, arrogance, complacency and other problems which destroy public confidence. Among other things, the system should afford a complainant the opportunity for a meaningful external review of a decision to dismiss a complaint and other adverse decisions.
- **Proper funding and resources** — it is essential that adequate resources (financial, human and technical) are provided to permit the operation of a comprehensive system of regulation, with the features enumerated above. The sources of funding should recognise the interests of both the legal profession and the general public in the maintenance of high standards in the provision of legal services.

Source: NSW Law Reform Commission (1993).

In addition, it is important that the overarching objectives of complaints bodies are articulated either in public ‘mission statements’ or in their enabling legislation. Publication of objectives provides guidance to both the regulators and the regulated

about which conduct will be targeted and how it will be dealt with, improving certainty for both consumers and lawyers.

A range of bodies handle complaints about lawyers

Each state and territory has a body charged by statute with receiving complaints about lawyers (table 6.2). Whether the complaints body is a commission, board or law society, its makeup and powers are outlined in each jurisdiction's legal profession act. The roles and powers of these bodies are broadly similar between jurisdictions and many appear to reflect considerations of the principles in box 6.3 — with a few notable exceptions outlined below.

The form of these complaints bodies has changed over time as jurisdictions have replaced self-regulatory arrangements — where professional bodies (law societies and bar associations) handled complaints — with statutorily independent complaints bodies. This began in New South Wales with the establishment of the Office of the Legal Services Commissioner in 1994 (as recommended by NSW LRC (1993)). Queensland and Victoria followed in 2004 and 2005 respectively, while a Commissioner was also appointed in South Australia in 2013.

Table 6.2 **Complaints bodies in Australia**

By jurisdiction

	<i>Complaints body</i>	<i>Disciplinary tribunal</i>
NSW	Legal Services Commissioner	NSW Civil and Administrative Tribunal
Vic	Legal Services Commissioner & Legal Services Board	Victorian Civil and Administrative Tribunal
Qld	Legal Services Commission	Queensland Civil and Administrative Tribunal
WA	Legal Profession Complaints Committee ^a	State Administrative Tribunal
SA	Legal Practitioners Conduct Commissioner ^b	Legal Practitioners Disciplinary Tribunal
Tas	Legal Profession Board of Tasmania	Legal Practitioners Disciplinary Tribunal
ACT	ACT Law Society Complaints Committee	ACT Civil and Administrative Tribunal
NT	Law Society NT	Legal Practitioners Disciplinary Tribunal

^a A committee of the Legal Practice Board of Western Australia. ^b To replace the Legal Practitioners Conduct Board on 1 July 2014 (Rau 2014).

The move to independent arrangements has resulted from increasing recognition that professional bodies were focused on professional standards and were not providing adequate redress in relation to consumer issues and that, more generally, the independence of complaints processes was important for public confidence. The issue was raised more recently during consultation with consumers for the *National Legal Profession Reform* project:

It was seen as important that complaints against lawyers were handled outside of the profession due to conflict of interest. In particular, consumers strongly believed that the professional associations such as Law Societies and Bar Associations should not be involved in handling consumer complaints. A number of advocates, as well as some consumers, referred to other national ombudsman schemes that were independent and working well for consumers, such as the Financial Services Ombudsman and the Telecommunications Industry Ombudsman. (ARTD Consultancy 2010, p. 12)

At present, complaints are still handled entirely by professional bodies in the ACT and NT — this may be because the relatively small number of legal professionals and the volume of complaints in these smaller jurisdictions is insufficient to justify separate statutory bodies.

Where independent complaints bodies exist, they operate in a co-regulatory environment, meaning some complaints are referred for investigation by professional bodies. In such cases, the independent body monitors the professional body and can also give direction, or take over an investigation. The independent body also makes the decision on how to proceed after the professional body reports on its investigation. Such controls allow delegation of matters while preserving the overall independence of the process.

The legal profession acts also subject complaints bodies to transparency requirements including informing lawyers of complaints, informing complainants of decisions and maintaining a public online register of disciplinary action. Several complaints bodies have also recently made their enforcement policies public, for example, in Victoria the *Compliance and Enforcement Policy* (2012) and in Western Australia the *Disciplinary Applications Guidelines* (2013). As noted above, the Commission considers this to be best practice as it improves understanding and certainty for both consumers and lawyers.

In addition to their investigatory and disciplinary roles, complaints bodies also seek to prevent disputes from arising by educating the legal profession and the community about legal issues, areas of concern to lawyers and consumers, and the rights and obligations relating to lawyer-client relationships. They do this in a number of ways including by releasing fact sheets and presenting seminars at law schools and practices.

Complaints bodies receive a variety of enquiries — not all lead to complaints

Based on the annual reports of complaints bodies, roughly 60 per cent of complaints come from clients, with the remainder made by clients' friends or relatives, officers of courts and lawyers. In all jurisdictions, complaints most often relate to alleged overcharging, poor communication and negligence. Overcharging and poor

communication are often raised together in a single complaint (SA LPCB 2013). The majority of complaints in each jurisdiction relate to services provided in the areas of family law or probate. The Victorian Legal Services Commissioner explained:

Complaints most commonly arise from unsophisticated clients who do not deal regularly with the legal system. The context is usually highly emotional matters such as family law, probate, conveyancing, and small commercial transactions – often buying or selling a small business. (2011, p. 2)

The volume of complaints varies substantially by jurisdiction. In the 2012-13 financial year the NSW Legal Services Commissioner received 2685 complaints, while the ACT Law Society received only 71 (NSW OLSC 2013; Law Society of the ACT 2013).

Complaints bodies also receive many enquiries that do not result in formal written complaints. Enquiries are usually handled by providing information on the client's rights and options (including explaining the complaints process), contacting the lawyer on behalf of the client and, if necessary, providing a complaint form. Several complaints bodies actively intervene to stop enquiries from escalating into complaints, for example:

... when the caller says that they keep trying to contact their practitioner to get an update in their matter but the practitioner will not return their calls, or if the caller says that the practitioner has exercised a lien on their documents despite the fact that they have paid all their accounts. In these examples, a call by the Inquiry Officer to the practitioner to ask them to contact the caller to provide an update on their matter or ask them why they are retaining the documents if the accounts have been paid, may prompt the practitioner to respond to the caller's requests and may prevent a complaint being formally made. (NSW OLSC 2012a, p. 16)

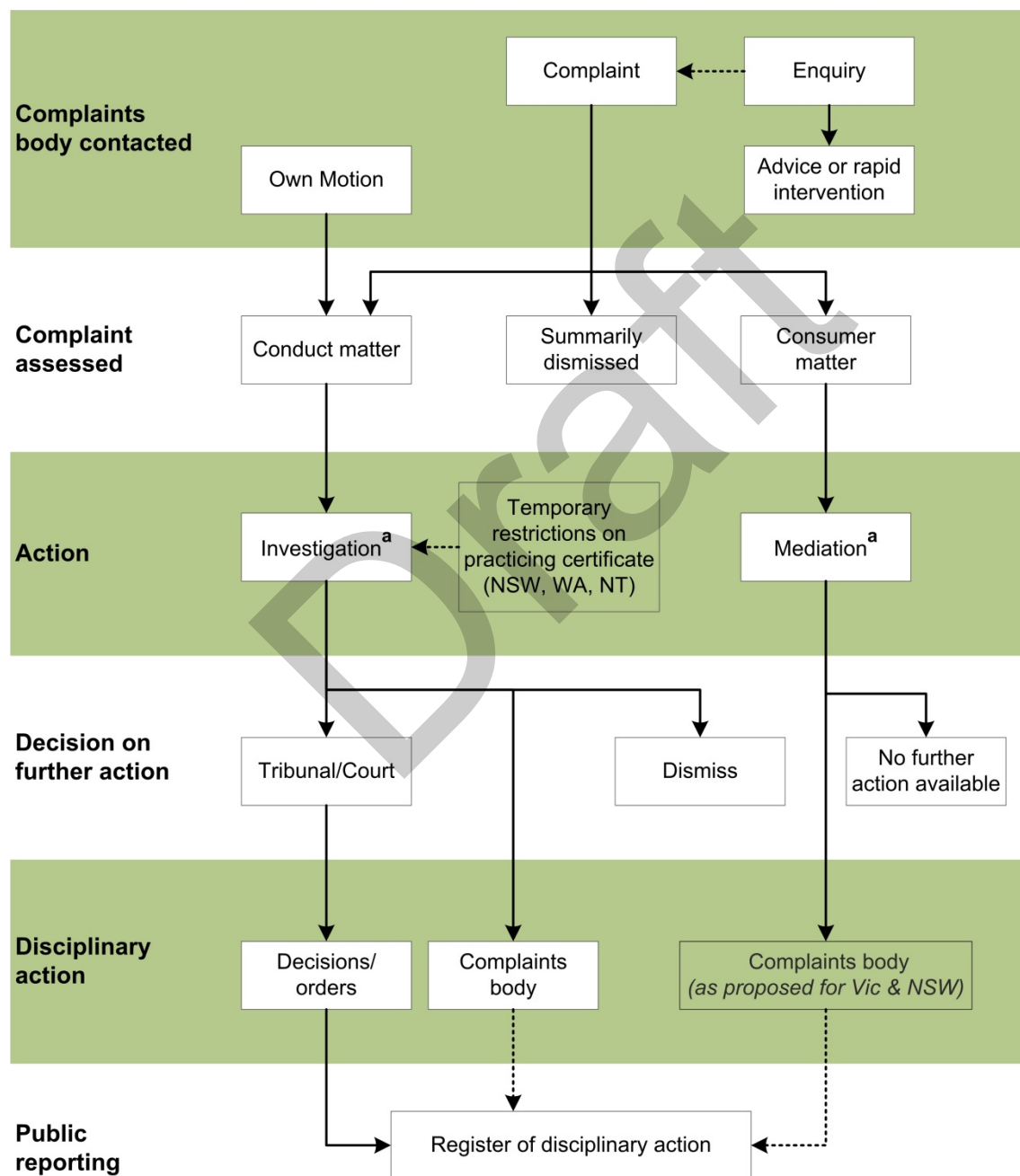
The Western Australian Legal Profession Complaints Committee also sends 'risk alert letters' to law practices that have had multiple enquiries or complaints. Because complaints are made against individual lawyers and not firms, the practice may be unaware of the extent of enquires or complaints received about their practitioners (WA LPCC 2013).

The Commission considers early intervention of this form to be beneficial as it minimises the time and cost involved for all parties in a dispute.

Some complaints bodies need stronger powers

While processes and terminology vary slightly between jurisdictions, complaints processes and the powers available to complaints bodies are broadly similar. Figure 6.2 depicts the general features of complaints processes.

Figure 6.2 **An outline of complaints processes**



^a Sometimes referred to professional body and referred back for next stage.

When formal complaints are received, complaints bodies class them into ‘consumer matters’, which relate to service cost or quality, or ‘conduct matters’, which involve the possibility of unsatisfactory professional conduct or professional misconduct by the lawyer — this can include being late to court, failing to complete expected work or, at the extreme, fraud or theft.

This classification determines the enforcement tools available for responding to the complaint. In relation to consumer matters, complaints bodies are only able to facilitate mediation of the dispute. In most jurisdictions mediation can only proceed with the consent of both parties. For conduct matters, complaints bodies undertake an investigation (either internally, or by referral to a professional body) to determine the appropriate disciplinary action.

The Commission has identified two key powers that exist in some jurisdictions that, if adopted, would improve complaints processes in other jurisdictions.

First, in Victoria and NSW, under amendments in the uniform law complaints bodies will have disciplinary powers in relation to consumer matters, including the ability to: caution; require the work to be redone at no charge; and order compensation. The absence of these powers was identified as a weakness during consultation for the *National Legal Profession Reform* project:

Although most jurisdictions have forums for accepting and mediating consumer complaints, they do not provide an opportunity for the complaints handler to provide a remedy where agreement is not achieved. ... This adds to costs for consumers pursuing complaints and lawyers responding to complaints, and provides no remedy in situations where a genuine complaint is nonetheless not serious enough to constitute a disciplinary matter and an agreement cannot be struck with the practitioner. (COAG CRIS 2010, p. 9)

Outside of these two states, complaints bodies have no disciplinary powers where attempted mediation has failed to resolve a consumer matter. This situation does little to rectify any ‘wrongs’ against the consumer, and also provides little in the way of a disciplinary ‘stick’ to discourage poor behaviour by lawyers. Therefore the Commission considers that these powers should be granted to complaints bodies, not only for the direct effect in individual cases, but also as the threat of their use can provide an incentive to improve lawyers’ conduct (both in their legal practice, and when involved in mediation with clients).

DRAFT RECOMMENDATION 6.6

Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters

(those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).

- *This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.*
- *Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.*

Second, in New South Wales, Western Australia and the Northern Territory, complaints bodies can order the immediate suspension of, or place restrictions on, a lawyer's practising certificate on public interest grounds while an investigation is undertaken. For example, they may restrict the lawyer from doing 'front line' work engaging directly with clients while still allowing them to practice. In New South Wales and the Northern Territory the complaints body makes this order in writing to the practitioner, while in Western Australia this action requires an order from the State Administrative Tribunal. This power may be valuable in some instances where, for example, the lawyer appears to have committed repeated instances of misconduct, and is in a position to reoffend during the course of the investigation. Such a restriction need only apply while the investigation is pending, as its outcome will provide a considered judgment on whether a more permanent sanction is required. The Commission considers that complaints processes in other jurisdictions would be more robust, and thus more able to protect consumers, if this power were adopted.

DRAFT RECOMMENDATION 6.7

As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.

They also need to be better able to investigate on their own motion

All complaints bodies are able to investigate legal practitioners and conduct reviews of legal practices on their own motion, where they have reasonable cause to suspect a problem. These investigations can arise for various reasons including evidence from an existing complaint, a trust account report or the media. For example, in Queensland, if a complaint about the lawyer was found to be correct, the Commissioner will investigate whether other clients were affected (Qld LSC 2013a).

The number of own motion investigations initiated varies substantially between jurisdictions — for example, in 2012-13 there were 45 in Victoria, 108 in Queensland, five in Tasmania and two in the Northern Territory.

While complaints bodies are not restricted from initiating own motion investigations, several have been frustrated by restrictions on their ability to obtain a meaningful outcome. The NSW Legal Services Commissioner noted the difficulty in undertaking systemic reviews:

The complaints process embodied in the Legal Profession Act in NSW largely allows the regulators to focus on how an individual legal practitioner has dealt with an individual client in a single matter. The investigation of complaints involving a pattern of conduct by an individual lawyer over multiple matters, or systemic issues within a law practice, is labour intensive and costly, and, depending on the case, may be impossible to prosecute. This has resulted in budgetary blowouts and diversion of resources from other complaint investigations. (sub. 36, p. 6)

Since prosecutions in relation to systemic matters are difficult, the NSW Legal Services Commission adopts a preventative strategy. It conducts practice audits with the aim of improving management processes before complaints arise, but has noted that this approach is resource intensive (sub. 36).

Where complaints bodies seek to test whether overcharging is systemic, draft recommendation 6.4 above may assist by making cost information across a range of clients more readily available for inspection by complaint bodies.

The Queensland Legal Services Commissioner raised a more specific problem, namely that its power to compel lawyers to produce information or documents, despite duty of confidentiality, only holds ‘if the client is the complainant or consents to its disclosure.’ The Commissioner argued that:

This caveat on our powers of investigation can frustrate and even completely stymie any effective investigation of a complaint about a lawyer’s conduct in the course of his or her dealings with a client whenever the complaint is made by someone other than the client and the client declines to consent to the lawyer disclosing relevant information.

... The problem extends well beyond ‘third party’ complaints. It similarly compromises our ability to conduct ‘own motion’ investigations — investigations we commence on our own initiative when we have reasonable grounds in the absence of a complaint to believe that a lawyer may have acted improperly. (Qld LSC 2013a, p. 5)

In principle, the nature and seriousness of a complaint does not vary depending on who reported it (be it the client in question, a third party, or commenced on the body’s own motion due to reasonable suspicion of misconduct). Allowing complaints bodies to compel information regardless of how an investigation was

initiated can help to avoid future costs by reducing repeated instances of the behaviour.

There are some privacy concerns with equipping complaints bodies with the power to compel information that is otherwise confidential between lawyer and client. However, in other jurisdictions where they are able to compel such information, complaints bodies are only able to do so subject to important limits:

... a client's legal professional privilege is preserved ... we can use any information obtained through the use of these powers only for the purposes of investigating a lawyer's conduct and any subsequent disciplinary action against the lawyer and for no further purpose. (Qld LSC 2013a, p. 6)

The Commission considers that such limitations strike an appropriate balance between empowering the regulator to address real issues and preserving the genuinely private aspects of the lawyer-client relationship.

DRAFT RECOMMENDATION 6.8

The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.

Are complaints bodies doing their job effectively?

In the past, there has been some criticism of complaints processes. In several jurisdictions there were concerns prior to complaints bodies gaining independence. For example the previous legislative arrangements in Queensland:

... had come under intense and very public and adverse scrutiny in 2002 and 2003 [when professional associations handled complaints] and were seen as flawed, in the public eye certainly but among many practitioners also. ... The problem in the public view was that the process was insufficiently independent of the profession to give the community confidence that complaints about members of the profession would be dealt with thoroughly and impartially – the media characterised the process as ‘Caesar judging Caesar’. The publicity gave the impression not only that the profession ‘looked after its own’ as it were but that malpractice was commonplace. (Qld LSC 2005, p. 7)

This criticism led to the establishment of the Queensland Legal Services Commission. However, independence is not a ‘silver bullet’, and poor practices can still prevail within independent bodies. For example, in 2008, the Victorian Ombudsman criticised the Victorian Legal Services Commission following

investigation of its complaints process (McGarvie 2012). The Ombudsman found poor practices including delay, poor handling of minor matters, poor investigatory techniques, denial of procedural fairness to parties, inadequate documentation explaining decisions and a low number of substantive prosecutions. The Ombudsman made several recommendations to improve processes that were adopted. One example was the introduction of a Rapid Resolution Team in 2010 to expeditiously handle straightforward service matters (McGarvie 2012).

Though there has been evidence of poor processes in the past, the Commission received little commentary from stakeholders on the current effectiveness (or ineffectiveness) of complaints processes, other than from the complaints bodies themselves. Complaints processes outlined in legislation appear broadly consistent with an independent and graduated approach, however there is a question of whether the intent of the regulations is executed in practice.

While it is difficult to conclusively quantify, the effectiveness of complaints bodies can be evaluated by reference to the framework identified earlier (including in box 6.3). In the draft recommendations made above, the Commission has identified some deficiencies, but also welcomes further comment from participants relating to the powers, structure and execution of complaints handling in all jurisdictions.

INFORMATION REQUEST 6.4

The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:

- *consumers are aware of complaints avenues and using them*
- *resolution of disputes and investigations is timely and the sanctions imposed proportionate*
- *consumers and lawyers are satisfied with the outcomes of complaints processes?*

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

7 A responsive legal profession

Key points

- An efficient and responsive legal profession can improve access to justice for those consumers who have not resolved their disputes in other ways.
- There are several elements that affect the quality of, and competition in, legal services markets — the education and training of lawyers, their entry into the profession, and regulation of the profession itself.
- The education and training of law students influences the future legal profession.
 - Despite concerns of potential oversupply of graduates, there is no policy rationale in the legal market — beyond ensuring baseline quality standards — for restricting numbers.
 - While there are examples of leading practices in various institutions, there is scope for a systematic modernisation of the legal education system. More emphasis should be placed on teaching skills, rather than accumulating knowledge. This could include:
 - ... reviewing the need for the 'Priestley 11' core subjects
 - ... including alternative dispute resolution as a core subject
 - ... practical training, including pro bono placements, interpersonal skills and business management courses
 - ... reviewing the necessity, role and conduct of separate admission and practising certificate requirements.
- More radical changes in legal education would only be effective if coupled with reforms to the profession.
 - Building on existing examples, scope exists to consider allowing other appropriately qualified professionals to perform select tasks that are currently the exclusive domain of lawyers.
- Specific restrictions regarding professional indemnity insurance and advertising appear unnecessary given broader economywide regulation and general legal professional standards of conduct.
- Implementation of the National Legal Professional Reform, initiated in 2009, has been stymied by jurisdictional differences.
 - Progress made by Victoria and New South Wales provides other jurisdictions with a 'preview' of the benefits of reforms. Further gains depend on evaluation of these reforms.

From the perspective of most users, legal services exist as part of a market. In theory, this should ensure that the legal profession is efficient and responsive, providing services to consumers at the best possible price and innovating in their service delivery in order to attract new clients. Such a well-functioning market would assist access to justice by minimising barriers relating to the cost, and range, of services.

However, no market is perfectly competitive. In a truly competitive market it is not just the competition between firms currently in the market that leads to efficient outcomes, but also the threat that other firms may enter the market if they believe they can make a profit. In many sectors of the economy, factors such as natural market size, high fixed costs to entry, behaviour of those with market power and government regulations inhibit competition or provide barriers to entry that limit (or eliminate) the threat of new entrants. Without such competitive disciplines to motivate them, firms may be able to use market power to increase their own returns at the expense of consumers, competitors and the community as a whole. Beyond prices, there is also limited pressure to innovate, meaning that suppliers become unresponsive to emerging (or indeed long standing) consumer needs.

While chapter 6 examines regulation specifically designed to protect consumers in individual transactions, this chapter discusses more structural aspects that affect the efficiency of the supply of legal services. Section 7.1 discusses characteristics of the legal profession in Australia, section 7.2 looks at the education and training required to become a lawyer and section 7.3 examines the current regulation of the profession, and the need for any reform.

7.1 Characteristics of the legal profession

Nationally, the legal services market is large. Based on 2007-08 data, the Australian Bureau of Statistics (2009) estimated that the legal services sector¹⁶ generated \$18 billion of income, and contributed \$10.9 billion of industry value added to the Australian economy. More recent figures estimated that total revenue in the legal services industry was around \$21 billion in 2012-13 (IBISWorld 2014).

A national profile of solicitors showed that in 2011, there were 59 280 practising solicitors in Australia (Urbis 2012). Almost three quarters (73 per cent) of solicitors were in private practice (that is, in law firms), nearly 15 per cent worked as

¹⁶ The ABS used a broad definition including not only barristers and solicitors, but also legal aid commissions, community legal centres, aboriginal legal services, government solicitors and public prosecutors.

solicitors within corporations (in-house counsel) and just over 9 per cent worked within government. There are limited data available on the number of barristers, although the Law Council of Australia (sub 96, p. 17) estimated that there were approximately 5600 barrister practising in Australia.

The Urbis profile revealed an experienced profession, with 37 per cent of solicitors having been admitted for 15 years or more. There was also substantial new entry into the profession; just under one third (31 per cent) had been admitted for 5 years or less, and roughly 10 per cent had only been admitted to practise in the past year (Urbis 2012).

From a user's perspective, not every law firm will be able, or appropriate, to meet their need — someone with a family dispute in Geraldton is unlikely to consider a firm of environmental law specialists in Sydney as an option to assist with their dispute. Therefore, while it is possible to describe 'the legal services market' as a conceptual whole across Australia, it is more relevant to consider sub-markets that are geographic, and to a lesser extent, functional in nature.

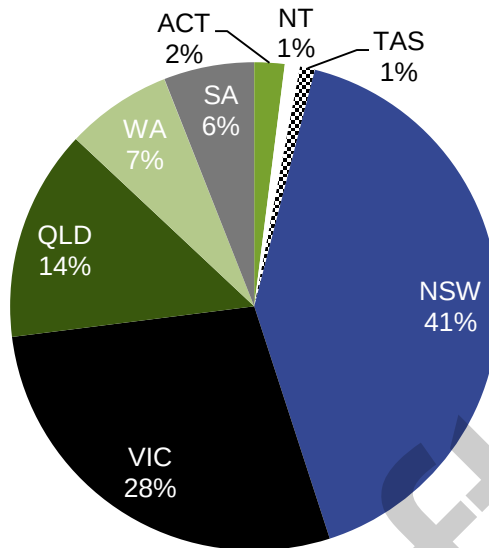
There are many different legal markets

For many users the decision about which legal services provider to use will be based simply on location. For some, it may be based on area of specialty. For example, advertising or reputation may suggest that a particular firm is 'the personal injury specialist'.

Firms exist in different locations, but are concentrated in the big cities

Law firms are concentrated in populated areas, as a greater population density (and commercial activity) typically means more transactions and more disputes. In Australia, the legal profession is concentrated in the largest states, with nearly 70 per cent of solicitors in New South Wales (NSW) and Victoria alone (figure 7.1).

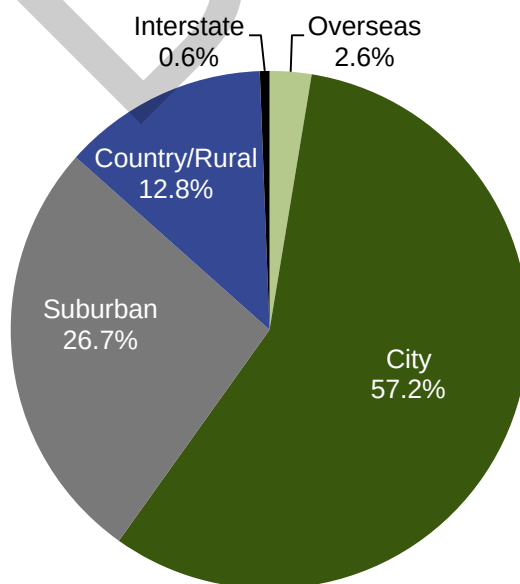
Figure 7.1 Proportion of solicitors by state and territory
2011



Data source: Urbis (2012).

More specifically, solicitors also tend to be concentrated in major cities, with over half practising in the central business district of the capital city of their jurisdiction, and a further quarter practising in a suburban location (figure 7.2).

Figure 7.2 Big city law — workplace location of solicitors
2011



Data source: Urbis (2012).

To a degree, and especially for smaller, personal matters, the location of a law firm effectively grants a natural advantage in capturing the business of those in the physical area. As discussed in chapter 6, consumers of legal services do not often undertake thorough searches for alternative providers and may often engage the first firm they consult, particularly when urgent assistance is needed.

Different firms practise in different areas of law

‘The law’ is a multifaceted concept with many areas of speciality. Lawyers earn income from various types of civil matters (table 7.1).

Table 7.1 Income of solicitors and barristers by area of law^a
2007-08

Area of law	Solicitors	Barristers
	per cent	per cent
Commercial	34	31
Property and estates (wills)	23	8
Personal injury	8	25
Family	6	6
Intellectual property	5	4
Industrial relations	4	6
Administrative/Constitutional	2	5
Environmental	2	3
Other	16	12

^a Civil matters only.

Source: ABS Cat. No. 8667.0.

Many smaller law practices, particularly in regional areas, may (by necessity) operate as ‘general practitioners’, dealing with whatever legal issues arise in their town or surrounds. Conversely, some of the largest firms are big enough to have separate divisions in different areas of law. Additionally, while the market for criminal law can be considered separately, there are consumers and legal service providers who will be involved in both civil and criminal matters.

There are also firms that either fully or partially specialise in certain areas of law. Typically, such firms will develop a reputation (perhaps fostered by advertising) as specialists in a certain area such as family law or personal injury, entertainment law and so on. As noted above (and in chapter 6), where consumers are unwilling or unable to effectively search and compare services, an immediate association based on a firm’s reputation can be a powerful way to capture a share of the market.

A further division in the market is between the specialist advocate services of barristers, and the more general role of solicitors. Many consumers will only engage

a barrister through a solicitor. As such, table 7.1 shows that typically ‘transactional’ services (such as property and estate services, and some commercial matters) are a more important source of income for solicitors, while those matters that are more likely to proceed to court (personal injury) are a more important source of income for barristers.

There is a big, and a small, end of town

Despite some perceptions of monolithic, marble-lobbied corporate law firms, it is more common for solicitors to work for small firms. Based on data from the Law Society of NSW (Urbis 2012), some 38 per cent of solicitors worked as sole practitioners, with a further 21 per cent in firms with two to four partners (figure 7.3). Only 12 per cent of solicitors worked in firms with 40 or more partners.¹⁷

Figure 7.3 **Proportion of firms and proportion of solicitors^a**



^a All states and territories, excluding Victoria.

Data source: Urbis (2012).

Statistics on overall firm and employee numbers do not reveal the relative financial activity within the legal services market. While information on revenue levels is limited, available data illustrates the size and earning capacity of the ‘big end of

¹⁷ These figures exclude Victoria, the second largest jurisdiction. Assuming Victoria displayed a similar industry structure to NSW suggests that its inclusion could further skew the data towards a bifurcated profession, with a higher proportion of solicitors working as either sole practitioners or within large firms, and relatively few in the middle.

town' (table 7.2), with the largest firm earning over half a billion dollars in revenue in 2011-12, and the top 25 firms together earning over \$5 billion (Business Review Weekly 2012).

Table 7.2 Top 10 law firms by revenue
2011-12

Rank	Firm	Revenue	Partners	Lawyers	Graduates
		\$ million	FTE	FTE	FTE
1	Freehills	565	185	729.2	89.8
2	Clayton Utz	455.4	197	575.2	75
3	Allens	440 ^a	175.1	635.1	86.9
4	King & Wood Mallesons	424	158.3	541.3	89
5	Minter Ellison	419.2	193.1	574.9	53
6	Ashurst Australia	398	181.5	581	87.5
7	Corrs Chambers Westgarth	265	122.3	370.5	61
8	Norton Rose Australia	250 ^a	140.2	394.5	42
9	Slater & Gordon Ltd	217	na ^b	436	19
10	Gadens Lawyers	207.4	137	346	0

^a Estimate by Business Review Weekly. ^b ASX listed company, does not have partners.

Source: Business Review Weekly (2012).

These large firms practise across a range of areas of law, and often across the country. These firms compete for the valuable business of large clients such as corporations and governments. For the majority of solicitors in small firms however, their 'market' is more limited by specialty and location.

7.2 Becoming a lawyer — education and training

As befits the level of knowledge and skill required to navigate the legal system, becoming a lawyer is not a simple, nor quick, task. Typically, it requires three steps:

- university education to obtain a law degree
- Practical Legal Training focused on procedures and skills required to work as a solicitor, culminating in admission as a lawyer in the local Supreme Court
- obtaining a practising certificate (a licence to practise) to work as a solicitor or barrister from the relevant professional body (a law society or bar association).

Each of these steps, and any potential reforms that could improve access to justice (while preserving the quality of new entrants to the legal profession), are discussed in turn below.

University education

There are currently 33 law schools in universities across Australia — ten in NSW, six in Victoria, six in Queensland, four in Western Australia, three in South Australia, one in Tasmania, two in the ACT, and one in the Northern Territory (CALD 2013).

Law degrees require a minimum of three years' study, though many students choose to undertake a combined degree — some 23 per cent of law graduates in 2012 undertook a combined degree, compared to an average of over 9 per cent for all graduates (Graduate Careers Australia 2013a). For graduates to qualify for admission as Australian lawyers, their degrees must cover the so-called 'Priestley 11' core subjects (box 7.1). While these provide a strong base knowledge of the law, they limit the flexibility of universities to compete and innovate in offering more tailored degrees.

Box 7.1 The 'Priestley 11' core subjects

The following academic subjects constitute the Priestley 11:

- Criminal Law and Procedure
- Torts
- Contracts
- Property both real (including Torrens system land) and personal
- Equity
- Administrative Law
- Federal and State Constitutional Law
- Civil Procedure
- Evidence
- Company Law
- Professional Conduct.

Source: Legal Profession Admission Rules 2005 (NSW).

A more recent trend is the offering of postgraduate 'Juris Doctor' (JD) degrees by Australian Universities. As with undergraduate degrees, these vary across universities, but are all targeted at graduates (of non-law disciplines) seeking to obtain legal qualifications. At most universities, graduating from a JD is in effect equivalent to holding a bachelor's degree in law (LLB). However, some schools (such as the University of Technology, Sydney) have incorporated practical legal training as an option in their JD courses. Some law schools (such as the University

of Western Australia) have also ceased offering undergraduate law as an option, offering JDs for graduate students instead.

Practical Legal Training and admission

Following the completion of a law degree or JD, those wishing to practise as lawyers (both as a solicitor or a barrister) must also complete Practical Legal Training (PLT) (though in some jurisdictions an alternative traineeship path is also available). This period of training focuses on the skills and knowledge generally needed for an entry level lawyer, including:

- professional skills such as writing and drafting, advocacy, client interviewing and dispute resolution
- practical knowledge in areas such as civil litigation, commercial, corporate and property law
- work management and business skills
- trusts management and office accounting skills
- ethics and professional responsibility.

The training combines a traditional course work component with work experience within a firm. Overall, students can complete PLT in under 6 months if undertaken on a full-time basis. The courses are offered online and throughout the country by universities, the College of Law and other select training bodies. PLT is undertaken at the cost of a sponsoring firm or the student themselves (who may sometimes access assistance programs such as FEE-HELP loans).

Upon completion of PLT, candidates are admitted to the Supreme Court in their jurisdiction as an 'Australian lawyer'. In each jurisdiction, the Supreme Court is the admitting authority, but is often assisted by a registry body, such as the Legal Practitioner Board in NSW, or a professional regulatory body, such as the Legal Practice Board in Western Australia. Those who are admitted to practise as a barrister or solicitor (or both) in their state or territory's Supreme Court are also eligible to practise in all federal courts, provided they have registered their name on the High Court's Register of practitioners. Admission processes include checks that applicants have completed the required academic qualifications, as well as certifying the character of the applicant, any criminal record and medical conditions insofar as they may affect the applicant's ability to perform their duties (see, for example the Law Foundation of South Australia (2013)).

Obtaining a practising certificate

Once they are admitted to a Supreme Court, lawyers who wish to practise must apply for a practising certificate to their local law society or bar association (it is an offence to engage in legal practice without a certificate). Generally, it is these professional bodies, rather than regulators, who administer matters relating to practising certificates — though there are some exceptions to this. First, in Victoria, practising certificates are formally a matter for the (regulatory) Legal Services Board. While the Board sets policies, it delegates some functions — which must be performed in accordance with those policies — to other bodies. In the case of practising certificates, the functions are delegated to the Victorian Bar (for barristers) and the Law Institute of Victoria (for solicitors) (Vic LSB 2012). The second main exception is in WA, where the Legal Practice Board administers both admission (in an advisory role to the Supreme Court) and practising certificates, as well as being responsible for complaints handling (chapter 6).

Requirements for granting a certificate are set in law and include that:

- the (prospective) practitioner holds professional indemnity insurance
- they are a ‘fit and proper person’ (essentially a character check)
- they have contributed to fidelity funds — typically established by law societies, these funds pay compensation to users who have suffered financial loss due to a lawyer’s (or firm’s) dishonest acts or omissions relating to trust money or property
- they undertake continuing professional education on an annual basis.

The professional associations are authorised by statute (for example, section 50 of the *Legal Profession Act (NSW)*) to place ‘reasonable and relevant’ (s50(2)) conditions on practising certificates. The ability to impose them is relatively unfettered, but such conditions can include restrictions on the areas of law practised or the operation of a trust account, requirements for supervision, and the completion of specified training (including continuing education).

Reflecting these conditions, there are a number of categories of practising certificate that vary in the degree of supervision and breadth of practice, from unsupervised ‘principal’ certificates (for sole practitioners and principals or partners of a law firm), ‘non-principal’ certificates (employees in firms), through to work within government or corporations and certificates for volunteer work (discussed in chapter 23).

Certificates must be renewed annually at a cost to practitioners. The renewal process provides an opportunity for a ‘check’ on continuing education and ‘fit and proper person’ requirements.

Those seeking to work as barristers must meet additional requirements. While the process varies slightly between jurisdictions, applicants typically undertake a ‘Readers’ Course’, incorporating an examination, for example in NSW:

Candidates must achieve a 75 per cent pass mark in the three bar examinations, and successfully complete a formal Bar Practice Course. ... The course is run twice a year and currently runs for four weeks, full-time. (NSW Bar Association, sub. 34, p. 25)

Upon completion of the course, applicants are issued with a conditional practising certificate and undertake a period of ‘reading’, effectively an apprenticeship under the supervision of a senior barrister. The length of this period varies — for example in NSW (and the ACT) it is ‘at least 12 months’ (NSW bar association, sub. 34, p. 25), while in Victoria it is seven months. In Queensland, new barristers undertake one year’s ‘pupillage’, and within the first 6 months may not take briefs directly from clients without written approval from their ‘Senior and Junior masters’ (Australian Bar Association, sub. 149, p. 11). The Tasmanian Bar does not conduct bar examinations or practice courses, but new barristers must complete at least two years of pupillage (Australian Bar Association, sub. 149).

In this way, regulation of the legal profession has evolved to incorporate specialisation not only between barristers and solicitors, but also through tiered practising certificate types.

A need for reform?

Are there ‘too many’ law students?

Australian universities operate on a demand driven funding model for all courses except medicine. Essentially, universities decide how many places they offer in courses based on demand from students and employers (although the Commonwealth Education Minister may place an upper limit for Commonwealth Grants for particular courses in order to slow expenditure growth). This system is currently under review by the Department of Education (2014).

As part of this inquiry, some have raised concerns that there is an ‘oversupply’ of law students. For example, the Law Society of SA submitted:

... there is an oversupply of law graduates who wish to practise law and this has led to adverse impacts on graduates, law students and the legal profession. ...

With law schools producing more graduates than can possibly find work in the legal profession, the Society has observed law students and graduates desperate to break into the profession offering their services for free to an established lawyer. While this phenomenon is not new, the Society is concerned at this rising trend in recent years and how a “race to the bottom” could have adverse impacts on innovation and competition. (sub. 139, pp. 4–5)

Recent data reported in the media also point to significant entry into the profession, with the number of law graduates more than doubling between 2001 and 2012, and more than 12 000 graduates (roughly one fifth of the profession) entering the market in 2012. This was primarily driven by a sharp increase (330 per cent) in postgraduate degrees (such as JDs), particularly since 2010 (Tadros 2014).

The Australian Law Students’ Association (2013) also argued that oversupply can lead to detrimental effects including that:

- student expectations before enrolment are not met, and this can trigger stress, anxiety and depression in ‘high achievers’
- students are unable to recuperate their investment in their education
- students have reduced bargaining power in the employment market upon graduation.

While it may be true that not all law graduates are immediately employed, recent survey data from Graduate Careers Australia (2013b) showed that some 83 per cent were in full-time employment, and a further 10 per cent were seeking full-time employment while working in a part-time or casual role. Although the (full-time) figure was below some professions such as medicine and pharmacy (98 per cent) and civil engineering (90 per cent), it compared favourably to the average for all graduates (76 per cent).

Further, a lack of employment in the legal sector does not necessarily mean that graduates of law are unemployed:

... a law degree has become a generalist degree, the “new arts degree”, and that not every law student aspires to practise law. (Law Society of SA, sub. 139, p. 5)

This sentiment was echoed by Geoff Bowyer, the president of the Law Institute of Victoria:

The law degree is changing from being a career-specific [degree] to a broad degree ... Law degrees are seen in corporate and government [fields] as a good base for making good administrative people. Arts used to be seen as that generalist field. In a society where regulation is increasing, being able to [understand it] is a skill. (Tadros 2014)

Indeed, just over 80 per cent of graduates of ‘law and justice studies’ in 2012 self-reported that their field of study was at least somewhat important to their job (Graduate Careers Australia 2013c). In 2012, 55 per cent of law graduates reported that their degree was a ‘formal requirement’ in their main paid job (suggesting they practised as lawyers), a further 22 per cent reported that their degree was important 11 per cent reported that their degree was ‘somewhat important’, and 12 per cent reported that it was ‘not important’ (Graduate Careers Australia 2013b). While not definitive, these results indicate that law graduates enter employment in a range of roles varying from practising lawyers, in roles directly involving law in firms and government, and in roles where knowledge of law is useful, but not core to, their job. These results are consistent with the trend to undertake combined degrees, suggesting that a relatively large share of students are not tied to law as their only career choice.

Recent research observed that the increase in law graduates was substantially larger than the increase in graduate numbers across all disciplines, but also noted that graduate numbers were not the sole determinant of the supply of lawyers and other factors such as net migration and retirement need to be considered (Daly 2012). The increase in graduates also generally reflected broader economic conditions:

There is therefore an element of luck involved in the timing of graduation in relation to the business cycle as to whether new graduates find work easily or not. ... [the increase in law graduates] has occurred at a time of rising demand for legal services. (Daly 2012, pp. 447, 449)

The same research also revealed that the income (starting salary) of law graduates grew by approximately 16 per cent over a ten year period from 1999. This was in line with the growth for starting salaries for all graduates, meaning that in 2009, median starting salaries for law graduates of \$50 000 remained higher than the \$48 000 median for all graduates (Daly 2012). Despite this growth in starting salaries over the ten year period, there was also an observed decline (between the 2001 and 2006 censuses) in the median salaries of all people with legal qualifications (including practising lawyers and those working outside the legal profession). Daly noted that this decline was not sufficient to regard as a long-term trend, and that it may have been:

... in response to a number of factors, including the shift in the view of law as a purely vocational degree to being a more general degree, the increase in women with a law degree and increases in part-time work. (2012, p. 453)

Daly concluded that there was limited evidence to support an argument of excess supply, and noted that:

In a labour market such as this, much of the burden of adjustment is likely to fall on new entrants. Evidence presented here on the unemployment rate of new graduates

shows the cyclical nature of unemployment and an unemployment rate which is below that of graduates as a whole. Starting salaries of new law graduates have kept pace with those of all graduates. (2012, p. 453)

While it is clear that graduate numbers are increasing, overall, the Commission does not see that this justifies any constraint on student numbers for law degrees. The available evidence indicates that this increase in graduates may not equate to an excess supply in the legal market, that law students do not necessarily enter the legal profession and that incomes of starting graduates are relatively unaffected by growth. Indeed, increased entry fosters competition in the profession and therefore improves the responsiveness of firms. This can improve access to justice.

The solution to address concerns that the prospects of law graduates may not align with student perceptions does not lie with capping entry. Rather, as the Law Society of SA noted (sub. 139), improved information to prospective students should enable them to make more informed choices about their future study and career.

Embedding alternative dispute resolution into the legal psyche

The current education and training undertaken by lawyers reflects a court and statute focus on formal, rights-based law. Specifically, there is no requirement for the study of alternative dispute resolution (ADR) and in some cases lawyers are not fully informed about the range of dispute resolution options available (chapter 8). Changes to legal education provide for a longer-term remedy.

This has previously been noted by the former National Alternative Dispute Resolution Advisory Council (NADRAC):

NADRAC's view is that law schools should increase the amount of compulsory ADR teaching contained in law degrees. Lawyers in practice are becoming increasingly engaged in ADR, either as providers of ADR services or as representatives of or support people for clients in ADR processes. (2012a, p. 18)

This concept was also supported by the Attorney-General's Department (sub. 137).

As is the case at the University of NSW, law degrees should include a core subject that trains students to identify clients' needs, and offer a range of solutions, including ADR where appropriate. Rather than simply adding to the existing workload of law students (and thus potentially increasing the cost of graduates) this change should be introduced as part of other, wider reforms to legal education focussing on skills-based degrees (below).

Clinical legal education can provide more practical training

Clinical legal education is a focused, practical and intensive method of learning that involves (supervised) students taking on professional responsibilities of lawyers, including giving legal advice, preparing documents, meeting clients, conducting research and developing materials for community legal education. Clinical legal education courses aim to provide a ‘real world’ education for the student while meeting the needs of clients. These courses are commonly delivered in partnership with community legal centres, and involve:

... a system of self-critique and supervisory feedback so that law students learn how to learn from their experience. The high staff-student ratio and collaborative learning environments support a climate in which each student is motivated to improve and perform at their best. In its common focus on real clients, students are motivated by the inescapable personal responsibility of working with and being accountable to those clients, to perform to the best of their ability. The result for participating students is a profound consolidation of substantive legal knowledge with the practicalities, compromises and successes of contemporary legal practice. (Evans et al. 2013, p. 6)

In this way, clinical legal education attempts to teach students legal ‘content’ concurrently with an increased focus on the importance of interpersonal and business management skills that are required in day-to-day legal practice. Advocates of clinical legal education also believe it can assist with overall professional ethics and instil a sense of social justice within students, as students gain a better understanding of the impact of pro bono work on the (often disadvantaged) clients:

... clinical experience helps law students identify themselves as able to play a role in improving access to justice and strengthens their determination to ensure that ordinary Australians have that right of access. ... serious investments on clinical methodology and underlying ethical assessment are likely to positively address and support future lawyers’ attitudes to access to justice, so that more lawyers value such access at least as much as they do their opportunity to earn an income. (Adrian Evans, sub. 114, p. 1)

... undergraduate and graduate law courses should have a greater emphasis on social justice and access to justice issues. One way to achieve this is through greater opportunities for the students to participate in clinical legal education programs and undertake volunteer work in community organisations. (Public Interest Advocacy Centre, sub. 145, p. 38).

Although it has benefits, clinical legal education is very intensive in terms of staff resources, and is therefore relatively expensive when compared to more traditional university-based methods for teaching law. Its advocates argue that such costs could be recouped by society in the long-term:

... students’ (clinical) education, when conducted in accord with [identified best practices] ... represents a cost-effective strategy over time for the community and

profession because their skills and ethical understanding are far more likely to be retained within legal practice than those without such law school experience. (Evans et al. 2013, p. 14)

While the Commission generally supports an increased focus on skills in legal education, it is wary of simply requiring clinical legal education as an ‘add-on’ to all existing law degrees. Given the increasingly generalist nature of the undergraduate law degree, a focus on elements that are specific to practising in the legal profession (as distinct from corporate or government work) could be misplaced. However, in postgraduate study (such as JDs), the use of clinical legal education to concurrently develop knowledge and skills may prove a valuable means to expedite courses while still maintaining quality.

More fundamental reforms — balancing between the stages of training

The need for a greater focus on ADR and continuing legal education is indicative of a broader need to contemporise the way that legal education in Australia is structured and delivered.

While the Priestley 11 are important to ensuring a base level of knowledge across a range of topics, they stem from a time before advancements in information and communication technologies led to vast improvements in the ease of accessing information. Today, the challenge is not obtaining information, but rather knowing how to analyse it, use it, and place it in context. In other words, the art of the professional lies less in an encyclopaedic memory but more in the skill of accessing, understanding and wielding the knowledge.

The Commission acknowledges the importance of maintaining high quality entrants to the legal profession through training requirements. Without such requirements, there is a risk that consumers of legal services are harmed through sub-standard advice and representation, potentially denying them the ability to enforce their rights. In maintaining these high professional standards, however, it is important not to impose undue barriers to entry into the profession.

In terms of conducting and regulating the education and training of lawyers, achieving this balance requires several elements, as outlined below.

- *Achieving a balance across the three components of legal education (university, practical training and practising certificates)* — simply adding new elements to legal education (ADR, clinical legal education) risks driving up the cost and duration of education. Instead, there should be an examination of the role of each of these stages in training professional lawyers. Given the tendency towards more ‘generalist’ undergraduate law degrees a tiered approach to education

might be appropriate, with strengthened postgraduate or practical legal training for those who intend to practice.

- *Maintaining regulatory oversight while minimising regulatory burdens* — while the Commission appreciates the importance of an independent legal profession, the role of some professional associations in granting (and restricting) practising certificates, in the first instance, appears to duplicate elements of the admission process (such as ‘fit and proper person’ tests), creating burdens upon applicants as well as those administering the duplicate tests. The Commission considers that it is worth exploring whether other jurisdictions should adopt the consolidated model of administering admission and practising certificates (as in WA), or if regulatory oversight of a professional association (as in Victoria) is an appropriate balance.
- *Ensuring that a professional’s skills match the tasks they are allowed to do* — there is also potential to consider whether those who have been admitted necessarily need practising certificates to perform certain tasks (for example, provide advice, but not representation, when employed within a (non-legal) corporation or a government).

Achieving these aims across the spectrum of legal education is no small task. However, it is important that they are considered as part of a single review of legal education and training to avoid the risk that changes in one element have unintended consequences on other parts of the legal education system.

DRAFT RECOMMENDATION 7.1

The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:

- ***the appropriate role of, and overall balance between, each of the three stages of legal education and training***
- ***the ongoing need for the ‘Priestley 11’ core subjects in law degrees***
- ***the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education***
- ***the relative merits of increased clinical legal education at the university or practical training stages of education***

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- *the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.*

7.3 Regulation of the profession

The theory and rationale for regulation of the legal profession

Though typically expressed in a professional and ethical obligation context, the primary reason for regulation (and certification) of the legal profession is one of consumer protection. As chapter 6 noted, consumers need protection in the legal services market due to information imbalances between most consumers and their lawyer, and the ‘principal-agent problem’ that this gives rise to. In the context of professional standards this means attempting to (partly) rectify the information imbalance between consumers and providers by assuring consumers that all providers are of at least a minimum quality.

However, regulating quality is difficult, particularly when regulation is based on input standards for a service, rather than observable, quantifiable outputs (chapter 6). It carries with it risk at either end of the risk spectrum. That is:

- *if standards are too lax:* consumers may be exposed to ‘rogue’ operators who abuse their information imbalance. Further the system, particularly courts, may bear additional costs as inappropriate cases are brought, or judges have to ‘pick up the slack’ in managing cases and assisting practitioners
- *if standards are too strict:* while quality will be assured, the cost and effort required to meet standards will add directly to costs businesses face, and flow on to consumer costs. In the long term, stricter standards can also discourage entry into the profession.

While achieving this regulatory balance is difficult, there is a substantial body of literature devoted to best practices in regulation. As the Commission has previously observed, effectively targeted regulation can minimise regulatory burdens while still meeting the regulatory objective (PC 2007). In some circumstances, self-regulation will allow industries to find the level of regulation that suits them best, based on their own expertise. In other circumstances, allowing the incumbents in an industry to set standards can act as a barrier to entry favouring incumbents at the expense of consumers.

Attempts at national regulation have stalled

The legal profession has been the subject of several rounds of reform, including moves towards consistent national regulation. However, rapid and pronounced changes in the way in which the profession is regulated have not been common.

The latest attempt was the Council of Australian Governments' (COAG) *National Legal Profession Reform* project, which began in 2009 prompted by concern that the range of legal profession regulations imposed unnecessary costs on lawyers and did not provide adequate protection for consumers. Consultation documents were released in May 2010, including the draft bill and associated rules, a consultation report by the reform taskforce, a regulation impact statement and a COAG-commissioned cost-benefit analysis, conducted by ACIL Tasman (2010), which estimated a net annual benefit from the reforms of between \$16.9 and \$17.7 million.

In 2011, COAG agreed to legislation proposed by the reform taskforce. However, jurisdictions have progressively dropped out of the national project. Reflecting the relative concentration of the profession in some states, the potential benefits of the reforms were not evenly distributed across all states and territories. It has been suggested to the Commission during the course of this inquiry that distributional issues — and in particular the impact of removing a requirement for multiple trust accounts (discussed below) on the availability of 'public purposes funds' — was a motivation for smaller jurisdictions withdrawing from the process.

The remaining jurisdictions, Victoria and NSW (which account for 70 per cent of the legal profession) have proceeded with the reforms by agreeing to implement a uniform law that builds on COAG's work (Smith and Clark 2013). The scheme will commence on 1 July 2014. The relevant bill passed the Victorian parliament in March 2014 — the key reforms created by the bill are outlined in box 7.2.

Box 7.2 Reforms under the Legal Profession Uniform Law

The Legal Profession Uniform Law ('uniform law') is template legislation intended to be implemented in multiple jurisdictions in the same form. Victoria, as the first jurisdiction to pass it (in March 2014), will act as 'host'. NSW has agreed to join the scheme next. The aim is that other states and territories will choose to join after having the opportunity to observe the scheme's operation in Victoria and NSW. In many respects the law continues with the existing regulatory framework, for example in relation to professional indemnity insurance requirements. Some key reforms under the uniform law include:

- establishing new bodies such as a single Legal Services Council and Admissions Committee to set and apply policy, as well as a Legal Services Commissioner for uniform legal services regulation.
- simplifying and standardising regulatory obligations, cutting red tape for law firms, especially those operating across jurisdictions through:
 - a single set of rules governing matters such as the requirements for maintaining and auditing trust accounts, continuing professional development requirements and billing requirements
 - a single set of admissions requirements
 - a simplified process for admitting foreign lawyers to practise Australian law.

Other reforms relating to new billing rules and consumer complaints about lawyers are discussed in chapter 6.

A mobile profession — is harmony necessary?

Although the national reform process has stalled, unanimous national agreement is not necessarily required for the process of reform to continue. Indeed, SA updated their regulation in October 2013, and as noted above, NSW and Victoria have gone ahead with the Legal Profession Uniform Law ('uniform law'). This has bifurcated the regulation of the profession, between the approach in New South Wales and Victoria, compared to the remaining states and territories.

While some inconsistencies exist, their impact is not necessarily large. Other than some larger businesses and those in border communities, most consumers are unlikely to engage legal professionals across jurisdictions — for them, getting the 'right' regulation is more important than uniform national regulation. Similarly, sole practitioners and small firms may only have a small amount of work (if any) that involves multiple jurisdictions. For those practitioners that do work across borders, practising certificates are mutually recognised between Australian jurisdictions.

In addition to savings from the use of national trust accounts (see below), many of the purported savings from the reform come from streamlining processes that were

previously done on a jurisdictional basis. For example, nationally centralised admission was estimated to save \$2.45 million a year (ACIL Tasman 2010).

Overall, while a national approach may give rise to savings for governments and large firms, from the perspective of many consumers it is more important to find the most efficient set of regulations, rather than unanimously adopting a given regulation for the sake of harmonisation.

In this light, the reforms adopted by NSW and Victoria offer an opportunity to advance the regulation of the profession. The operation of the uniform law in those jurisdictions can serve as an experiment for other jurisdictions so that they can observe how the new regulations work, and how much control should be centralised, or should remain with ‘local offices’. It is therefore important that the process in Victoria and NSW incorporates information gathering to gauge the benefits of the reform. This would inform a post-evaluation of the reforms and provide other jurisdictions with an evidence base to act upon.

In addition to this ‘regulatory experiment’, the Commission is also interested in exploring any remaining reforms that represent a significant, and unnecessary, obstacle to the profession.

INFORMATION REQUEST 7.1

Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there ‘best practice’ jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?

Preventing irresponsible advertising

The Australian Consumer Law (ACL)¹⁸ governs a range of business interactions with consumers, including, among other things, laws prohibiting misleading and deceptive conduct, which includes false advertising. As noted in chapter 6, these provisions (and the other consumer protections available under the ACL) generally apply to the provision of legal services.

However, in relation to advertising, lawyers are also subject to an additional layer of regulation. In all jurisdictions, legal practitioners are allowed to advertise their services provided the advertising is not false, misleading, deceptive, offensive or prohibited by law (for example, as outlined in the *Australian Solicitors’ Conduct*

¹⁸ Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*.

Rules 2011). In Queensland, WA and the NT there are further restrictions on advertising by legal practitioners that seeks to encourage a potential client to engage that practitioner for a personal injury claim. There are also prohibitions against promoting services at hospitals or at the scene of an incident.

Similar restrictions also exist in NSW under both the *Legal Profession Regulation 2005* and the *Workers Compensation Regulation 2010*, which together effectively prohibit the advertising of personal injury services, which affects the range of words lawyers can use in their advertising (box 7.3).

Some of these additional advertising restrictions were introduced to curb a surge in public liability claims (and a corresponding rise in insurance premiums) in the early 2000s. Nonetheless, limiting the advertising of legitimate services — rather than reforming the public liability laws themselves to achieve an appropriate balance — amounts to ‘shooting the messenger’. Instead of dealing with the root of the issue, prohibitions on advertising risk limiting competition and inhibiting consumers’ attempts to search for the best service provider — an issue already of concern in the legal services market (chapter 6).

Further, some restrictions are aimed at preventing ‘irksome’ behaviour by some lawyers, such as ‘ambulance chasing’. Such behaviour can have negative effects including exploiting vulnerable consumers, encouraging potentially vexatious claims and generally bringing the legal profession into disrepute. However, rather than prohibiting all advertising, the Commission considers that such behaviour is more appropriately dealt with through general prohibitions on ‘dishonest and disreputable conduct’¹⁹ and enforced by complaint bodies.

Overall, the Commission considers that reliance on the ACL (and legal complaint bodies for ethical matters) is sufficient to protect consumers from any misleading, deceptive or otherwise unethical conduct, without inhibiting advertising by the profession. Lifting the existing prohibitions could lead to ‘teething problems’ as lawyers may be unsure of exactly what sorts of advertising are newly permitted, and what sorts remain prohibited (as misleading or deceptive conduct). Therefore, to assist lawyers and consumers in transitioning to the new regulation, jurisdictional complaints bodies should formulate and publish guidelines for good advertising. The complaints bodies should also draw on the expertise of their local Offices of Fair Trading (or equivalent), and the Australian Competition and Consumer Commission in relation to the ACL.

¹⁹ See, for example, *Australian Solicitors’ Conduct Rules*, rule 5 (Law Council of Australia 2011a).

Box 7.3 Prohibitions on advertising personal or work injury services in NSW

In NSW, clauses 23 to 40 of the *Legal Profession Regulation 2005* and clauses 78 to 85 of the *Workers Compensation Regulation 2010* effectively prohibit lawyers from advertising their services in relation to personal or work injuries.

In addition to the injuries themselves, the regulations extend the definitions of the prohibition to include:

... any circumstance in which work injury might occur, or any activity, event or circumstance that suggests or could suggest the possibility of work injury, or any connection to or association with work injury or a cause of work injury. (cl 79, *Workers Compensation Regulation 2010 (NSW)*)

In advising its members of their professional responsibilities, the Law Society of NSW (2009)²⁰ noted that the regulations 'appear to prohibit' a list of words and expressions in solicitor advertising, including:

• accidents	• motor vehicle accidents
• asbestos litigation	• motor vehicle injuries
• chemical spill injuries	• occupier's liability
• car accidents	• pain and disability
• diving accidents	• personal injury
• driving accidents	• public liability
• disability (subject to context)	• public place accidents
• dust diseases	• shopping centre accidents
• 'hurt at work'	• 'slips, trips and falls'
• 'hurt on road'	• toxic exposures
• injury law	• victims compensation
• medical malpractice	• victims of crime
• medical negligence	• work accidents
• motor vehicle accident claim	• work place injury
• motor vehicle collision claims	• workers compensation.

DRAFT RECOMMENDATION 7.2

Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

²⁰ While the Law Society's advice relates to the previous *Workers Compensation Regulation 2003 (NSW)*, the definition of the prohibition on advertising in clause 79 has remained unchanged in the 2010 version.

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- ***Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.***

Ensuring adequate professional indemnity insurance

In order to protect clients, legal practitioners are required to hold approved professional indemnity insurance as a condition of their practising certificates. The requirements and terms and conditions of insurance policies are approved by each jurisdiction's law society or bar council, except in NSW and SA where approval is granted by the Attorney-General, and Victoria where it is granted by the Legal Services Board. In several jurisdictions, the professional society negotiates with insurance providers in relation to provision of indemnity insurance, in some cases negotiating a 'master policy' with one or several insurance providers on behalf of practitioners.

In some jurisdictions, indemnity is provided by a 'captive insurer', which services all practitioners in that jurisdiction. For example, in Queensland, Lexon Insurance Pte Ltd (a wholly owned subsidiary of the Queensland Law Society) provides insurance to practitioners. And in Victoria, the Legal Practitioners' Liability Committee — a statutory authority (the only one of its kind in Australia) which reports to the Victorian Attorney-General and Minister for Finance — provides insurance to 16 000 solicitors in Victoria (and other jurisdictions).

While it is clear that some regulation is needed to ensure that the insurance cover obtained by lawyers is adequate to meet potential claims (and thus allow effective recourse for consumers), the need for profession-specific assurance of a financial product is less clear. This is especially the case when there is established economywide regulation of insurance products, overseen by the Australian Prudential Regulation Authority (APRA). Further, the profession-specific regulations often amount to unnecessary regulatory duplication as many of the professional indemnity insurance products are provided by organisations who are already approved by APRA. This creates compliance costs on legal service providers and unnecessary expenditure by regulators in duplicating work that has already been undertaken.

In this light, the Commission notes that it is not the first to question the need for additional lawyer-specific insurance requirements. Indeed, one option that was raised in the *National Legal Profession Reform* process was that 'professional indemnity insurance policies would not need to be approved if provided by an insurer regulated by APRA' (COAG CRIS 2010, p. 26).

Additionally, other professions have accepted that regulation by APRA is appropriate for their insurance requirements. In particular, medical indemnity insurance — of particular importance due to the potential adverse impacts that medical negligence can have on a patient's life — is not subject to profession-specific requirements. Instead:

Since 1 July 2003, medical indemnity insurance has been required to be provided to Australian practitioners by insurers licensed under the *Insurance Act 1973* and prudentially supervised by APRA. (Australian Government Actuary 2012, p. 4)

Accordingly, the Commission considers that regulation of providers by APRA is sufficient for legal professional indemnity insurance. This could reduce the regulatory costs for the existing providers of professional indemnity insurance and allow the relevant regulators to each focus on their expertise — APRA on the financial viability of insurance products, and legal regulators on the standard and conduct of practitioners.

DRAFT RECOMMENDATION 7.3

State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.

Allowing innovation in business structures

While sole practitioners and traditional legal partnerships are still common in the market for legal services, law firms have increasingly adopted new business structures to meet their changing needs.

In Australia, the two most common alternative business structures are Incorporated Legal Practices (ILPs) and Multi-Disciplinary Partnerships (MDPs). Put simply, ILPs are corporations (as defined by the *Corporations Act 2001* (Cth)) which engage in legal practice. MDPs are a partnership between one or more Australian lawyers and one or more non-lawyers for the purposes of conducting a business that includes legal and other services — a common example is an accounting firm that also provides legal services.

Alternative business structures are becoming increasingly popular — for example, the number of ILPs in NSW increased from 900 in 2009 to 1200 in 2012 (Law Council of Australia, sub. 96).²¹ These structures are not limited to large firms — in

²¹ The Law Council also reported that in 2012 there were 2800 ILPs in Australia including the 1200 in NSW, 768 in Victoria, 454 in Queensland and 384 in WA (sub. 96).

NSW in 2009, 65 per cent of ILPs were sole practitioners, and 30 per cent were mid-sized firms with between two and five partners (Law Council of Australia, sub. 96).

These business structures are now permitted, subject to regulation, in all states and territories. These regulations are essentially targeted at ensuring that there is at least one director who is a legal practitioner, and that normal legal professional rules apply (including ethical obligations) — that is, that there is no ‘corporate veil’ that can shield practitioners from their professional obligations.

In addition to the current business structures, the Law Council of Australia called for the introduction of limited liability partnerships (LLPs) as an allowed structure:

LLPs are permitted in a number of other jurisdictions, for example the United States, United Kingdom, China, Germany, Canada, Greece, India, Japan and Singapore. They were introduced as a business structure with limited liability for professions such as the legal profession, and are a preferred business structure for international law firms.

LLPs offer the benefits of incorporation and limited liability (as is the case with incorporated legal practices) under a partnership structure which governs the relationship between the members of the LLP. (sub. 96, p. 109)

Given several international firms operate as an LLP, restrictions on the use of this business structure could raise the costs of entering the Australian market, and potentially limit competition. Nonetheless, this has not entirely discouraged entry from some international firms who either established a local office in accordance with Australian regulations, or merged with a pre-existing domestic firm.

While the Commission is interested in exploring any reductions in regulatory burdens, it is also interested in any potential ‘side effects’ that allowing this new structure could have — particularly in relation to the availability of recourse for consumers in the event of any wrongdoing by lawyers.

INFORMATION REQUEST 7.2

Does the inability to operate as a limited liability partnership represent a significant cost to, or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?

A need for local trust accounts for national firms?

Lawyers' trust accounts are used to hold money on behalf of a client in connection with the provision of legal services, including holding the proceeds of a court action. The manner of handling money in a trust account is regulated by legal profession acts in each state and territory, which cover how money must be deposited, recorded and disbursed (among other things).

Currently, firms operating across borders must keep separate accounts in each jurisdiction. The compliance cost savings of allowing single, national trust accounts was estimated to be a large share of the potential benefits of the *National Legal Profession Reform* process — some \$11.6 million of the roughly \$17 million benefits per year (ACIL Tasman 2010). These savings would only benefit larger firms — at the time, ACIL Tasman (2010) identified nine large and 75 medium firms that could benefit.

The Commission understands that a proposal for a national trust account was one of the stumbling points in the national reform process. Smaller jurisdictions feared that firms might relocate their trust accounts to large jurisdictions, which would have an effect on the amount of interest from the trust accounts going to 'public purposes funds' in each jurisdiction (see below). During the reform process, the idea of developing a funding formula (to divide interest revenue between jurisdictions) was floated (The Law Society of WA 2009), but was not a feature of the draft National Legal Profession Legislation (AGD 2011a).

However, even with separate accounts, costs could be minimised through memoranda of understanding between regulators to mutually recognise audits of multi-jurisdictional firm's accounts, particularly where these are conducted according to nationally agreed accounting standards.

A further issue relates to the use of the funds obtained from the interest on trust accounts (and some other sources such as earnings from investment, fines, or contributions from practising certificate fees). The manner in which these funds are distributed varies significantly between jurisdictions, and can be controlled by law societies, attorneys-general (sometimes overseeing law societies) or independent bodies. In some cases the distribution of funds are set out in legislation. For example, in Victoria funds are only available for distribution to community organisations after payments have been made to fund legal professional regulators, and to professional associations for continuing legal education programs (Vic LSB 2012). Funds can also be used for such things as:

- disciplinary costs
- regulatory bodies such as professional boards and legal services commissions

- projects aimed at legal education and community awareness
- legal aid commissions and particular community legal centres
- compensation claims for defaults by law firms
- administration of the funds themselves, including auditing and staff costs.

In Queensland in 2013-14, over \$19 million (nearly 60 per cent of the available funds) was allocated to the legal aid commission, nearly \$7 million (21 per cent) to a range of community legal centres and almost \$5.5 million (over 16 per cent) to the Legal Services Commission (Qld DJAG 2013). Similarly, in Victoria in 2013, over \$25.5 million (representing over 31 per cent of the overall ‘general account’ funds) was allocated to Victoria Legal Aid, nearly \$8 million (10 per cent) to the Legal Services Commissioner, and nearly \$4.5 million to the Law Institute of Victoria for delegated functions (5.5 per cent) (Vic LSB 2012).

The Commission is interested in exploring if current approaches to ‘public purposes funds’ across jurisdictions represent an efficient use of the interest from solicitors’ trust accounts.

INFORMATION REQUEST 7.3

To what extent would harmonising accounting standards and mutually recognising audits between jurisdictions reduce the compliance burden on firms from maintaining trust accounts in each jurisdiction? Are there alternative ways to ‘ earmark’ interest earned from the account as arising in particular jurisdictions? Is it possible to develop funding formulas to redistribute funds if national trust accounts are adopted? If so, what should these formulas be based on — legal activity or legal need in each jurisdiction?

INFORMATION REQUEST 7.4

How should money from ‘public purposes’ funds be most efficiently used?

Reservation of practice — fit for purpose or one size fits all?

It is an offence for non-lawyers to provide legal services. This ‘reservation of practice’ rule exists to allow the profession to regulate itself on quality grounds. Professional bodies often cite fears that allowing anyone other than fully qualified lawyers to provide legal advice risks consumers receiving low quality services and the possibility that courts have to ‘pick up the slack’ in rectifying errors or being ‘clogged’ with ill-prepared, ill-advised actions that only delay other, valid claims.

However, not all areas of the law remain the exclusive domain of lawyers. Reforms have led to the creation of particular ‘specialists’ such as conveyancers, migration agents and tax agents, who are allowed to offer services within their designated area of expertise.

The Law Council of Australia (sub. 96, p. 105) supported the retention of the reservation of practice for a range of reasons (box 7.4). However, each of these grounds suggests that *some level* of regulation is required, but not that the *current* level of regulation is appropriate for every service.

Box 7.4 The Law Council's grounds for reserving practice

The Law Council supported the retention of current arrangements for the reservation of practice on several grounds:

- (a) Australian lawyers are subject to the most extensive regulatory framework of any professional service provider in Australia. Non-lawyers are not subject to the same standards and expectations of ethical or professional conduct and are not subject to the same complaints handling and investigatory processes, and supervision by the court or legal services regulators;
- (b) Australian lawyers are subject to extensive education and professional training requirements both before and after they become eligible for admission as a legal practitioner. This requires specific knowledge about a broad range of legal areas (covered by the Priestly 11 ... expert knowledge about their areas of practice or specialisation and continuing education with respect to legal practice skills;
- (c) Legal practitioners are required to hold a high level of professional indemnity insurance, to ensure clients can be indemnified in the event of malpractice or negligence on the part of the practitioner. This is not a standard requirement for non-lawyers. All jurisdictions have a fidelity fund, the purpose of which is to provide compensation to clients who have lost trust money or property due to dishonest conduct by a practitioner or law firm; and
- (d) Legal practitioners owe specific duties to their clients and to related parties, including fiduciary duties and a requirement to observe confidentiality and client legal privilege. In broad terms, there is a duty for all lawyers to act in their client's best interests, which is a professional obligation second only to the lawyer's paramount duty to the Court and to the administration of justice. These obligations are unique to the legal profession and do not affect most non-lawyers. Breach of these obligations by lawyers can have serious professional consequences. (sub. 96, p. 105)

First, in relation to the regulatory framework, arguments that non-lawyers are not subject to the same standard as lawyers presume that any reforms would lead to an ‘open slather’ and any person could offer any service, unburdened by any regulation at all. This is not necessarily the case. Indeed, careful consideration of the introduction of new specialities could afford an opportunity to consider appropriate and tailored regulation suited to that specialty — including the duration of training and level of insurance required by the relevant risk profile. While this does not

mean that new specialities would go unregulated, equally it should not necessarily mean that new specialties are burdened with exactly the same regulation as generalist lawyers (unless their risk profile and a considered analysis of the costs and benefits to the industry and consumers suggests otherwise).

As noted above, the profession currently incorporates ‘tiers’ of speciality in the form of the delineation between barristers and solicitors and, to a lesser extent, classes of practising certificates. Contemplating further delineation, and adjusting regulation in line with risk and responsibility, simply adds granularity to this pre-existing concept. Indeed, some tribunals in Australia (chapter 10) allow non-lawyer representatives (for example, in relation to employment and work health and safety matters).

Second, as identified above, graduate lawyers commence in the workforce with a substantial degree of embedded ‘human capital’ (investment in their own education), and seek to recoup their costs through their work. More narrowly defined roles could allow for more tailored education with flow on effects for the prices of legal services:

Bringing down the price of legal help from a luxury good to a commodity can only promote planning, advice, and dispute resolution. That requires increasing the supply and lowering the cost of supply, by allowing more nonlawyer professionals to enter the field without first spending three years and six figures to acquire a full-fledged JD. Specialist professionals need not acquire that breadth of knowledge if they do not plan to be jacks of all trades. Perhaps law schools and colleges could develop shorter paraprofessional training, akin to paralegal courses, to prepare people to handle unemployment compensation, disability claims, uncontested divorces, estate planning, and similar specialized tracks. (Bibas 2013, p. 1306)

In addition to those already existing as part of the legal profession in Australia, there are further precedents in other jurisdictions for considered and specific relaxing of the reservation of practice. In the United States, Washington State’s newly founded Limited License Legal Technician Board has developed rules that will soon lead to the start of the first class of limited license technicians, focused on family law matters (Kittay 2013). The course will run for one year. While the process of implementing limited licenses in Washington State has been arduous (box 7.5), it is seen as a model for other jurisdictions that are seeking to introduce similar concepts. For example, California is considering limited-practice licences, and New York is examining ‘the use of non-lawyers to provide some assistance in simple legal matters ... [focused on] the areas of housing, elder law and consumer credit’ (Rigertas 2013, p. 385).

Box 7.5 Introducing limited licences: experience in the United States

In some jurisdictions in the United States, non-lawyers are allowed to perform some legal tasks. For example, in California, paralegals working under supervision can assist consumers in limited ways, such as helping to fill out forms.

Washington State has expanded on this concept by introducing limited licences for legal 'technicians', with clearly specified abilities:

... technicians must be trained and approved by the Limited License Legal Technician Board. They work independently and help clients with tasks including selecting and completing court forms, informing them of procedures and timelines and reviewing and explaining pleadings. They are not, however, allowed to represent their clients in court and cannot negotiate with opposing counsel on the clients' behalf. (Yarbrough 2013)

The road to establishing limited licences has been a long one. While the first group of 'technicians' (focused on family law) take their licensing exams in September 2014 (Kittay 2013), its origins can be traced back to 2001, when the Washington State Practice of Law Board was established to, among other things:

... advise on the authority of non-lawyers to perform legal services and to make recommendations to the Supreme Court about services that non-lawyers could perform to fill the need for legal services. (Yarbrough 2013)

After considering the issue of limited licences, the Board submitted a rule to the State's Supreme Court in 2008. The rule was not approved until 2012, and only after modifications. In approving the law, the Washington Supreme Court explained that:

... the rule was necessary because the legal profession's efforts to close the access to justice gap have not successfully stopped the growth of low and moderate income citizens who have no access to affordable legal assistance. (Rigertas 2013, p. 384)

Similarly, despite studies supporting the concept of licensing legal technicians in the late 1980s, and early and mid-1990s, the State Bar of California has only recently decided to support limited licensing. This decision followed the conclusion of a State Bar working group that conducted hearings in 2013. In line with the experience in Washington State, the Californian proposal faced opposition that came 'almost exclusively from lawyers' (Kittay 2013). However, some also pointed out that limited licences were targeted in areas of unmet legal need, so in theory they should not detract from the existing caseloads of lawyers in the market. Additionally, there was recognition that sole reliance on the 'full' lawyer model did not meet the legal needs of the modern market, as members of the California State Bar remarked:

Despite fundamental changes in society and the needs of clients, the basic legal service delivery system we use today has not fundamentally changed for more than 150 years ...

Adding up what it costs for a fully licensed lawyer to deliver full-service legal services in today's market, it is hard to deliver such legal services for less than \$100 an hour, a price many people cannot afford ... There's a market below that to be served by trained professionals. ... Lawyers are not serving that market ... We have simply priced ourselves into oblivion. (Yarbrough 2013)

Analysts in the United States acknowledge that while limited licences do not resolve all access to justice issues, they nonetheless have a role to play:

Washington State's legal technician program may not be perfect, and it will not solve the access to justice problem entirely. But the program does offer a well-regulated framework for enhancing access to justice meaningfully, and perhaps even equitably, by authorizing trained professionals to practice in discrete, limited areas of law. (Holland 2013, p. 128)

Examples of limited practice also exist in other countries. In the United Kingdom 'McKenzie Friends' and 'lay advocates' are allowed to provide assistance to those who would otherwise be self-represented (chapter 14). In several European countries, that operate under the civil law system, 'notaries' serve as impartial, independent professionals who assist both parties (rather than representing the interests of only one party) in completing a range of transactions:²²

In five central European countries ... notaries handle real estate transactions and registries, security interests, corporate transactions from formation through liquidation, marital property contracts and arrangements, same-sex civil unions, uncontested divorces, probate and intestacy proceedings, consumer financial services, and alternative dispute resolution. In some cases, consumers may choose whether to hire a lawyer or a notary for the same type of transaction. In Germany, notaries handle real estate conveyances, mortgages, incorporations, wills, estate and tax planning, powers of attorney, and important contracts. (Bibas 2013, p. 1304)

Similarly, Japan allows many kinds of (non-lawyer) legal professionals to appear in court including '... patent attorneys, administrative law specialists, judicial scriveners, tax attorneys, social insurance and labour specialists, and in-house transactional lawyers' (Bibas 2013, p. 1304).

Based on the pre-existing experience both overseas and in Australia, the Commission considers there is merit in examining whether further delineation of legal specialties, coupled with forms of limited licences, would be appropriate.

As they are primarily targeted at unmet need in other market segments, limited licences offer the opportunity to increase access to justice beyond the level that lawyers are currently delivering. Further, while they will not replace the 'core'

²² Notaries in civil law systems (as in Europe) typically complete similar training to lawyers (including a university degree, professional training and 'apprenticeship' practice), with a focus on notarial law (primarily private transactions) instead of court-based skills such as advocacy, procedure and evidence. While the concept of notaries is common across civil law systems, the exact arrangements vary. For example, in some countries they work solely as notaries, but in Germany some 'advocate-notaries' practise as both lawyers and notaries. Similarly to elements of legal professional regulation, some systems have anti-competitive restrictions on the profession, including limits on the overall number of notaries, and fixed fees set by government. Both of these limits were abolished in the Netherlands in 1999 (Schmid 2012).

business of a lawyer, such new models can place some competitive pressure on the ‘fringes’, perhaps preventing high charges for relatively simple activities acting as cross subsidies for core legal services. Together with transparency requirements in billing regulation (chapter 6), this competitive pressure could help to ensure that lawyers’ service charges more closely reflect their costs.

As is the case with unbundling (chapter 19), governments and regulators can delineate the stages in legal advice by defining new specialties. Indeed, progressive introduction of limited licences is likely to facilitate further unbundling opportunities as properly informed consumers could use the services of particular specialists for stages of a legal process, and only engage the (expensive and skilled) barristers or solicitors (at the peak of the professional ‘pyramid’) when necessary. This has the benefit of reduced costs to consumers and would also free up the time of the more experienced practitioners to focus on complex matters. Allowing specifically trained professionals to perform limited tasks in this way is a concept that has been accepted in other professions, such as medicine:

In medicine, where lives are at stake, we let nurse practitioners, midwives, paramedics, and urgent care clinics provide certain routine services but refer more complex matters to doctors. ... So too the law could let paralegals, social workers, and court clerks assist and advise litigants in routine criminal and civil cases, as well as those contemplating routine wills, divorces, contracts, corporations, and the like. (Bibas 2013, p. 1305)

Although there are benefits in terms of reduced costs of supply, and to consumers, introducing limited licences in Australia would not be without some costs. In consultations with the Commission, concerns were raised that new classes of ‘technician’ could increase costs for legal regulators as they must be able to regulate, and handle complaints for, a range of specialties, potentially subject to a range of different regulations.

Broadening their expertise would require effort (and expense) on the part of regulators. However, the Commission notes that a wide remit is not unprecedented — many regulators cover a range of professions. For example, the Australian Health Practitioner Regulation Agency (AHPRA) oversees the national regulation of 10 health professions (PC 2012), and state and territory Offices of Fair Trading are responsible for regulating a diverse range of industries including tattooists, travel agents and funeral providers. While it is mindful of the expense of regulating new professions (in the form of requirements for additional funding), the Commission considers it is likely to be small when compared to the benefits that can arise to consumers, and the community as a whole.

As discussed above, the Commission is not advocating opening the provision of legal services by any person who would represent themselves as capable. Instead,

the Commission proposes considering appropriate areas of specialty that could be introduced, and the educational and regulatory requirements that should accompany them.

INFORMATION REQUEST 7.5

In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?

Draft

8 Alternative dispute resolution

Key points

- Alternative dispute resolution (ADR) provides parties with a range of options that are procedurally simpler and potentially less adversarial than resolution by hearings in courts and tribunals. It covers a broad range of facilitative, advisory and determinative processes that can be tailored to particular dispute types and circumstances.
 - ADR is often a more efficient and effective method to resolve disputes (compared to other means), and can lead to both lower cost dispute resolution and mutually beneficial outcomes being achieved. The parties involved also have more control over the process, which is undertaken confidentially.
 - However, it is not an appropriate mechanism for resolving all disputes and the use of ADR must be accompanied by safeguards that allow for litigation if a settlement cannot be reached. Further, there are concerns that a lack of transparency in ADR processes and outcomes may limit the identification and resolution of systemic legal issues.
- Despite the greatly expanded use of ADR in recent years, there is significant scope to increase ADR use across the civil justice system.
 - Government agencies need to continually improve their practices to attempt to resolve disputes quickly and without litigation. In particular, the development and implementation of dispute resolution management plans would promote certainty and consistency for both administrators and parties in dispute.
 - Courts and tribunals can improve incentives to better encourage disputes to be settled before determination.
 - State and territory governments could partially subsidise small business commissioners (or their equivalent) to provide ADR services to small businesses, particularly in jurisdictions where tribunals have limited civil jurisdiction.
 - More broadly, organisations that resolve disputes should develop and use guidelines to allocate disputes to the most appropriate mechanism for resolution.
- Greater uptake of ADR also requires: improved knowledge and education about ADR in the wider community; triage and advice services that suggest ADR options; practitioners who are experienced and competent; and support to ensure services can cater for diverse needs.
- Evidence on the efficiency and effectiveness of ADR is patchy and would benefit from a standardised set of indicators. This should be developed as part of a broader approach to data collection in the civil justice system.

In the last few decades, alternative dispute resolution (ADR) techniques and processes have gained increasing recognition as a way for individuals and businesses to seek to resolve disputes without recourse to traditional trial and hearing processes. ADR complements other forms of dispute resolution (such as early resolution and hearing processes) and is widely used across a range of civil law areas.

This chapter begins by examining how ADR can be used to resolve legal disputes, and the impacts of doing so (sections 8.1 and 8.2). It also considers the potential for ADR to be applied more widely and how this might be facilitated (sections 8.3 and 8.4). The final section briefly examines how to build a better evidence base in support of ADR activities (section 8.5).

While the work of government and industry ombudsmen makes use of ADR techniques, this work often extends beyond what is considered ADR by also including a level of independent investigation not normally associated with ADR. The unique challenges faced by ombudsmen in discharging their duties as external dispute resolvers are considered in the following chapter.

8.1 What is ADR and what role does it play?

ADR refers to a range of ways that people can resolve disputes without resorting solely to court and tribunal hearings for determination. Progressing disputes through formal court and tribunal processes is resource intensive and can be lengthy, costly and stressful for parties involved (chapter 3). For some disputes, it may be more appropriate for parties to seek a resolution through the use of ADR.

ADR methods are employed across the civil justice system to resolve all types of disputes and complaints. For example, parties in dispute may engage in ADR privately, supported by legal professionals or ADR practitioners. Indeed, it is not uncommon for companies to agree ADR mechanisms within contracts as their primary enforcement option. Alternatively, specialised dispute resolution bodies may facilitate ADR processes. Services may be publicly- or industry-funded and may operate as part of a larger suite of services to assist disputing parties (such as in the case of legal aid commissions (LACs)). Many government departments also use ADR techniques to lessen the uncertainty and costs associated with litigation. Finally, courts and tribunals often refer or require parties in dispute to participate in ADR, either before or as part of litigation proceedings.

In some cases, ADR is not used to resolve a dispute but rather to narrow the scope of issues in dispute for a court or tribunal to subsequently adjudicate. ADR can also

provide guidance for the parties in dispute as to the case's merits and the likelihood of various outcomes if litigation were to proceed.

Given the disparate development and use of ADR across a wide variety of dispute types, there is a range of views as to what is and is not considered ADR and the characteristics of different types of ADR techniques. For the purposes of this draft report, there are three broad types of ADR processes — facilitative, advisory and determinative — with various specialised processes within each of these broad areas (box 8.1). Each of these vary in their formality, the extent to which outcomes are binding, and in their use of practitioners to assist parties towards a resolution (NADRAC 2012b).

Box 8.1 Exploring ADR processes

Unlike negotiation where parties in dispute interact directly with each other, ADR involves an independent practitioner who assists parties to attempt to reach a resolution.

Facilitative processes assist parties in dispute to identify issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Examples of facilitative processes include mediation, conciliation and facilitated negotiation.

Advisory processes consider and appraise the dispute to provide advice on the facts of the dispute, the law and, in some cases, possible or desirable outcomes and how these may be achieved. Examples of advisory processes include case appraisal, conciliation (where advice is offered) and neutral evaluation.

Determinative processes evaluate the dispute, including the hearing of formal evidence from parties in dispute where appropriate, before making a determination. Examples of determinative processes include arbitration, expert determination and private judging.

Source: Attorney-General's Department (2013a).

In general, facilitative and advisory ADR processes are undertaken with the consent of the parties in dispute and are relatively informal, generally non-binding and seek mutually acceptable agreement based on the evidence, arguments and interests of participants. By contrast, adjudicative ADR processes are focused solely on the evidence and arguments, and are more formal and binding (that is, subject to review or appeal).

This chapter considers the full range of ADR processes as described above. However, some ADR techniques are more appropriate for resolving certain types of legal disputes, or in particular contexts. As such, the following sections explore the appropriateness of ADR in resolving civil disputes generally and, where relevant, a

specific ADR method for targeted purposes (for example, mediation as a pre-action protocol for family law disputes or mandatory arbitration to resolve a commercial payment dispute).

8.2 The benefits and costs of using ADR

Why use it?

There can be a number of advantages for stakeholders in resolving disputes through ADR compared with court and tribunal proceedings. ADR can produce overall results that are more satisfactory to all parties involved than through litigation, provided that both sides are willing to constructively engage in the resolution processes.

The control that ADR gives people over their own destiny, its potential to repair damaged relationships and the ability to manage sensitive matters in private all offer incentives and good reasons for using ADR rather than courts ... (Cannon 2009, p. 8)

There can be significant savings in cost and time to all stakeholders if disputes can be resolved early and without the need for the dispute to escalate to a court or tribunal.

Even in cases where disputes involve courts and tribunals, ADR can be employed to promote early settlement and minimise hearing times, and so avoid significant costs. Stakeholders note that the time taken to resolve disputes is often more important than monetary costs, as prolonged disputes often restrict the activities of disputants and can result in missed social and economic opportunities.

The cost of a dispute for small business is not merely the financial cost of the lost business and the cost of pursuing resolution (such as legal costs), but also the opportunity cost and emotional stress involved. The opportunity cost includes what the small businessperson would otherwise have achieved for the business using their time and effort. For small business, resolving a dispute takes someone out of the business. (Australian Small Business Commissioner, sub. 23, p. 3)

By choosing to use ADR, parties in dispute have more control over the course of events and, to some degree, the overall outcomes. For example, parties can often choose who the ADR practitioner is and when it takes place. In addition, ADR can also be less formal than a court or tribunal hearing, and this may suit parties who are unfamiliar with the relevant institutional procedures and rules, such as those without legal representation.

Parties may value the confidentiality of resolving a dispute in private and eliminating the public interest and scrutiny associated with a hearing. Conversely, others may value their ‘day in court’ and derive non-pecuniary benefits from this process. It was suggested by Consumer Action Law Centre (sub. 49) that confidentiality may do more harm than good for accountability and can make it difficult to identify and remedy systemic problems since settlements are not publicly available. It is also difficult to evaluate the quality of services and outcomes.

Some ADR processes also allow parties in dispute to take an interests-based approach to dispute resolution — that is, the dispute resolution process takes into account participants’ underlying needs and concerns.²³ According to the National Alternative Dispute Resolution Advisory Council (NADRAC):

The benefits of ADR in undertaking interests-based processes include people in dispute being able to reach agreements that they are more likely to comply with and which may be more likely to finally resolve the whole dispute. (sub. 109, p. 4)

Anecdotal evidence from consultations corroborated the notion that ADR agreements more likely to be complied with than court and tribunal determinations.

Fundamental justice principles of fairness and equity need not be compromised by the use of ADR where parties have access to courts and tribunals if they cannot reach a consensual agreement (Negocio Resolutions, sub. 52) and ADR is not mandated in circumstances in which it is not appropriate.

What does the evidence say?

Many stakeholders argued that resolving disputes by ADR is beneficial, efficient and effective, subject to caveats about appropriateness.

It is widely accepted that if a dispute can be resolved quickly, cheaply and fairly through ADR, disputants are generally more satisfied with the outcome than if that dispute had been resolved through court process. (QPLICH, sub. 58, p. 4)

However, relatively few submissions provided robust evidence to demonstrate the benefits of ADR compared with other methods for resolving similar disputes. Quantitative analysis was particularly lacking.

There is a huge gap in information that must be addressed. Energy and resources need to be invested to answer this question [of how much ADR is used and whether it is successful]. (Negocio Resolutions, sub. 52, p. 18)

²³ By contrast, court and tribunal hearings and adjudicative ADR take a rights-based approach to dispute resolution which considers only the participants’ legal entitlements.

In part, a lack of quantitative analysis reflects the relatively recent emergence of more systematic and widespread ADR use. But in the main, analysis is limited by challenges in assessing the costs and benefits of ADR. Some benefits, such as harmonious ongoing relationships and the confidentiality of outcomes, are subjective and not easily quantified. Assessments of whether parties who use ADR are ‘better off’ also need to take in to account the possible alternative course of action. This assumes the counterfactual is known — whereas the outcome of an alternative course may be uncertain, or there may be a range of alternative courses available.

That said, settlement outcomes and satisfaction rates provide some insights into the effectiveness of ADR for certain types of civil disputes. Many stakeholders who undertake ADR provided the Commission with data on the success rates of ADR in their field of expertise (box 8.2).

Box 8.2 ADR success rates

Stakeholders and research studies indicate that the success rates of ADR across specific areas of law are relatively high. For example:

- Legal Aid NSW Family Dispute Resolution achieved a full or partial settlement rate of 81 per cent in 2012-13 (sub. 68).
- Annual reports of the Office of the Victorian Small Business Commissioner indicate that around 70 to 80 per cent of matters resolve at mediation (VSBC 2013).
- The Administrative Appeals Tribunal reported that in 2012-13, 79 per cent of applications were finalised without a decision on the merits following a hearing (sub. 65). However, this figure may overstate the success of ADR as finalisations also result from dismissals, withdrawals and agreements reached without ADR.

More generally, ADR practitioners report that ADR is an effective means of settling disputes with 93 per cent reporting settlement outcomes in 50 per cent or more of disputes and 57 per cent reporting settlement outcomes in 75 per cent or more of disputes (Unpublished survey of ADR practitioners undertaken in 2013 by the Attorney-General's Department).

While high success rates of ADR are one indicator of the effectiveness of ADR, they may not tell the full story. As outlined above, ADR can be more accessible for parties who are not familiar with formal procedural rules of courts and tribunals, and allows parties to work constructively on long-term solutions to their legal problems. These benefits are not captured in settlement outcomes.

Satisfaction rates provide another perspective on the value of ADR services. Analysis from the *LAW Survey* indicates that people who finalised their disputes by ADR (through, for example, formal mediation, conciliation or dispute resolution

sessions) were ‘very satisfied’ in 33 per cent of problems, relative to 44 per cent of problems finalised in courts and tribunals. However, there was a similar proportion of ‘very’ and ‘slightly’ satisfied between the two methods (75 and 72 per cent, respectively) (Commission estimates based on unpublished *LAW Survey* data).

Rates of satisfaction appear to be higher among businesses. For example, satisfaction rates for the Victorian Small Business Commissioner’s (VSBC’s) mediation services were 93 per cent, with parties themselves more satisfied than their legal representatives (Sourdin 2012b). A number of independent research studies have examined ADR practices in more depth and reported generally positive outcomes across a range of indicators.

Family dispute resolution services in LACs were found to deliver benefits that outweighed costs for all jurisdictions except Victoria and the Northern Territory between 2004-05 and 2007-08 (table 8.1). It also found that this model for family dispute resolution was effective in avoiding high costs of litigation, enabled management of more complex legal and support needs, and was effective in identifying family violence and child abuse early in the process (KPMG 2008).

The relatively low benefit-cost result for Victorian LACs may reflect certain characteristics of the implementation (such as intensive pre-conference activity) and reporting differences. In addition, Victorian LACs did improve their performance over the course of the evaluation and, by 2007-08, benefits almost outweighed costs (KPMG 2008).

Table 8.1 Benefit-cost results for family dispute resolution services provided in LACs
2004-05 to 2007-08, \$'000s

<i>Jurisdiction</i>	<i>Benefits</i>	<i>Costs</i>	<i>Net present value</i>	<i>Benefit cost ratio</i>
NSW	42 262	26 118	16 144	1.62
Vic	9 507	11 971	-2 463	0.79
Qld	39 558	26 272	13 286	1.51
WA	9 036	6 830	2 206	1.32
SA	4 628	2 660	1 968	1.74
Tas	7 240	1 867	5 373	3.88
ACT	1 394	964	430	1.45
NT	1 051	1 053	-2	1.00
Total	114 676	77 736	36 940	1.48

Source: KPMG (2008).

There has been a focus in recent years on encouraging parties — such as through obligations in pre-action protocols — to seek to resolve their disputes (including through ADR) before approaching the courts.

The requirements (and assessments of their effectiveness) are discussed in greater detail in the following section. But overall findings indicate pre-action requirements that attempt to encourage the resolution of disputes using ADR appear to work well, are effective in resolving disputes, are mostly regarded as procedurally fair and just, and could lead to cost and time savings even where litigation had commenced (Sourdin 2012b).

While this evidence shows that ADR can be effective in particular contexts, it should not be interpreted as universal support for ADR. The nature of civil legal disputes varies, and so too does the suitability of ADR. This was borne out in research by Sourdin (2012b), which found that the benefits of pre-action requirements varied considerably according to the nature and characteristics of the dispute, and was predicated on parties having a genuine interest in settling prior to litigation.

Indeed, there are some circumstances where the use of ADR may not be considered appropriate. These have been identified by stakeholders as circumstances in which:

- there is an imbalance of power between parties (such as between consumers and corporations) because of socioeconomic disadvantage, or a history of violence between the parties
- there is an unwillingness of parties to engage in constructive ADR, or to acknowledge that there is a problem
- there is little or no prospect of a successful outcome, such as when claims are unreasonable and inflexible or when disputes are vexatious
- it is in the public interest to set a precedent that can guide future dispute resolution, particularly if a dispute type is common and recurring
- one party wants to send a public message to deter future action (such as defending intellectual property rights)
- time is a crucial factor and a party wants to stop a disputed action immediately.

In these instances, mandatory ADR requirements (as part of pre-action protocols) prior to litigation may delay resolution and increase costs, and thereby inhibit efficient and effective resolution of disputes.

8.3 Can ADR be used more extensively?

While there are some circumstances in which the nature of the legal dispute and the individual circumstances of the parties involved mean that ADR is not an appropriate resolution mechanism, the available evidence suggests that, outside

these circumstances, the use of ADR can be beneficial. And there are some areas — such as court and tribunal processes, government disputes and private disputes — where there is potential to better target and encourage greater use of ADR.

- For court and tribunal processes, broadly based ADR requirements — prior to approaching the courts, or prior to any hearing if parties have approached a court — may be appropriate so long as there are safeguards and exemptions that do not constrain access to justice. Alternatively, requirements to undertake ADR in the first instance may be justified where there is an evidence base to suggest good outcomes or where there have been good outcomes in a related field.
- For disputes with government, processes used by some government agencies seem to be working well and could be expanded and adopted by other agencies. Beyond encouraging government agencies to consider ADR, the diverse nature of government disputes means that individual agencies are best placed to know when and where to use ADR to best effect.
- For private disputes, there could be a role for assisting small businesses to resolve their disputes efficiently and effectively through ADR, if possible.

The above options will not cover all circumstances. Clear guidelines on the range of ADR mechanisms available, and on how and when to best use ADR, should continue to be developed by organisations involved in resolving disputes — including courts, tribunals and ombudsmen.

Encouraging ADR for court- and tribunal-based disputes

As in other forums, ADR has a place in the court and tribunal system as a way of facilitating the fair, efficient and effective resolution of disputes. Broadly speaking, ADR can be employed at two stages — before parties approach courts or tribunals to have their disputes heard, or as part of the court or tribunal process.

The first seeks to encourage parties to actively and seriously consider resolution before becoming entrenched in a litigious position.

In the second, where matters proceed to litigation, the aim is to ensure that the issues are properly identified and that early settlement is promoted. For matters that proceed to trial, ADR undertaken to narrow issues can reduce the time taken for a court or tribunal to determine the matter. There have been a number of efforts designed to promote the use of ADR at both stages.

ADR as part of pre-action requirements

In order to encourage the early resolution of disputes, some jurisdictions impose requirements on parties to consider alternative options for resolution prior to commencing formal proceedings. Some of these requirements are legislative, while others are prescribed by individual courts or tribunals.

In the federal jurisdiction, the *Civil Dispute Resolution Act 2011* (Cth) requires parties to file a ‘genuine steps statement’ as part of litigation proceedings and encourages parties to resolve disputes before commencing litigation. This explicitly includes consideration of, and participation in, ADR before commencing legal proceedings (OLSC 2012). The requirement extends to parties in certain types of legal disputes, including consumer protection, taxation, and intellectual property disputes.

The state and territory governments, however, have been more reluctant to embrace obligations requiring parties to seek to resolve their disputes before approaching the courts. Victoria and New South Wales considered introducing similar requirements to the Commonwealth, but these attempts proved controversial (Sourdin 2012b). Neither jurisdiction currently has legislated pre-action requirements and are reluctant to enact them until they are shown to improve the process of civil disputes.

While the Australian Government has examined the effectiveness of its pre-action requirements, the results are not yet public. Some state governments, such as New South Wales, intend to use this evaluation in deciding whether or not to implement similar requirements (Smith 2012). It would be premature for the Commission to advocate for broadly based requirements in the absence of this analysis.

The Northern Territory Supreme Court has implemented broadly based requirements whereby parties are expected to exchange early and full information, and engage in ‘good faith, genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings’ (NT Supreme Court 2009). Practitioners have estimated that costs for cases settled through pre-action protocols were considerably less than they would have been had the matter proceeded to litigation (estimated savings ranged from 50 to 96 per cent) (Sourdin 2012b). Pre-action requirements were also found to assist in case preparation and reduce time to hearing for cases that proceeded to a hearing, without compromising fairness.

That said, some legal practitioners in the Northern Territory have questioned whether pre-action protocols assisted in settling cases, as the majority of these cases would have settled prior to the commencement of litigation. Other practitioners see

the protocols as essential to the exchange of relevant information between parties to facilitate a ‘fairer’ negotiation environment (Sourdin 2012b).

Pre-action protocols are explored further in chapter 12.

ADR in the litigation process

In addition to pre-action ADR, a wide range of ADR processes and referral options operate in Australian courts and tribunals once a matter has commenced (Sourdin 2012a). These include mediation, arbitration, case appraisal, neutral evaluation, referral to a referee or conference. These different processes are used to different degrees, and courts and tribunals are adopting increasingly innovative ways of incorporating ADR into their processes, and matching processes to the needs of disputes. A range of different approaches is described below.

Mediation is the most popular form of ADR for proceedings in the Supreme Court of New South Wales. In 2012, 4570 civil cases were filed for which mediation was considered generally applicable.²⁴ Of these, 1092 were referred to mediation, representing 24 per cent of civil cases. Approximately 65 per cent of referrals were to court-annexed mediation conducted by the Court’s registrars, with a settlement rate of 54 per cent for these referrals (Supreme Court of New South Wales 2012).

The Local Court of New South Wales has entered into a memorandum of understanding with community justice centres, which provide mediation services in a range of matters, including civil proceedings, in locations across the state. In its small claims division, the Court is required to use its best endeavours to bring the parties to a settlement before determining the proceedings. Proceedings are first listed for a pre-trial review where the parties must explore the prospect of settlement.

In the Magistrates Court of Victoria, obligations to use ADR are commonly applied to small claims. This follows a successful pilot in 2007 of compulsory mediation for civil disputes for all defended claims under \$10 000. The pilot revealed that compulsory mediation delivered high resolution rates (greater than 75 per cent), speedier turnaround times for civil disputes, fewer court attendances by litigants and equivalent disposals of cases, using less expensive resources (VLRC 2009).

²⁴ The Court views mediation as generally inapplicable for cases where no defendant contests the claim, routine probate applications, applications for adoption of children, applications to wind up companies, applications for recovery of proceeds of crime and applications that require administrative processing only. For other civil cases, while mediation is considered generally applicable, individual cases may have circumstances that make mediation inadvisable or inappropriate.

The Commission considers that private parties and the wider community may benefit from compulsory mediation for contested disputes of relatively low value, where this is not already occurring. This reflects the principle that the method of dispute resolution should be proportionate to the value or importance of the matter in dispute.

Also in the Magistrates' Court of Victoria, a court registrar in the Early Neutral Evaluation (ENE) List of the civil jurisdiction reviews cases that are amenable to ENE using case characteristics checklists developed by experienced magistrates and registrars in the Court. The process is overseen by a senior magistrate. The Court has reported that early neutral evaluation has proven successful in resolving disputes early in the litigation process (Magistrates' Court of Victoria 2011). The ENE program has been made a permanent feature of the range of ADR processes available in that court.

The Land and Environment Court of New South Wales has described itself as a de facto 'multi-door court house'. It offers, under one roof, an array of dispute resolution services (adjudication, conciliation, mediation and neutral evaluation), which facilitates the court being able to 'fit the forum to the fuss'. The different services can also be individually tailored. For example, the forum for adjudication in certain types of matters can be an onsite hearing or a court hearing. Dispute resolution services can be combined, such as conciliation-adjudication (Preston 2011).

The Victorian Civil and Administrative Tribunal (VCAT) recently established the Short Mediation and Hearing (SMAH) listings as a permanent program following a pilot in 2010-11. SMAH listings are a shortened form of mediation where the parties can explore options to resolve their dispute. If the parties are unable to resolve their dispute, the matter proceeds to hearing on the same day. SMAH's are conducted by accredited VCAT staff mediators and are available for proceedings in the Civil Claims List. Approximately 60 per cent of SMAH listings are resolved without a hearing (VCAT 2013).

However, while ADR is increasingly being used by Australian courts and tribunals, sometimes in quite innovative ways, there continue to be opportunities for expanding its use in particular areas. Wills and estates, elderly care and guardianship are three areas of civil law that may be amenable to greater resolution by ADR. These areas can be considered somewhat natural extensions of family law, where disputes are often protracted and tensions between parties run high. Given the apparent success of ADR in resolving family law disputes, there appears to be value in extending ADR requirements in these areas.

Courts can offer other incentives to encourage parties to settle or reduce the scope of disputes through ADR. The Commission's proposals to reform court fees (chapter 16), such as introducing staged fee structures and increasing the level of cost recovery, are intended to ensure that parties fully consider alternative mechanisms for resolution both before litigation and throughout the litigation process.

DRAFT RECOMMENDATION 8.1

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

INFORMATION REQUEST 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50 000).

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.

Encouraging greater ADR use by government

The administrative functions of government give rise to a significant number of civil disputes across a range of legal areas. For example, disputes may arise because of planning decisions, service contracts, administrative decisions related to welfare and immigration, and the conduct of government employees. Indeed, the *LAW Survey* reported that almost 11 per cent of people over 15 years of age who had a legal problem experienced a government-related problem in a 12 month period (Coumarelos et al. 2012). As governments, their departments and agencies are relatively intensive users of the civil justice system, they are prime candidates for more actively employing ADR to resolve disputes early.

Most jurisdictions have developed civil procedure legislation, model litigant policies, guidelines or engagement strategies as a means of reducing the need for

litigation to resolve disputes with government. At the Commonwealth level, all agencies are required to act in accordance with the Legal Services Direction 2005 and the *Civil Dispute Resolution Act 2011* (Cth).²⁵ These require agencies to take genuine steps to resolve disputes early, and to act as model litigants by trying to avoid, prevent and limit the scope of legal proceedings wherever possible. Model litigant guidelines are further discussed in chapter 12.

However, there is little available information or analysis on how different agencies have implemented these requirements, and how successful they have been in settling disputes early and avoiding litigation.

A 2012 survey of the use of ADR to resolve disputes with Australian Government agencies found that only 37 per cent of responding agencies used ADR regularly (Allen 2012). Further, 85 per cent indicated that negotiation and inclusion of effective dispute resolution clauses in contracts was a priority but only 45 per cent agreed that their agency had effective measures in place to identify potential disputes as and when they arise.

It is apparent that some agencies are doing better than others at implementing efficient and effective dispute resolution mechanisms. For example, only three agencies, the Australian Taxation Office (ATO), the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator, are reported to have dispute resolution management plans (AGD 2014).

The Commission understands that other agencies are in the process of developing their own plans but are yet to release them. In the interests of providing clarity and consistency for staff and disputants, the Commission considers that it would be beneficial for all agencies, particularly those with high numbers of disputes, to finalise and release tailored dispute resolution plans as a priority. This is consistent with NADRAC's 2009 recommendation that 'ADR can be significantly strengthened by enhancing the obligations of government agencies' (sub. 109, p. 7).

Having found ADR to be effective in reducing the costs of resolving disputes, the ATO has undertaken its own analysis to improve its ADR processes. The ATO deals with a significant number of disputes relating to individual and corporate taxation and seeks to use early resolution techniques (such as direct negotiation) and ADR in most matters, except where there may be benefit in clarifying tax law through a test case (box 8.3). Direct negotiation and mediation are reported to work well for low-value disputes where there is an experienced, independent ADR

²⁵ The *Civil Dispute Resolution Act 2011* (Cth) places pre-action requirements on all parties involved in disputes to take genuine steps, not just private parties. Indeed, government agencies have an important lead role in promoting greater use.

practitioner involved, but less well for high-value disputes where neutral evaluation is undertaken to give both sides a clearer understanding of the merits of their cases before commencing litigation (ATO, sub. 150).

Box 8.3 The ATO's approach to ADR

The ATO takes an active approach to resolving disputes early and at the most appropriate level. Disputes with the ATO are not common, representing less than 0.2 per cent of all returns. While direct negotiation is the ATO's preferred approach to resolution, ADR techniques are routinely used where appropriate and litigation only resorted to when necessary.

In the last few years, the ATO has completely reviewed and updated its approach to dispute management with the aim of resolving disputes earlier, reducing legal costs for taxpayers and the ATO, and reducing resources devoted to dispute management in the ATO and in the community.

As part of this initiative, the ATO has adopted the approach that all disputes are suitable for ADR except where it would be clearly inappropriate (for example, cost and delay disproportionate to benefit, clear benefit in judicial determination and genuine concern due to serious criminal fraud or evasion). Processes for data collection and the independent evaluation of ADR services have been established, and a 'Plain English Guide to ADR' has been developed to improving understanding about ADR and the processes used in tax and superannuation disputes.

According to the ATO, it has:

... a strong commitment to the use of ADR to resolve disputes without recourse to litigation. ADR is not our first option to resolve disputes. We prefer to exhaust direct engagement and negotiation as a means of resolving the dispute with the taxpayer before considering ADR. Engaging an external ADR practitioner will not be a proportionate response to most smaller high volume disputes prior to litigation commencing. We are increasingly using ADR at early stages of our large business and high risk disputes. Our dispute management plan sets out our approach to management of disputes and ADR. Although not all disputes are suitable for ADR, ADR should be considered in all disputes to assist in resolving disputes earlier and to minimise cost. (sub. 150, p. 13)

Source: ATO (sub. 150).

Outside Commonwealth departments and agencies, information on the legal activities of other levels of government is scarce and not consistently reported. As such, there is no reliable evidence on the extent to which they use ADR to resolve disputes, and its relative efficiency and effectiveness. Stakeholders have also indicated anecdotally that local governments are more keen to resolve disputes through litigation than through alternative mechanisms.

While the general common law obligation to act as a model litigant applies to all tiers of government, only some states and territories have clearly articulated

legislation- and policy-based model litigant guidelines. These do not appear to apply to local governments, even though some may choose to act in accordance with relevant state or commonwealth guidelines (chapter 12).

A failure by government departments to resolve their disputes means that they are often referred to external review. Somewhat ironically, ADR is being employed in these later stages of dispute resolution to good effect. As the Administrative Appeals Tribunal observed:

The integration of ADR as part of the broader process for independent review of government decisions also has distinct advantages. In most cases, applicants will have been dealing with a decision-maker through primary decision-making and internal review processes. The involvement of an independent ADR practitioner ... can help to address issues relating to actual and perceived imbalance of power between citizens and government. It also creates efficiencies by enabling an assessment to be made of the likelihood of an agreed resolution and, where this cannot be achieved, allowing the case to proceed more quickly to hearing and determination. (sub. 65, p. 7)

As part of the development of dispute management plans, agencies need to be cognisant that clear and appropriate communication with disputants can significantly reduce the number of appeals and, as a result, the time and costs associated with dispute resolution.

DRAFT RECOMMENDATION 8.2

All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

Avoiding litigation by further encouraging private ADR

While the Commission understands there is a significant level of ADR undertaken in the context of private dispute resolution, it is unclear exactly how much occurs and what potential there is to encourage more. It is also unclear what appetite there is for using ADR to resolve commercial disputes.

For many medium and large businesses that have the resources to pursue disputes in whatever way they see fit, ADR may be attractive in that settlements can be confidential and evidence can be presented away from the public eye. Often the obligation to undertake an ADR process prior to commencing court proceedings is a contractual requirement. Submissions did not indicate that medium and large businesses have access to justice issues.

By contrast, small businesses are generally constrained in their capacity to pursue disputes through litigation and are particularly sensitive to the impacts of legal disputes on their business activities (SBDC, sub. 76). They often rely on small business commissioners to assist them to access justice and enforce their legal rights through a quick and fair resolution process. Small business commissioners operate in some states to assist small businesses with disputes with other businesses or governments.

One model that appears to be working well is the Western Australian Small Business Development Corporation (SBDC) ADR service (box 8.4). Established in 2012, this partially subsidised ADR service builds on the advice that the SBDC gives to small business through internal guided resolution to also offer a low-cost, non-litigious means of resolving small business disputes with governments and other businesses, while preserving business relationships (sub. 76).

The response from users has been positive and, based on their experience, the SBDC proposes that similar ADR services could be established in other jurisdictions and across the community to improve less resourced parties' access to justice (sub. 76).

A similar model has been developed by the VSBC, which provides a low-cost resolution service for small businesses. A staged approach engages experienced dispute management officers early, and, if that fails, invites parties to mediation which is partially subsidised by the VSBC (Sourdin 2012b). In 2012-13, 83 per cent of mediations settled without the dispute progressing to VCAT (VSBC 2013).

Further, recent changes to the *Small Business Commissioner Act 2013* in New South Wales allows the Small Business Commissioner to 'require parties to attend mediation prior to initiating a legal process and impose penalties for any non-adherence to the requirements' (NSW Small Business Commissioner 2013).

The intervention of small business commissioners (or equivalent organisations) has been successful in reducing the cost, time and stress associated with resolving small business disputes. They can provide an important dispute resolution option in those jurisdictions that lack a significant civil tribunal, such as Western Australia and the Northern Territory.

Box 8.4 Small Business Development Corporation ADR service (Western Australia)

The Small Business Development Corporation (SBDC) ADR service in Western Australia provides an avenue for small businesses to resolve disputes in a range of areas including retail and commercial tenancy, debt collection, contracts, franchises, intellectual property, trade practices, unfair market practices and professional and product liability.

The ADR service provides hands-on, timely assistance to help small business owners resolve disputes quickly and inexpensively. It is an easy process to access and navigate and assists businesses get back to normal operations quicker, with business relationships still intact, and without costly legal fees.

The process commences with the SBDC providing information, advice and guidance to assist clients in understanding their rights and obligations, clarifying the disputed issues and identifying options.

If agreement is not reached through guided resolution, or if guided resolution is not appropriate for the dispute, parties can proceed to mediation when both parties agree to participate. The alternative resolution course would be through the Western Australian State Administrative Tribunal or relevant court.

The Small Business Commissioner of Western Australia will appoint an experienced mediator to facilitate the mediation, and a fee of \$125 per party applies for each mediation session. This subsidised fee covers the cost of one mediation session, with the balance of the cost of mediation (between \$650 and \$775) met by the Western Australian Government. For most disputes, it is anticipated that a mutually agreed outcome will be achieved within one mediation session.

The total cost of the guided resolution and ADR service to the Western Australian Government is estimated to be less than \$1 million per year. This figure does not include the cost of other services provided by the SBDC that are not necessarily dispute-related but that assist in avoiding disputes.

According to the SBDC, feedback from small businesses that have accessed the ADR service has been positive and they support the service as a valid alternative for providing cheaper and quicker resolution to business disputes.

Sources: SBDC (2012; sub. 76; pers. comm. 7 March 2014).

State and territory governments could partially subsidise small business commissioners (or their equivalent) to provide alternative dispute resolution services to small businesses to resolve disputes in a timely and cost-effective manner. As Tasmania and the Northern Territory do not have small business commissioners, governments in these states should consider how best to support the efficient and timely resolution of small business disputes. Tailored small business dispute resolution services should be a priority for states and territories where tribunals have limited civil jurisdiction.

8.4 Facilitating greater ADR

The capacity of ADR to resolve more disputes relies on improving general knowledge about ADR, providing triage and advice services, ensuring legal professionals consider and suggest ADR as an option to clients, and supporting the delivery of culturally appropriate and accessible ADR.

Improving education and information

Improving general awareness and education about different avenues to resolve disputes is an essential pre requisite for getting parties to think about how ADR might be usefully applied to their dispute. The discussion in this section is intended to complement a broader discussion about the role of education and information in promoting access to justice (chapter 5).

Based on their experience operating the Magistrates Court Legal Advice Service (MCLAS) in South Australia, Caruso, Castles and Hewitt note that:

... information regarding ADR is not currently conveyed in an effective manner. Statements about the value of ADR do not address the mind-set of parties. Parties invariably need to be introduced to the ideas of compromise, reminded that there are two sides to every story, that the court will be required to see both sides and so too should they. (sub. 16, p. 8)

Basic legal information — whether provided by legal assistance providers, online resources or within courts and tribunals — needs to include elements of ADR to ensure that disputants know that there are alternatives to litigation and that, in some circumstances, interests-based ADR can result in better outcomes for all stakeholders (and the wider community). As Cannon observed:

Education of potential court users and lawyers as to alternatives to court proceedings is central to improving the whole system. (2009, p. 8)

There are a number of potential benefits that could arise from increasing the awareness of ADR services, as highlighted by Field:

First, users who suffer detriment are more likely to know that there are services that can be utilised to resolve their dispute, thus preventing the undesirable escalation of disputes. Second, awareness of dispute resolution services will make it more likely that users efficiently choose the most appropriate ADR provider. ...

Knowledge of ADR services can also have a positive effect on the market for civil justice — the better informed disputants are about the suitability of ADR, the more likely that they will express preferences that align with their actual needs for ADR, thus leading to efficiency improvements in the market for civil justice. (2007, p. 81)

NADRAC proposed a number of strategies that could be employed to increase public awareness about alternative avenues to accessing justice, including:

- identifying specific groups who are prone to disputes and providing targeted ADR information
- equipping legal professionals with ADR knowledge to assist them to inform clients
- identifying organisations within the community that provide support for parties in dispute and providing them with information so they can give comprehensive advice on ADR options
- increasing education about ADR within primary and tertiary curricula (sub. 109).

Stakeholders have also noted the potential for online resources to provide information and be a forum for disputes to be resolved. Online resources allow individuals to learn at their own pace and provide access to information at any time. They can also provide checklists and step-by-step guides to ensure that parties in dispute use a staged approach to escalation and reasonably exhaust all relevant options before progressing to the next level. Such resources could be targeted at various groups that may derive the greatest benefit — for example, school-aged children, as a way to help them to resolve dispute themselves and build resilience, or small businesses through small business commissioners or chambers of commerce.

In order to fully capture the benefits of greater education and information, ADR educators and practitioners need to employ a standardised terminology. Work on the definition of ADR was an ongoing research task undertaken by NADRAC throughout its existence. This work should be revisited and form the basis of an agreed terminology. Without this, current inconsistencies in the use of ADR terminology will continue and is likely to generate confusion.

DRAFT RECOMMENDATION 8.3

Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.

Triage and advice to guide disputes to the most appropriate forum

Providing information and education about ADR in the context of resolving disputes may open up a range of options. However, some stakeholders indicated

that information by itself may not be enough to persuade parties to opt for ADR. Rather, efficient triage processes are required to filter and direct disputes to the most appropriate forum.

Triage is a key to delivering effective access to justice. Triage needs to embrace all methods of [dispute resolution] and assist parties to choose and engage whether that is in collaborative problem solving or adversarialism. (Negocio Resolutions, sub. 52, p. 17)

The concept of triage is not new to dispute resolution and is feature of the information and advice services discussion in chapter 5. Fundamental to any system of legal dispute triage should be a consideration of ADR options and whether they can potentially resolve the issues in dispute.

The provision of advice and triage services requires knowledgeable and experienced practitioners who understand the needs of clients, can quickly evaluate the dispute, and recommend an appropriate course of action. LawAccess NSW is a telephone service that provides legal information, advice and referrals for people who have a legal problem in New South Wales. This public service provides information about ADR generally and its application for particular types of disputes. Other states and territories looking to replicate the LawAccess NSW service would benefit from ensuring that the advice provided contains relevant information on resolving disputes informally through ADR.

In addition to triage services for individuals to help them understand the nature of their legal problem and what is the most appropriate forum for resolution, there is also a role for developing and implementing processes to guide administrators and decision makers in organisations that use ADR as part of a wider range of resolution processes — including courts, tribunals, ombudsmen and government agencies.

The Administrative Appeals Tribunal (AAT) has already developed a set of process models and guidelines to assist conference registrars and tribunal members to determine when it may be appropriate to refer an application to a particular type of ADR process.

The AAT has developed process models for each form of ADR that is used. Each process model sets out a definition of the process and then provides a range of information relating to the conduct of the process including:

- the stage of the proceeding at which the process is likely to be undertaken;
- a description of the way in which the process will proceed;
- the role of the person conducting the process as well as the role of the parties and their representatives; and
- what is likely to occur at the conclusion of the process.

The AAT has also developed a set of guidelines designed to assist Conference Registrars and Tribunal members determine when it may be appropriate to refer an application to a particular type of ADR process. The guidelines set out a range of considerations to be taken into account, including such things as:

- the capacity of the parties to participate and their attitudes;
- the nature of the issues in dispute;
- the likelihood of reaching agreement or reducing the issues in dispute; and
- the cost to the parties. (sub. 65, pp. 7–8)

These materials assist to reduce the subjectivity of referral decisions and provide clarity for participants, particularly when they are unfamiliar with the process.

Such process models should not fix the range of circumstances in which ADR is considered suitable. Changes in the way in which ADR is delivered can expand the range of situations in which it is appropriate. For example, parties who may be disadvantaged through a lack of financial resources or an unfamiliarity with the process could be provided with appropriate support or legal assistance (chapter 21). The use of ‘shuttle mediation’, where parties negotiate from different rooms, or video conferencing may provide a more ‘user friendly’ process where parties affected by power imbalance can safely and comfortably participate in ADR. Such practices are already being employed with some success by Legal Aid NSW in family mediation where violence has occurred (Legal Aid NSW, sub. 68).

DRAFT RECOMMENDATION 8.4

Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

Ensuring practitioners are competent and experienced

It is not enough for consumers to be informed about and/or directed to ADR. Greater use of ADR also needs to be supported by quality practitioners.

ADR services are provided by a range of professionals and organisations, depending on the context. For example, court-mandated ADR is generally facilitated by qualified court registrars, while commercial arbitration may be undertaken by experienced judges. ADR services in family matters can be provided

by family relationship centres, legal assistance services, or private services providers (including lawyers).

A research report on ADR by the National Pro Bono Resource Centre highlighted that the independence, professionalism and skill of the ADR practitioner may be the most important factor in ensuring a fair and effective process and that these traits should be developed through appropriate training and experience (sub. 73).

While it appears that legal assistance service providers are well versed in ADR and use it effectively, stakeholders indicated that many qualified legal professionals have no or limited experience in the application of ADR.

The potential for ADR to improve access to justice could also be strengthened through promoting awareness amongst legal practitioners of available ADR services and an understanding of the different ADR processes, which would improve their confidence in both participating in, and assisting parties to participate in, ADR processes. (QPILCH, sub. 58, p. 36)

This may be related to the training of legal professionals. While law graduates are meant to be familiar with a range of ADR processes, a 2011-12 survey of law schools by NADRAC found that a number of Australian law degrees do not contain any ADR-related subjects and provide only limited exposure to informal means to resolving disputes (ALTC 2010; NADRAC 2012b). This appears to be a significant barrier to the wider use of ADR.

Indeed, the importance of ADR training for legal professionals was echoed by the Public Interest Advocacy Centre, which contended that:

... if lawyers are to be involved in ADR processes, they must be adequately trained for the task. The principles of dispute resolution and the skills required to act for a party in ADR are different to those needed in typical court proceedings. ADR training should be included as a compulsory component of law degrees and of mandatory continuing legal education. (sub. 45, p. 23)

That said, the Commission is aware of law schools that devote some training to the full gamut of dispute resolution techniques. For example, the University of New South Wales School of Law has introduced a new core course in 2013 aimed at strengthening the dispute resolution 'tool-kit' of legal professionals, so they can be equally competent in invoking the court system or employing negotiation, mediation or arbitration (UNSW School of Law 2013).

While it is important that lawyers are exposed to ADR as part of their training, not all ADR practitioners need to be professionally trained lawyers. Flexible options are necessary to ensure that mediators' skills and qualifications are relevant to the disputes they are employed to resolve. In this context, the Commission endorses the

use of the industry-led accreditation scheme for mediators — the National Mediator Accreditation Scheme — which assures clients that practitioners are trained, assessed and qualified, and acts to improve the quality of services. To the Commission’s knowledge, voluntary accreditation standards have not been developed or introduced for other types of ADR practitioners, such as conciliators or arbitrators, but such schemes could ameliorate the need for regulations on the conduct of ADR professionals more broadly. In lieu of industry accreditation, Australian governments may consider regulating professionals delivering ADR services.

DRAFT RECOMMENDATION 8.5

Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.

Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.

DRAFT RECOMMENDATION 8.6

Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.

Responsive ADR to cater for diverse needs

Specialised services may be required to ensure that all client groups can fully make use of ADR as a mechanism to resolve their disputes. The Commission received a number of submissions that highlighted the diverse needs of particular client groups, including people with a disability, cultural sensitivities, non-English speaking backgrounds and those with more general socioeconomic disadvantages. For example, QPILCH suggested that:

ADR services could be strengthened by ... culturally sensitive services and mediators trained to recognise and deal with disadvantaged parties and power imbalances. (sub. 58, p. 36)

Culturally sensitive services were considered particularly important for Aboriginal and Torres Strait Islander Australians who are often reluctant to engage in ADR unless cultural protocols are observed. Indeed, it may also be necessary for ADR processes to be significantly adapted to ensure participation and adherence with agreed outcomes. These issues are discussed in more detail in chapter 22.

The Australian Federation of Disability Organisations (sub. 24) is concerned about accessibility of ADR services for people with a disability. They suggest that staff involved in ADR services need to be familiar with access and communication needs, as well as ensuring that physical infrastructure is appropriate.

Submissions also raised the need for interpreter services to be available to allow participants from non-English speaking backgrounds to fully engage with the ADR process, understand the offers and implications of proposed settlements, and make informed decisions to resolve their disputes in these forums (for example, Peninsula Community Legal Centre, sub. 28).

8.5 Building the evidence base

As noted above, there is a lack of data and information on the use of ADR to resolve civil disputes. The data are often reported in an ad hoc way and cannot be collated nor usefully compared. There appears to be an opportunity to develop a consistent framework to collect and disseminate data on ADR activities; appreciating that these activities themselves are disparate and occur across very different forums.

In some areas, current data reporting requirements could be better targeted to give a clearer picture of ADR activities. For example, legal assistance service providers should be required to provide information on the provision of ADR services as part of their reporting requirements for public funding.

Further, courts and tribunals should be required to report on how disputes have been settled and the role of ADR, if any, towards reaching a resolution as supported by *Negocio Resolutions*:

An important data set is missing in most courts and tribunals. While courts record “disposal rates” of cases they usually keep no record that allows us to find out how many or what percentage of cases are settled as opposed to those that are determined by a decision or Order of the Court of Tribunals. (sub. 52, p. 5)

In relation to data collection, the Victorian Law Reform Committee recommended in 2009 that:

At a minimum, the Committee believes that there is a need for consistent data collection across ADR service providers about:

- settlement rates
- factors that may influence settlement rates, such as referral stage
- what happens when disputes are not settled at ADR
- participant satisfaction with ADR and perceptions of fairness
- the time and costs expended by participants and service providers. (VLRC 2009, pp. 58–59)

While the Commission appreciates that relevant and reasonable data relating to all cases may not be able to be collected, concerted efforts should be made to collect and report at least basic data on how settlement outcomes were achieved.

ADR data collection is but one part of a much broader data collection proposal which is discussed in more detail in chapter 24. As in other areas of civil law, there are problems with inconsistent approaches to recording and reporting ADR activities. This is not helped by inconsistency in the use of ADR terminology. Hence, moves towards improving ADR data collection must include agreed ADR terminology.

9 Ombudsmen and other complaint mechanisms

Key points

- Ombudsmen provide independent and impartial mechanisms for individuals and businesses to resolve disputes with each other or with governments, free of charge. They are simple and fast to use, and resolve around 773 000 disputes each year. By comparison, tribunals and courts together resolve around 1 million disputes.
- Ombudsmen can be classified into two types.
 - Government ombudsmen deal with disputes about the conduct and decision making of government agencies, and/or with disputes in a particular policy sector. Other government funded complaint investigation bodies have similar powers and act like ombudsmen — for example, rights commissioners, health complaints bodies and fair trading or consumer affairs offices.
 - Industry ombudsmen resolve disputes between consumers and businesses, particularly in industries such as energy and water, telecommunications and financial services.
- A significant proportion of unmet legal need could be served by greater knowledge of, and access to, ombudsmen services.
 - The appropriate ombudsman may be more effectively connected to consumers through better visibility, mandatory notification and other referral processes.
- Ombudsmen services are free of charge but not costless. Indeed, costs ultimately get passed back to consumers (in the case of industry ombudsmen) and taxpayers (in the case of government ombudsmen).
 - Funding for ombudsmen should be designed so that firms and government agencies have incentives to minimise complaints and resolve disputes efficiently. These incentives are well aligned for industry ombudsmen, but less so for government ombudsmen.

The word ‘ombudsman’ comes from Sweden, which in 1809 established the position of Justitieombudsman to oversee government administration. The title loosely translates as ‘citizen’s defender’ or ‘representative of the people’. The first ombudsman in Australia was the Ombudsman of Western Australia, created in 1972 (Ombudsman WA 2014).

The Commission identified 30 organisations in Australia with the word ‘ombudsman’ in their titles, and a further 43 that have similar functions but are

called commissions or use other names.²⁶ On available data, these organisations resolved around 773 000 complaints in 2011-12. This compares to 373 000 disputes finalised in tribunals and 673 000 in courts.

As ombudsmen have grown in number and scope, they have filled an important gap in the civil justice landscape — a mechanism for resolving low value disputes. Their evolution is seen by many as a great step forward in promoting consumer rights and industry accountability. The Consumer Action Law Centre said that:

... in providing access to justice, the establishment of these [industry ombudsman] schemes has been one of the most significant advances in consumer protection of the past 30 years. (sub. 49, p. 14)

This chapter examines the role of ombudsmen. It is structured in four parts. Sections 9.1 and 9.2 consider the role ombudsmen play in the civil dispute resolution landscape, including their role in promoting access to justice. Section 9.3 assesses how ombudsmen are performing with respect to cost, timeliness, informality and delivering just outcomes. Finally, section 9.4 considers how ombudsmen might be used to greater effect to improve access to justice.

9.1 What do ombudsmen do?

Ombudsmen are impartial organisations that receive and resolve complaints, and conduct inquiries into individual or systemic cases based on those complaints. Ombudsmen services are generally provided at no cost to the complainant.

Ombudsmen operate to address a wide range of disputes. Disputes are typically handled through early resolution methods, such as initial assessments or referrals (including back to the service provider's complaints department), but may require conciliation, facilitation, investigation, or in rare cases, determination or recommendation.

According to the Australian and New Zealand Ombudsman Association (ANZOA), the two types of ombudsmen are government ombudsmen and industry ombudsmen. Ombudsmen are characterised by six essential criteria: independence, jurisdiction, powers, accessibility, procedural fairness and accountability (box 9.1).

²⁶ A full list of ombudsmen is available in appendix D.

Box 9.1 Essential criteria for describing a body as an ombudsman**Independence**

- The Ombudsman must: be independent of the organisations being investigated; be appointed for a fixed term; not be subject to direction; be able to select his or her own staff; not be an advocate for a special interest group, agency or company; have an unconditional right to transparency; and must operate on a not-for-profit basis.

Jurisdiction

- The jurisdiction should be clearly defined in legislation or in the document establishing the office, and should extend generally to the administrative actions or services of organisations falling within the Ombudsman's jurisdiction.
- The Ombudsman should decide whether a matter falls within jurisdiction.

Powers

- The Ombudsman must: be able to investigate whether an organisation within jurisdiction has acted fairly and reasonably; have the right to deal with systemic issues or commence an own motion investigation; have power to obtain information or to inspect the records of an organisation relevant to a complaint; and must have the discretion to choose the procedure for dealing with a complaint.
- There must be an obligation on organisations within the Ombudsman's jurisdiction to respond to an Ombudsman's question or request.

Accessibility

- A person must be able to approach the Ombudsman's office directly.
- It must be for the Ombudsman to decide whether to investigate a complaint.
- There must be no charge to a complainant for the Ombudsman's investigation.
- Complaints are generally investigated in private.

Procedural fairness

- The procedures that govern the investigation work of the Ombudsman must embody a commitment to fundamental requirements of procedural fairness.
- Parties involved must be given an opportunity to respond before the investigation is concluded.
- The actions of the Ombudsman and staff must not give rise to a reasonable apprehension of partiality, bias or prejudgment.
- Reasons must be provided for any decision, finding or recommendation.

Accountability

- The Ombudsman must be required to publish an annual report.
- The Ombudsman must be responsible to the relevant stakeholders.

Source: ANZOA (2010).

Government ombudsmen deal with disputes about the conduct and decision making of government agencies and/or with disputes in a particular policy sector. Other government funded complaint bodies that have similar functions to ombudsmen include rights commissioners, health complaints bodies and fair trading or consumer affairs offices.

Industry ombudsmen deal with disputes about service providers in key industries — such as energy and water, financial services, public transport and telecommunications — and receive industry funding to do so.

While some government ombudsmen, such as the NSW Ombudsman, deal with a broad range of complaints, others deal with specific matters, including taxation or law enforcement.

9.2 How do ombudsmen promote access to justice?

Ombudsmen provide a mechanism for resolving low value disputes ...

In order to deliver access to justice, it is necessary to provide mechanisms that deal with issues in a proportional manner. For example, a court or tribunal is not the appropriate forum to deal with a dispute over a \$32 train ticket. Addressing issues at this lower end of the spectrum is important because a number of people could suffer the same treatment, causing significant cost to society yet insufficient cost to any one individual to justify legal action. Further, early dispute resolution can prevent small problems becoming big problems.

As a number of stakeholders observed, the availability of an ombudsman creates a practical and proportional alternative:

Without industry ombudsman schemes, hundreds of thousands of people would have been left with no avenue for redress other than courts, or more likely, because of cost and other access barriers, would have been left with nowhere to turn. (Consumer Action Law Centre, sub. 49, p. 14)

Industry-based Ombudsman schemes are often referred to as an ‘alternative’ avenue for complaint. In the case of public transport, my office is often the only avenue of complaint. For many of the issues raised with my office, it is unlikely that a consumer would even contemplate court or tribunal proceedings. ... Our processes are cost free and informal and are designed to ensure the efficient and effective resolution of complaints. (The Victorian Public Transport Ombudsman (PTO), sub. 118, p. 3)

Research has shown that unresolved complaints cost businesses in the vicinity of \$720 for every negative customer experience, due to loss of business and

reputational damage (EY 2014). In many cases, customers take no action to complain, and when they do complain, they are often unsatisfied with the outcome. This supports the cost-effectiveness of highly accessible industry dispute resolution mechanisms.

... help to overcome power imbalances

Some consumers may feel powerless to assert their rights when dealing with large service providers or government agencies. Ombudsmen can help overcome these power imbalances.

A survey undertaken by the Telecommunications Industry Ombudsman (TIO) highlights the difficulties faced by consumers in dealing directly with industry:

- more than 50 per cent of consumers surveyed said that they had contacted their service providers five or more times to address their matters prior to coming to the TIO
- almost 50 per cent of consumers had interacted with more than 3 different contact points or departments at their service provider before lodging a TIO complaint
- nearly 27 per cent of consumers surveyed said they had spent between three and six hours trying to resolve their complaint with their provider, and another 20.3 per cent said they had spent more than nine hours before giving up and turning to the TIO. (sub. 134, p. 14)

... are simple to use

Ombudsmen are independent and impartial, so they do not provide advocacy as such. However they actively pursue the resolution of disputes rather than leaving primary control of the case to the parties, as has occurred historically in courts (and to a lesser extent, tribunals). This model removes the need for professional advocates or representatives:

The model for industry-based Ombudsman schemes is designed to address these power imbalances, without the need for either party to have legal representation. (PTO, sub. 118, p. 4)

It is unusual for a party to require representation by a professional advocate such as a legal representative, though complaints are lodged on behalf of customers by friends, family members or financial counsellors. (The Energy and Water Ombudsman Victoria, sub. 119, p. 5)

Ombudsmen provide easy options for individuals to lodge their complaints. Ninety per cent of complaints are made by phone or electronic forms available on the internet. Complaints are also accepted by fax, letter and in person. Accessibility

is further promoted by the availability of interpreters via the National Relay Service (ANZOA, sub. 133). The North Australian Aboriginal Justice Agency (NAAJA) noted that obviating the need for written complaints helps promote access to justice:

The TIO also accepts complaints over the phone - the requirement of a written complaint is a significant barrier to the accessibility of an ADR [alternative dispute resolution] service. (sub. 95, p. 3)

... and identify and address systemic issues

A further way in which ombudsmen provide access to justice is through the conduct of systemic investigations. Ombudsmen are not limited to the investigation of complaints individually, but may instigate their own investigations in order to identify systemic issues. This generally occurs when a number of similar complaints are received:

The PTO [Public Transport Ombudsman], and other industry Ombudsman schemes, are required either through mechanisms such as their Charter and/or the National Benchmarks to identify, review, refer or resolve systemic issues facing the industry they oversee. (sub. 118, p. 5)

EWOV [The Energy and Water Ombudsman Victoria] also plays a key role in complaint prevention. EWOV has the power to investigate and seek redress to energy and water systemic issues. Performance of this role ensures that where an issue is identified remedial action can be taken by the relevant member to limit the impact of the systemic issue on its customers. (sub. 119, p. 11)

Systemic investigations can represent an efficient form of dispute resolution since they address all instances of wrong treatment in one investigation (box 9.2).

Ombudsmen are also able to resolve non-legal issues. Ombudsmen do not determine disputes based on the law alone — they also consider good industry practice and what is just, fair and reasonable in all of the circumstances, as well as whether the matter was within the service provider's reasonable control (sub. 133). The Public Transport Ombudsman said:

We are also able to seek fair and reasonable outcomes for issues where no legal entitlement exists but where redress is warranted. (sub. 118, p. 3)

Box 9.2 Case study: systemic overcharging

The Public Transport Ombudsman (PTO) in Victoria gave the example of a train company's ticketing system inadvertently overcharging customers. The problem was that new fares were loaded into the ticketing system when they were announced rather than at the time they were supposed to come into effect.

The PTO conducted a systemic investigation, and the train company agreed that in the future it would not load new fares into the system until the date they came into effect.

The company identified that 1551 tickets had been affected over a period of seven years, with a total overcharge value of \$27 000 — the average overcharge being \$17 per ticket.

Given the lack of purchaser information and the disproportionate cost of advertising the mistake and offering refunds, the company sought advice from the PTO about alternative ways of redressing the issue. The PTO suggested that it explore opportunities for these funds to be used to provide services/assistance to regional commuters who experienced challenges with public transport accessibility, and also emphasised the fact that consumers who approached the company about being overcharged as a result of this issue should be appropriately reimbursed, where proof of purchase information is provided.

Source: PTO (sub. 118, p. 8).

9.3 How well are ombudsmen performing?**Where services are being used, outcomes are generally good**

There is a general consensus among stakeholders that ombudsmen are effective in promoting access to justice.

SMLS [Springvale Monash Legal Service] feels that the Ombudsman role is effective and generally efficient in the services they provide. In particular, SMLS has had positive outcomes and experiences through matters handled by the Telecommunications Ombudsman. (sub. 84, p. 8)

ABA [Australian Bankers' Association] members and customers alike value the EDR [external dispute resolution] service as an alternative mechanism of access to justice. (sub. 121, p. 2)

There is no doubt that government Ombudsmen play an essential role in highlighting and addressing systemic access to justice issues in people's dealings with government. (NAAJA, sub. 95, p. 23)

... the number of ombudsmen and the services provided by ombudsmen appears to be growing. This would indicate that ombudsmen are perceived as an efficient and

effective way to resolve particular types of disputes. (Queensland Public Interest Law Clearing House, sub. 58, p. 37)

Industry external dispute resolution schemes offer all consumers, including disadvantaged consumers, a speedy, effective and inexpensive mechanism to deal with problems, most of which would not be appropriate to resolve via litigation. (Public Interest Advocacy Group, sub. 45, p. 25)

These views are supported by data on timeliness and user satisfaction.

Ombudsmen resolve complaints relatively quickly. ANZOA reported that 80 per cent of complaints are resolved within one month, and 97 per cent within two months (sub. 133, p. 10). This is considerably faster than courts and tribunals; for example, most tribunals resolve disputes within a median time of 6 months.

Systemic investigations also have a beneficial impact on complaint numbers. For example, the TIO provided data and made recommendations for increased consumer protection in the area of international roaming charges, after increases in related complaints of 50 per cent in 2010-11 and nearly 70 per cent in 2011-12 (sub. 134, p. 15). The implementation of these changes saw a 50 per cent decrease in related complaints in 2012-13 (TIO 2012).

While ‘just’ outcomes are difficult to measure, some information can be gained from consumer surveys undertaken by select ombudsman organisations. ANZOA reported that of its six members that undertake regular consumer satisfaction surveys, satisfaction with their services is around 86 per cent, with consumers either satisfied or very satisfied with the overall handling of their disputes. As for industry ombudsmen, consumers usually rate their offices more positively than service providers do, however, recent survey results showed increased service provider satisfaction (sub. 133, p. 13).

However, low visibility prevents many from using these services

Commission estimates based on unpublished *LAW Survey* data suggest that some of the key areas of unmet legal need (where people experienced legal issues but were unable to resolve them) do not represent gaps in the availability of appropriate dispute resolution services, but rather, gaps in community knowledge about those services (chapter 2).

In particular, disadvantaged clients who stand to benefit most are often not well informed of ombudsman services. The Redfern Legal Centre (RLC) said:

The clients we assist at RLC are predominantly low-income earners, or on Centrelink payments, and frequently from Aboriginal/Torres Strait Islander, CALD [culturally and

linguistically diverse] or non-English speaking backgrounds. In our experience, accurate awareness of the various Ombudsman services amongst our client-base is low. (sub. 115, p. 25)

Further, lack of understanding about where to lodge a complaint imposes high costs on high-profile complaint bodies. For example, the Victorian Ombudsman used 13 per cent of complaints-handling resources to redirect complaints that were not within its jurisdiction — almost half of all calls in 2012-13 (Victorian Ombudsman Working Group 2013).

Of the key areas of unmet legal need identified in chapter 2 and in appendix B:

- areas within the jurisdiction of government ombudsmen account for around 40 per cent of unmet need
 - of these, almost half were within the jurisdiction of rights commissioners, health complaints bodies and fair trading or consumer affairs offices
- 25 per cent of unmet needs are in industries such as utilities, telecommunications and financial services, where industry ombudsmen are available.

Any measures to substantially address unmet legal need would have major resource implications for ombudsmen. Given such a large prospective increase in workload, keeping costs in check would be essential.

Ombudsmen are free of charge but not costless, and costs can be extremely varied

Estimating the cost of ombudsmen is complicated by a number of factors. While data on overall funding and complaints are publically available, it may not reflect the extent of other activities undertaken by ombudsmen. For example, ombudsmen conduct systemic investigations in addition to managing complaints, which can vary widely in scope and resources required. Further, most ombudsmen conduct varying degrees of community education and interaction. This is in contrast to tribunals, for example, which tend to only hear disputes. Estimates for industry ombudsmen are likely to be more reliable as their functions are more contained. However for bodies that have other significant roles, such as human rights commissions, it is difficult to determine their cost structures on available data.

While Commission estimates (based on available data) show a high volume of cases being resolved in a timely fashion, costs in 2011-12 were significant²⁷:

²⁷ Average cost per case is calculated by dividing total expenditure by finalised cases, in order to include the full cost of overheads.

-
- 11 industry ombudsmen resolved 356 000 complaints at a cost of \$111 million (an average cost of \$310 per complaint)
 - 19 government ombudsmen resolved 87 000 complaints at a cost of \$117 million (an average cost of \$1300 per complaint)
 - the remaining organisations — primarily fair trading and consumer complaints bodies — resolved 330 000 complaints. The cost of resolving these complaints cannot be separately calculated given the varied roles of these organisations (the combined cost of these organisations was \$1.8 billion).
 - Focusing only on those bodies whose principal function is to deal with complaints (such as employment, rights and health complaints bodies) — collectively they resolved 62 000 complaints at a cost of \$258 million (an average of cost of \$4100 per complaint).

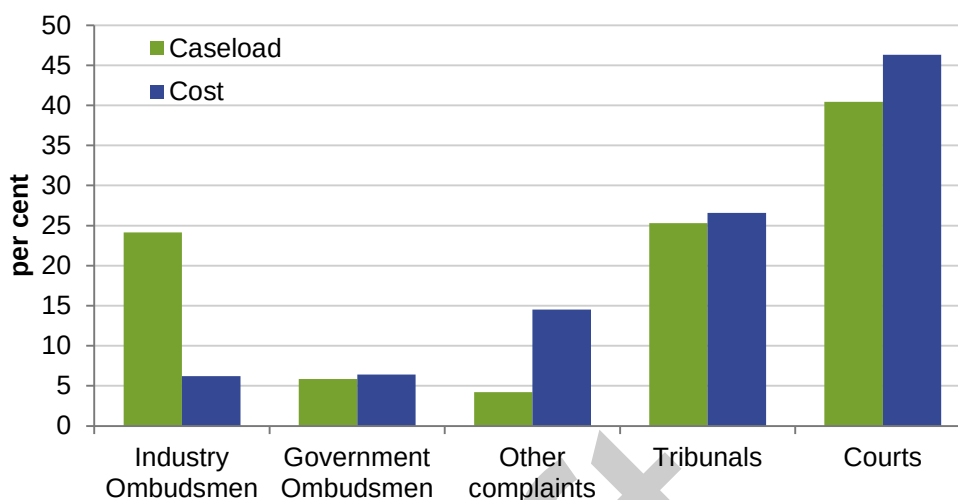
While industry ombudsmen generally fare well, some government funded ombudsmen and complaints mechanism services can be relatively expensive. In part, this reflects the complex nature of the disputes that they deal with (such as human rights disputes). Figure 9.1 shows the share of civil dispute resolution managed by the various ombudsmen and government funded complaints mechanisms compared to tribunals and courts, along with the share of costs incurred by these institutions.

However, context is important in interpreting these estimates. For example, these figures hide the fact that private legal expenses are not incurred when using ombudsman services, and that the systemic work undertaken by ombudsmen is not captured in the number of complaints. This work can actually reduce the number of complaints received, therefore making ombudsman services appear more expensive on a per-case basis.

INFORMATION REQUEST 9.1

Given the difficulty in estimating the individual costs of the various functions of some ombudsmen and complaints mechanisms, the Commission seeks feedback on whether the estimates it has derived can be further refined. The Commission also seeks feedback on the costs of ombudsmen undertaking systemic reviews.

Figure 9.1 Share of civil dispute resolution caseload and costs ^a
2011-12



^a The percentages in this figure differ from the proportions reflected in overview figure 1 because the organisations identified as ombudsmen for their complaints services but who actually have a wide range of other regulatory responsibilities, such as the Australian Competition and Consumer Commission, have been excluded from this data, because it is not possible to separate out the cost of their complaints functions.

Data source: Commission estimates.

In some cases, costs are declining. The cost of running ombudsmen services in 2012-13 was \$656 per in-jurisdiction dispute based on data from 11 of 15 ombudsman members.²⁸ The average cost in 2012-13 was 18 per cent lower than the cost in 2008-09, and the number of disputes was 30 per cent higher (ANZOA, sub. 133, p. 12). As noted by the Public Transport Ombudsman (PTO), ombudsmen are resolving more disputes within the limits of constrained funds:

Since being appointed in 2010, I have seen a 138% increase in enquiries and complaints to my office. This increase has been managed with only a 14.7% increase in budget. ... We offer excellent value for money for consumers and industry when compared to the costs associated with court or tribunal proceedings. (sub. 118, p. 3)

The PTO's average cost per complaint has fallen from almost \$1000 in 2008-09 to \$400 in 2012-13 (sub. 118, p. 15).

9.4 Can ombudsmen play a bigger role?

If a significant portion of unmet legal need is to be met by existing ombudsmen, reforms are required to increase community awareness of their services and improve the efficiency with which they resolve complaints.

²⁸ The average cost estimates provided by ANZOA capture both industry and government funded ombudsmen so are broadly consistent with the estimates derived by the Commission.

Increasing the visibility of services

In their submissions to this inquiry, many ombudsmen highlighted efforts they have made towards increasing community awareness. Each ombudsman office uses a range of means to promote and monitor public awareness of, and ease of access to, its dispute resolution services — including public awareness surveys and outreach programs or activities:

Over the past three years we have developed a regular program of community outreach activities, working with community groups, disability advocacy services, government agencies, PTO scheme members, universities and other dispute resolution services. We also work with operators to ensure that they are continually promoting awareness of our services in their complaint correspondence, publications and websites. (PTO, sub 118 pp. 4–5)

Enhanced awareness of the TIO [Telecommunications Industry Ombudsman] within the community remains a focus of our three-year strategy, which includes initiatives to increase outreach activities targeting young people and Indigenous communities and to improve our online presence and accessibility. We ensure our Outreach program is a robust one, and reaches out to as many different communities as possible – in 2012-13 we attended or participated in 72 different outreach events. Our Outreach program helps us raise awareness about how we can help resolve complaints between consumers or small businesses and their telecommunications providers. (TIO, sub. 134, p. 3)

Measures to raise awareness have only been partially effective. Further efforts are needed to improve awareness of, and access to, ombudsmen by particular groups within the community.

Recent public awareness surveys undertaken by three Ombudsman offices indicate a relatively good level of awareness of the respective office, ranging from 50% to 66%. These awareness surveys also highlight particular segments of the Australian community which are less likely to be aware of, or access, the dispute resolution services offered by Ombudsman offices. These segments include:

- Indigenous Australians, particularly those in regional and remote areas
- young people aged 18 to 24 years and young adults aged 25 to 34 years, and
- people from culturally and linguistically diverse backgrounds, especially new arrivals and migrant communities. (ANZOA, sub. 113 p. 13)

In some cases, measures to improve general awareness are still required:

While we have seen a year on year increase in the number of complaints being lodged with my office, increasing public awareness of the right to complain is a perennial issue facing industry-based Ombudsman schemes. Despite extensive community outreach, unprompted awareness about the existence of my office remains relatively low. (PTO, sub 118, p. 5)

Some websites provide information on the ombudsmen that exist in Australia and the nature of complaints that they deal with. For example the Australian Competition and Consumer Commission lists industry ombudsmen and dispute resolution organisations on its website. Some private parties also provide comprehensive web-based guided listings of complaint and dispute resolution options for consumer disputes. The Commonwealth Attorney General's Department *Access to Justice* website provides information on both government and industry ombudsmen and also provides information on where to seek advice based on an individual's location and the nature of the dispute. However, these websites are not always easy to find, or potential complainants may not recognise these as websites to go to when faced with a problem.

A further step could be to require relevant agencies to inform their clients of the availability of independent dispute resolution through the ombudsman, where appropriate.

DRAFT RECOMMENDATION 9.1

Governments and industry should raise the profile of ombudsman services in Australia. This should include:

- ***more prominent publishing of which ombudsmen are available and what matters they deal with***
- ***the requirement on service providers to inform consumers about avenues for dispute resolution***
- ***information being made available to providers of referral and legal assistance services.***

Redrawing the boundaries of existing ombudsmen

Ombudsmen are not appropriate for all industries or dispute types. Industry representatives have cautioned that the scope and operation of industry ombudsmen should be proportionate to the dispute resolution services required, and should consider the costs, given that industry funding is compulsory (ABA, sub. 121). Factors that lend themselves to the use of ombudsmen include:

- essential services are involved
- the market is characterised by large firms and limited competition, thus creating significant power imbalance
- there is significant asymmetry of information, such that consumers would have difficulty asserting their rights
- there are a large number of disputes.

Justice Sackville commented on the relative value of ombudsmen in the following way:

These kind of bodies would appear to be most valuable when a service sector has a large number of consumers who cannot easily “shop elsewhere”. The [in]ability to “shop elsewhere” can arise, for example, where consumers have little or no choice between service providers (which is especially true when the service provider is a government department or instrumentality) and where consumers are tied into one service provider (for example, pursuant to a long term superannuation or life insurance policy, or even a mortgage that cannot easily be re-financed. (1994, p. 304)

Applying these criteria to existing ombudsmen reveals that there may be some scope to roll back existing schemes, or at least vary the extent to which they attract government funding.

As an example, the Commission sees little value in the Produce and Grocery Industry Ombudsman, which received only 19 complaints in 2011-12. This is more of a dispute resolution service than an ombudsman, and supports the Produce and Grocery Industry Code of Conduct. Similar dispute resolution services exist for the franchising, horticulture and petroleum industry codes. Dispute resolution under these codes is funded by government and, in some cases, co-funded by the disputing parties. Combined, these four services resolved 121 disputes and cost the government \$2 million in 2011-12 (on available data).

Where ombudsmen services are warranted (based on the criteria set out above), there may be scope to improve the efficiency of service provision by redirecting some complaints or redrawing the boundaries of some schemes. Indeed, the Commission identified 73 ombudsman or complaints services, and of the 69 that had reported caseload data for 2011-12, the smallest 50 per cent (34 bodies) provided only 2 per cent of complaint resolutions. As the Commission has previously identified, whether this proliferation of ombudsmen matters depends on whether:

- it confuses consumers about where to go
- variations between the individual schemes mean parties are treated in a materially different way, either procedurally or substantively
- there are efficiency gains in specialisation or, alternatively, in consolidation or sharing common assets.

There are several examples where existing ombudsman functions warrant reconsideration.

Commissions that are responsible for privacy and freedom of information complaints receive very small numbers of disputes. These exist in most states and

territories and have very high average costs per complaint (\$9200 per case in 2011-12, figure 9.2, panel A). Efficiency and visibility of these services could be improved if they were run by the appropriate state or territory ombudsman (as is currently the case in Tasmania), or an amalgamated tribunal (as in the case of Victoria, where the Victorian Civil and Administrative Tribunal hears freedom of information cases — this forms part of its administrative division, which on average deals with cases at a cost of around \$2500).

The Aged Care Commissioner (129 complaints in 2011-12 and \$1.5 million total funding) hears unresolved complaints from the Aged Care Complaints Scheme (which itself only deals with around 4246 complaints per year). In its investigation into caring for older Australians, the Commission recommended that the Aged Care Commissioner be abolished and appeals go to the Administrative Appeals Tribunal (PC 2011).

The SA Workcover Ombudsman finalised 189 complaints in 2011-12. This low caseload is probably due to the narrow jurisdiction left after excluding overlap with other bodies. The Workcover Ombudsman has no jurisdiction to investigate issues related to the operation of the *WorkCover Corporation Act 1994* (SA) or the *Fair Work Act 1994* (SA), although workers compensation issues sometimes overlap with the provisions of these Acts, or to investigate matters that are, or are capable of being, the subject of proceedings in the SA Workers Compensation Tribunal.

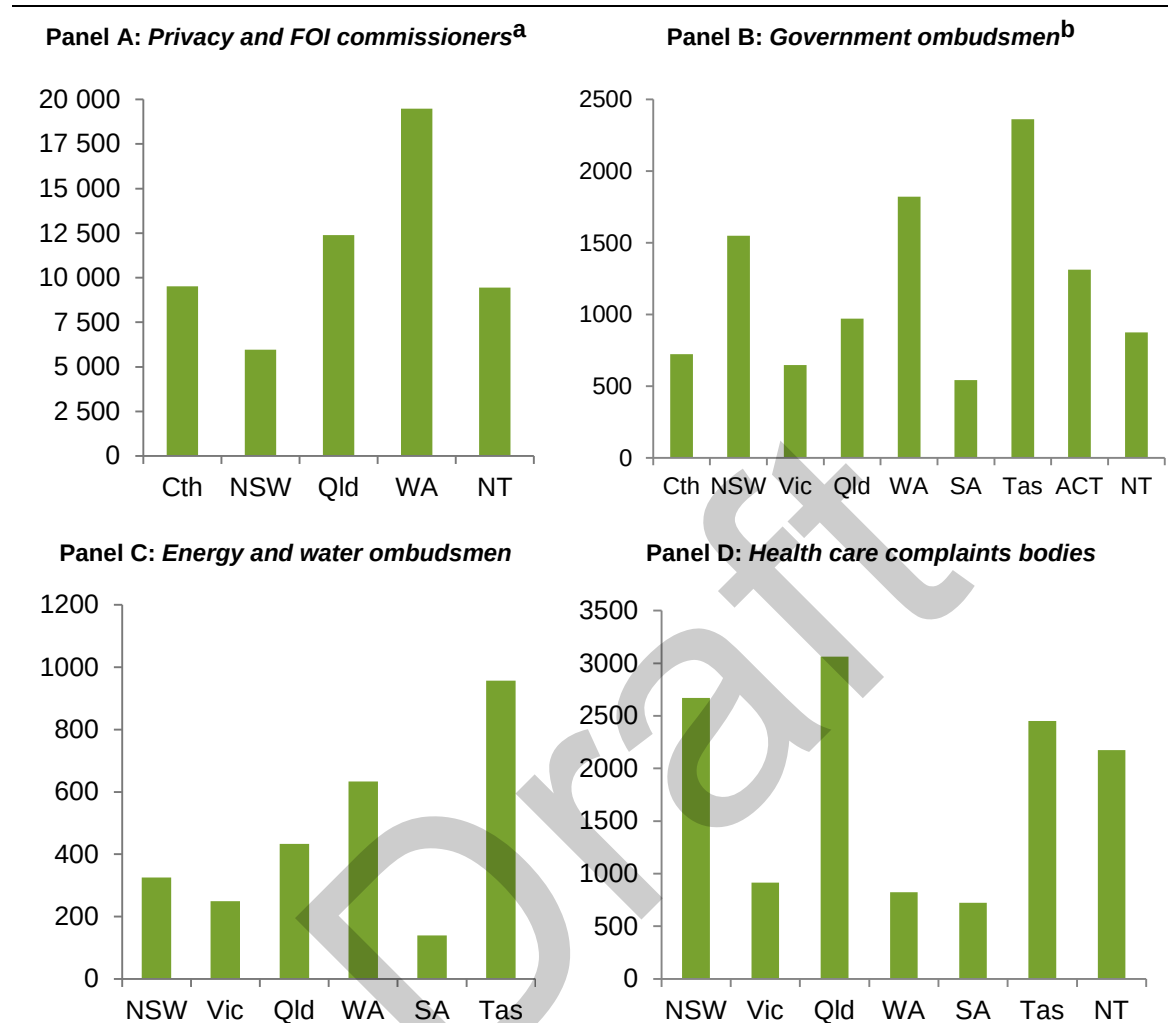
DRAFT RECOMMENDATION 9.2

Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.

The Commission has also previously recommended that jurisdictions consider the potential for bilaterally combining energy ombudsman offices, and the ultimate formation of a national energy ombudsman (PC 2008). As identified at the time, relative cost efficiencies vary significantly, with the highest cost scheme currently around seven times more expensive per complaint than the least (figure 9.2, panel C). An important reason is that the smaller schemes have a limited capacity to spread their fixed costs over many complaints. For example, the smallest, the Tasmanian Energy Ombudsman, finalised only 515 complaints in 2011-12, less than 1 per cent of the number finalised in Victoria.

As well as reducing the average cost in smaller jurisdictions by spreading fixed costs across greater complaint numbers, rationalisation would allow the development of greater expertise within a larger body on complex issues, enable better benchmarking of the consumer performance of suppliers across jurisdictions, and provide greater capacity to feed regulators advice about systemic issues.

Figure 9.2 Cost per case of various ombudsmen
2011-12



^a FOI: Freedom of Information. The Freedom of Information Commissioner Victoria did not exist in 2011-12. ^b Cost per case for 2012-13 has been used for WA.

Data source: Commission estimates.

Improving incentives

Industry ombudsmen provide an example ...

Submissions to this inquiry consistently saw industry ombudsmen as relatively better performers:

In our experience the Industry Ombudsmen are generally more effective than other Ombudsman. (Redfern Legal Centre, sub. 115, p. 25)

SMLS [Springvale Monash Legal Service] finds that Ombudsman services are particularly useful in disputes between industry and consumer and has had positive experiences with them from that perspective. (sub. 84, p. 9)

A number of participants pointed to the incentive structures of industry ombudsmen to explain performance differences.

These schemes are set up with inbuilt incentives which encourage settlement. Industry bodies are required to be a member of the dispute resolution schemes in order to get their licence, they pay a ‘penalty’ when each dispute is lodged and at each stage as it escalates through the resolution process without being finalized. These schemes can make decisions which bind the service provider. The industry Ombudsman are able to report systemic abuses or breaches of the relevant code of conduct to the regulator with the possibility of additional penalties being imposed. (NAAJA, sub. 95, p. 2)

... at the Financial Ombudsman the further you engage in the dispute process and the longer it takes the more the member must pay — so it becomes more costly for them to delay, thus encouraging early settlement before the matter reaches the final stages of the process. (Redfern Legal Centre, sub. 115, p. 25)

Indeed, there seem to be a number of design features contributing to the leading performance of industry ombudsmen, summarised here by the Consumer Action Law Centre:

- industry ombudsman schemes are typically a condition of holding a relevant licence, so all businesses in an industry must participate in the scheme;
- industry ombudsman schemes are funded by industry, so industry has a financial incentive to minimise consumer disputes;
- industry ombudsman schemes typically have independent boards with 50 per cent representation from consumers so the dispute resolutions processes are fair and balanced;
- the ombudsman scheme process provides flexible solutions to disputes but also has ‘teeth’ because the Ombudsmen can make findings binding upon the trader
- Ombudsmen are typically required to investigate and report on systemic problems, meaning that they not only provide solutions for individual disputes but also help bigger problems be solved at their source; and
- Ombudsmen keep detailed records and make detailed reports that assists the advancement of consumers’ interests. (sub. 49, pp. 14–15)

The Commission considers that while there may be some scope for further consolation (particularly in smaller states), industry ombudsmen are performing relatively well. Consistent reporting and performance benchmarking across comparable industry ombudsmen would help to inform ongoing improvements.

... for some government ombudsmen to consider an industry-style approach

In contrast to industry ombudsmen, government departments or agencies do not face ‘penalties’ based on the number of complaints they attract or the time taken to resolve them.

If government agencies were likewise required to contribute to the cost of resolving disputes, they would internalise the cost of poor practices, and would have strong incentives to improve any systemic issues generating complaints, and to resolve complaints that did arise in an efficient and timely manner. While it would likely prove cumbersome to impose a fee for every complaint, a fee could be imposed on agencies that attract complaints above a pre-determined threshold. Focused efforts could yield significant gains as unmet need is centred on just a few key areas, including local government and social welfare payments.

Industry ombudsmen are also accountable to their members to use contributions efficiently. Oversight is facilitated by performance reporting. Performance benchmarking could be used to shed light on inter-jurisdictional cost differences — currently there is a fourfold difference between the average costs of the cheapest and most expensive government ombudsman (figure 9.2, panel B). Any benchmarking should be undertaken carefully to ensure comparability.

Finally, industry ombudsmen have powers to make binding recommendations, while government ombudsmen do not and can only make reports to ministers or to parliament. Among complaints lodged, only 1.1 per cent reach the stage where a determination or binding decision is made (ANZOA, sub. 133). While the potential for such action provides industry ombudsmen with greater influence in negotiating with members, the same powers may not be appropriate for government ombudsmen. Government ombudsmen review decisions that were made not with an overarching profit motive but with a public interest motive, and so would need strong evidence to strike down and re-make such decisions.

DRAFT RECOMMENDATION 9.3

In order to promote the effectiveness of government ombudsmen:

- ***government agencies should be required to contribute to the cost of complaints lodged against them***
- ***ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have responded***
- ***government ombudsmen should be subject to performance benchmarking.***

Government funding does not appear warranted in some cases ...

Some government funded ombudsmen might be more appropriately funded by industry. For example, where an ombudsman or complaints scheme oversees a specific industry, such as the Private Health Insurance Ombudsman or the Aged Care Complaints Scheme, the Commission finds no strong rationale for government funding. Requiring industry to fund these bodies could significantly reduce cost to the taxpayer and place financial incentives on providers to improve services and internal complaint handling procedures.

As noted above, the Commission does not see value in retaining the government funded dispute resolution services that support the produce and grocery, franchising, horticulture and petroleum industry codes. Were these services to be continued, alternative industry-based funding arrangements should be made.

... and in other cases incentives could be improved

Less clear-cut is the appropriate response for employment ombudsmen and health care complaints services. These bodies are relatively expensive to run, reflecting the often complex nature of the issues they address (figure 9.2, panel D). The Fair Work Ombudsman incurred expenditures over \$5000 per complaint in 2011-12.

One option is to require parties subject to numerous, meritorious complaints, to contribute to the cost of resolving those complaints. This measure would target only repeat players rather than achieving cost-recovery for dispute resolution services. Businesses or providers involved in very few complaints (relative to their size) would be excluded, as they have little opportunity to internalise the cost of complaints by improving their internal processes.

Consumer and fair trading bodies constitute a further category of publicly funded entities that resolve disputes between consumers and businesses. In addition, they play significant regulatory roles that vary by jurisdiction — making the cost of their complaints functions difficult to isolate and estimate. A similar fee per complaint (above a certain threshold) levied on businesses could be used to target those businesses with systemic issues or poor complaints mechanisms.

DRAFT RECOMMENDATION 9.4

Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

10 Tribunals

Key points

- Tribunals are statutory, independent legal institutions established to provide a forum to resolve specific types of administrative and civil disputes.
 - Administrative tribunals reconsider the merits of government decisions across Commonwealth, state and territory jurisdictions.
 - Civil tribunals offer alternative forums to courts for resolving disputes. Only states and territories have tribunals with civil jurisdiction.
- Tribunals across Australia are responsible for resolving a wide range of disputes, including administrative matters (such as veteran's entitlements, refugee applications, and planning decisions), civil disputes (such as claims related to the supply of goods and services), and human rights cases (such as guardianship, anti-discrimination and the care of children).
- Tribunals aim to provide informal, low cost and timely avenues for resolving disputes through: active case management; using alternative dispute resolution processes; limiting legal representation and costs awards; and assisting self-represented litigants.
- However, comments from participants and data available to the Commission suggest that some tribunals are not always meeting these aims. Options to improve the performance of tribunals and counteract the criticism of 'creeping legalism' include:
 - more effectively integrating alternative dispute resolution into case management systems
 - more effective application of restrictions on legal representation
 - ensuring that legal representatives are under an obligation to assist the tribunal in achieving its objectives of being fair, just, economical, informal and quick
- There is also potential to improve the efficiency and effectiveness of tribunals through:
 - developing and adopting new technology, such as e-tribunals
 - restructuring operations by co-location or amalgamation, where this has not already occurred
 - streamlining the appeals process to limit the duplication of forums for redress
 - ensuring that there is appropriate access to merits review of administrative decisions.

Tribunals play a significant and evolving role in resolving civil disputes in Australia by providing relatively informal and timely avenues for resolving disputes. Initially, their remit was to help resolve disputes with government and this continues to comprise a significant share of their caseload, reflecting the ongoing impact of government decision-making on the everyday lives of Australians. However, tribunals are increasingly seen as both an adjunct and alternative to courts in jurisdictions where they have been assigned to hear civil disputes. Today there are around 57 tribunals in Australia, and collectively they resolve around 370 000 disputes per year.

Section 10.1 of this chapter briefly considers the role tribunals play in the civil dispute resolution landscape. The following section examines the features inherent in the processes of, and techniques employed by tribunals, that are intended to promote access to justice (section 10.2). How tribunals perform in terms of cost, timeliness, informality and delivering just outcomes is examined in section 10.3. The final section (section 10.4) considers how the performance of tribunals might be improved.

10.1 Tribunals in the civil dispute resolution landscape

What is a tribunal?

Tribunals are created by statute. Reflecting their many and varied roles, tribunals are difficult to neatly define. The Council of Australasian Tribunals (COAT) defines them by reference to both what they are and what they are not:

Tribunal means any Commonwealth, State or Territory body whose primary function involves the determination of disputes, including administrative review, party/party disputes and disciplinary applications but which in carrying out this function is not acting as a court. (2002, pp. 2–3)

In the Commonwealth jurisdiction, tribunals cannot exercise judicial power, which is reserved for the courts under the Constitution. Further, tribunals cannot create binding precedents, nor can they apply criminal penalties. Notwithstanding these important differences, many features of courts are common to tribunals, for example they must:

- be impartial and detached from the ordinary processes of executive government
- have a defined jurisdiction
- receive claims or applications

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- determine claims following a process of examining submissions, receiving evidence and assessing that evidence by reference to standards of proof
 - use a process of assessment that gives rise to the making of a reasoned decision applying the relevant law
 - make a final order that is binding (*N (No 2) v Director General, Attorney-General's Dept* [2002] NSWADT 33 (8 March 2002) at [15]).

This differs from ombudsmen who do not require an application to conduct an investigation and who resolve complaints through negotiation rather than rulings (although some ombudsmen can make rulings in some circumstances).

Tribunals are further defined by the way in which they seek to carry out their functions — with less formality, shorter timeframes and at lower cost than courts. Indeed, many tribunals include objectives around time and cost in their enacting legislation. As COAT noted:

Most tribunals operate under statutory exhortations to be quick, economical and inexpensive while observing principles of natural justice and procedural fairness. (sub. 98, p. 5)

What types of disputes do tribunals hear?

Tribunals traditionally resolve disputes in particular areas, reflecting the complexity of some disputes and therefore the specialist knowledge required to deal with them. Over time, some jurisdictions have created broader institutions that act as a one-stop-shop, although they preserve varying degrees of internal specialisation. Tribunals hear both administrative cases (reviewing the merits of government decisions) and civil cases. The nature of this distinction varies by jurisdiction.

Under Chapter III of the Constitution, the Australian Government is restricted in the jurisdiction it may assign to Commonwealth tribunals. As a result, Commonwealth tribunals are purely administrative, with civil jurisdiction reserved for the courts.

Commonwealth tribunals exist for issues such as workplace relations, migration, veterans' affairs, taxation and social security matters. Tribunals 'stand in the shoes' of the original decision maker, and so can impose a different decision. This can be contrasted with judicial review by courts, where only the legality of a decision is considered. As the Administrative Appeals Tribunal (AAT) remarked:

Merits review undertaken by skilled independent members allows these tribunals to reach the correct or preferable decision — not merely to set a flawed decision aside and send it back for reconsideration. ... judicial review can set decisions aside, compel duties to be performed and prevent wrongs, but it cannot substitute a correct or

preferable decision — that is a step which only merits review can undertake. (sub. 65, p. 1)

Constitutional restrictions do not apply to state and territory governments, which may assign both civil and administrative jurisdiction to tribunals. Rather, the jurisdiction of state and territory tribunals is limited to what is endowed on them by their own legislation or by subject matter legislation (for example, the *Fair Trading Act 1999* (Vic)).

While states and territories have more latitude in the powers they can confer on tribunals, jurisdictions have exploited these opportunities to the differing extents (table 10.1):

- The Victorian Civil and Administrative Tribunal (VCAT) was the first amalgamated tribunal of its kind in the world and remains the largest tribunal in Australia (VCAT 2013). It has a considerable jurisdiction outside merits review of administrative decisions, with three divisions — civil, administrative and human rights — and 14 lists that focus on more specialised issues.
- Queensland Civil and Administrative Tribunal (QCAT, sub. 98) receives applications across 160 jurisdictions, including in relation to consumer disputes, guardianship and administration, child protection, administrative review, anti-discrimination, professional discipline and town planning.
- The NSW Civil and Administrative Tribunal (NCAT) commenced on 1 January 2014, consolidating 23 tribunals, many of which were quite small.
- The SA Civil and Administrative Tribunal is set to commence later in 2014, and is likely to take responsibility for many of South Australia's 16 tribunals.
- At the other end of the spectrum is the Northern Territory, which has no general civil or administrative tribunal. Civil matters are heard in the courts and administrative merits review is unavailable in some cases. The Northern Territory has two specialist tribunals — the Mental Health Review Tribunal and the Lands, Planning and Mining Tribunal.

A full list of tribunals is set out in appendix D.

There is a broad trend toward consolidating tribunals:

From 1 January 2014 five states and territories (Victoria, Western Australia, Queensland and New South Wales, and the ACT) will have large 'super' civil and administrative tribunals with a wide jurisdictional reach and broad but similar powers to decide administrative review matters, civil disputes and human rights cases quickly and economically. South Australia has announced plans for one. The Northern Territory government has instituted discussions to a similar end. (COAT, sub. 98, p. 4)

Table 10.1 Tribunals, by issues handled

<i>Jurisdiction</i>	<i>Administrative</i>	<i>General civil</i>	<i>Mental health and guardianship</i>	<i>Land and planning</i>
Commonwealth	✓ (AAT 1975)	n.a.	n.a.	n.a.
NSW	✓ (NCAT 2014)	✓	✓	No – specialist court
VIC	✓ (VCAT 1998)	✓	✓	✓ (VCAT)
Qld	✓ (QCAT 2009)	✓	✓	No – specialist court
WA	✓ (SAT 2005)	No ^a	✓	✓ (SAT)
SA	No ^b	No ^b	✓	No – specialist court
Tas	✓ (AAD ^c 2002)	No ^d	✓	✓ (RMPAT ^e)
ACT	✓ (ACAT 2008)	✓	✓	✓ (ACAT)
NT	No	No ^c (mental health only)		✓ (LPMT ^f)

^a The SAT has limited jurisdiction in civil matters. ^b The South Australian Civil and Administrative Tribunal (SACAT) Bill was introduced in 2013. ^c Administrative Appeals Division of the Magistrates' Court. ^d Minor civil matters are dealt with in the magistrates' court. ^e Resource Management and Planning Appeals Tribunal. ^f Lands, Planning and Mining Tribunal.

Source: Commission research.

What share of disputes do tribunals handle?

A commonly held view is that more cases in Australia are dealt with by tribunals than courts. The former president of the AAT, for example, said:

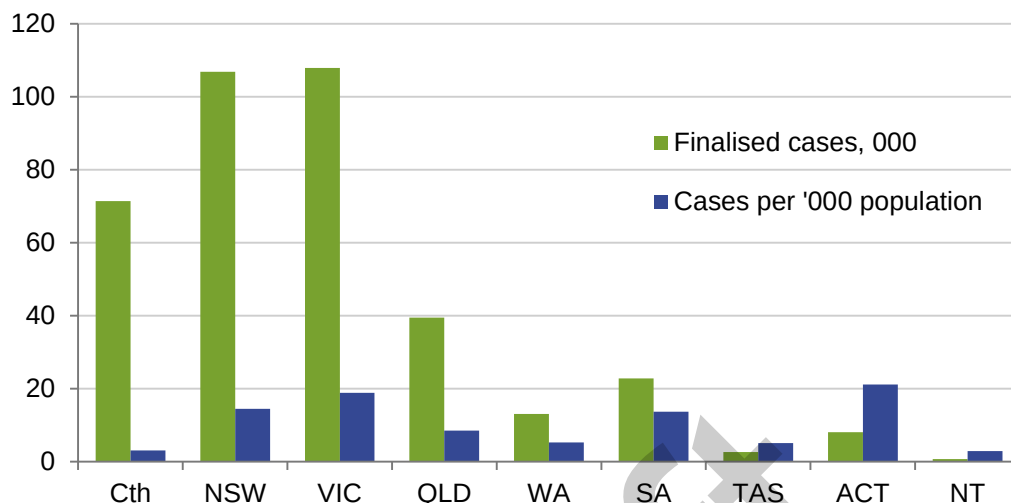
Ordinary Australians are more likely to experience proceedings before a tribunal than before a court. (Downes 2004)

However data collected by the Commission show that courts finalise around 60 per cent more cases than tribunals. That said, tribunals are significant players in the civil justice system — the Commission estimates that tribunals finalised 373 000 cases in 2011-12 (figure 10.1). This point was echoed by COAT, who remarked:

Tribunals impinge upon the lives of citizens in broad and diverse ways. Large or small, they are busy. (sub. 98, p. 4)

Per capita caseload differences between jurisdictions reflect the types of tribunals that exist and the range of cases they are able to hear. For example, the ACT has a well-established consolidated tribunal with wide jurisdiction, but Western Australia's State Administrative Tribunal does not have general civil jurisdiction.

Figure 10.1 Tribunal caseload by state
2011-12



Data source: Commission estimates.

10.2 A different way of 'doing business'

Tribunals seek to meet statutory requirements to deliver quick, economical and inexpensive justice by:

- being less formal than courts
- providing active case management
- employing alternative dispute resolution (ADR)
- limiting legal representation and costs awards
- assisting self-represented litigants.

Informality

Tribunals are commissioned to be just, quick, efficient and low cost without regard to technicalities and legal forms. Tribunals generally set their own procedures and they are not bound by the rules of evidence (NSW Standing Committee on Law and Justice 2012). This promotes substantive justice, as all relevant evidence is admissible.

The criterion for admissibility of material in the tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance. (*Hill J., Casey v Repatriation Commission* (1995) 39 ALD 34 at 38)

Informality is often institutionalised by a tribunal's enacting legislation or by subject matter legislation. For example, the following features of the Social Security Appeals Tribunal (SSAT) are found in various Acts that assign jurisdiction to it.

The SSAT is not bound by legal technicalities, legal forms or rules of evidence and is required to act as speedily as a proper consideration of the review allows. The SSAT may inform itself on any matter relevant to a review of a decision in any manner it considers appropriate. The SSAT may take evidence on oath or affirmation for the purposes of a review of a decision. (sub. 86, p. 2)

Active case management

Tribunals exert greater influence over events and the pace of hearings than courts. And they can be more inquisitorial in their approach. According to COAT:

... [most tribunals'] case management techniques involve early discussions with the parties themselves at directions hearings, compulsory conferences and the like. Tribunal members also often adopt an inquisitorial approach to dispute determination. This early intervention through directions hearings and the like informs the tribunal about the real issues in a matter, and enables members to frame directions designed to ensure the quickest and least expensive method of resolution. (sub. 98, pp. 8–9)

The inquisitorial powers of tribunal members are thought to assist self-represented litigants because members can ask questions and seek information that a self-represented litigant may not know to present. This can be used to address any imbalance of power between parties and direct parties to the core issues, which can expedite proceedings. Justice Barker, President of the WA State Administrative Tribunal, explained:

We can ask for more information, and that is a very important part of being a tribunal. Courts cannot do that. (Standing Committee on Legislation 2009, pp. 22–23)

The extent to which tribunal hearings become inquisitorial depends on the nature of the matter before the tribunal and the parties and members involved. A significant benefit of tribunals is that they can actively modify procedures depending on the demands of a particular case. As O'Connor J observed:

An unrepresented applicant in the social security jurisdiction, with an intellectual disability, will require vastly different procedures compared to a case where two SCs [senior counsel] are arguing about complex taxation law. That is not to suggest that either application is of any lesser importance to the applicant in each case. It is simply to demonstrate that procedural flexibility has a context. (1999)

Intensive and widespread use of ADR

Tribunals identify themselves as being extensive users of ADR, and many operate under legislation which exhorts and encourages parties and the tribunal itself to use a range of ADR techniques and strategies. For example, QCAT operates under a statutory imperative to use ADR ‘widely and energetically’. It uses compulsory conferences where mediators (who are also Tribunal members) not only have the usual powers of mediation but can also give directions:

That directions power is salutary, and invaluable. It enables the presiding member, after an unsuccessful mediation, to make case-specific directions about remaining unresolved issues, evidence, and the speediest and cheapest method of getting the matter to the shortest possible hearing. (COAT, sub. 98, p. 7)

Where matters are referred to mediation or conciliation, they are often resolved through conferences between the parties prior to formal hearings. For example:

- of matters referred to compulsory conferences at VCAT in 2012-13, 57 per cent were resolved
- of matters referred to conciliation at the Fair Work Commission in 2011-12, 78 per cent were settled
- of new building matters at the WA State Administrative Tribunal in 2011-12, 56 per cent were settled through the directions hearing process and mediation
- of non-minor civil disputes in QCAT in 2011-12, 62 per cent were settled at mediation.

A number of tribunals highlighted the benefits of incorporating ADR into their processes. The AAT for example, said that it uses a number of forms of ADR and that these processes lead to applications being finalised earlier than would otherwise be the case and are a means of reaching outcomes that parties prefer. The AAT observed that ADR processes also provide an opportunity for the issues to be explored and discussed in detail in a forum that is less daunting for many parties than a formal hearing (sub. 65).

Even if parties are not able to resolve disputes through pre-hearing discussions, the discussions can identify and narrow the issues in dispute.

Limiting rights to legal representation and costs awards

Some tribunals operate under statutory provisions requiring that parties may only be legally represented with the leave of the tribunal.

The purpose of the provisions is to balance the right to representation with the need to operate quickly and cheaply (Bell 2009). The SSAT explained that due to the non-adversarial nature of SSAT hearings, the presence or absence of legal representatives does not put either party at a disadvantage (sub. 86).

Discretion generally exists to allow representation where the proceeding is likely to involve complex questions of fact or law, where another party is represented, or where all parties have agreed to representation. However, other constraints may apply. For example, in the SSAT, a lawyer representing a party is not permitted to cross-examine the other party or his or her witnesses.

Limits on the use of legal representation are far from universal. For example, parties in the AAT are entitled to be represented.²⁹ The extent to which they elect to do so varies significantly by type of decision being reviewed — ranging from 82 per cent for Veterans' Affairs to 26 per cent for Social Security matters (sub. 65).

Similarly, in specialist tribunals dealing with adult guardianship and administration and mental health issues, representation is often a matter of automatic right or, at least allowed in the majority of cases. For example, the Mental Health Review Tribunal (NSW) permitted legal representation in 63 per cent of all hearings in 2011-12 and just over 98 per cent of all forensic hearings, where criminal charges were involved (COAT, sub. 98).

Another feature of tribunals is the limit on the award of costs. Typically, costs are only awarded where one party has acted unconscionably, for example, by delaying proceedings or making a legally untenable claim (*Choi v Mee Wah To (No 3)* [2014] QCAT 030).³⁰ This is in contrast to the courts, where costs are assumed to 'follow the event' (chapter 13). Limiting costs also reduces the proportion of cases where obtaining legal assistance is cost-effective.

Assisting self-represented parties

Limits on the use of legal representation are typically coupled with requirements on tribunals to ensure that all parties understand the practices and procedures. This can require the tribunal to:

- explain to a self-represented party the procedures to be followed

²⁹ Section 32 of the AAT Act.

³⁰ The AAT is bound by a different set of exceptions. While the usual position is that parties bear their own costs, the decisionmaker will usually be required to pay the costs incurred by an applicant who is successful when seeking review of decisions under particular Acts (sub. 65, p. 14).

-
- direct the self-represented party positively to the legal and factual issues in the case, helping them to understand what they are
 - direct the self-represented party negatively away from irrelevant issues, explaining why
 - assist the self-represented party to present their evidence and to test the evidence of the other party
 - assist the self-represented party to present their submissions in the case by directing their attention to the relevant issues and asking for their response. (Bell 2009)

Some larger tribunals (or their larger registries) have dedicated outreach officers to assist self-represented litigants, in addition to other client services. For example, the AAT runs an outreach program that involves calling self-represented litigants early on to answer questions they may have and provide information on what will happen next and what services may be available to them, such as interpreters, disability services or legal assistance. This is repeated prior to a hearing, where a staff member will again contact a self-represented litigant to discuss the proceedings. On the day of the hearing, a staff member will also familiarise the person with the hearing room and what will occur (sub. 65).

10.3 Are tribunals effective in delivering access to justice?

Given that it is the delivery of economical, timely and informal justice that sets tribunals apart from the courts it is important to explore how successful tribunals are in delivering accessible justice.

Cost to government of service provision

The cost of maintaining a tribunal depends on factors such as the number of cases, the type of cases and the needs of clients. These factors vary across tribunals, and along with a paucity of data, make cost comparisons problematic.

Significant cost differences exist as a result of the nature of the work undertaken in different tribunals. At the high end, the National Native Title Tribunal cost over \$1 million per case resolved in 2011-12, and the Australian Copyright Tribunal cost over \$100 000 per case. It is difficult to analyse the efficiency of tribunals based on cost per case when there are no similar tribunals available for comparison. A lack of publically reported data for many tribunals was also an obstacle. Where

comparisons are available on similar (although not identical) case types, the Commission observed the following.³¹

- Most mental health tribunals have similar average costs (to government) per case, ranging from \$320 in Tasmania to \$530 in Victoria.
- Civil tribunals tend to have relatively low average costs. In 2011-12, average costs in VCAT's civil division were \$290 per case, costs in NSW's civil tribunal (which is now part of NCAT) were around \$440 and minor civil disputes in QCAT cost \$250.
- Administrative tribunals appear significantly more expensive. For example, in 2011-12, average costs in VCAT's administrative division and in the NSW Administrative Decisions Tribunal were \$2500 and \$4700 respectively. In the AAT, which deals with social security reviews along with a range of other (relatively complex) matters such as tax, average costs per case were \$7200.
- Average costs for specialist administrative tribunals varied. For example in 2011-12: average costs were \$2300 in the SSAT, \$4200 in the Fair Work Commission, \$4900 in the Migration and Refugee Review Tribunals and \$1700 in the Veterans' Review Board (\$1700).

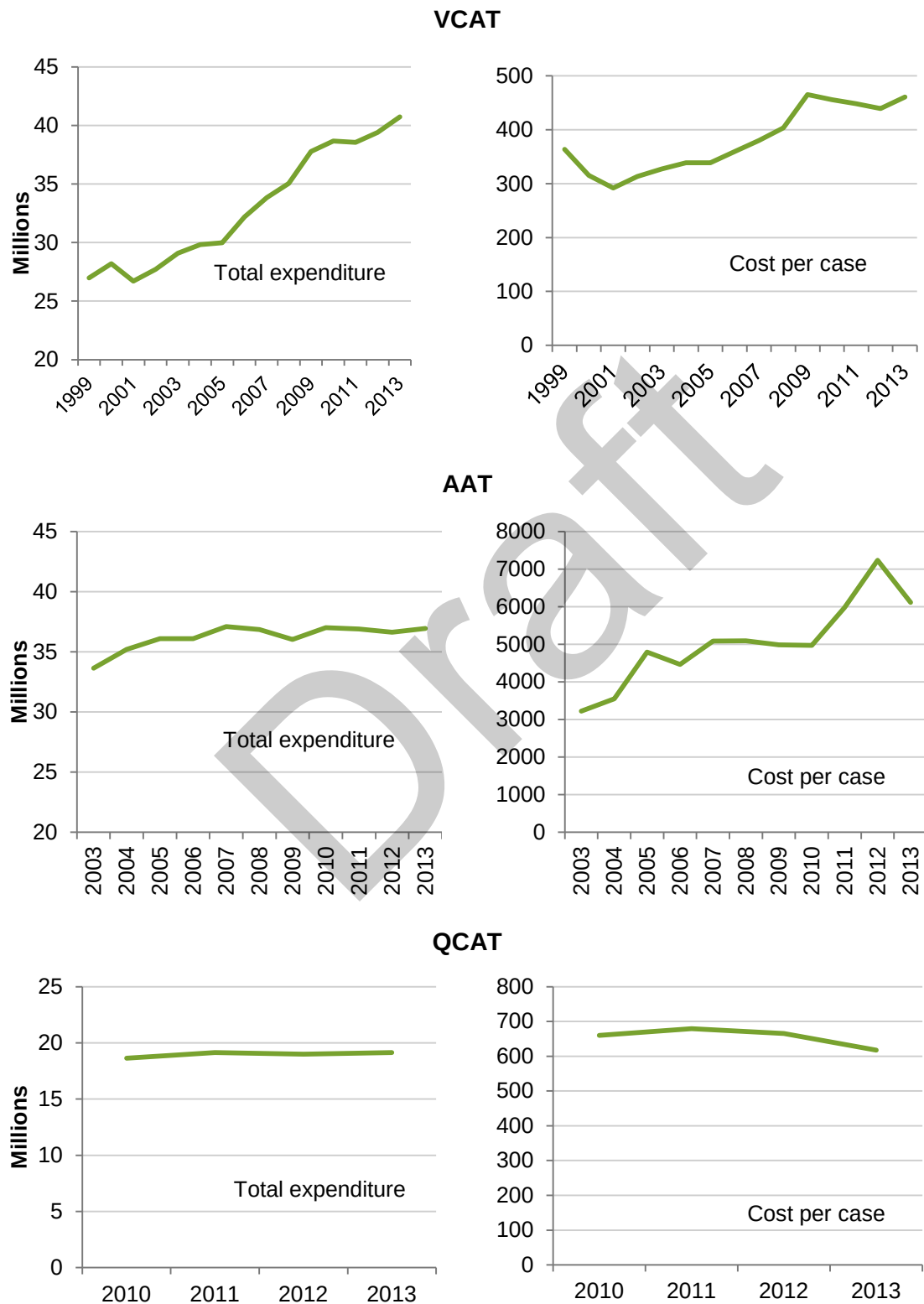
Average costs can also vary from year to year depending on caseload (figure 10.2). For example, between 2007 and 2009 a fall in VCAT's caseload, together with expenditure increasing at a steady rate, resulted in a spike in average cost. Average costs at VCAT have continued to increase around 3 per cent per year in real terms since 1999–2000. A possible explanation is that over time, the proportion of complex cases heard in the smaller lists has been increasing (Bell 2009).

Cost per case at the AAT has increased for both cases that proceed to a hearing and those that do not. Between 2004 and 2013 the average cost of finalisations without a hearing increased from \$2000 to \$3500, and those with hearings from \$11 000 to \$16 600 (2013 prices).

In contrast, since its creation in 2009, overall costs in QCAT have risen only one per cent, and costs per case have fallen two per cent. While these tribunals have different case mixes and are difficult to compare, differences in cost trends over time suggests that there may be leading practices in some tribunals that could be applied elsewhere.

³¹ Average cost per case is calculated by dividing total expenditure (or total expenditure of a particular tribunal division) by finalised cases, in order to include the full cost of overheads.

Figure 10.2 Total annual expenditure and cost per case
2012 prices



^a Costs per case are given by total expenditure divided by total finalised case in a given year.

Data source: Annual reports.

Cost to litigants

Given that most tribunals aim (and many are required by statute) to minimise the cost to parties, it is imperative to know what costs parties incur when resolving their disputes. But there is little meaningful data on the full cost to litigants of attending tribunals. Previous reviews, such as the 2009 review of the WA State Administrative Tribunal, have not attempted to estimate these costs.

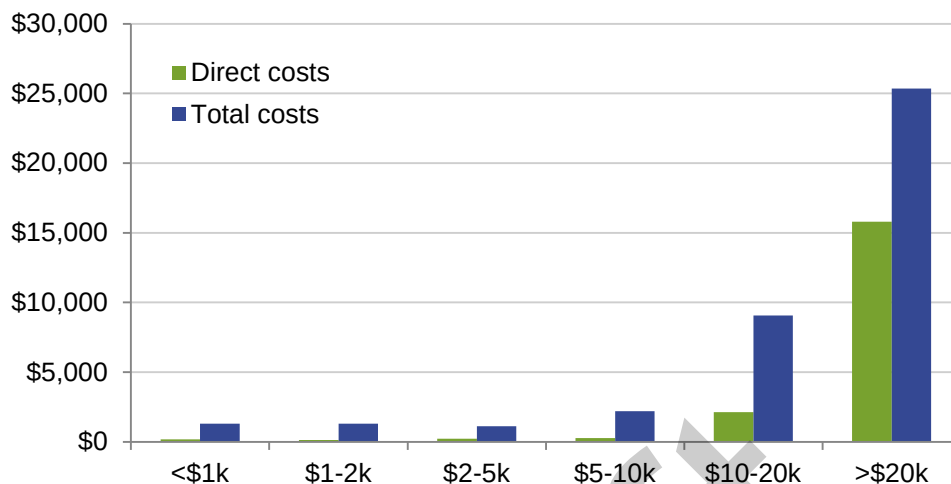
For smaller claims or less complex cases, which comprise the bulk of tribunal caseload, the key costs to litigants are tribunal fees and time costs, including the cost of preparing the case and attending the tribunal. There is limited information available on these costs. One of the few empirical studies of the direct and indirect costs of tribunal use was undertaken by the Victorian Small Business Commissioner of the cost to small businesses of attending VCAT (VSBC 2014). The study found the indirect costs — such as the cost of staff time and attending hearings — to disputants was around \$1000 in lower value disputes (under \$5000). Greater use of technology provides one avenue to reduce these costs and is discussed in section 10.4.

In more complex cases where parties require legal advice or expert reports, professional fees can substantially increase the cost to litigants (chapter 3). Of the small businesses that participated in the VCAT study, 20 per cent engaged a legal representative, at a mean cost of \$8000 (median \$2700). The combined direct and indirect costs of attending VCAT — including staff time costs, travel and other expenses, but not including VCAT fees — was \$9000 for disputes between \$10 000 and \$20 000, or \$25 000 for disputes over \$20 000 (figure 10.3). The average cost across all disputes was 74 per cent of the disputed amount (VSBC 2014).

The study also surveyed non-pecuniary costs. Businesses said that litigation had an adverse effect on business performance (37 per cent), work related stress (52 per cent), and/or health and well-being (31 per cent). This was significantly higher for smaller businesses and where larger amounts were in dispute.

A further source of information on the cost incurred by litigants appearing in tribunals is sourced from Comcare and involves disputes over workplace compensation — usually resolved in the Administrative Appeals Tribunal (AAT). These types of cases typically involve large compensation amounts and can require testimony from expert medical witnesses. Comcare advise that the mean cost to the opposing party in such disputes is just under \$20 000 (median of around \$15 000) (Comcare, pers. comm., 28 February 2014). (The cost to Comcare in these disputes is discussed later in this section.)

Figure 10.3 VCAT, average costs incurred by small businesses, by amount of dispute ^a



^a Direct cost included expert services (e.g. lawyers, accountants) and transport and related costs, but not VCAT fees; indirect cost included the amount of time spent by the businessperson or their staff on the dispute and litigation process, calculated at an ABS-based hourly rate.

Data source: VSBC (2014).

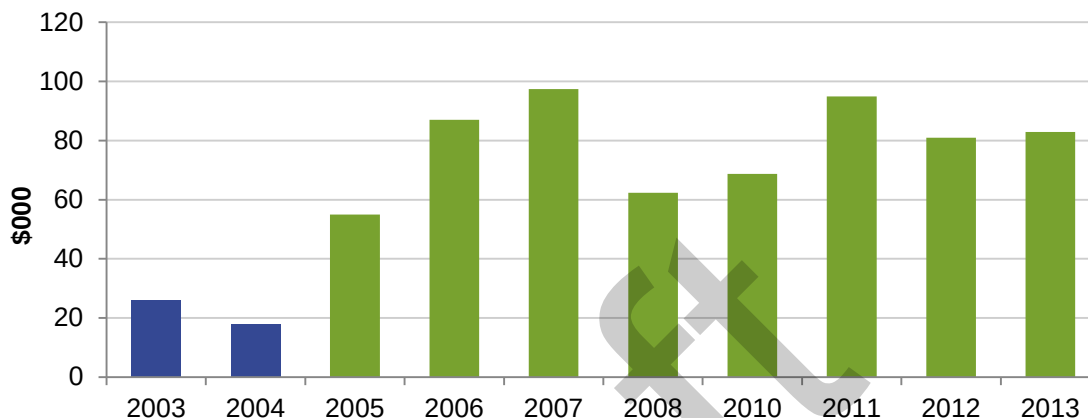
While broad based estimates are not available for the cost incurred by parties attending Western Australia's SAT, the Veterinary Surgeons Board of WA noted a significant increase in legal and administrative expenses after the introduction of the SAT (figure 10.4). The Board stated that the potential for legal costs to blow out for a single case has had an impact on their decisions to proceed with some complaints, and that the time to resolve more serious issues has doubled. One matter where the board sought to reprimand a veterinary surgeon took 15 months and cost \$44 000, of which the board recovered \$30 000 — the board considered this time and cost to be disproportionate to the severity of the misconduct, however there was no suitable alternative sanction (sub. 145). Issues of increased complexity, legality and cost were raised by the Veterinary Surgeons Board and others in the 2009 review of the SAT (Standing Committee on Legislation 2009).

Costs to litigants are mitigated in some cases by provision of legal assistance and fee waivers. For example, a number of tribunals offer fee waivers for disadvantaged clients (chapter 16); these same clients may also be eligible for assistance from a Legal Aid Commission or Community Legal Centre (chapter 20).

Governments also incur legal costs in defending administrative matters, although the nature of these costs varies by tribunal. In the Social Security Appeals Tribunal (SSAT) and Veterans' Review Board (VRB), government departments provide the tribunal with the relevant information and do not attend hearings, obviating any need for legal representation. In contrast, both the ATO and Comcare can incur

substantial costs in bringing or defending action in the AAT. For example, Comcare report that they incurred average costs per case of \$15 500 when matters were withdrawn, \$23 000 when matters were resolved by consent and \$48 000 for matters that went to hearing (Comcare, pers. comm., 28 February 2014).

Figure 10.4 Legal expenses of the Veterinary Surgeons Board WA



^a The SAT commenced operations on 1 Jan 2005, in the middle of the 2004-05 year.

Data source: Veterinary Surgeons' Board of WA (sub. 145, p. 2).

Timeliness

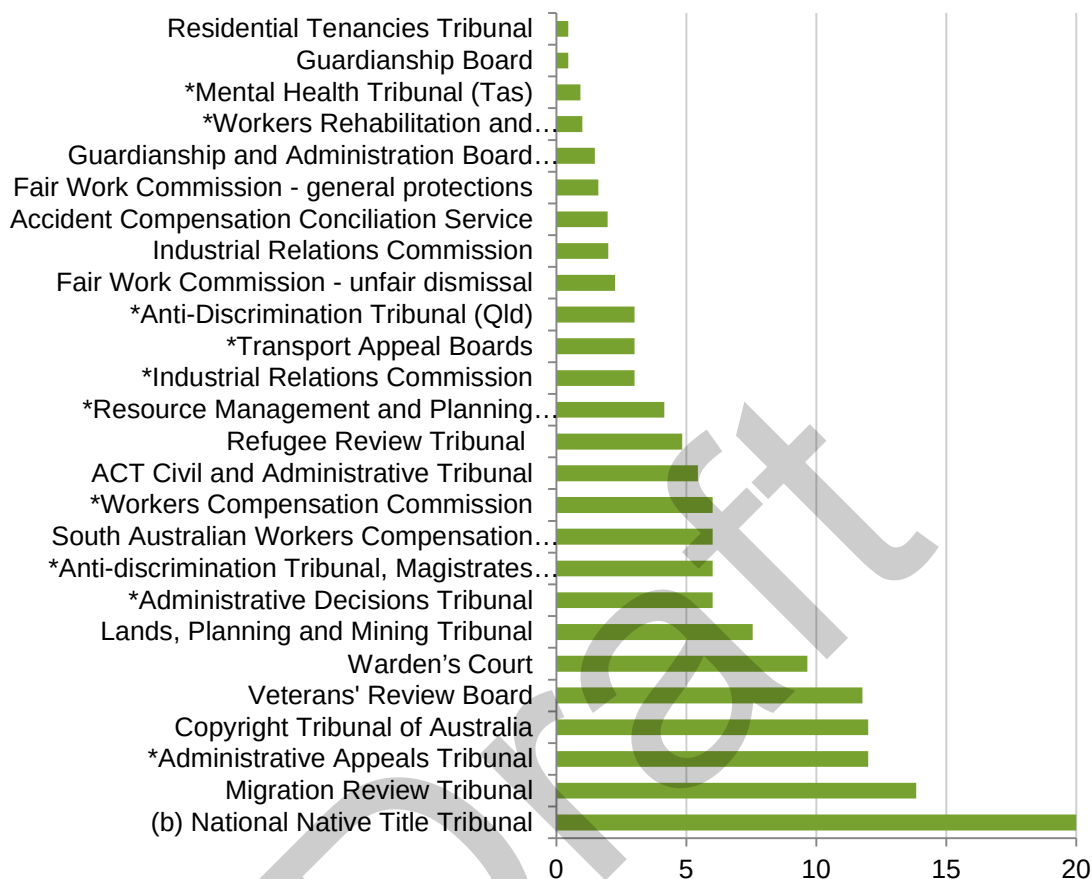
Tribunals aim to resolve disputes quickly in order to minimise the impact of the process on parties. Long timeframes may reduce access to justice by discouraging parties from seeking redress. As noted by the Tasmanian Mental Health Tribunal:

The Tribunal's failure to meet statutory timeframes is not just about statistics, it impacts on the lives of involuntary patients with mental illness. (2012, p. 5)

The Consumer Action Law Centre(sub. 49) also argued that delays can have very real tangible and intangible costs on their clients. The Centre provided the example of a recent small civil claim relating to a defective vehicle that was before VCAT. For this case, there was an eleven month delay between the time the client stopped using the defective car to the time a favourable result in VCAT was achieved. While the client had access to another car which had been loaned to her, the car was not large enough for all of her children.

Most tribunals that report data on timeliness resolve at least 50 per cent of disputes within 6 months (figure 10.5). When weighted for case numbers, the average time for all tribunal cases is 3 months. However, many tribunals do not provide this data.

Figure 10.5 Time to finalise at least 50 per cent of matters ^a
Months; 2011-12



^a Tribunals that did not specify the time taken to resolve 50 per cent of matters are denoted by (*). The time taken to resolve a higher proportion of cases was used as an alternative, according to the data available. The consolidated state and territory tribunals report this data by division and were not included in the figure. ^b The National Native Title Tribunal recorded an average time to finalise of 71 months (6 years).

Data source: Annual reports.

It is important to bear in mind that the complexity of disputes handled varies significantly both across and within tribunals, affecting the time taken. For example, the AAT reports that 93 per cent of social security applications were finalised within 12 months, but only 68 per cent of workers' compensation and 70 per cent of veterans' affairs applications were finalised in that (target) timeframe (sub 65). This reflects differing times required to gather factual evidence and organise witnesses, among other factors, and underscores the need for caution making timeliness comparisons across tribunals.

In the civil jurisdiction, some comparison can be made with the courts. For example, in South Australia, where most civil disputes are heard in the Magistrates' Court, 66 per cent of civil cases were finalised within 6 months. In VCAT's civil

claims list, 50 per cent of matters were finalised within 3 months, and for QCAT minor civil disputes, 2 months (Commission estimates).

User satisfaction

Cost and timeliness measures are only partial indicators of the effectiveness of tribunals — ultimately users are seeking fair and just resolutions to their disputes. Given the nature of legal disputes, some dissatisfaction is likely to remain even where no injustice has occurred. Rates of appeal, complaints and surveys of user satisfaction provide some insights (table 10.2).

Table 10.2 Measures of satisfaction
2011-12

QCAT	Client satisfaction 71%; stakeholder satisfaction 67%; complaints at 0.7% of total applications
AAT	59% of litigants considered that their matter had been dealt with fairly; representatives (including lawyers) rated the tribunal more highly. 1.9% of cases were appealed and 0.8% complained of (94 and 41 cases, respectively)
CTTT ^a	Complaints less than 1% of hearings held
ACAT	0.7% of cases were appealed (60 appeals) and there were four applications for leave to appeal to the Supreme Court
SSAT	Appeals (to the AAT) fell by 13% in 2011-12
VRB	15.6% of VRB decisions were appealed (to the AAT)
FWC ^a	10.5% of unfair dismissal cases were appealed (58 of 551)
MRT ^a	3.2% of decisions are appealed to the AAT (254 of 8,011)
RRT ^a	23.5% of decisions are appealed to the AAT (660 of 2,804)

^a Consumer, Trader and Tenancy Tribunal, Fair Work Commission, Migration Review Tribunal, Refugee Review Tribunal.

Sources: Annual reports.

The AAT and QCAT both conducted user surveys in 2012. In the AAT, perceptions of fairness were strongly correlated to whether the case was decided in a person's favour. However among their representatives, who tend to have less of a personal investment in the outcome, 75 per cent expressed satisfaction with the fairness of the review process.

The *LAW Survey* of legal need collected data on recently finalised problems. In terms of satisfaction, courts and tribunals received similar overall ratings. However, a greater proportion of problems had respondents who expressed that they were 'very satisfied' with tribunals relative to courts (Commission estimates based on unpublished *LAW Survey* data).

Based on limited data, the complaint rates are low. Rates of appeals vary from 1.9 per cent of AAT cases to 23.5 per cent of Refugee Review Tribunal (RRT) cases — bearing in mind that it is much more expensive to appeal to the Federal Court (from the AAT) than to the AAT (from the RRT).

10.4 How might tribunal performance be improved?

There is a divergence between the public's expectations of tribunals — that they should provide a forum accessible to the ordinary citizen — and current practice. This divergence is borne out in some of the data that the Commission has gathered on timeliness and the costs to litigants and the findings of past reviews. For example, a 2009 review of VCAT, pointed to criticisms about excessive cost and delay in being listed and getting a decision, as well as 'creeping legalism' and the dominant role of lawyers (Bell 2009). Justice Bell, who conducted a review of VCAT put it this way:

[The tribunal] was intended to provide quick, cheap and efficient justice for the general public. Yet many people think it had become too formal, with lawyers, expert witnesses and advocates dominating proceedings. It was often said the tribunal had allowed 'creeping legalism' to occur. (2009, p. 21)

Participants to this inquiry also highlighted the divergence between the original intent of tribunals and their experience (sub. 22). For example, the Springvale Monash Legal Service (SMLS) said:

Tribunals are promoted as a user friendly, cost and time effective option in the dispute resolution process. SMLS believes that whilst this was the initial intention of the tribunal jurisdiction there has been a drift away from this ethos. (sub. 84, p. 9)

The Commission has identified a number of ways in which the performance of tribunals can be improved. Most represent an extension of measures that have already been shown to be effective or a 'return' to guiding principles. They include:

- employing ADR as part of active case management
- limiting legal representation where appropriate
- employing technology to greater effect
- identifying opportunities for streamlining and amalgamation
- ensuring coverage of relevant disputes.

Assistance for self-represented litigants is discussed in chapter 14.

More effectively using ADR as part of case management

The generally inquisitorial nature of tribunal processes means that often disputes considered by them are well suited to the use of ADR. Some tribunals, particularly those that undertake administrative review, are active users of ADR and refer a significant proportion of cases to these processes.

There are many options that can be presented by blending ADR skills and techniques with tribunal processes to enable that the tribunal system to meet a range of objectives and to promote a more responsive approach to litigant needs. Many tribunals have pursued the option of referral of cases to ADR processes such as mediation, arbitration and case evaluation or appraisal that are conducted separately from the determinative process. (Sourdin 2005, p. 17)

The use of ADR to resolve disputes lodged with tribunals can significantly reduce costs for both tribunals and users. For example, the AAT (2013) noted a significant difference in its average costs between cases finalised prior to a hearing (\$3500) or with a hearing (\$16 600).

There are a number of dispute types or case circumstances where a formal determination at hearing is more appropriate and results in a quicker and more cost effective resolution. For example, residential tenancies matters in Victoria generally take around 15 minutes to resolve, and the relevant legislation does not lend itself to an ADR component (VCAT, pers. comm., 13 March 2014). As such, headline figures relating to the use of ADR in tribunals may not accurately reflect the different types of disputes and their amenability to the use of ADR (box 10.1).

Ensuring that disputes are resolved in the most efficient and effective way requires case management processes that can identify and triage disputes, and direct parties to an appropriate process, such as ADR or a hearing, that is most likely to result in settlement and the most beneficial outcome for the parties involved.

While it appears that most tribunals have triage processes in place, it is not clear how well these processes and guidelines for how and when matters are referred to ADR are operating. As noted in chapter 8, the AAT (sub. 65) has developed process models for each form of ADR they use and guidelines to assist staff in the appropriate referral of cases. Such measures can increase the consistency in referral and resolution pathways, and if made available to parties, could better inform them about what to expect in the dispute resolution process.

Some tribunals are applying novel approaches to expand the range of dispute types that may benefit from attempted resolution through ADR (in its many and varied forms). For example, VCAT considers itself to be a leader in the application of ADR to various disputes and is actively seeking ways to expand the range of

processes offered and increase the application of these processes as part of improving case management (VCAT 2013).

Box 10.1 Unpacking ADR use in VCAT

On a first glance, it would appear that ADR use and settlement rates in VCAT are very low. The overall settlement rate through compulsory conference and mediation was 1.6 per cent in 2012-13 (or 1382 matters of 88 421 finalised). However, this headline figure does not reflect the types of disputes lodged at VCAT and the appropriateness of these disputes for resolution through ADR.

Exploring different types of disputes can provide a different perspective on how and where ADR is being used to settle disputes. For example:

- Retail tenancy matters are not generally amenable to resolution through ADR due to legislative limitations on how matters can be settled. Only 85 cases out of 58 436 went to compulsory conference or mediation — 44 were resolved through these processes.
- Guardianship matters are not amenable to ADR as hearings are required to make protective orders. No matters were referred to ADR (out of 11 952 finalised).
- Civil claims are predominately managed under the Short Mediation and Hearing program which is not reported as a mediation activity in the ADR statistics. Only 414 cases out of 8433 matters went to compulsory conference or mediation — 246 were resolved through these processes.
- Review and regulation matters are quite amenable to ADR. 401 cases out of 1492 finalised were dealt with at compulsory conference — 208 were finalised through this process.

Overall, the settlement rate through compulsory conference and mediation was 56 per cent (1382 of 2457 matters). The relatively low referral rate to compulsory conference and mediation reflects case management processes that only use these techniques in cases where they are appropriate.

In amalgamated tribunals, such as VCAT, unpacking the use of ADR can provide a nuanced insight into the limits and potential to expand the use of these resolution techniques.

Source: VCAT (2013).

There would appear to be scope for tribunals in other jurisdictions to follow the lead of the AAT in more explicitly incorporating ADR into case management and more actively seeking to refer matters where ADR is an appropriate option for possibly reaching pre-hearing settlement.

INFORMATION REQUEST 10.1

Given the contextual differences of the specific matters that tribunals seek to resolve, the Commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.

Restrictions on representation

There are benefits and costs associated with allowing legal representation (and other professional representation) in tribunals. Representation can assist parties who cannot adequately promote their own interests (for example, individuals appearing before Mental Health Tribunals) or when facing an opponent who is a business professional or even an in-house lawyer.

However, as indicated in section 10.3, legal costs can substantially reduce the potential gains from litigation. Where both parties are equally capable of handling the dispute themselves, the incentive to use legal representatives in tribunals can be seen in terms of a ‘prisoner’s dilemma’. That is, both parties may well be better off if they both elect to self-represent. But where one party chooses to engage a lawyer, it creates an incentive for the other party to do the same.

Not surprisingly, a wide range of views exists on whether legal representation should be permitted in tribunals. Stakeholders in this (and other related) inquiries have argued variously that legal representation should be increased, stay the same, or be scaled back.

The Springvale Monash Legal Service suggested that legal representation should be more widely available in tribunals because of ‘the increasing procedural complexity’ and the limited understanding of tribunal procedure that many clients have (sub. 84, p. 9). But another (more direct) means for addressing this problem is to reduce procedural complexity and provide more guidance for self-represented litigants.

Bell (2009), in the context of the review of VCAT, argued that further restrictions on representation in tribunals are not warranted or practical because:

- there needs to be a strong reason to override the right to representation
- an exclusionary rule would be difficult to formulate and require a lot of exceptions

-
- lawyers are not the issue and excluding them will not fix the system — it would be more useful to improve assistance to self-represented litigants
 - lawyers are helpful in complex cases.

However, as noted during the review of the QCAT Act (Queensland Government 2012), increased use of lawyers can create unintended consequences such as increased formality, length and cost of proceedings, and legal representation is usually only available to those who can afford it, creating inequity between users of the tribunal.

In one example given by the SSAT, legal representation was considered an obstruction to timely justice:

... the SSAT noted the observation of the Federal Magistrates Court about the “paucity” of relevant evidence after a five day hearing at which one party was legally represented. The inquisitorial hearing by the SSAT of an application for review of the same kind of decision involving the same parties (in respect of a different child support period) took 2.75 hours and neither party was legally represented. The SSAT’s decision was not impugned on appeal. (sub. 86, p. 3)

The Queensland Public Interest Law Clearing House (sub. 58) also argued that it had observed instances where lawyers introduced unnecessary complexity and dealt aggressively with self-represented parties, such as by threatening to pursue an order for costs.

The Consumer Credit Legal Centre (NSW) said that restrictions on representation should be more strictly enforced to avoid the case of in-house lawyers appearing without leave.

Our main submission is that lawyers should need leave to represent complainants. In NSW, in matters commenced by unrepresented litigants we routinely saw the defendants being represented by ‘in-house legal counsel’. The defendants were not seeking leave to appear. (sub 87, p. 39)

The Commission considers that legal representation should not be the norm in tribunals. Consistent with their original intent, tribunals should conduct themselves in a way that, in many cases, will make the involvement of lawyers unnecessary.

However, the Commission accepts that there are some circumstances in which legal representation would be desirable or necessary, such as where it would facilitate the identification and resolution of the issues, or where the needs of the client require it for fairness in the particular case, such as in specialist tribunals dealing with adult guardianship and administration and mental health issues. Tribunals should have in place clear guidelines on the circumstances in which legal representation would be

desirable or necessary and set in place processes for ensuring these guidelines are met.

The Commission's approach is consistent with the view put by Leon:

Thus, an assumption of legal representation will not be the starting point. It may well be the outcome in any given case, but that will be because the circumstances warrant such representation rather than because the culture of the tribunal creates the need or the expectation of representation. (1999, p. 357)

In cases where representation might genuinely be required, there should be requirements on representatives to support the objectives of the tribunals in which they appear. A duty on parties and their representatives was recommended by the AAT and supported by Professor Spender of the Australian National University, a presidential member of ACAT:

The AAT's view is that there would be value in making explicit in its governing legislation not only the responsibilities of the AAT but also the responsibilities of parties and their representatives to help facilitate a review process that is fair, just, economical, informal and quick. (sub. 65, p. 12)

An example of such a requirement can be found in the *Federal Court of Australia Act 1976* (Cth), which sets out the purpose of case management (to facilitate the just, quick, inexpensive and efficient resolution of disputes according to law) and requires parties to act consistently with that purpose (ss. 37M, 37N). These provisions give judges the power to take compliance into account for the purposes of making costs awards, and even allow costs awards to be made against lawyers. Judges can also make other directions as necessary to achieve the stated purposes (s. 37P). The AAT (sub. 65) noted that it cannot award costs except in very limited circumstances, reducing its ability to enforce litigant behaviour.

Educating legal representatives on the differences between courts and tribunals and the way in which they are expected to conduct themselves in tribunals would help to prevent them reverting to familiar court formalities. A former President of the AAT commented on the extent to which legal counsel are unused to the disapplication of the rules of evidence and other court norms.

Even cases with senior counsel representing all parties are not quite the same [in the AAT] as in courts. They may look very similar, but I still see the surprise on the face of counsel when I reject a question that has not been objected to, or tell counsel that I will admit evidence, but if it is in contest he will need to supplement it, or interrupt submissions to tell counsel what I want the submissions to address, or tell counsel to exchange documents informally rather than using a summons to produce, or tell counsel that if they make a further interlocutory application they will need first to explain to me why they have not been able to agree on what is being sought. (Downes 2008, p. 11)

DRAFT RECOMMENDATION 10.1

Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.

DRAFT RECOMMENDATION 10.2

Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.

Use of technology

There are many ways in which the use of technology can improve outcomes for tribunals and their users. The use of information and communication technology (ICT) can significantly improve the administration of justice in order to enhance efficiency, access, timeliness, transparency and accountability (CEPEJ 2006). Technology can also make tribunals more accessible for self-represented litigants (chapter 14).

Tribunals across Australia already make good use of technology including in administrative and back-of-office functions, lodgments, record keeping, data collection and reporting, hearings and case management.

While there has been significant technological uptake (and as is the case with the courts — chapter 17), investment in information technology has been uneven across jurisdictions, with the availability, quality and use of technology varying widely between and within jurisdictions. Even relatively basic uses of information technology, such as case managements systems, do not appear to be utilised as fully as they might be. The Commission is aware of at least one tribunal that keeps paper-based case records.

Greater use of technology appears to have significant potential in dealing with small claims, where the total cost of resolving low-value disputes may exceed the amount in dispute, especially when indirect costs — such as the time taken to complete forms or travel to the tribunal location — are included (figure 10.3). Audio visual systems (including teleconferencing and video conferencing) are already in use in all Australian tribunals, for example to conduct preliminary conferences over the

phone or to allow expert evidence to be given remotely. That said consolidated tribunals tend to have more facilities, particularly for video conferencing, than smaller, specialist tribunals.

Online access to justice is another way in which technology might be better utilised to ensure proportionate mechanisms for dealing with small claims. There are several international examples of ‘online justice’. In England, the Money Claim Online is a virtual legal service allowing claimants and defendants to make or respond to debt claims on the internet. A qualitative study in 2013 found that most users consider the online forms easier and more convenient than paper forms, and a number of organisations reported the online system to be quicker and more efficient. However some individuals and organisations continued using paper forms because of habit or unfamiliarity with online forms in general. Other problems included limited awareness of the online system and technical limitations such as forms timing out or large attachments being rejected (GfK NOP 2013).

A form of ‘e-tribunal’ is currently being implemented by the Government of British Columbia in Canada (2012). The Civil Resolution Tribunal, due to commence in 2014, will provide a range of free dispute resolution tools for any dispute, including diagnostic tools, triage support and online information to encourage resolution, followed by an escalating range of (predominantly online) ADR options for small claims and strata disputes that are not resolved among the parties.

Chapter 17 recommends a greater use by courts of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and this is also relevant in the context of tribunals.

INFORMATION REQUEST 10.2

Due to the varying degrees to which tribunals have implemented information and communication technologies, the Commission seeks further information on the extent to which such technologies are used in tribunals, and on the experiences of tribunals that have implemented them.

Creating efficiencies by restructuring

Australia was one of the first countries to move towards greater consolidation of tribunals and has provided a template for others. The AAT model, established in 1976 as the prototype of a general jurisdiction tribunal, received warm commendation in South Africa, Canada and the United Kingdom (Creyke 2002).

Since the creation of the AAT, many Australian states and territories have followed suit — with five jurisdictions now having ‘super’ civil and administrative tribunals and other jurisdictions planning similar consolidation.

Consolidation at the state and territory level has generally been well-received and appears to offer the following advantages:

- streamlined administrative structures resulting in improved efficiency
- increased physical presence outside of capital cities, thus improving visibility and access for rural and remote clients; and greater availability of technology to reduce the need for travel
- better record keeping and more consistent data collection
- support services, such as duty solicitors, more likely to be cost-effective.

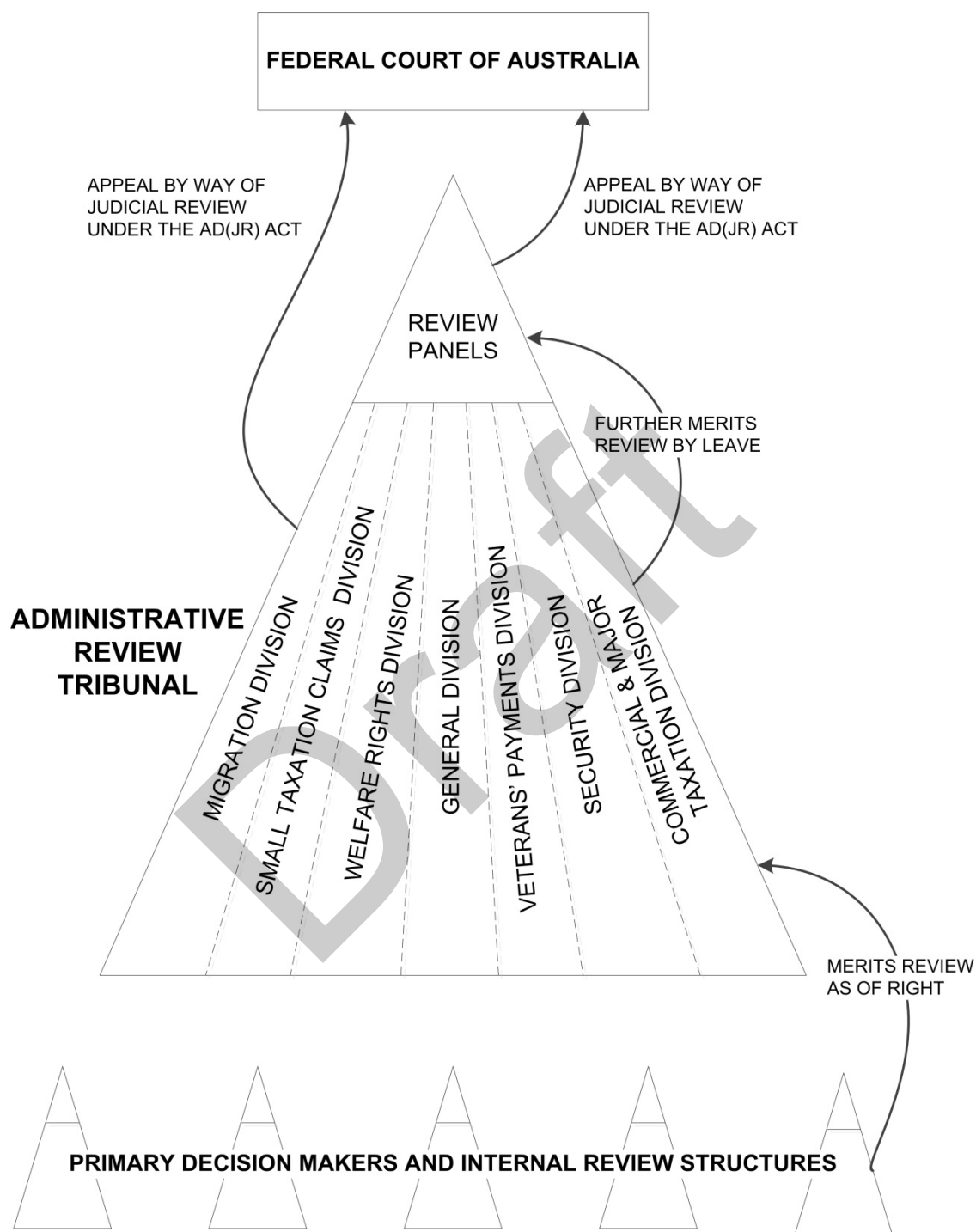
However, the actual impact of reforms consolidating tribunals on efficiency and effectiveness has not been well measured. In 2004, when amalgamation was still in early stages across Australia, Bacon found that:

... these reforms are taking place in the absence of data about their likely implications, and without a thorough understanding of the objectives that generalist versus specialist tribunal systems can realistically achieve. (2004, p. i)

And little has changed. In 2009, a ten-year review of VCAT made broad statements about the benefits of amalgamation, but presented no comparative data on the differences in efficiency or other indicators between large generalist and small specialist tribunals (Bell 2009). There is also a similar lack of comparative data in the review of the SAT (Standing Committee on Legislation 2009) and the NSW study that recommended the creation of NCAT (NCAT 2013). This is partially due to poor case management systems in very small tribunals, and a subsequent lack of data that can be analysed or compared pre or post consolidation.

However, in spite of an absence of data, the Commission considers that there are key savings to be found in tribunal consolidation, and — where consolidation is not appropriate or desirable — shared administration of tribunals. This is consistent with overseas experience. In Scotland, for example, the creation in 2010 of the Scottish Tribunals Service — a shared administrative body for six tribunals — was estimated to have achieved efficiencies in 2011-12 of £1 million through rationalising organisational structures and support services (The Scottish Government 2012).

In the federal context, in 1994, the Administrative Review Council proposed that the main Commonwealth Tribunals be merged into a new general administrative review tribunal (ART) (the proposed structure of which is outlined in figure 10.6).

Figure 10.6 **Proposal for Commonwealth Administrative Review Tribunal**

Data source: Administrative Review Council (1994).

This recommendation was picked up and expanded upon in the 2012 Skehill Review which recommended that the consolidation of all Commonwealth merits review bodies should be 'endorsed as the Government's desired end-state' (Department of Finance and Deregulation 2012, p. 90).

However, the Skehill review refrained from recommending the Government move to reach this ‘end-state’ at the current time as meaningful gains in efficiency and effectiveness would only be achieved in the short-to medium-term if the creation of the ART was supported by a substantial up-front capital investment in accommodation and IT systems development and deployment, understood not to be available in the financial climate of the time. The Skehill Review also considered that achieving reform along these lines would be ‘protracted and politically difficult’ and would result in a limitation of existing appeal rights from ‘first-tier’ SSAT and VRB decisions (discussed below).

Instead, the Review recommended that the heads of the larger jurisdiction Commonwealth tribunals should work together and report on initiatives for efficiencies or improvements that might be achieved by cooperative or shared efforts between them (Department of Finance and Deregulation 2012).

The Commission considers that while moves towards the model recommended by the ARC may require significant upfront investment, the savings to be gained over the medium-to-long term warrant the Federal government continuing to explore and move towards this model.

INFORMATION REQUEST 10.3

The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.

In situations where consolidation is not appropriate, there are other ways in which tribunals can cooperate to improve efficiency. Options include co-location, shared administrative services (such as information technology and records management) or shared outreach efforts. Co-locating is a simple option to reduce the internal administrative costs of small tribunals. The Tasmanian Guardianship and Administration Board said that it was in the process of co-locating with other Justice Department tribunals (2012).

INFORMATION REQUEST 10.4

Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.

Ensuring appropriate and cost-effective review and appeal rights

Closely related to the question of the most efficient and effective way to structure tribunals, is that of the availability (or not) of second tier merits review or internal appeal.

In the federal tribunal system, for example, decisions of the SSAT and the VRB are reviewable by the AAT. An aspect of the Administrative Review Council's 1994 proposal for a Commonwealth ART was that second tier merits review be limited to only those cases:

- raising issues or principles of general significance
- involving manifest error of fact or law, or
- where new information that would have materially affected the decision is discovered.

At the time, the Council considered that this would improve the approach that some applicants take to merits review in the veteran's area, noting a culture where 'some applicants approach the VRB with an expectation of eventually proceeding to the AAT' such that they 'do not always present the VRB with all relevant information, or raise all relevant issues' (Administrative Review Council 1994, p. 157). In 2012-13, almost 20 per cent of VRB decisions were reviewed by the AAT, with 40 per cent of these decisions varied or set aside.

In its submission to this inquiry, the Commonwealth Attorney-General's Department raised as a matter for consideration:

... whether the cost of maintaining multiple layers of external merits review as of right are justified in a modern merits review framework, for example as judicial review of all decisions is available and internal review mechanisms are more common (sub. 137, p 30).

The issue of appeal rights has also been raised in the state context. Currently, decisions of VCAT can be appealed only on a question of law and a party must seek leave to appeal to the Supreme Court of Victoria. The President of VCAT has recommended that the Victorian Government give VCAT a general power of reconsideration, subject to sensible limits, and establish an appeal tribunal within VCAT (Bell 2009).

Tribunals in a number of other jurisdictions provide for internal appeals. For example, QCAT provides that a party may appeal to an internal appeal tribunal from a decision of a non-judicial member subject to certain limitations and exclusions — for example, leave of the tribunal is required in order to appeal a decision in a proceeding for a minor civil dispute, or on a question of fact.

Similarly, the recently established NCAT provides for internal appeals to an Appeal Panel as of right on any question of law, or with the leave of the Appeal Panel on any other grounds. There is no internal appeal system in the Western Australian or Commonwealth tribunals.

The three main arguments put in favour of internal appeals include:

- giving parties a more accessible and affordable right of appeal
- increasing the consistency, predictability and quality of tribunal decision-making, and
- encouraging the building of tribunal jurisprudence.

However, if too broad, internal appeal rights and second tier merits review have the potential to result in unmeritorious appeals and unnecessary and costly duplication.

The Commission considers that this issue has important implications for the accessibility, efficiency and effectiveness of tribunal dispute resolution. However, it is not an issue that was canvassed in detail in submissions. The Commission therefore seeks further information on this issue.

INFORMATION REQUEST 10.5

The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and effectively, and what opportunities exist for rationalisation or improvement.

Increasing coverage

The Northern Territory does not have a tribunal capable of conducting merits review of administrative decisions, although there are some commissioners and other bodies with powers to review some decisions. The North Australian Aboriginal Justice Agency indicated that this, coupled with an under-resourced government ombudsman, is creating a gap in the access to justice. For example, in appeals of public housing decisions:

The Northern Territory Ombudsman now has jurisdiction over complaints regarding remote housing. ... However we have been advised that the NT Ombudsman has very limited resources to take on complaints about remote housing services. ... We are now attempting to resolve systemic remote housing [issues] through other means. (sub. 95, p. 24)

A report in 1991 and a further report in 2004 recommended the establishment of an administrative appeals tribunal in the NT. The 2004 report found no clear reason why the 1991 recommendations had not been implemented. It found that there would be no overlap between the ombudsman's investigative role and the tribunal's determinative role. The 2004 report has not been implemented, and in August 2013 another study was commissioned, stating that the information contained in the first two reports is out of date (Elferink 2013). A temporary solution may be to increase the resources of the NT Ombudsman while these issues are being resolved.

Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

11 Court processes

Key points

- The courts are a central component of the formal civil justice system and perform a public service that goes beyond the private interests of the parties to a dispute.
- Of the small proportion of civil disputes that make their way to the formal civil justice system, most get resolved before final judgment.
- A wide range of interrelated factors influence the cost, timeliness, fairness and efficiency of court-based dispute resolution. Some factors, such as court resourcing and court fees are outside courts' control. Other factors, such as court processes and case management approaches are within courts' control.
- Australian courts have implemented a wide range of reforms to promote efficient and proportionate dispute resolution and address issues of cost and delay including through:
 - active judicial case management
 - adoption of docket systems of case allocation
 - greater utilisation of specialist lists and judges
 - limiting the scope of discovery
 - promoting greater judicial management of the discovery process
 - developing rules and techniques for the more efficient use of expert witnesses.
- However, there is scope for many of these reforms to be more broadly adopted and further developed.
- Care must be taken to ensure reforms designed to promote early and more active identification of issues do not simply front-load rather than reduce costs.
 - This underscores the importance of improved data collection and empirical evaluation of the impact of reforms.
- Any reforms to court processes need to be accompanied by better incentives for litigants and their legal representatives to avoid undue cost and delay.

Courts are the central pillar of the civil justice system. They provide a mechanism for creating, interpreting and applying the law, and in so doing, perform a public service which goes beyond the private interests of the parties to a dispute. However, despite significant civil reform efforts in all jurisdictions, there remain concerns that court-based dispute resolution is excessively resource intensive.

Court processes and different case management approaches establish a framework within which parties to litigation operate and can provide incentives for parties to engage in proportionate dispute resolution. As such, they can significantly impact on the cost, timeliness, fairness and efficiency of the litigation process.

This chapter initially explores the importance of courts in providing access to justice, the factors that affect court performance, and ways in which court rules and processes can contribute to unnecessary cost and delay (sections 11.1 and 11.2). It then examines a range of court processes and case management approaches as potential responses designed to improve the efficiency of court-based dispute resolution (sections 11.3 to 11.7).

11.1 Courts are important in providing access to justice

Courts are arranged hierarchically, both federally and at the state and territory level. Federal courts include the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, and the Federal Circuit Court of Australia. All states, except Tasmania, have a supreme court, a district (or county) court and a magistrates' (or local) court. Tasmania, the ACT and the Northern Territory do not have an intermediate court. Some jurisdictions have established additional specialist courts or divisions within courts (chapter 17).

Courts deal with a significant proportion of disputes entering the formal civil justice system (chapter 10). However, most matters that reach courts are resolved prior to final judgment. For example, judicial determination generally accounts for less than 3 per cent of all civil finalisations in state and territory supreme and district courts. Magistrates' courts appear to have a much higher rate of finalisation by judicial determination, although the majority of cases are still finalised before this stage.

Cases of greater legal or factual complexity are distributed upwards in the hierarchy of courts. This seeks to ensure that matters are dealt with at the most suitable level, using the simplest and most cost effective procedures.

11.2 What influences the accessibility of the courts?

Factors affecting the accessibility and efficiency of court based dispute resolution can be conceptualised as 'supply' side factors (which influence the number of cases resolved over a particular period) and 'demand' side factors (which influence the number of incoming cases in a particular period or the 'litigation rate').

Table 11.1 Factors affecting the 'market for litigation'Where the number of disputes in the community is given ^a

<i>Supply side factors</i>	<i>Demand side factors</i>
Court resourcing	Cultural traits and general economic conditions
The efficiency of the litigation process as influenced by:	The costs of accessing the service and cost shifting rules
- the degree of task specialisation	The incentives that apply to lawyers as shaped by the joint effect of the fee regulation and the organisation of the supply of legal services
- case-flow management	The availability of alternative dispute resolution (ADR)
- use of information and communication technology	Court processes and procedures
- conduct of parties	
- court process and procedures	
Governance structure	

^a The level of disputation in the community is itself affected by a number of factors such as the structural social and economic characteristics of the economy, the business cycle, and the quality and quantity of legislation.

Source: Adapted from Palumbo et al. 2013.

Courts have varying degrees of control over these factors. Levels of court funding and judicial resourcing, for example, have direct impacts on the timeliness of court outcomes, but are largely outside the control of the courts. However, courts can influence the efficiency of the litigation process through their choice of court processes and case management.

A review of the literature and the submissions made to this inquiry identify the following as key factors contributing to unnecessary cost and delay:

- a lack of early identification and narrowing of the issues, including problems with pleadings (for example, strict adherence to overly formalistic pleadings, disputes over pleadings, continual amendment of pleadings)
- deference to party autonomy / lack of proactive judicial case management of the litigation
- lack of judicial specialisation, ownership and continuity
- unnecessary interlocutory steps and excessive time and resources being devoted to interlocutory disputes
- a lack of adherence to timelines set by the court
- wide ambit of document discovery, disputes about discovery, abuses of discovery
- inefficient listing practices of courts

-
- the use of multiple expert witnesses and the increasing cost of the professional services of such experts
 - insufficient use of modern technology (for example, requiring parties to appear for minor timetabling issues that could be done by telephone).

Courts have been actively seeking to address these factors in an effort to contain unnecessary cost and delay.

11.3 Case management

What is case management?

Traditionally, Australia's adversarial system of litigation left primary responsibility for the pace of litigation in the hands of the parties and their lawyers. 'The court's role was reactive — the judge was the umpire; not a player in the process' (ALRC 2000, p. 390). Case management transfers some of the initiative in case preparation from the parties to the court — including management of pre-trial processes and, for the very few matters that proceed to trial, the trial itself.

Case management has been implemented in courts across Australia (and the common law world) over the past two decades. Over time, practice and procedure rules have been significantly modified so that pleadings, discovery, evidence presentation and settlement facilitation are subject to court control and supervision (ALRC 2000).

Moves to give courts greater control are based on the premise that the conduct of litigation is not a mere private matter for the parties but that 'there is an important public interest in the functioning of the civil justice system' (Cairns 2014, p. 51). This sentiment has been supported by the High Court of Australia. It indicated that just procedural outcomes must not be pursued solely by reference to the interest of the parties to particular proceedings. The effects of procedural decisions on other litigants and on the public's interest in the efficient use of court resources must also be taken into account.³²

By giving greater control of the litigation to the court, case management seeks to contain the cost of litigation and ensure the timely resolution of cases, without compromising the quality and fairness of the process. This includes reducing the

³² *Aon Risk Services v Australian National University* (2009) 239 CLR 175 at 217-18 (Gummow, Hayne, Crennan, Keifel and Bell JJ).

time parties' lawyers spend on unnecessary processes or issues that can be resolved early in the process. As noted by the Law Council:

Lawyers' time is expensive. It cannot be too plainly stated that the only effective means for reducing the cost of litigation are means which result in less work being done by lawyers over the course of a proceeding. (2011b)

Approaches to case management

Courts perform their case management functions through a series of directions held either before a judge, magistrate, associate judge, master or registrar. This may involve:

- making orders for alternative dispute resolution (ADR) in an appropriate case (chapter 8)
- ensuring that the parties and their lawyers adhere to agreed schedules and other obligations
- dispensing with pleadings in appropriate cases
- keeping the scope of discovery, subpoenas and interrogatories proportionate to what is at stake
- requiring parties to focus on case preparation at an early stage, with a view to settling the case or narrowing the issues in dispute
- limiting experts or using court appointed experts
- restricting the length of interlocutory and final hearings (for example, limiting the time that may be taken in cross-examination, limiting the number of witnesses).

In practice, a wide variety of case management practices and approaches are employed in Australian courts and in relation to different types of matters (Cairns 2014). As noted by Justice Sackville, in contrast to the United Kingdom, case management in Australia has generally been implemented on the initiative of the courts themselves, rather than as a consequence of recommendations made by an external agency. Approaches to case management have been articulated in court rules and practice notes. More recently, case management provisions have also been put in legislation.³³

This 'process of innovation on a court-by-court basis has tended to produce diverse case management arrangements across the various jurisdictions' (Sackville 2009,

³³ For example, the *Civil Procedure Act 2005* (NSW); *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth); and the *Civil Procedure Act 2010* (Vic).

p. 213). Further, case management approaches must necessarily vary according to the type of litigation:

No single case management model can or should be applied to all forms of litigation. A trial court with wide and varied caseloads, including potentially complex and lengthy litigation, is likely to require a more flexible and judge-intensive regime than a specialist court accustomed to handling high-volume, largely standardised claims. Even within the same court, case management techniques will have to be adapted to the demands of particular categories of litigation. (Sackville 2009, p. 213)

At the superior court level, most jurisdictions direct more complex cases to particular lists that are subject to more intensive case management than other matters. For example, in the Supreme Court of Western Australia, cases requiring more intensive supervision are entered into the ‘Commercial and Managed Cases List’ and docket-managed by the judge likely to hear the trial of the case. Cases not entered on this list are case managed by registrars up to the listing conference stage. In larger volume jurisdictions such as NSW, there are a greater number of subject matter ‘lists’ – for example, in the Common Law Division of the Supreme Court of NSW there is the defamation list, professional negligence list, possession list, administrative law list and the general management list. Cases in specialist lists are generally case managed by the list judge in conjunction with a registrar. The list judge also allocates the cases for hearing.

The Federal Court provides a Fast Track list with streamlined procedures for commercial, insolvency and intellectual property matters that will be heard in less than five days. Key elements of the list are the abolition of formal pleadings, a scheduling conference six weeks after filing (which the parties’ lawyers must attend), interlocutory applications dealt with on the papers, reduced discovery obligations, a pre-trial conference, and a ‘chess-clock’ style trial. Judgments are generally delivered within six weeks of the trial concluding. The Federal Court also has specific case management approaches for other types of matters, for example, taxation and admiralty and maritime cases.

Intermediate and lower courts also use active case management. The Local Court of NSW applies strict timeframes for different stages of the process and its court practice notes clearly set out case management steps and timeframes. Claims in the small claims division are conducted with as little formality and technicality as the proper consideration of the proceedings permit. A normal adversarial trial is not available as of right and the procedure at the trial is determined by the magistrate or assessor.

Case management approaches in the Family Court of Australia, the Federal Circuit Court and the Family Court of Western Australia implement, in different ways, Division 12A of Part VII of the *Family Law Act 1975* (Cth). This Part requires

child-related proceedings to be conducted in a less adversarial way with the court actively controlling and managing the proceedings.

Courts in all jurisdictions use ADR as part of the case management process in different ways (chapter 8).

Impacts of case management reforms

Many stakeholders in this inquiry expressed strong support for active judicial case management and considered that it reduced cost and delay. Indeed, some submissions considered there was a need for judges to go further and ‘flex their muscles’ in ensuring that litigation is conducted efficiently and expeditiously (IMF, sub. 103, p. 39).

However, the wide variety of case management approaches in Australian courts make it difficult to assess the costs and benefits of case management in a general way. Added to this difficulty is an absence of empirical evidence on the impacts of different models of case management in Australian courts. As Chief Justice Martin observes:

... courts and litigants are investing substantial resources into intensive case management. It is most unsatisfactory to be left to anecdotal experience and intuition in order to assess whether these investments are paying dividends. (Martin 2012b, p. 44)

Case management approaches can have different effects on delay and cost. The available international evidence suggests that active judicial case management is effective in reducing delay between the time of commencing proceedings and finalisation (Kakalik, Dunworth and Hill 1996; Peysner and Seneviratne 2005). Chief Justice Martin suggests that there is also anecdotal evidence in Australia to this effect (Martin 2012b).

However, active case management also carries a risk that, in an effort to move matters along more quickly, cases may be ‘over managed’ resulting in increased costs. This is supported by international evidence, which suggests that some forms of judicial case management may increase costs for litigants. One of the only large empirical studies on case management, conducted in the United States in 1996, found that although early judicial case management significantly *decreased* time to finalisation, it significantly *increased* litigant legal costs. The report suggested that the latter occurred because — in those cases that would previously have settled before judicial involvement — the early involvement of the judge meant that lawyers worked more hours to respond to the judge’s requirements (Kakalik, Dunworth and Hill 1996). Similarly, the Australian Law Reform Commission (ALRC) has previously noted concerns that past case management practices in the Family Court increased costs to litigants due to repeat case events (ALRC 2000).

While far reaching reforms to case management occurred in England following the introduction of the Woolf reforms in 1999, the evidence about their effects is weak as no large empirical study was undertaken. Commentators have varying views about the effects of these reforms on costs. Some commentators consider that costs have increased significantly as a result of case management (Zander 2009), while Lord Jackson, in his final report on costs, concluded that ‘case management can and should be an effective tool for costs control’ (Jackson 2009a, p. xxiii), noting:

All the feedback I have received during the Costs Review indicates that (despite academic scepticism) both costs and time are saved by good case management. (Jackson 2009a, p. 394)

Similarly divergent views were contained within the Law Council’s submission to this inquiry. The Law Society of NSW expressed support for the involvement of the court in narrowing the issues, while the Law Society of South Australia raised some doubts about the efficiency benefits of case management practices (sub. 96, p 50).

In respect of the Federal Court’s Fast Track list, there is some evidence to suggest that it has been successful in reducing both cost and delay. Anecdotal commentary by practitioners suggests that the Fast Track list reduces legal costs from filing to resolution by about two-thirds or more (Black 2009). One solicitor interviewed by Lord Jackson estimated a 50 per cent cost saving from the Federal Court’s Fast Track list (Jackson 2009b).

In addition to its impact on cost and delay for litigants in individual cases, it is important to note that increased judicial time spent on case management means that without the allocation of additional resources, there is less judicial time for other matters. As noted by Justice Byrne:

There is no spare judge time. So committing more judicial effort to pre-trial management means that something else has to give: there might be fewer judge hours committed to the Applications jurisdiction or to Crime, as examples. That should only be done if the return justifies the commitment: in particular, where that would enhance the chances of settlement or else reduce the number of days needed for a trial (2010, p. 4).

Case management — where to from here?

Based on the above, it appears likely that well-targeted and appropriately employed case management can improve efficiency in the dispute resolution process. The challenge is in getting the balance right — ensuring that case management processes result in a fair, timely and efficient resolution of the dispute and limit unnecessary work on the part of legal practitioners, court staff and judicial officers.

No single model of case management is appropriate for all cases in all courts. Nevertheless, good approaches tend to share some common features. The elements to which the success of the Federal Court's Fast Track List are attributed include:

- the lack of automatic progression through a series of procedural steps with sequential timelines
- very few pre-trial appearances before the judge (usually only two)
- a focus of the whole procedure is on early identification of the real issues
- consistent engagement by those who are in charge of the litigation as principals (that is, a judge with ownership of the matter and the practitioners who will have the conduct of the trial)
- discovery by leave and only for good cause
- strict observance of time limits (Black 2009).

The Fast Track list abolishes formal pleadings which are a major contributor to unnecessary cost and delay in the litigation process (Allens, sub. 111; Spender, sub. 135; Marfording, sub. 19; Law Council of Australia 2011b; Thornburg and Cameron 2011). In the course of recent inquiries, both the ALRC and the Victorian Law Reform Commission have recommended further consideration be given to reform of pleadings (ALRC 2011; VLRC 2008). The former Chief Justice of the Supreme Court of South Australia has similarly noted:

The system of pleadings does not work. The pleadings do not identify, define and confine the limits of a dispute. They do not present a clear framework for the resolution of pre-trial issues, nor for trial issues. Anyone who talks to judges about civil litigation will have heard judges remark how often it is that the pleadings conceal rather than expose the real dispute. They will say that the pleadings are too complex, pleading a confusing set of alternatives or cumulative claims. Often at the start of the trial judges ask for a summary of the real issues between the parties, because the pleadings are of no practical use ... Costs are incurred at the pre-trial stage because of this (Doyle 2011, p. 6)

The reduction in the number of pre-trial appearances also significantly contributes to the effectiveness of the Fast Track list. This was emphasised by Lord Jackson in his report on costs. He recommended that courts should ensure that case management conferences and other interim hearings be used as effective occasions for case management and do not become formulaic hearings that generate unnecessary costs (for example, where directions could easily have been given without a hearing) (Jackson 2009a), a point made by IMF Australia (sub 103) and the Law Council of Australia (Law Council of Australia 2011b).

While elements of the Federal Court's Fast Track list are already incorporated to differing degrees in the case management practices of lists and divisions in other

Australian courts, there appears to be scope for this approach to have broader application.

DRAFT RECOMMENDATION 11.1

Courts should apply the following elements of the Federal Court's Fast Track model more broadly:

- ***the abolition of formal pleadings***
- ***a focus on early identification of the real issues in dispute***
- ***more tightly controlling the number of pre-trial appearances***
- ***requiring strict observance of time limits.***

In order to ensure the benefits of case management reforms are maximised, the application of different case management techniques to different types of matters at different stages of proceedings needs to be subject to evaluation. Judges and other court officers involved in case management also need to be appropriately trained in effective case management techniques and this training, should as far as possible, draw from evidence-based evaluations. As noted by Justice Sackville:

The enthusiasm for case management ... needs to be matched by equal enthusiasm for systematic evaluation of the many and various techniques adopted by courts and for training judicial officers in tried and tested techniques of case management. The latter should involve regular opportunities for judicial officers to exchange views and experiences. In the Australian federal system, notwithstanding the undoubted advantages of federalism, the tendency to reinvent the judicial wheel is frequently apparent. (2009, p. 217)

Participation in judicial education programs can enable greater use of case management techniques and promote the sharing of approaches adopted or trialed in different jurisdictions. In particular, it can assist in addressing the apparent reluctance of judges to use existing case management powers, despite the possibility that their use could resolve disputes earlier (Law Council of Australia, sub. 96, p. 72).

There are a number of existing programs available through judicial education bodies in Australia for judges to receive training in case management skills, for example, the National Orientation Program for new judges conducted by the National Judicial College of Australia, and seminars offered by the Australian Institute of Judicial Administration. In 2011-12, the National Judicial College of Australia reported that a specific program on case management is in the early stages of development.

DRAFT RECOMMENDATION 11.2

There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction.

The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).

INFORMATION REQUEST 11.1

The Commission seeks feedback on the most appropriate body for coordinating analysis and evaluation of the different case management approaches and techniques available to Australian courts.

DRAFT RECOMMENDATION 11.3

The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.

11.4 Case allocation

Lack of judicial continuity and ‘ownership’ may contribute to unnecessary cost and delay in dispute resolution. As noted by former Chief Justice Black of the Federal Court:

Endemic tendencies to delay are liable to be exacerbated when, in the years that might elapse between the commencement of the action and its trial, any one of many associate judges, masters, prothonotaries, registrars or other quasi-judicial officers may deal with the case. (2009, p. 91)

The degree of judicial continuity and ownership is largely determined by the model by which courts allocate their cases.

In Australia, there are two basic methods for allocating cases within a particular court, court division or court location — the master calendar system and the individual docket system (Mack, Wallace and Roach Anleu 2012). Under the calendar system model, all cases go into a common pool with judges, masters,

registrars and/or magistrates allocated to particular tasks that arise at different stages. Within the master calendar system, there are two ways work is allocated to a judicial officer: cases are initially allocated to lists, and then to specific dates, such as the first appearance list or the small claims list or a trial list (the judicial officer to preside over those cases in that list or category is determined by a separate process); or work is allocated directly to an individual judge or magistrate (for example, in urgent cases or just before a matter is set for trial).

The master calendar system has been the predominant system in most Australian state and territory courts (Mack, Wallace and Roach Anleu 2012), although there is increasing use of individual dockets. Under the individual docket system each case is assigned to a judge or magistrate and managed until the case is finalised. Some courts, such as the Federal Court, the Federal Circuit Court and the Family Court of Australia, utilise an individual docket system for all matters. Other courts, for example, the Supreme Court of Western Australia, utilise an individual docket system only for cases requiring more intensive case management. Others may use an individual docket system for civil but not criminal matters. Others may use a hybrid approach, whereby a single judge deals with pre-trial directions for all matters in the list, but the trial of the matter will then be allocated to any of a number of list judges as occurs in the Commercial List of the Supreme Court of NSW.

The individual docket system is seen to have a number of advantages. It enables judicial officers to exercise greater control over their workload. It also imposes more direct responsibility on judicial officers for case managing the files allocated to them. Judicial continuity means there is no need to explain to a new judge the nature of the case and its history and allows judicial time for reflection on the case and its issues. It has also been suggested that judicial monitoring creates incentives for practitioners to comply with orders and that pre-trial processes may be more productive and lead to quicker or better disposition (Mack, Wallace and Roach Anleu 2012).

For these reasons, a number of submissions (for example, Maurice Blackburn, sub. 59, p. 10; Marfording, sub. 19, p. 6) and consultations to this inquiry were strongly supportive of judicial case management by a single judge as in the individual docket model, although a small number of judicial officers have expressed a contrary view. This is consistent with international experience. In the course of both Lord Jackson's 2009 review on costs in England and Wales and the 2010 Duke Conference in the United States, there was strong support for the greater use of active case management by a single judge (Kourlis and Kauffman 2013). In respect of England and Wales, Lord Jackson recommended ensuring that as far as possible, a case remains with the same judge (Jackson 2009a).

However, the individual docket system has some limitations:

- the additional managerial responsibilities may not suit the skills and abilities of all judges (though this could be remedied with training and improved judicial selection)
- additional staff and technology resources may be required to do organisational work involved in case management
- there may be problems of (perceived) overwork or delay arising from very long trials, trials overrunning estimates, differing judicial approaches to management, and the unequal impact of random case allocation, resulting in longer lists for some judicial officers (Mack, Wallace and Roach Anleu 2012)
- from a management perspective, disparities in how far out cases are listed can mean a lack of the ability of the court to control its backlog.

Nevertheless, on balance, the Commission considers that that jurisdictions should further examine the potential for using the individual docket model to support judge-led case management in appropriate cases, noting that there will be courts where, for reasons relating to the volume and characteristics of the case load of the court and the number of judicial and other human resources, the disadvantages of the individual docket model may outweigh the advantages.

A 2012 evaluation of docketing at Leeds County Court in England, for example, found that formal docketing and specialisation may be problematic in smaller courts, with reduced flexibility for listing — and consequent delay — outweighing the advantages to be gained by docketing (Taylor and Fitzpatrick 2012). That said, it was still suggested in the course of the evaluation, that even in smaller court centres a degree of informal docketing and specialisation might occur where practical as a matter of good practice.

DRAFT RECOMMENDATION 11.4

Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.

11.5 Discovery

What is discovery and why does it matter for access to justice?

Discovery allows the parties to litigation to obtain and/or inspect documents and other information held by the opposing party that are relevant to the issues in dispute. The purpose of discovery is to ensure that all relevant evidence is brought before the court (Cameron and Liberman 2003).

While sometimes described as ‘a critical element of fact-finding, truth seeking and decision making (Cameron and Liberman 2003), many reports into the justice system, judicial officers, and commentators have raised concerns about discovery (VLRC 2008). Among the concerns raised are the cost and delay associated with discovery without corresponding benefit and the use of discovery as a tactical tool to leverage settlement or put off an opposing party.

The process of discovery reduces information asymmetry between the parties and the judge. Like all information problems, the benefits of any given additional piece of information should exceed its costs. It is the purpose of discovery rules to promote this outcome.

Developments in information technology have resulted in the production and storage of increasing volumes of electronic documents amplifying the challenges in managing the efficient operation of the discovery process. In its 2011 report, *Managing Discovery*, the ALRC argued that:

... the sheer volume of data that must be managed in modern trade and commerce can blow out the cost of searching through electronic material for the purposes of discovery, resulting in costs disproportionate to the value of the documents discovered — in terms of their use in litigation (ALRC 2011, para. 2.47).

However, the magnitude of the problem of disproportionate discovery in Australia remains unclear.

Noting significant data limitations, the ALRC estimated that discovery in Federal Court proceedings generally represented approximately 20 per cent of total litigation costs (ALRC 2011). It found that disproportionate discovery efforts were most likely in proceedings relating to corporations law, trade practice law, intellectual property law, class actions, engineering or construction law, product liability, insurance litigation taxation law and financial cases in family law matters (ALRC 2011).

Similarly, in assessing the regulatory impact of Victoria's 2011 discovery reforms, the Victorian Department of Justice assessed the percentage of client costs attributable to discovery as:

- 15 per cent for small commercial cases and 52 per cent for large commercial cases
- 15 per cent for small common law cases and 25 per cent for large common law cases
- 51 per cent for 'atypical' cases such as class actions (comprising both common law and commercial cases)

Accordingly, discovery reforms would realise particularly significant cost savings in larger commercial matters and 'atypical cases' (Vic DoJ 2012a).

In some areas, discovery reforms appear likely to have few net benefits. For example, this would apply in cases where there is a relatively narrow range of documents, such as medical negligence and personal injury.

The ALRC found that discovery rules in respect of family law matters in both the Family Court of Australia and the Federal Circuit Court of Australia were generally working well (ALRC 2011). Similarly, submissions to this inquiry raised no concerns about discovery in family law matters.

At this stage, the Commission has focused on discovery more generally, noting that time wasted on unnecessary discovery on one matter, means fewer resources for other cases, and, therefore, can reduce access to justice for all users of the system. However, the Commission seeks further information about whether the access to justice implications of discovery require further consideration in respect of particular types of litigation.

INFORMATION REQUEST 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.

Discovery reforms — where are we at now?

Many Australian jurisdictions and individual courts have reformed their discovery processes over the last two decades. Reforms have involved differing combinations of:

- narrowing the scope of discovery
- facilitating more tailored discovery orders through use of ‘categories’ or ‘menus’ of discovery options
- promoting greater judicial scrutiny of the discovery process through:
 - limiting the accessibility of discovery mechanisms through leave requirements
 - giving judicial officers express and broad case management powers in relation to discovery
- requiring a focus on proportionality
- encouraging party cooperation and issue identification through use of discovery plans and protocols, particularly in respect of electronically-stored information
- utilising cost powers to provide incentives for proportionate discovery
- requiring or facilitating early disclosure of critical documents
- utilising pre-trial oral examinations about discovery and specialist referees.

Australian jurisdictions have approached discovery reform and its timing in many ways. Some reforms, such as narrowing the scope of discovery and using a ‘categories’ based approach, were implemented in some jurisdictions many years ago. Other reforms, such as mandatory pre-disclosure, have only been implemented relatively recently in a smaller number of jurisdictions.

Narrowing the scope of discovery — the death of the Peruvian Guano test

The classic test of relevance is the ‘train of inquiry’ test (otherwise known as the Peruvian Guano test).³⁴ This test requires discovery of documents that either ‘directly or indirectly’ relate to the matters in question in an action.

³⁴ So called because it was established in *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 65. A document is relevant if it may either advance a party’s own case or damage the opponent’s case, or alternatively lead to a course of inquiry which would do so.

All Australian jurisdictions, except the ACT and Western Australia, have followed the United Kingdom's lead — moving away from the Peruvian Guano 'train of inquiry test' to adopt a narrower test. New Zealand has also followed this approach.

Most Australian jurisdictions have moved to a requirement that discoverable documents be directly relevant to issues in the proceedings (or directly relevant to issues raised by the pleadings or in the affidavits).

The effectiveness of this shift is unclear. Lord Jackson's 2009 Review of Civil Litigation Costs in England and Wales found that the narrowing of the test in the UK had resulted in no difference in practice from the old Peruvian Guano test.³⁵ Lord Jackson reported that solicitors simply continued to disclose everything that might be in any way relevant (Jackson 2009a). The continuation of past discovery practices is not surprising as the reduced volume of discoverable documents under a narrower test substantially benefits the receiving party who has to review fewer documents. However, a party making discovery often needs to review a broader range of documents to determine whether they fall within scope, which is costly. Once having done so, the party making discovery can act strategically by over-disclosing. As noted by Justice Byrne of the Supreme Court of Queensland:

Substitution of 'directly relevant' for the Peruvian Guano touchstones seems not to have had a major impact on the burdens of disclosure, for a number of reasons. Sometimes a litigant is content to over-disclose: to slow down the litigation or to swamp the other side with material, forcing significant expense to be incurred. Sometimes, the lawyer wants to search through the client's documents to make sure that nothing has been overlooked. Having done that, the additional expense of delivering the documents to the other side is often insubstantial in the scale of things (2010, p. 3).

The relevant policy question, however, is whether overall costs — those that accrue to all parties — are lower relative to the benefits lost from not having access to additional information. Analysis of the impacts of discovery reforms suggest the benefits of a narrower test are potentially significant. For example, the Victorian Department of Justice estimated that the number of discoverable documents would be reduced by around 20 per cent under a narrower test, resulting in savings in the order of \$67.5 million (Vic DoJ 2012a).³⁶

³⁵ Lord Jackson's Review of Civil Litigation Costs found that parties who strictly complied with the test of 'direct relevance' would disclose fewer documents, but incur higher costs (Jackson 2009a).

³⁶ The report noted that the estimated figure depends on the extent to which lawyers conform to the spirit of the new discovery test and the way the judiciary exercises its case management powers to manage the volume of documents discovered in large litigation.

In the absence of data as to how often general discovery is given by parties in the ACT and Western Australia, it is difficult to assess the potential impact of a narrower test for discovery in those jurisdictions. Moreover, the Commission considers that stronger judicial control, supported by leave requirements, and utilisation of a tailored approach to discovery (both discussed below) are more effective ways of reducing disproportionate discovery costs.

However, given there is evidence to suggest that a narrower test, when combined with other approaches, may offer considerable cost savings, those jurisdictions which have not already acted to limit discovery to information of direct relevance should do so, provided that this reform is accompanied by strong judicial control of discovery to ensure that benefits are achieved.

Utilising categories and other means of tailoring discovery

Narrowing the scope of general discovery is one way of controlling the cost of discovery. Another way is for parties or the Court to tailor discovery obligations in each case to suit the issues by describing discoverable documents by categories. Discovery by categories has been available in all Australian courts for a number of years.

There is limited evidence as to whether discovery by categories of documents or particular issues in dispute has reduced the burden of discovery. Some submissions to the ALRC's 2011 review contested any significant efficiencies, citing failure of parties to collaborate in devising categories, inappropriate timing of discussions as to appropriate categories, and the fact that parties are still required to review all of their documents to ascertain their relevance to the categories (ALRC 2011).

In its submission to this inquiry, Allen's commented on the need for careful crafting of categories to ensure that they appropriately limit the discovery process, noting:

In our experience, the limiting function intended to be achieved by categories can backfire and actually increase the scope of discovery (sub. 111, p. 6).

Categories appear to be most effective in limiting discovery obligations when formulated with objective criteria, such as where the documents were located, or when the documents were created. Some have suggested that greater judicial involvement in the formulation of categories would reduce the complexity, uncertainty and cost associated with discovery (ALRC 2011).

Some jurisdictions have gone further than making category based discovery available, and moved to a presumption against standard discovery. The Federal Court's starting point is that it will fashion any discovery order to suit the

issues in the particular case. Similarly, in the United Kingdom, ‘standard disclosure’ is no longer the default position for multi-track cases. Instead the judge will decide what order for disclosure to make from a ‘menu’ of options, usually at the first case management conference. A similar approach has also been adopted in New Zealand’s High Court Rules where what is termed ‘tailored discovery’ (which can involve more or less than standard discovery) is presumed to apply instead of standard discovery in specified circumstances.

While courts in all Australian jurisdictions have powers to limit discovery to what is necessary, the Commission considers that rules and practice notes in a number of Australian courts could:

- more clearly contain a presumption against standard or general discovery, at least for more complex cases
- more clearly outline available discovery options for practitioners and the court.

As noted by the ALRC in the context of the Federal Court:

articulating in practice notes some of the specific ways the Court might exercise its broad powers in relation to discovery ... might serve to drive cultural change and generate certainty of expectations and obligations. This would alert practitioners and remind the court of the range and flexibility of the powers available to the Court. (ALRC 2011, para. 7.20)

The Supreme Court of Queensland’s Supervised Case List Practice Note, for example, sets out a range of options for consideration by parties, including the exchange of critical documents, Fast track orders (where the scope of discoverable documents is confined along the lines of the Fast Track in the Federal Court), exchange of documents to be relied upon, supplemented by additional requested documents, or the exchange of documents limited to certain categories.

Promoting strong case management of the discovery process

Rule changes to encourage more tailored and targeted discovery have been accompanied by increasing recognition that strong judicial control and involvement is critical to ensuring proportionality in the discovery process (ALRC 2011).

In all Australian jurisdictions, discovery is controlled by the different case management systems in operation in each court. Discovery will generally be discussed at an early directions hearing or case management conference.

Jurisdictions define court powers in relation to discovery with varying degrees of specificity, with some jurisdictions using legislation for this purpose and others applying court rules. However, all courts have capacity to restrict discovery to that

which is necessary at the particular stage of the proceeding for fairly disposing of an action or for the saving of costs.

Yet in spite of broad powers, there are consistent calls for increasing judicial involvement in the discovery process. It is therefore critical that judges use their existing powers effectively and actively engage in scrutinising discovery requests.

In its 2011 report, the ALRC recommended that the Federal Court, in association with relevant judicial education bodies, should develop and maintain a continuing judicial education and training program specifically dealing with judicial management of the discovery process in Federal Court proceedings. Some work is already proceeding. In March 2012, the Australasian Institute of Judicial Administration and the National Judicial College of Australia held a discovery seminar for judges which covered some of the foundations for judicial education in this area.

The Commission supports continued development of a judicial education program on managing the discovery process, including e-discovery and its use by judges throughout Australia. Given that work on a program is in progress the Commission makes no recommendation in this area.

Use of leave requirements

Requiring leave of the court for discovery facilitates much greater judicial control of the discovery process. Traditionally, general discovery has been available to parties as of right in most matters — usually by a party serving notice on another party³⁷ — without leave or a court order. This continues to be the case in most state and territory supreme courts except NSW. In NSW discovery must be obtained by order of the court, although parties can, by notice, require production of specific documents — such as documents referred to in the other party’s originating process, pleadings, affidavits or witness statements.

Differing views have been expressed, including by different law reform bodies, as to whether discovery should be available of right or require leave (ALRC 2011; VLRC 2008) and there are strong policy arguments both ways.

In its 2011 report, the ALRC’s position was that the requirement to obtain leave is an important control over the use of discovery in Federal Court proceedings,

³⁷ In the Northern Territory, Queensland and South Australia, the obligation arises automatically without any requirement for notice. In WA, leave is required where the matter has been entered for trial. In Tasmania, discovery is allowed without leave in an ‘action’. The court’s leave is necessary for a proceeding commenced by application.

reflecting the ‘gatekeeper role of the Court to ensure that discovery obligations are not imposed on litigants unnecessarily’ (ALRC 2011). The ALRC also noted that the rule promotes the principle of consistency in the types of cases for which discovery mechanisms are reserved. The ALRC supported rule revisions proposed by the Federal Court (now implemented) requiring parties to justify applications for discovery orders to better support the leave requirement (discussed further below).

Several state and territory superior courts are moving towards a requirement for leave for matters in particular court divisions or court lists. For example, in the Commercial Court of the Supreme Court of Victoria and the Equity Division of the Supreme Court of NSW discovery is by court order only. In the Supreme Court of Queensland’s Supervised Cases List discovery obligations are deferred until a Document Plan is agreed and approved by the Court. Similarly, in the Supreme Court of the Northern Territory, the Court will make an order dispensing with discovery in any civil case unless it is satisfied that discovery should be limited to particular documents or classes of documents or that general discovery is necessary to resolve the real issues in dispute and proportionate.

The Federal Court and the Federal Circuit Court both take a restrictive approach with parties required to seek the leave of the Court to obtain discovery.

An important policy question is whether other jurisdictions should continue to make discovery available as of right, or whether a requirement for leave should be introduced or, in those jurisdictions that already have a leave requirement applying to some types of matters, whether a requirement for leave should be introduced to a broader range of cases.

While there is little empirical evidence on the effectiveness of requirements for leave in containing cost and delay associated with discovery, *prima facie*, there is a strong case for the broader application of leave requirements, at least in respect of more complex cases.

Requiring parties to justify discovery

By themselves, leave requirements do not ensure proportionate discovery. Accordingly, several jurisdictions have introduced rules which require that parties justify discovery as necessary.

For example, Federal Court rules and practice notes impose a clear obligation on litigants to justify an application for discovery orders — even when those orders are sought by consent of the parties — by explaining to the Court why discovery is necessary for the just determination of issues in the proceedings. In turn, this

ensures that the Court scrutinises the need for discovery and makes a conscious decision as to whether discovery is necessary in each case (box 11.1). However, the court still has flexibility to tailor discovery obligations to the need of the case.

Similar obligations exist in the Supreme Court of NSW's Equity Division and the Supreme Court of Queensland's Supervised Case List. There are good grounds for other jurisdictions to apply such obligations.

The Commission sees scope for a number of other jurisdictions to similarly provide in practice directions that discovery applications must be justified on the basis of proportionality and necessity.

Box 11.1 Case management of discovery in the Federal Court

Federal Court rules require all applications for discovery orders to specifically address the *need* for the orders sought and require the Court in all cases to make a determination as to whether discovery is necessary. In this way, discovery obligations in Federal Court proceedings are the result of conscious judicial decision-making.

In determining whether to make any order for discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely benefit of discovery and the likely cost of discovery and whether that cost is proportionate to the nature and complexity of the proceeding.

In making orders for discovery the Court must actively fashion any order to suit the issues in a particular case and consider:

- is discovery necessary to facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible?
- if discovery is necessary, for what purpose?
- can those purposes be achieved by a means less expensive than discovery or by discovery only in relation to particular issues?
- where there are many documents, should discovery be given in a non standard form, e.g. initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
- whether discovery should be given by the use of categories or by electronic format or in accordance with a discovery plan?
- should discovery be given in the list of documents by categories and by a general description rather than by identification of individual documents?

Source: Federal Court Rules 2011 (Cth), r. 20.11. Practice Note CM 5.

Costs orders

A more direct way of ensuring the proportionality of discovery efforts is to extend courts' powers to make costs orders in relation to discovery. Examples include requiring parties requesting discovery to pay in advance for some or all of the estimated costs of discovery; requiring security for the payment of the cost of discovery; or specifying the maximum cost that may be recovered for giving discovery or taking inspection. Amendments facilitating this approach have been made in respect of the Federal Court and recently introduced in the Parliament of Victoria.

Such orders would need to be used carefully. However, the Commission sees merit in this approach being utilised more broadly in appropriate cases.

DRAFT RECOMMENDATION 11.5

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In addition:

- ***court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available***
- ***courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly***
- ***court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate***
- ***courts should be expressly empowered to make targeted cost orders in respect of discovery.***

Limiting when discovery can be ordered

Standard practice has traditionally been for discovery to be completed first and for the parties to then prepare their evidence having regard both to their own and the other party's documents. In 2012, the Supreme Court of NSW moved away from the orthodox model. New rules in the Equity Division stipulate that the Court will not make orders for disclosure of documents until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

The aim is to significantly reduce the financial burden on litigants, particularly in commercial litigation. The Court's view is that the approach will enable the parties to better identify the issues in dispute and determine whether there is any necessity for disclosure of any documents other than those that are part of the exchanged evidence.

This option was considered by the ALRC in 2011 in the context of the Federal Court. However, the ALRC concluded that this may not be appropriate or efficient in every case and should not be applied uniformly, a view echoed by some participants in this inquiry (IMF, sub. 103; Maurice Blackburn, sub. 59). The Commission sees merit in the approach but acknowledges concerns that it may overly restrict access to discovery.

INFORMATION REQUEST 11.3

The Commission seeks feedback on the effectiveness and access to justice implications of the approach to discovery in Practice Note No. SC Eq 11 of the Supreme Court of NSW under which the Court will not make orders for disclosure of documents until the parties to proceedings have served their evidence, unless there are exceptional circumstances necessitating discovery.

Managing e-discovery

Discovery of electronically stored information (ESI) will usually comprise the bulk of the discovery exercise in modern commercial litigation and it presents particular challenges for those involved in discovery processes. Electronic technologies have proved necessary to manage the large volumes of ESI and this has important implications for access to justice. As noted by QPILCH:

Electronic documents create problems for access to justice. Litigants who cannot afford specific software to access, categorise and review documents are at a disadvantage.

The form and scope of ESI is amorphous and changing. ESI gives rise to metadata, legacy data and backup media issues (Legg and Turner 2011). Discovery of ESI therefore raises questions about what constitutes a 'reasonable search' for discoverable documents stored in multiple and constantly changing electronic document management systems or databases, and in what form documents should be exchanged or produced for inspection by the parties or the Court. The answers to these questions have potentially large implications for the ease (and therefore cost) of review.

In many cases, decisions about the scope of discovery should not be made in isolation from practical issues arising in the discovery process — such as where or

with whom those documents are located or held, how the documents are stored and how they may be retrieved:

... decisions about the practicalities of discovering relevant documents — particularly in relation to electronic documents — can have a far greater impact on the cost and time involved, than deciding what the relevant documents are. (ALRC 2011, para. 6.101)

In our view, the burden of discovery would be more effectively and appropriately ameliorated by focusing on the scope of the search rather than the test for relevance. (Allens, sub. 111, p. 7)

A more effective option ... might be to introduce protocols limiting the extent of searches that parties conduct in the first place. Protocols could require parties to agree on the limits of document retrieval and review to ensure that discovery remains proportionate to the nature and complexity of the proceedings, the amount of damages claimed and the real issues in dispute. (QPILCH, sub. 58, p. 48)

Decisions about the scope of discovery, or even whether discovery should be permitted at all, should take into account the practicalities and costs of making discovery at the time discovery orders are made.

In most Australian jurisdictions, courts have issued practice notes to encourage parties to consider, from the start of proceedings, ways to use information technology to manage the discovery process more efficiently (and also to use technology in appropriate cases at trial — chapter 17). There are no relevant practice directions in the ACT or Tasmania. In Western Australia, guidance is provided to parties who may be required, or who wish, to present material to the court in electronic format but the practice direction does not cover the use of technology in pre-trial processes.

There is scope for the wider adoption by Australian jurisdictions of practice directions covering e-discovery and use of document plans. Checklists utilised in the United Kingdom (Practice Direction 31B and Electronic Documents Questionnaire), New Zealand's High Court Rules, the Federal Court's Pre-Discovery Conference Checklist and the Supreme Court of Queensland Supervised Case List provide useful models. Recommendations 6.6 – 6.8 of the ALRC's report on discovery also identify a range of issues for possible inclusion in such guidelines.

DRAFT RECOMMENDATION 11.6

All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently.

All jurisdictions should ensure that, at a minimum, these checklists cover:

-
- *scope of discovery and what constitutes a reasonable search of electronic documents*
 - *a strategy for the identification, collection, processing, analysis and review of electronic documents*
 - *the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)*
 - *a timetable and estimated costs for discovery of electronic documents*
 - *an appropriate document management protocol.*

A right to inspect critical documents prior to discovery

Some jurisdictions — most notably Victoria in 2011 — have sought to promote the timely identification of issues and reduce the problem of disproportionate discovery by requiring early disclosure of critical documents.

Such disclosure may help facilitate settlement and does not affect or limit a party's discovery obligations. The term 'critical documents' is intended to capture the documents that a party would reasonably be expected to have relied on as forming the basis of the party's claim when commencing the proceedings, as well as documents that the party knows will adversely affect the party's case.

Similarly, as part of recent reforms to discovery rules in the High Court of New Zealand, parties must make initial disclosure of documents referred to in a pleading or used when preparing the pleading. The disclosure must be made at the time that the pleading is served.

Some submissions to this inquiry have suggested that there may be benefit in introducing early disclosure requirements more broadly. In its 2011 report, *Managing Discovery*, the ALRC considered this issue in the context of the Federal Court noting that early disclosure of significantly probative documents is likely to support early settlement or assist the parties to expedite the determination of their dispute. However, the ALRC was concerned that imposing a uniform rule requiring litigants to disclose critical documents at an early stage may unnecessarily add to costs in some cases or be otherwise impracticable, and that the uncertainty around what is a 'critical document' may generate satellite litigation.

The more preferable approach may be that adopted in the Supreme Court Queensland's Supervised Case List, where parties are encouraged to seek directions that provide for the early exchange of 'critical documents', which are the documents

likely to be tendered at any trial and likely to have a decisive effect on the resolution of the matter.

This approach gives judicial control over any obligation on parties to produce appropriately tailored documents prior to discovery, rather than imposing uniform disclosure obligations in all cases.

The ALRC was advised that this approach is operating successfully in Queensland (ALRC 2011). It recommended, in respect of the Federal Court, that practice notes should highlight existing mechanisms that enable the production and inspection of documents prior to discovery in proceedings.

The Commission considers that it is premature to make a recommendation for mandatory pre-disclosure until the impact of the Victorian reforms is evaluated. However, it considers that the approach of the Supreme Court of Queensland could be more broadly adopted.

DRAFT RECOMMENDATION 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

INFORMATION REQUEST 11.4

The Commission seeks feedback on the impact of the pre-disclosure requirements in section 26 of the Civil Procedure Act 2010 (Vic) on the conduct of litigation in that jurisdiction.

11.6 Expert evidence

An expert is a witness who the court accepts as qualified to express an opinion on a matter relevant to the court's determination (Cairns 2014). While not required in all types of cases, expert evidence has been identified as one of the principal sources of expense, complexity and delay in civil proceedings. The views of experts are important not only in the small proportion of matters that go to trial, but can be critical to advancing a pre-trial settlement.

Studies of litigation costs have found that expert witness costs:

- can equal or exceed solicitor fees in personal injury cases, especially those that reach court (Williams and Williams 1994)

- are significantly affected by the number of experts involved in a case (Fry nd)
- are generally higher for plaintiffs (Williams and Williams 1994; Worthington and Baker 1993)
- are higher for cases that proceed to trial and to verdict (Williams and Williams 1994, Worthington and Baker 1993).

Average and median amounts spent on expert witnesses depend on the court and tribunal (table 11.2). Average expert costs noticeably exceed median expert costs, suggesting that in some cases, expert costs can be very high.

Table 11.2 Estimated expert costs per case in selected jurisdictions

From various surveys of legal costs in Australia, in 2011-12 dollars^a

<i>Court</i>	<i>Year</i>	<i>Description</i>	<i>Sample size</i>	<i>Mean</i>	<i>Median</i>
				\$	\$
District Court of Queensland	1990	Personal injury	116	1 292	n.a.
County Court of Victoria	1990	Personal injury	185	1 397	n.a.
New South Wales (District and Supreme)	1993	Plaintiff	33	9 145	2 277
	1993	Defendant	48	1 652	1 207
Victoria (County and Supreme)	1993	Plaintiff	50	2 690	1 360
	1993	Defendant	65	1 052	545
Family Court of Australia	1999	Applicant	41	3 284	586
	1999	Respondent	33	2 900	1 172
Federal Court of Australia	1999	Applicant	15	6 705	2 929
	1999	Respondent	8	119 943	8 780
NSW Dust Diseases Tribunal	2006	Plaintiff	52	5 009	n.a.
	2007	Plaintiff	125	4 325	n.a.

^a Converted to 2011-12 dollars using price deflators from National Accounts (ABS 2013a).

Sources: Williams and Williams (1994); Worthington and Baker (1993); Matruglio (1999a, 1999b); NSW Government (2007).

Several submissions raised concerns about the costs of expert evidence, particularly in the context of family law. Legal Aid NSW, for example, said:

A major financial cost of litigation in family law disputes arises from the need for parties to obtain expert evidence. Expert reports are an important way in which Family Courts determine what outcome is in a child's best interest ... Arguably the shortage of child and family experts willing to practice in the family law jurisdiction (both psychologists and psychiatrists) has resulted in a market rate in excess of \$5000 per report. Legal Aid NSW will fund some reports for those who are legally aided and meet guidelines, but due to limitations on funding cannot approve all requests. Many self-represented litigants are unable to afford such reports. (sub. 68, pp. 29–30)

Progress so far

Rules governing the use of expert witnesses have undergone significant reform in Australian jurisdictions, both on the initiative of courts themselves and through legislative reform. In so far as these reforms seek to reduce the costs associated with the use of experts by giving courts greater control over how experts are used, they are part of the broader trend toward more active judicial case management.

Australian expert evidence reforms have been influenced, in part, by the 1996 Woolf Report in the United Kingdom, which identified two problems with the manner of adducing expert evidence, namely, adversarial bias, and excessive costs in the engagement of unnecessary experts. That said, some Australian reforms pre-date the Woolf report, and some innovations were developed by Australian courts and tribunals. Reform has been gradual and uneven across jurisdictions.

Substantial review of the rules and practice concerning expert evidence was undertaken in New South Wales in 2004–2006 (NSW LRC 2005), and reforms were implemented empowering the court to take early control of the use of expert evidence in civil proceedings.

The purposes of the reforms and key features are:

- to ensure that the court has control over the provision of expert evidence
- to restrict expert evidence in proceedings to that reasonably required to resolve the proceedings
- to avoid unnecessary costs associated with parties to proceedings retaining different experts
- if it is practicable to do so without compromising the interests of justice, to enable expert evidence to be given on an issue in proceedings by a single expert engaged by the parties or appointed by the court
- if it is necessary to do so to ensure a fair trial of proceedings, to allow for more than one expert (but no more than are necessary) to give evidence on an issue in the proceedings
- to declare the duty of an expert witness in relation to the court and the parties to proceedings.

Key features of the NSW model are:

- a requirement to seek directions from the court if parties intend to adduce expert evidence at trial

-
- extensive powers to control expert evidence, including limiting the number of experts
 - use of single joint experts
 - a power to appoint court appointed experts
 - a requirement for disclosure of contingency fee arrangements
 - a power to direct experts to confer and produce joint reports
 - options for the manner in which expert evidence is to be given, including concurrently.

Chief Justice Martin (2009) has referred to the NSW model as ‘best practice’. In 2008, the VLRC recommended adoption of most of the elements of the NSW model in Victoria and this recommendation has since been implemented.

Other jurisdictions have adopted some, but not all, of the elements of this model (table 11.3). Roughly half of Australian jurisdictions require parties to seek directions if they propose to adduce expert evidence; the Family Court goes further and — following the English approach — requires parties who seek to rely on expert evidence to apply to the court for permission to do so. All jurisdictions empower the court to direct experts to confer and prepare joint reports and expressly permit expert evidence to be heard concurrently. About half of Australian jurisdictions provide for court appointed experts. All but two impose specific duties on experts.

The Queensland rules take a unique approach in that they provide for persons who are in dispute to appoint a joint expert to report on a question *before* proceedings are instituted. If the parties cannot agree, one of the disputants can apply to the court to appoint an expert. In either case, unless the court otherwise provides, only that expert can give evidence in proceedings on the relevant question. These provisions are intended to provide a mechanism to overcome the difficulty that the appointment of a single expert in the course of litigation often takes place after the parties have already engaged their own experts, and thus already incurred substantial costs.

Similarly, a recent practice note of the Equity Division of the Supreme Court of NSW encourages parties to discuss the appointment of experts before commencing proceedings with the goal being the retention of just one expert, or one expert for each specified issue or matters in issue.³⁸

³⁸ Practice Note SC Eq 5, 10 August 2012.

Table 11.3 Expert evidence reforms

■ Yes □ No

	<i>Purpose clause</i>	<i>Requirement to seek directions of court</i>	<i>Express powers including limiting number of experts</i>	<i>Disclosure of contingency fee arrangements</i>	<i>Duties on experts - code of conduct</i>	<i>Provision for conferences and joint reports</i>	<i>Express power to direct parties to engage a single joint expert</i>	<i>Power for court to appoint own expert ^b</i>	<i>Direct how expert evidence is to be given</i>
Jurisdiction									
NSW	■	■	■	■	■	■	■	■	■
VIC	■	■	■	■	■	■	■	■	■
QLD	■	■	■	□	■	■	■	■	■
SA	□	□	■	■	■	■	□	□	■
WA ^a	□	■	■	□	□	■	□	■	■
TAS ^a	□	□	■	□	□	■	□	□	■
NT ^a	□	□	□	□	■	■	□	□	■
ACT	■	□	■	□	■	■	■	■	■
Federal Court	□	□	■	□	■	■	■	■	■
Family Court	■	■	■	□	■	■	■	■	■

^a Refers to superior courts only. ^b Does not cover use of referees.

Data source: Court rules and practice directions in Australian jurisdictions. The full list of sources is in appendix E.

Impacts, benefits and costs of expert evidence reforms

Australian reforms of expert evidence are based on the premise that greater judicial control of experts will help keep costs down. As such the effectiveness of the reforms depends on how often and appropriately judges use their powers and monitor the compliance of parties with expert evidence requirements. It is difficult to measure the overall impact of Australian expert evidence reforms, particularly in the absence of any empirical studies. That said, the Commission considers that there is sufficient evidence that particular reforms introduced in some jurisdictions may reduce costs. Each of these reforms is discussed in turn.

Leave or court direction

A majority of Australian jurisdictions require parties to seek directions from the court before adducing expert evidence. The purpose is to give greater judicial control over the use of experts to reduce unnecessary costs. It allows a court, at an early stage, to make a range of directions, for example, that no expert evidence be given on a subject, that it be given only on certain subjects, that only a certain number of experts give evidence on a particular subject, or that a single expert witness or court appointed expert be appointed. Courts can make such directions in the course of ordinary directions hearings and case management conferences.

The Commission considers that such an approach is consistent with more active judicial case management generally and could be implemented more broadly across Australian jurisdictions.

Single experts

A single expert may be chosen by the parties or appointed by the court and is the sole person who is able to give evidence on a particular issue unless the court directs otherwise.

Roughly half of Australian jurisdictions have followed the United Kingdom's lead in allowing courts to direct that an expert be engaged jointly by the parties. However, it is difficult to determine the extent to which these provisions are used.

The Queensland rules differ from other jurisdictions in that they establish a presumption in favour of single experts in all cases. Thus, although the parties do not require permission of the court to call expert evidence, they are restricted to a single expert unless the court determines that the case justifies an alternative course. That said, it has been suggested that this preference is not reflected in the practice of

the Supreme Court of Queensland, with the single expert model being used in only a minority of cases (Rackemann 2012b). A similar presumption operates in the NSW Local Court.

A primary objective of the use of single experts is to minimise cost and delay to the parties and the court by limiting the volume of expert evidence that would otherwise be presented. Other potential advantages are that single experts are likely to be more impartial and less adversarial; they can assist in levelling the playing field between parties with unequal resources; and their use may increase the prospects of settlement.

However, the model has disadvantages:

The most obvious limitation of the single court-appointed expert model is that it deprives the decision-maker of the benefit of competing views where, as is often the case in matters which proceed to trial, there is more than one available expert opinion. (Rackemann 2012b, p. 171)

Support for single expert evidence, both in Australia and the United Kingdom is mixed. In so far as there have been positive reports, the former President of the Administrative Appeals Tribunal (AAT) has cautioned:

The evidence will almost certainly be given efficiently. The task of the judge will be easier. The problem is that there is no way of testing whether the conclusions are correct. By definition there is nothing to test the expert evidence against. (Downes 2005, p. 6)

However, there appears to be a reasonable consensus that single joint experts can reduce costs, while still ensuring fair outcomes, provided that they are used carefully.

Submissions to the VLRC review noted that the appointment of single joint experts may be appropriate in more straightforward cases, for example the assessment of future care needs of a plaintiff in a personal injury matter, but not for complex issues of liability (VLRC 2008). A similar view was reached by Lord Jackson in the course of his Costs Review, noting ‘the general view of practitioners is that single joint experts are beneficial for less important and less controversial quantum issues’ (Jackson 2009a). In the Land and Environment Court of NSW matters relating to more objective issues such as noise, traffic, parking, overshadowing, engineering, hydrology and some contamination issues are seen as suitable for a parties’ single expert (Pepper 2012).

Justice McClellan of the Supreme Court of NSW has commented on the need to carefully assess the appropriateness of a single expert in this way:

We have also found [single experts] to be of significant utility in cases in the Common Law Division of the NSW Supreme Court, particularly in relation to less controversial issues relating to damages ... [but] there are legitimate concerns about the use of single experts. They may mask legitimate differences of opinion in relation to complex issues. They may also lead the parties to incur additional expense, especially if a party engages another expert to evaluate and advise with respect to the single expert. These issues must be recognised and the case for a single expert carefully considered. (McLennan 2010, p. 39)

On balance, the Commission sees benefit in judicial officers in all Australian jurisdictions having the flexibility to appoint single experts in appropriate cases. In the United Kingdom, section 7 of Practice Direction 35 provides clear guidance as to the factors that the court should take into account when deciding whether to make an order for a single joint expert. Similar guidance is provided in relevant Practice Notes in the NSW Land and Environment Court, the Supreme Court of Queensland's Supervised Case List and section 65L of the *Civil Procedure Act 2010* (Vic). Other Australian jurisdictions could consider providing similar clear guidance.

Court appointed experts

A court may appoint experts to assist in the consideration of substantial matters in a case, or because parties do not wish to use a single expert but the Court finds that a single expert would be appropriate.

About half of Australian jurisdictions provide for courts to appoint experts. However, it has been suggested that courts rarely avail themselves of this form of expert evidence (Selby and Freckleton 2013).

In the course of this inquiry, Marfording (sub. 19, p. 7) expressed strong support for greater use of court appointed experts, as have other commentators (Davies 2003).

One lower court — the South Australian Magistrates Court — has successfully used court-appointed experts to good effect. The Court has developed a panel of experts that can be called on by the court to provide independent expertise to help the court. The panel comprises 18 professional, trade and technical experts. These experts are used to help parties to settle disputes, to assist the court and parties prepare for an efficient trial and to assist the court during hearings. The Court notes that this has 'proven to be a cost effective and efficient means of dealing with complex technical issues' (Courts Administration Authority 2013).

There is scope for the greater use of court appointed experts in Australia. The approach used by the South Australian Magistrates Court may prove particularly

cost effective in other Australian lower courts. Section 65M of the *Civil Procedure Act 2010* (Vic) provides clear guidance about the factors a court might consider in deciding whether to appoint a court appointed expert.

Expert conclaves, concurrent evidence and the management of experts

Most Australian courts can direct expert witnesses to give evidence at the same time ('concurrent evidence' or 'hot-tubbing'). Generally, such concurrent evidence follows a conference between the experts ('conclave of experts'), although it need not do so. Conclaves also take place when the concurrent evidence technique is not employed. Procedures for them differ between courts (and tribunals).

Concurrent evidence is an alternative to the traditional adversarial method in which expert evidence is given sequentially by experts for one side and then the other, in the course of which they are examined-in-chief and cross-examined by the legal representatives for each side. While procedures differ between courts and individual judges, the giving of concurrent evidence has seven key stages, are set out in box 11.2.

While rules or practice directions in all Australian jurisdictions allow the court to direct experts to participate in expert conclaves and give evidence concurrently, the extent to which these techniques are utilised in Australian courts is uneven. It appears to be most used in the Land and Environment Court of NSW, the Federal Court, the Supreme Court of NSW and the Administrative Appeals Tribunal (AAT).

Proponents of concurrent evidence argue that the procedure narrows the issues in dispute, allows all evidence to be presented to the decision maker at the same time, reduces the likelihood of adversarial bias and saves costs and time (Garling 2011; Pepper 2012).

A number of submissions to this inquiry also expressed strong support for the efficiencies of the concurrent evidence approach, including the AAT:

In a study into the use of the procedure conducted by the AAT in 2005, members reported that the use of the concurrent evidence procedure improved the quality and objectivity of evidence and that as a result the decision-making process had been enhanced. In relation to the impact of the procedure on the length and cost of hearings, the AAT's experience is that the concurrent evidence procedure can save significant amounts of hearing time, particularly in cases where the parties seek to call a large number of expert witnesses to give evidence. (sub. 65, p. 13)

Box 11.2 Stages of concurrent evidence

- First, identification of the issues upon which expert evidence is needed.
- Second, the preparation of individual expert reports.
- Third, a conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including, where possible, short reasons as to why they disagree.
- Fourth, the preparation of the joint report.
- Fifth, the experts are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence.
- Sixth, the experts are given an opportunity to explain the issues in dispute in their own words. Each expert is then allowed to comment on or question the other expert.
- Seventh, cross-examination of the experts is permitted. During this process, each party is permitted to rely on their own expert for clarification of an answer.

Source: Pepper (2012).

In evaluating the early phase of the 2012 Manchester Concurrent Evidence Project in the United Kingdom, Genn found that, although a larger evidence base was needed, early signs were that there are time and quality benefits to be gained from the use of concurrent evidence (Genn 2012).

However, while there are many proponents of concurrent evidence, support is not universal. Some have raised concerns that the procedure remains partisan, saves little in costs, and that there is the potential for expert evidence to be ‘dumbed down’ and for more assertive experts to dominate the ‘hot tub’. It has also been suggested that because the structure of concurrent evidence varies from court to court, the benefits of such procedures depends greatly on the ability of the judicial officer to direct the discussion. Others have cautioned that, while useful in certain matters, concurrent evidence is no substitute for appropriate management of expert evidence earlier in the process:

One of the problems with the enthusiastic promotion of concurrent evidence is that it has tended to give the impression that it is ‘the’ method for adducing expert evidence and is, in itself, a sufficient way to address concerns surrounding expert opinion evidence. In truth, it is neither, the usefulness of which will vary according to the context in which it is used and the manner in which it is employed. (Rackemann 2012a, p. 56)

Even when it is used, it may be that the early stages of the concurrent evidence process, namely identification of the key issues, and the experts’ conference and preparation of the joint report, are more important than the later step of concurrent oral evidence.

In my experience the first step [identifying the critical questions for expert opinion] is not utilised as extensively as it should be ... Ordinarily, each party and its expert get together to formulate the questions, with appropriate assumptions, that the expert is to address in his written report. Consequently, there is the risk of a disconnect between the questions addressed and the assumptions used by one party's expert and those used by another party's expert. Usually these differences will get sorted out in due course, often by the provision of supplementary or reply expert reports, but this tends to complicate and lengthen the expert evidence section of the case. Frankly, it is to no-one's advantage to have to grapple with a series of lengthy intersecting expert reports that have been provided in chief, in reply or by supplementary report. (Young 2010, p. 2)

Holding a joint conference earlier in the process may also be beneficial.

In the usual civil case, the experts only get together to identify the critical issues after they have exchanged their written reports. The concept of an experts' conference and the preparation of a joint report works well, so there is no reason why an earlier meeting between experts would not be advantageous. (Young 2010, p. 2)

This approach is used in the Queensland Planning and Environment Court. Experts in this court are required to confer at an earlier stage in the process, without individual reports being prepared and with their opinions being formulated in a process of mutual peer review while quarantined from the parties and their legal representatives (Rackemann 2012b). The benefits of this approach are that experts are briefed on the same questions and factual assumptions and have an opportunity to confer prior to coming to conclusions in individual reports. This model has possible advantages in reducing adversarial bias and achieving efficiencies in the expert evidence process (Monichino 2012).

Overall, the full concurrent evidence process (including early identification of issues, experts conferences and joint expert reports) appears to be a useful alternative to the orthodox expert witness processes. Its practicality has been tested in several Australian courts and there is scope for its wider application. The Commission also considers that the practice of using experts' conferences earlier in the process (as in the Queensland Planning and Environment Court) should be more broadly adopted.

The level of guidance about when court should use concurrent evidence and the procedures for doing so vary considerably across jurisdictions. The guidelines developed by the AAT may prove a useful model for other jurisdictions.

Expert evidence — where to from here?

Australian courts have adopted many innovative reforms in relation to expert evidence. However, Australian jurisdictions have implemented these reforms to

different degrees and refinement of the approaches and the circumstances to which they are best applied are ongoing.

While there is incomplete evidence on the benefits of the multiple variants for managing expert witnesses, *prima facie*, judges should have more discretion in this area. The Commission considers that judicial officers in all jurisdictions should have the power to utilise the full ‘menu’ of options available to judicial officers in NSW and Victoria.

DRAFT RECOMMENDATION 11.8

Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:

- ***a requirement on parties to seek directions before adducing expert evidence***
- ***broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.***

DRAFT RECOMMENDATION 11.9

Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether:

- ***a single joint expert or court appointed expert would be appropriate in a particular case***
- ***to use concurrent evidence, and if so, how the procedure is to be conducted.***

DRAFT RECOMMENDATION 11.10

All courts should:

- ***explore greater use of court-appointed experts in appropriate cases, including through the establishment of ‘panels of experts’, as used by the Magistrates Court of South Australia***
- ***facilitate the practice of using experts’ conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.***

11.7 The importance of complementary reforms

Case management and reforms to court processes and procedures, while important, can only ever be a partial solution to the problems of unnecessary cost and delay. Justice Croft has expressed the need for complementary reforms in the following way:

Judicial management is a major factor in narrowing issues and keeping litigation on track. However, it is my view, that no matter how involved a judge becomes in the management of litigation to define the issues, until practitioners and parties do not have incentives (whether they be financial or tactical) to spend time in interlocutory proceedings the problems of delay and expense will not finally be addressed (Croft 2011, p. 26)

Incentives for litigants to use procedural tactics to their own advantage, and incentives for lawyers to ‘over-service’ can be more directly addressed through changes to the way costs are awarded to parties and the way practitioners are remunerated. These issues are discussed in chapters 6, 13 and 18.

Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

12 Duties on parties

Key points

- The behaviour of parties to litigation influences the timeliness and cost of resolving disputes. Adversarial behaviour that is not geared towards efficiently and effectively resolving disputes is often tolerated. A cultural shift towards more cooperation would improve access to justice.
- Parties face overarching obligations to assist the court to get to the truth and resolve disputes. The effectiveness of these obligations could be improved with more ready and consistent enforcement.
- The use of pre-action protocols, if well targeted, can help resolve disputes early by narrowing the range of issues in dispute and facilitating alternative dispute resolution. Jurisdictions should further explore the use of pre-action protocols which are targeted to the type of issue in dispute, in conjunction with strong judicial oversight.
- Governments and their lawyers use model litigant rules to guide their behaviour. While good in theory, they are seldom enforced in practice. Compliance and enforcement need to be more even and transparent. The benefits of subjecting other parties who are in a position of substantial bargaining power to model litigant rules should be explored.
- It is unlikely that any one reform will significantly change the behaviour of parties. While duties and obligations on parties can assist, reforms that empower courts and tribunals to enforce obligations are essential.
- A very small proportion of parties display especially inappropriate behaviour during the litigation process. These frivolous and vexatious litigants can cause significant harm to parties directly affected, and disproportionately consume court and tribunal resources on matters with little or no merit.
 - The laws that curtail their access to the justice system often act late in the process and provide insignificant deterrence. There is a need for earlier and graduated responses that allow a wider range of individuals to apply for orders and enable the judiciary to better manage frivolous and vexatious litigation.

The behaviour of parties when conducting litigation influences the timeliness and cost of dispute resolution. Adversarial conduct such as lack of cooperation and disclosure, time-wasting tactics and strategic behaviour designed to wear the other party down, work against the timely and effective resolution of disputes, which affects access to justice for the parties directly involved.

Adversarial behaviour can also have broader implications for access to justice when cases consume a disproportionate amount of court resources. This is particularly true in ‘mega litigation’ (for example, infamous cases such as the C7 or Bell Group litigation), which is characterised by excessive documentary and expert evidence, unnecessarily lengthy pleadings, an absence of attempts to narrow issues in dispute, and costs highly disproportionate to the amount in issue (AGD 2009). As the Adelaide Law School said:

... it is important to acknowledge that access to justice by less well-resourced litigants is impacted by the use of justice resources by government and well-resourced litigants. This is becoming increasing [sic] apparent with the rise of mega-litigation in commercial disputes which can remove members of the judiciary for substantial periods (up to years) from their normal duties. (sub. 16, p. 1)

Given these potential impacts, access to justice can be improved by making sure that parties who draw on publicly-funded resources face the right incentives to efficiently and effectively resolve their disputes. This chapter explores a number of options for improving these incentives. These include the use of overarching obligations on parties both before and during litigation (section 12.1), as well as specific obligations to address power imbalances in disputes between individuals and government agencies or large corporations (section 12.2). The most appropriate response to vexatious and frivolous litigation is discussed in section 12.3.

12.1 Duties on parties regarding behaviour and conduct

While courts traditionally allowed parties free rein to run a dispute, this approach is giving way to one in which judges and courts exercise greater control to ensure that resources are used efficiently and proportionately. Part of this cultural change has involved more active case management by judges (chapter 11).

A second, related suite of initiatives have sought to directly influence behaviour by placing duties and obligations on parties. Overarching obligations, pre-action protocols and model litigant requirements have increasingly been imposed to encourage ‘reasonable’ or ‘genuine’ behaviour and promote more efficient dispute resolution and a less adversarial culture (ACJI 2013). Taming overly adversarial behaviour can also reduce the extent to which resource disparities between parties affect the outcome of a dispute.

Overarching obligations to support timely dispute resolution

Overarching obligations on parties and their lawyers have been introduced in all Australian jurisdictions except Tasmania, with the aim of facilitating the just, quick

and cheap resolution of disputes by emphasising cooperation and candidness (ACJI 2013). These typically include requirements to act honestly, reasonably and proportionately, to cooperate, minimise delays and disclose critical documents in the conduct of litigation. For example, section 37M of the *Federal Court of Australia Act 1976* (Cth) imposes obligations on parties and lawyers to act consistently with the overarching purpose of the court rules ('to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible'), and allows the court to take into account the failure to observe these requirements when awarding costs.

Similar obligations are sometimes imposed outside the formal justice system. For example, via contract, regulatory requirements, legal services directions, legislation, and requirements to engage in alternative dispute resolution (ADR) or attempt to resolve a dispute before litigation commences.

Jurisdictions have implemented overarching obligations in different ways. Some place the onus on parties, while others place the onus on courts. For example, the New South Wales *Civil Procedure Act 2005* places the obligation on *parties* to assist the court by participating in processes of the court and complying with directions and orders of the court. In contrast, the United Kingdom's Woolf reforms place an obligation on *the court* to encourage 'the parties to co-operate with each other in the conduct of the proceedings' (VLRC 2008, p. 158).

Participants were generally supportive of overarching obligations. Some preferred this approach to encouraging cooperation among parties over model litigant guidelines (section 12.2). For example, Allens argued that:

... [a legislative obligations] regime is a more appropriate way to ensure that litigation is conducted with a view to merits rather than resources deciding the outcome. The principles that must be applied are clear and they apply equally to both sides of a dispute. There are sanctions for violating them. (sub. 111, p. 5)

However, some participants raised concerns about a lack of enforcement. In its submission, Maurice Blackburn noted that:

... the effectiveness of these reforms tends to depend on the individual judicial officer before whom an action is being conducted. ... judicial officers should be encouraged to actively engage in the conduct of matters before them and to enthusiastically enforce the overriding principles to ensure that cost and delay do not frustrate the quick and just resolution of the case before them. (sub. 59, pp. 7–8)

An evaluation of overarching obligations by the Australian Centre for Justice Innovation (2013) highlighted judicial support (along with engagement of key stakeholders, and the specificity of the obligations) as a key factor influencing their success. Indeed, many of the broadly based reviews of the civil justice system in

Australia and internationally have noted the importance of clearly defining the obligations of parties and their legal representatives prior to, and during litigation, and the importance of effective enforcement mechanisms to promote compliance.

Internationally, the United States Federal Rules of Civil Procedure are an example of a mechanism that places heavier obligations on lawyers for the conduct of litigation (box 12.1). Reviews of Australian civil justice systems by the Australian Law Reform Commission (ALRC) and the Law Reform Commission of Western Australia recommended reforms to overarching obligations modelled on these rules (ALRC 1999b; LRC WA 1999).

Box 12.1 Regulation of litigation conduct in the United States

Rule 11 of the United States Federal Rules of Civil Procedure provides an example of a mechanism aimed at regulating litigation conduct, with the added consequence of explicit sanctions. The rule provides that 'every pleading, written motion and other paper [presented to the court shall] be signed by at least one attorney of record', or, if the party is not represented by an attorney, shall be signed by the party. By signing the document the attorney (or party) certifies that:

- the document is not being presented for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation
- the claims, defences and legal contentions are warranted by existing law or by non-frivolous argument [for the modification of the law]
- any allegation and other factual contentions or denials of such have evidential support (VLRC 2008).

The rule provides the court with positive authority to impose sanctions against attorneys, law firms, or parties who have violated the rule (ALRC 1999b).

Overarching duties on parties do not operate in isolation. They are inextricably linked to case management, pre-action protocols and standards of conduct for lawyers in court settings.

Lawyers' professional duties of conduct can shape incentives

Lawyers are subject to stricter standards of conduct than other parties to litigation because of their special position of influence. They have additional and separate obligations as officers of the court, and must comply with the legal profession's ethical standards.

While the legal profession has traditionally developed its own practice standards, there is a trend towards regulating lawyers' conduct by other methods. The use of

court rules and legislation to regulate conduct has generally occurred in situations where professional practice standards are inconclusive or silent on the matter. In the United States in particular, the conduct of lawyers is increasingly regulated by court rules (box 12.1). The United Kingdom's recently introduced Civil Procedure Rules also incorporate standards for lawyers into court rules, placing greater reliance on judges to oversee the conduct of lawyers.

In Australia, there has been a growing trend to define lawyers' obligations in legislation; for example, in the *Family Law Act 1975* (Cth) or in legislation establishing particular tribunals (ALRC 1999b). Spender suggested that:

The role of lawyers as officers of the court should be used positively to assist courts and tribunals, not just negatively to restrain unethical behaviour. (sub. 135, p. 3)

The ALRC considered that, while professional practice rules play an important role in regulating the conduct of practitioners and contributing to the proper administration of justice, distilling ethical principles into legal practice rules cannot provide a complete solution.

Lawyers tend to see rules as things to be circumvented in the pursuit of the client's interests. They may be honoured in the letter but ignored in the spirit. This is a potentially dangerous situation, for if lawyers approach codes of professional ethics in the same way they approach, say, revenue law then the underlying aim soon becomes avoidance rather than compliance. (Crispin 1992, p. 7 quoted in ALRC 1999, p. 140)

Professional obligations and codes of conduct are important in providing a framework of ethical behaviour for lawyers to abide by, with appropriate enforcement and sanctions in place. On their own and in combination with the measures discussed above, they play an important role in supporting access to justice.

INFORMATION REQUEST 12.1

The Commission seeks feedback on the effectiveness of current overarching obligations imposed on parties and their legal representatives in litigation processes. In particular, how might the detection of non-compliance and the enforcement of these obligations be improved?

Pre-action requirements may encourage behavioural change

There are also obligations imposed on parties before they enter the court system, often as a precondition for entry.

Pre-action requirements (or protocols) are a series of steps that a potential litigant must undertake before commencing an action in court. These requirements seek to facilitate the early exchange of information between parties in dispute and, where possible, remove the need for litigation by encouraging the use of ADR techniques (Legg and Boniface 2010). They aim to encourage early resolution and/or, where this is not possible, reduce the scope of issues in dispute for court determination.

Pre-action requirements promote access to justice by addressing the high costs and delays associated with accessing justice through the court system. They ensure that parties clearly articulate what matters are in dispute, at an early stage, and reduce the time spent on pleadings and discovery. Non-conformance with pre-action protocols can also have adverse cost consequences if litigation ensues, creating incentives for parties to act appropriately.

Although not universal, a number of Australian jurisdictions have implemented a range of pre-action requirements such as attempts at ADR, to reduce pressure on the court system (box 12.2).

In theory, the rationale for pre-action requirements is that they can deliver substantial benefits through reducing the number and duration of court proceedings. Anecdotal evidence indicates that they have been reasonably effective in reducing the number of disputes that proceed to litigation. The National Alternative Dispute Resolution Advisory Council (NADRAC) (sub. 109) referred to some examples from Victoria's Transport Accident Commission and the Dispute Settlement Centre of Victoria, where pre-action requirements reduced the number of matters that needed a final determination in a court or tribunal.

However, studies that have attempted to quantify the impact of pre-action requirements have had difficulty obtaining sufficiently robust data for analysis. The NSW Young Lawyers Committees supported this view:

Due to the present limited implementation of pre-action requirements, it is not possible to determine their utility or success. In theory, pre-action requirements are a useful step to ensure parties properly consider settlement prior to litigation. However, in practice, this may cause front-loading of legal costs, or cause parties to treat the requirements as merely a procedural step to comply with when commencing proceedings. (sub. 79, p. 25)

Some stakeholders supported the extension of pre-action protocols. For example, Legal Aid NSW considered that:

Pre-action requisites in family law are effective at screening matters prior to court. Legal Aid NSW Family Law service model makes an important contribution to resolving disputes earlier by filtering clients from advice clinics into mediation and where appropriate diverting clients from court. (sub. 68, p. 76)

Box 12.2 Types of pre-action requirements

Broadly based pre-action requirements operate in some jurisdictions as a result of legislative or court or tribunal requirements (Sourdin 2012b). For example, the *Civil Dispute Resolution Act 2011* (Cth) operates in the federal jurisdiction and requires potential litigants to file a 'genuine steps' statement when lodging a case with a relevant court, which states that genuine attempts to resolve the dispute have been made. In the Northern Territory, Supreme Court Practice Direction No. 6 of 2009 requires litigants to convey how they have complied with the relevant practice direction.

Other pre-action requirements exist in specific areas of law to prevent court proceedings being commenced without mediation or some other form of ADR occurring first (Sourdin 2012b). For example, the *Debt Farm Mediation Act 1994* (NSW) and the *Farm Debt Mediation Act 2011* (Vic) require mediation to occur before a creditor can take possession of property or other action under a 'farm mortgage'. Other areas where pre-action requirements exist in some states include personal injury, motor accident compensation, commercial arbitration, strata schemes and the legal profession. Certain types of family disputes also require compulsory dispute resolution before filing in the Family Court of Australia or the Federal Circuit Court. For example, applications for parenting orders must include a certificate from a registered family dispute resolution practitioner which sets out why dispute resolution was unsuccessful or inappropriate.

Pre-action requirements may also be voluntary, as is the case with the Transport Accident Commission (TAC) in Victoria. As described by the Victorian Law Reform Commission (VLRC):

The protocol development process involved stakeholders, Australian Lawyers Alliance, Transport Accident Commission, and the Law Institute of Victoria signing three protocols dealing with no-fault dispute resolution, impairment benefit claims and serious injury and common law claims. The protocols are essentially voluntary. They seek to expedite the dispute management process and facilitate early mutual disclosure of relevant information and documentation. In 2008, the VLRC reported that, according to the TAC, since the protocols were introduced in December 2004, there has been a 27 per cent decline in Victorian Civil and Administrative Tribunal applications for review. (2008, p. 130)

Other stakeholders expressed reservations. For example, the Law Council of Australia raised concerns that such requirements:

... have the potential for unnecessary increased expense arising from engagement with certain forms of ADR, which are unlikely to be successful or appropriate in the circumstances. (sub. 96, p. 77)

Similarly, Maurice Blackburn said:

... it appears that [Federal] pre-action requirements have not, in our opinion, been effective. The only impact of the requirements has been to add another layer of costs and provide an opportunity for defendants to cause delay. (sub. 59, p. 10)

In considering the available evidence, Sourdin concluded that generally:

... for pre-action requirements to ‘work’ ... there needs to be compliance with requirements and that this can be promoted by education, information ... sanctions and incentives ... there must be exceptions to any ADR referral or pre-action requirement and that not all disputes should be channelled into pre-action processes ... (2012b, p. xiii)

While there is little evidence to support pre-action protocols, there is also a lack of evidence to support the criticisms. The Commonwealth Attorney-General’s Department said:

Some stakeholders predicted that the Act would substantially increase the cost and time to resolve disputes, and encourage satellite litigation. There is little evidence to support these concerns. (sub. 137, p. 32)

Lord Jackson, in reviewing the role of pre-action protocols in the UK, concluded that the general pre-action protocol was not effective and, in many instances, had resulted in substantial delay and extra cost. That said, he found that specific protocols serve a useful purpose and, where no specific protocol applied, parties should be obliged to engage in ‘appropriate pre-action correspondence and exchange of information’ (Jackson 2009a, p. 354).

The Commission is aware that the Commonwealth Attorney-General’s Department has reviewed the broadly based pre-action requirements in the federal jurisdiction but its report, while completed, is yet to be released. As such, it would be premature for the Commission to recommend a similar wide-scale adoption in other jurisdictions at this stage. Other governments are also awaiting the release of this review before deciding whether to proceed with their own pre-action requirements.

DRAFT RECOMMENDATION 12.1

Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.

INFORMATION REQUEST 12.2

The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.

12.2 Model litigant guidelines to address power imbalances

While overarching obligations and pre-action requirements provide broad mechanisms for encouraging all parties to refrain from inappropriate behaviour, governments, government agencies and statutory bodies are also subject to model litigant guidelines (box 12.3).

Box 12.3 Government model litigant guidelines in Australia

The Commonwealth Legal Services Directions 2005 set out, in broad terms, the requirement that the Commonwealth and its agencies, and those who perform legal work for them, are to uphold the highest possible standards of fairness, honesty and integrity in litigation, going beyond the ethical or professional standards of lawyers appearing before a court or tribunal. The Directions are legally binding under the *Judiciary Act 1903* (Cth), but are only enforceable by the Attorney-General.

Specifically, the Directions require that the Commonwealth and its agencies:

- act honestly and fairly
- deal with claims promptly
- pay legitimate claims without litigation
- act consistently in the handling of claims and litigation
- consider alternative dispute resolution.

This also requires generally keeping costs to a minimum, and not taking advantage of claimants who lack the resources to litigate a legitimate claim. However, it does not require the Crown to take a soft approach; the Crown is not prevented from acting firmly and properly to protect its interests, and can take all legitimate steps in pursuing litigation or testing or defending claims made.

Following the introduction of the Legal Services Directions at the Commonwealth level, New South Wales, Victoria, Queensland and the ACT introduced their own model litigant policies in the form of guidelines that apply to the provision of legal services in matters involving government agencies. In each case, their guidelines closely mirror those in the Commonwealth Directions.

Source: NSW Bar Association (sub. 34).

Model litigant guidelines in Australia are set out in legislation (the Commonwealth Legal Services Directions 2005 and the ACT guidelines) or as a formal part of government policy (the Victorian, New South Wales and Queensland guidelines). These guidelines seek to bridle excessively adversarial behaviour by setting out acceptable standards and boundaries for the conduct of litigation, and aim to resolve disputes efficiently and appropriately.

[The Commonwealth Government], government agencies, statutory authorities (and their lawyers) have been required, since 2005, to comply with ‘model litigant guidelines’, which impose an obligation to, amongst other things, deal with claims promptly, to not cause unnecessary delay, to make an early assessment of prospects and to pay legitimate claims without litigation. As well, the obligation is to avoid, prevent and limit the scope of legal proceedings wherever possible and, where not possible, to keep the costs of litigation to a minimum. (Maurice Blackburn, sub. 59, p. 6)

These guidelines have evolved from a recognition at common law that governments should ‘play fairly’ and act as model litigants. Other than issuing judicial criticism, it is unclear how courts enforce this obligation (Chami 2010). The guidelines are separate to the common law obligation, which continues to apply in the absence of conflicting legislation.

There are a number of good policy reasons for government model litigant guidelines: the large amount of resources at governments’ disposal; the inherent power of government; and the proper role of government being to act in the public interest (as it has no legitimate private interest). These can contribute to a power imbalance in favour of governments when pitted against private individuals. The Australian Lawyers Alliance provided the following example:

In the personal injury jurisdictions, the injured person is frequently dealing with a statutory body. The power imbalance is enormous. Improper advice provided within the insurer can force an injured person to litigate. It is important to remember, the injured person has no option but to pursue a matter. An insurer cannot be forced to negotiate. (sub. 107, p. 18)

Governments also derive power from their frequent-player status, giving rise to advantages over other litigants through their greater expertise, experience, access to specialist knowledge and established reputation before courts and tribunals (Cameron and Taylor-Sands 2007; VLRC 2008). Governments can be important role models in setting benchmarks for behaviour and conduct across the system.

Model litigant obligations do not require government to ‘fight with one hand behind its back’. As the Commonwealth Legal Service Directions 2005 state:

The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. (schedule 1, appendix B, note 4, Legal Services Directions 2005)

While the common law obligation applies to all tiers of government, including local government³⁹ (Davis 2005), the model litigant guidelines do not appear to apply to local governments. However, some may choose to act in accordance with relevant state or Commonwealth guidelines.

Model litigant guidelines in practice — are they effective?

The limited research and evidence on how well government agencies are complying with model litigants guidelines present a mixed picture. A review in 2007 found that Commonwealth model litigant guidelines have been reasonably effective in controlling Commonwealth litigant behaviour, and that the guidelines are a valuable tool in regulating litigant behaviour (Cameron and Taylor-Sands 2007). However, a more recent review found variable compliance among departments and agencies (Blunn and Krieger 2009).

Participants have provided anecdotal evidence about their experiences in litigation with government. For example:

... it is the experience of Legal Aid NSW that the model litigant rules as embodied in the Legal Services Directions 2005 are not always applied by the Commonwealth and State agencies, particularly the rules relating to negotiating a settlement and properly conceding liability at an early stage. There is also variation in the way in which model litigant rules are applied by external legal providers. In particular, Legal Aid NSW has experienced prolonged proceedings and unnecessary requests for particulars. These practices result in increased costs both to applicants and the respondents. (Legal Aid NSW, sub. 68, p. 74)

Maurice Blackburn has represented plaintiffs and applicants in a number of jurisdictions against Commonwealth, State and Territory agencies and yet it is the exception rather than the norm in which we see any evidence of compliance with the model litigant guidelines. (Maurice Blackburn, sub. 59, p. 7)

Given their self-imposed nature, a key problem seems to be difficulties in enforcement and sanction, creating weak incentives for government entities to comply with the guidelines. In this regard, The Law Council of Australia (sub. 96) suggested that guidelines are not always followed and allegations of breaches are not effectively policed or reviewed. The Australian Lawyers Alliance said:

... the Model Litigant Rules lack a significant penalty in situations where there have been breaches. Whilst there may be reporting and investigation, that is an occurrence which happens after the event. It is not proactive in stopping inappropriate conduct before or shortly after it commences.

³⁹ *Scott v Handley* [1999] FCA 404 at [44].

As a remedy, it is reactive and occurs well beyond the timing of the inappropriate conduct. Whilst not a “toothless tiger” it does not compel proper conduct on the part of the Commonwealth (or other Governments) at the time of the running of the litigation. (sub. 107, p. 17)

Model litigant guidelines, whether legislation-based or policy-based, are generally overseen and enforced by the Attorney General of the relevant jurisdiction through his or her department. The Victorian guidelines, however, note that ensuring compliance with the obligation is primarily the responsibility of the agency which has responsibility for the litigation (Vic DoJ 2011). The Commonwealth Directions similarly place the onus of compliance on the agency.

While guidelines with legislative backing and enforcement mechanisms mean governments are theoretically more accountable, the consistency and frequency of enforcement has been criticised. For example, the Commonwealth’s model litigant rules are enforced through a system of self-monitoring, certification and reporting overseen by the Office of Legal Services Coordination (OLSC) (box 12.4). Publicly-reported data does not separately identify breaches with Commonwealth model litigant requirements, only broader non-compliance with the Legal Services Directions (Rule of Law Institute of Australia 2013). Appleby and Le Mire contend that:

The OLSC focuses on education and information sharing. It does not ‘police’ compliance, or even monitor cases; it rarely discovers breaches. (sub. 63, p. 4)

Many of these concerns were previously identified in the review *Legal Service Arrangements in the Australian Public Service* (ANAO 2005). It was noted then that the OLSC relies heavily on reporting by agencies or complaints from other sources, but there is also no formalised complaints system. The report also said that the OLSC does not commonly discover breaches, and does not proactively monitor agencies’ compliance with the Directions (Rule of Law Institute of Australia 2013).

While legislation-based model litigant requirements generally require some form of annual reporting, there seems to be less transparency for policy-based guidelines. For example, there appears to be no recent data on compliance or breaches of the Victorian guidelines, with the only available data coming from evidence presented to the Victorian Law Reform Commission in 2008 (VLRC 2008).

Box 12.4 Complying with Commonwealth Legal Services Directions

Agencies are obliged to report to the Office of Legal Services Coordination (OLSC) as soon as practicable about any possible or apparent breaches of the Legal Services Directions 2005. After each financial year, the chief executive of an agency that is subject to the *Financial Management and Accountability Act 1997* (Cth) must provide a certificate setting out the extent to which they believe the agency has complied with the Directions. If an agency, approved Commonwealth company or approved government business enterprise contracts in a financial year with an external legal services provider on the legal services multi-use list for legal work, the agency, company or enterprise must ensure the contract requires the provider to report to OLSC.

The Compliance Framework sets out the approach of the OLSC to achieving compliance with the Directions, and how OLSC prioritises its compliance activities. The OLSC also prepares guidance notes to help agencies to comply with their obligations.

Source: AGD (Nd).

A further criticism raised by participants was that the impotence of parties in holding governments to account creates problems for the effective enforcement of model litigant guidelines.

Individual litigants have no standing to allege any breach of the Legal Services Directions or to enforce their non-compliance. This is because the attorney-general has sole power to enforce compliance with the Legal Services Directions ... Attempts by individuals to do so have been rejected by the courts. (NSW Bar Association, sub. 34, pp. 11–12)

One of the biggest problems with the current regime of enforcement is there is no real opportunity for persons who appear against the government to lodge a complaint about its conduct in litigation for proper investigation (Appleby and Le Mire, sub. 63, p. 4).

Recent changes to the Commonwealth compliance framework mean that complaints from the public to the Attorney-General and the OLSC about non-compliance with model litigant requirements are no longer investigated by the OLSC but passed on to the relevant agency for appropriate action. While it is unclear how this will work in practice (since these changes have only recently been implemented), it appears that this approach reduces independent oversight.

The absence of a right of private action has meant that the primary source of public sanction for departure from the standards has been judicial criticism. The NSW Bar Association (sub. 34) and Spender (sub. 135) argued for a review of the current enforcement arrangements, to establish whether the ramifications of breaching the model litigant guidelines are sufficient and appropriate.

How might the operation of model litigant guidelines be improved?

A number of participants provided suggestions on how to improve the operation of model litigant guidelines. For example, Appleby and Le Mire made the following recommendations for reforming the Commonwealth model litigant rules:

1. that the model litigant rules contained in the *Legal Services Directions* are amended to clarify the factors that will be relevant to determining fairness in a particular case and provide some practical illustrations;
2. that the enforcement of the model litigant rules be amended to:
 - a. provide greater certainty about the division of responsibility between the courts and government;
 - b. enhance information sharing between the courts and the government; and
 - c. establish a complaints mechanism ... within the Attorney-General's Department to receive and resolve complaints, to supplement the current enforcement strategy, which is light-touch education and awareness driven, focussing on self-regulation and reporting by departments and agencies. (sub. 63, p. 1)

Some participants suggested that the obligations should focus on ensuring that government agencies engage early and use non-litigious mechanisms for dispute resolution where possible.

Existing obligations to encourage cooperation should be strengthened with the aim of resolving legal problems as early as possible, especially those obligations relating to negotiating a settlement and properly conceding liability at an early stage. (Legal Aid NSW, sub. 68, p. 74)

NADRAC advocated amending the *Legal Services Directions* to strengthen and systematise government use of ADR:

NADRAC favours imposition of an explicit obligation ... to the effect that Commonwealth agencies should participate in ADR unless they actually consider that so doing would be inappropriate. (sub. 109, p. 7)

Others advocated for tougher powers of sanction to be given to judicial officers, and broader mechanisms to allow affected parties to complain (Australian Lawyers Alliance, sub. 107; Maurice Blackburn, sub. 59).

It was suggested that the OLSC could work more closely with the courts to improve compliance monitoring (Appleby and Le Mire, sub. 63). In addition, transparency of investigation and monitoring of compliance by the OLSC could be improved.

Greater transparency about complaints and transgressions provides private litigants with an understanding of the way in which the model litigant obligation is applied, the standards they can expect, and reassurance that the government's enforcement is sufficiently rigorous. It will also provide litigants with a sense of redress if they feel wronged by government conduct in litigation. (Appleby and Le Mire, sub. 63, p. 6)

While criticisms of model litigant rules mainly relate to enforcement, Appleby and Le Mire (sub. 63) also argued that, despite the existing guidance, in difficult cases there is continuing uncertainty about what the guidelines actually require government agencies to do. During the course of the *Electricity Network Regulatory Frameworks* inquiry (PC 2013c), the Commission was made aware of concerns about the Australian Energy Regulator taking an overly narrow view of its status as model litigant and not vigorously defending its position before the Australian Competition Tribunal. The final report by the Limited Merits Review Panel said that ‘there was, to say the least, some confusion on these matters’ (Yarrow, Egan and Tamblyn 2012). Clarity around what the model litigant guidelines require in particular cases could reduce uncertainty about governments being either ‘too hard’, or ‘too soft’ during litigation.

Should guidelines apply more generally where there are power imbalances?

There are concerns that imposing model litigant guidelines on governments in circumstances where the other party fails to reciprocate puts governments at a disadvantage, compromising policy and compliance goals. As the Queensland Public Interest Law Clearing House (QPILCH) (sub. 58) pointed out, the government litigant is not necessarily the wealthier of the parties, such that the model litigant obligations may provide the private opponent with a positive advantage. As Chami said:

It is indeed the case that, very often, government litigants are better equipped to engage in litigation than their private opponents. Yet this is by no means always the case. In circumstances where it is not the case, the imposition of the model litigant obligation has the potential to provide the private opponent with a positive advantage. This was recognised in *ACCC v Leahy Petroleum Pty Ltd*, where Gray J observed that the obligation “is of significant value to parties against whom the Commonwealth is involved in litigation.” (2010, p. 49)

Some of the policy reasons supporting model litigant guidelines for governments also apply more generally to situations where there is a disparity in power and resources between private parties. For example, QPILCH points out that:

... in the case of SRLs [self-represented litigants] where there are limits on how far judges can go to assist them (given the duties to remain impartial and to be seen to remain impartial), it is arguable that some of the remaining imbalance can be made up by the represented opponent being held to the standards of conduct expected of a model litigant (sub. 58, p. 43, quoting Chami (2010))

Some participants supported extending model litigant guidelines to other parties.

The power imbalance between self-represented litigants and corporations and government agencies is such that applicants will not pursue their legal entitlements even in no cost jurisdictions. Legal Aid NSW supports the idea of model litigant obligations being extended where a private party is significantly better resourced, but notes the issues outlined above in relation to failure to enforce compliance by government agencies with the model litigant rules. (Legal Aid NSW, sub. 68, p. 74)

Other participants suggested that overarching obligations to the court or tribunal are better suited to reining in other non-government litigants.

... in Queensland, some of the principles contained in the model litigant rules are already partly applicable to private litigants pursuant to the overarching obligations found in section 5 of the *Uniform Civil Procedure Rules 1999* (Qld). These obligations require all parties to proceed in an expeditious way so as to avoid undue delay, expense and technicality, failing which the court may dismiss a proceeding or impose a sanction as to costs. (QPILCH, sub. 58, p. 43)

Although there is some commentary, particularly by Cameron and Sands, that supports the extension of the obligation to parties who are better resourced than the other in proceedings and, in particular, corporations, I think this is best achieved through an application of an obligation to assist, similar to that imposed upon government decision-makers in section 33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth). In my view, aspects of the [model litigant obligations] which emphasise the rule of law, the public good and the modelling responsibility of the Attorney-Generals should not be watered down by the imposition of the obligation upon a wider group whose activity in litigation should be restrained because of concerns about equality of arms. (Spender, sub. 135, p. 5)

DRAFT RECOMMENDATION 12.2

Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.

INFORMATION REQUEST 12.3

The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?

INFORMATION REQUEST 12.4

The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?

INFORMATION REQUEST 12.5

The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?

12.3 Vexatious litigants

There are a very small number of litigants whose inappropriate behaviour in pursuing litigation is described as frivolous, querulent or vexatious. Such behaviour includes taking legal action without reasonable grounds, repeating arguments already rejected, disregarding the court's practices and rulings, and persistently attempting to abuse court processes (AGD 2009). They often bring multiple actions against the same defendants and sometimes pursue litigation for collateral or improper purposes such as intimidation or harassment. Their behaviour is sometimes characterised as irrational or obsessive.

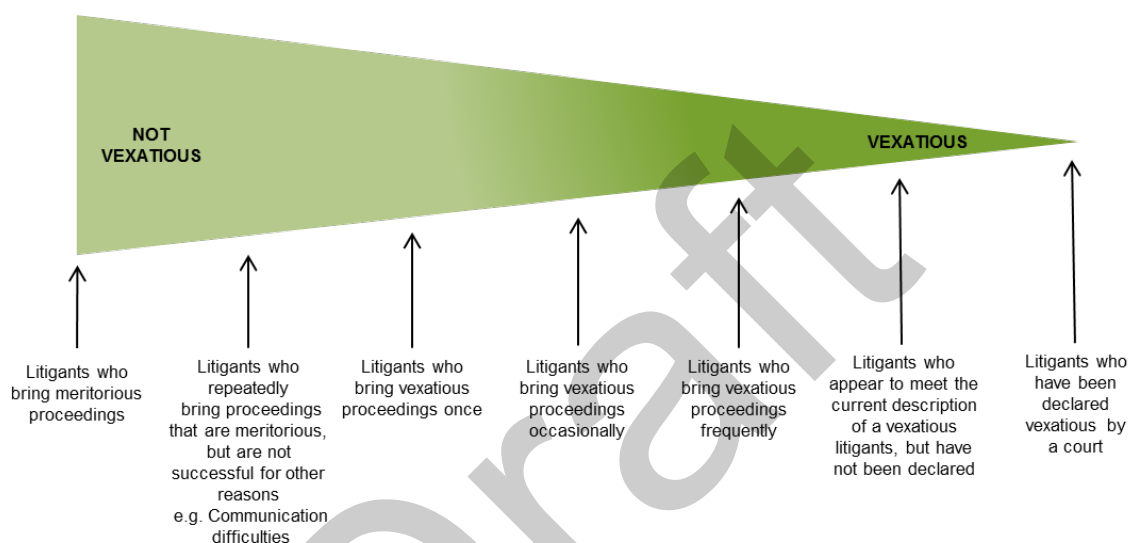
In examining cases involving vexatious litigants in England and Wales, Herman said:

... it is apparent that there are a number of elements to the offence of vexatiousness: the litigation contains no recognised legal claim; a utilitarian calculation concludes the costs of litigation (particularly to 'innocent' parties) hugely outweigh any benefits; the legal system is being used for an improper purpose, including successive attempts to relitigate the same matter; irrationality; and the refusal to take 'no' for an answer. (2012, p. 30)

While there are strict legal definitions on the meaning of a vexatious litigant, the Victorian Parliamentary Law Reform Committee's *Inquiry into Vexatious Litigants* (2008) noted that in the broader community and in the justice system itself, the term

is not so clear-cut — there is a spectrum of vexatious behaviour (figure 12.1). There is also a tendency to describe other categories of litigants on the spectrum as ‘vexatious’, including people with behaviours that are challenging or difficult (this might range from overtly aggressive conduct to people who have trouble communicating in the manner expected by the justice system). For the purposes of this report, the Commission uses the term vexatious litigant in this loose sense rather than in the strict legal sense.

Figure 12.1 A spectrum of litigant behaviour



Source: Victorian Parliamentary Law Reform Committee (2008, p. 11).

How does the justice system respond?

Most jurisdictions limit access to the justice system once litigation behaviour goes too far and is considered inappropriate by a relevant decision maker. While restricting access is a grave step and not to be taken lightly, the right to access the system must have limits.

Access to justice does **not** mean an unfettered access to the courts to pursue frivolous claims and applications. Justice involves a proportionate amount of time and resources being devoted to a particular case. Where the time and resources devoted to one case are disproportionate, that effectively denies parties in another case their fair and timely share; and hence denies them justice. (Judiciary of England and Wales 2013, p. 31)

Access is generally limited via a court declaration or order that requires the person to obtain the court’s permission before bringing an action. For example, a person

who is the subject of such an order in Western Australia is prohibited from instituting proceedings without the permission of a court or tribunal.⁴⁰

Such declarations or orders seek to balance competing interests, including the right of access to justice, the rights of other parties, and the need to ensure an efficient and effective justice system (Victorian Parliamentary Law Reform Committee 2008). But balancing these competing interests is challenging.

The Committee believes the aim of vexatious litigant laws should be to strike a fair balance between the interests of possible vexatious litigants, the justice system and other parties to proceedings. ... The more difficult question is what that balance should be, and how it should be expressed in law. (Victorian Parliamentary Law Reform Committee 2008, p. 15)

Australian jurisdictions have legislation setting out the grounds for declaring a person vexatious (box 12.5). Similar provisions exist overseas. While courts also have an inherent right to control proceedings, there is a reluctance to terminate the right to litigate.

In recent years, there has been a trend in Australia and overseas towards tightening laws dealing with vexatious litigants (Victorian Parliamentary Law Reform Committee 2008). The most significant reforms have been in the United Kingdom, which involved the introduction of a graduated system of civil restraint orders (box 12.6).

It is not just courts and tribunals that deal with vexatious behaviour — ombudsmen are also concerned with how to respond to ‘unreasonable complainant conduct’. The *Unreasonable Complainant Conduct Project*, a joint project of the Commonwealth and state ombudsmen, led to development of a manual to provide management strategies for staff (Commonwealth Ombudsman 2009, 2009).

⁴⁰ Section 4, *Vexatious Proceedings Restriction Act 2002* (WA).

Box 12.5 Vexatious litigant legislation in Australia

Western Australia was the first Australian state to significantly reform its vexatious litigant laws in 2002^a. The new laws ended the Attorney-General's monopoly on applying for vexatious litigant orders by allowing other parties to apply, and lowered the threshold for making declarations (Victorian Parliamentary Law Reform Committee 2008).

In 2004 the Standing Committee of Attorneys-General (SCAG) (now replaced by the Law, Crime and Safety Council) approved a model bill based on the Western Australian reforms, which allows a range of people to apply for orders, has a lower threshold for making orders, and attempts to address forum shopping across Australian courts (Victorian Parliamentary Law Reform Committee 2008). Queensland^b, the Northern Territory^c, New South Wales^d and the Commonwealth^e have passed legislation based on the model bill.

Queensland legislation allows for varying types of orders including staying all or part of any proceeding already instituted and prohibiting institution of a proceeding or proceedings of a particular type. Court rules^f also enable the court to prevent interlocutory applications by a party who has previously brought more than one interlocutory application that is frivolous, vexatious or an abuse of process (QPILCH, sub. 58, pp. 44–45).

New South Wales legislation authorises the Supreme Court, Land and Environment Court and the Industrial Relations Court to make various vexatious proceedings orders of their own motion or on application by the Attorney-General, Solicitor-General, court registrars, or a person affected (Supreme Court of New South Wales 2014).

The Family Court of Australia^g can dismiss proceedings and make a costs order if satisfied that proceedings are frivolous or vexatious. Judges also have authority to control proceedings where self-represented litigants use cross examination of their former spouse as an opportunity for harassment (Family Law Council 2000).

In Victoria^h, only the Supreme Court can declare a person vexatious. It is the only jurisdiction where the Attorney-General has a monopoly on applications for vexatious litigant orders — most other jurisdictions allow other public or court officials to apply, and all except for the High Court allow parties sued by possible vexatious litigants or persons with a sufficient interest to apply, as does the United Kingdom (Victorian Parliamentary Law Reform Committee 2008). Family violence matters are the exceptionⁱ, where the Magistrates' and Children's Courts can make orders restraining family violence intervention order applications without leave, and applications for orders can be made by other people (Victorian Parliamentary Law Reform Committee 2008). The Victorian Parliament is currently considering the Vexatious Proceedings Bill 2014, which would introduce a regime akin to the United Kingdom's graduated response system.

^a *Vexatious Proceedings Restriction Act 2002* (WA); ^b *Vexatious Proceedings Act 2005* (Qld); ^c *Vexatious Proceedings Act* (NT); ^d *Vexatious Proceedings Act 2008* (NSW); ^e *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth); ^f rule 389A Uniform Civil Procedure Rules 1999 (Qld); ^g section 118 *Family Law Act 1975* (Cth); ^h section 21 *Supreme Court Act 1986* (Vic); ⁱ *Family Violence Protection Act 2008* (Vic).

Box 12.6 United Kingdom reforms offer a wider range of responses

Courts in the United Kingdom initiated reforms to the way they deal with vexatious litigants. In a 2003 decision, the United Kingdom Court of Appeal described the behaviour of several vexatious litigants as ‘a very serious contemporary problem facing the dispatch of business in this court’ and set out a new system of civil restraint orders.

The system, set out in the United Kingdom’s Civil Procedure Rules, provides for a series of graduated orders:

- *Limited civil restraint orders* — restrain further applications in the proceedings in which the order is made without leave. A judge can make an order where a party has made two or more applications that are ‘totally without merit’.
- *Extended civil restraint orders* — restrain future claims or future applications that effectively re-litigate issues without leave. Specified judges may make these orders where a party has ‘persistently’ issued claims or made applications that are ‘totally without merit’.
- *General civil restraint orders* — restrain a litigant from issuing any claim or making any application without leave. Specified judges may make an order if the litigant persists in issuing claims or making applications that are totally without merit, ‘in circumstances where an extended civil restraint order would not be sufficient or appropriate.’

Parties to proceedings can apply for orders themselves. The courts are also required to consider making one of the orders whenever they strike out or dismiss a claim that is totally without merit. Orders last for two years and prevent a litigant from issuing further applications without first obtaining the court’s permission. The names of individuals with such orders issued against them are on the public record.⁴¹

These orders are separate to the list of official ‘vexatious litigants’ who are the subject of an order under the *Supreme Court Act 1981*, which is maintained by the Court Service where a person’s name may, potentially, be placed forever.⁴²

Sources: Victorian Parliamentary Law Reform Committee (2008, pp. 8, 157); Herman (2012, p. 29).

What is the nature and extent of the problem?

Despite greater concern about the issue in recent years, there is limited data on numbers of people declared vexatious. Only some jurisdictions maintain public registers of vexatious litigants (for example, New South Wales and Queensland). As at 2008, there were 305 orders in Australia, with most made in the last few decades and overwhelmingly in the Family Court of Australia (table 12.1).

⁴¹ Civil restraint orders in force are published on the UK Ministry of Justice website (nd).

⁴² Published on the UK Ministry of Justice website (nd).

Table 12.1 Vexatious litigant orders in Australia
By decade, up to 2008^a

<i>Jurisdiction</i>	<i>1930s</i>	<i>1940s</i>	<i>1950s</i>	<i>1960s</i>	<i>1970s</i>	<i>1980s</i>	<i>1990s</i>	<i>2000s</i>	Total
High Court	na	-	1	-	1	-	2	0	4
Federal Court	na	na	na	na	-	-	3	6	9
Family Court	na	na	na	na	-	2	75	147	224
NSW	na	na	na	na	-	-	2	11	13
Victoria	1	1	1	2	1	2	2	5	15
Queensland	na	-	-	-	-	3	3	11	17
WA	1	-	-	-	-	1	-	15	17
SA	-	-	-	-	-	-	1	5	6
Tasmania	na	na	na	na	na	na	-	-	-
ACT	na	na	na	na	na	na	-	-	-
NT	na	na	na	na	na	na	na	-	-
Total	2	1	2	2	2	8	88	200	305

^a Number of orders is based on information provided by state and territory Attorneys-General and Commonwealth courts. The table does not include orders made by the Federal Magistrates Court. The figures for the Family Court refer to the number of individual litigants subject to orders rather than the number of orders. Where a jurisdiction did not have a vexatious litigant provision in place in a particular decade, this is marked **na** in the table, with information provided by Simon Smith.

Source: Victorian Parliamentary Law Reform Committee (2008, p. 32).

From a system-wide perspective, there are few litigants declared vexatious, or who exhibit vexatious behaviour more generally. This view was supported by various participants in Victoria's *Inquiry into Vexatious Litigants*, including government agencies, courts and tribunals and legal representatives (Victorian Parliamentary Law Reform Committee 2008).

Not much is known about vexatious litigants. Anecdotal observations are often the only insight into their nature. For example, Douglas noted that:

In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the importance of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others). There will be evidence of significant and increasing loss in life domains, driven by their own pursuit of claim. Over time, they begin to pursue claims against others involved in the management of claims, be it their own legal counsel, judges and other officials. While claiming a wish for compensation initially, any such offers never satisfy and their claims show an increasing need for personal vindication and, at times, revenge, rather than compensation or reparation. (2012)

Yet others suggest that vexatious litigants do not fit any particular profile — that there is no apparent 'type' or common reason for their behaviour, and the way they conduct litigation varies from case to case:

Some participants in the Inquiry blamed factors such as poor early complaint handling services, lack of legal advice and poor treatment by courts and tribunals. Others pointed to characteristics of the litigants themselves, such as motive and personality. (Victorian Parliamentary Law Reform Committee 2008, p. xxvi)

While there are competing explanations of why certain litigants exhibit this behaviour, the variations within the spectrum of behaviour suggest a range of motives and experiences rather than a universal explanation.

Thousands of people are involved in legal proceedings in courts and tribunals every year but only a few ever become vexatious litigants. To deal with their behaviour effectively, it would help to understand why this happens. The Committee found very little consensus about this issue during its Inquiry. Some participants pointed to frustrations caused by the justice system itself. Others emphasised characteristics of the litigants themselves – their motivations, expectations, personalities, even possible mental or behavioural disorders. (Victorian Parliamentary Law Reform Committee 2008, p. 53)

There are very limited demographic data available. Some evidence suggests that vexatious litigants are more likely to be middle-aged males (Douglas 2012; Victorian Parliamentary Law Reform Committee 2008). A recent study of the then 190 individuals on the vexatious litigants list in England and Wales found that (based on a reading of first names) just forty-four were women (Herman 2012).

Deleterious effects on individuals and on the justice system

The number of people declared vexatious is unlikely to reflect the true extent of the problem in the justice system — people can engage in vexatious behaviour without meeting the very high legislative thresholds. Numbers of vexatious litigants are also a poor indicator of the effect they have on the court system and on others (in terms of extra time and other costs).

While there is a diversity of views about vexatious litigants — from ‘serial pests’ to ‘legal mavericks’ (Victorian Parliamentary Law Reform Committee 2008, p. xxiii), it is generally reasoned that proceedings brought by vexatious litigants hinder access to justice because their actions inconvenience other parties, and divert finite court resources towards unmeritorious actions (AGD 2009).

The conduct of unreasonable litigants impinges on the effectiveness and efficiency of the justice system and makes the process of litigation more expensive and protracted for everyone. (LRC WA 1999, p. 33)

But there is no extensive research on the impact of vexatious litigants. The Victorian Inquiry found that it was not possible to quantify the effect of vexatious

litigants on the justice system (Victorian Parliamentary Law Reform Committee 2008). However, it found that:

- There is anecdotal evidence that, although vexatious litigants are small in number, they consume disproportionate amounts of resources in courts and tribunals. There are also reports that some vexatious litigants cause stress and security issues for judicial officers, court staff and lawyers.
- The impact of vexatious litigants is felt more in the Supreme Court and County Court than in the Magistrates' Court or the Victorian Civil and Administrative Tribunal (VCAT).
- Vexatious litigants have a significant financial and emotional impact on the people they sue. Financial costs are only likely to be partially recovered through costs orders.
- There are particular problems in family violence proceedings in the Magistrates' Court. The new *Family Violence Protection Act 2008* (Vic) aims to address these issues.

Regarding the effect of vexatious behaviour on ombudsmen, the NSW Deputy Ombudsman told the Victorian inquiry that between 2 and 6 per cent of complainants consume between 20 and 25 per cent of resources in ombudsmen's offices (Victorian Parliamentary Law Reform Committee 2008).

While participants advised the Commission that vexatious litigants do not pose a significant problem from a system-wide perspective, serious negative impacts on those directly involved such as court staff and opposing parties were raised, particularly for family law matters (box 12.7). This is usually in a context of litigation undertaken for a collateral purpose such as to harass and intimidate another person.

Box 12.7 Family violence and vexatious behaviour

Vexatious behaviour can substantially affect women involved in family violence proceedings. As the Women's Legal Service Victoria said:

Vexatious litigants are a significant problem for some of the women we assist.

The nature of family violence is such that it is characterized by issues of control and dominance. In some instances this translates into prolonging family law proceedings by refusing to negotiate a settlement.

It also can result in vexatious litigation, where numerous applications are made over a long period of time in several different jurisdictions – for example multiple applications in the family law jurisdiction together with cross-applications and appeals in the criminal and family violence intervention order jurisdiction ...

This conduct is very stressful and upsetting for parties who are the focus of the excessive litigation, particularly those who have also been previously subjected to stalking or family violence by the vexatious litigant. In some cases the persistent litigation can continue for 12 years or more. (sub. 33, pp. 24, 28)

Are current measures effective?*Legislative responses are too reactive*

There are mixed views about the efficacy of current arrangements. Some believe that the present arrangements are working relatively well. For example, QPILCH's opinion is that the process in Queensland adequately deals with vexatious litigants (sub. 58, p. 44). Others are more critical of current arrangements. For example, some stakeholders pointed to a judicial reluctance to make orders.

The Law Council is advised that courts are generally reluctant to declare a party 'vexatious' and it may take several findings by the Court that a party's claim is frivolous or vexatious before such an order is made. This is understood to be a particular problem in family law matters. (sub. 96, p. 97)

Some participants also argued that current arrangements are not proactive enough to deter harmful behaviour as it emerges.

In properly addressing the issue of vexatious litigants, we are of the view that improving the efficacy of the processes and procedures for monitoring and investigating potential vexatious litigants is just as important as the nature of the legal test that is to be applied. (Women's Legal Service Victoria, sub. 33, p. 29)

The problem is to identify such litigants at an early stage of proceedings before they do too much damage to their opponents and the system. An early warning sign is their common inability to articulate their claims in the form required by the rules of court or at all. (Douglas 2012)

Further, some adverse behaviours are not captured by current arrangements since they do not trigger the strict legislative criteria for declaration as a vexatious litigant. This includes the behaviour of ‘unreasonable litigants’, which the Law Reform Commission of Western Australia identifies generally as:

... people who litigate in a manner that may abuse opposing parties and other participants in the justice system. These litigants may or may not be legally represented. They often engage in ‘solicitor shopping’ and excessive interlocutory and pre-trial manoeuvres. They may raise spurious claims or defences, flout time limits to cause delays, pursue unmeritorious actions, refuse reasonable settlement offers, fail to pay orders for costs and launch frivolous appeals. (1999, p. 33)

As discussed above in box 12.6, the power to make restraining orders against unmeritorious claims has been extended in the United Kingdom to cover wider circumstances than are dealt with by most Australian legislation, commencing with limited orders where a party has made two or more applications totally without merit (Douglas 2012).

Cost awards and financial disincentives offer limited deterrence

Aside from the specific legislative provisions dealing with vexatious litigants, there are some in-built mechanisms to deter frivolous actions and provide natural incentives to proceed in a proportionate manner. These include court and tribunal fees, the cost of legal representation and the threat of an adverse cost award, all of which prompt parties to weigh up the costs and benefits of taking action.

However, these seem to have a limited influence on many vexatious litigants who are often self-represented and/or have few financial resources, which limits their exposure to an adverse cost order.

The conclusion of the ALRC almost 20 years ago is still relevant today:

It is not possible to measure accurately the extent to which the costs indemnity rule deters claims and defences that may be frivolous, vexatious or without merit. Although it seems that the rule deters a proportion of these claims and defences, it also appears that people who wish to pursue these claims or defences will often not be deterred by the risk of an adverse costs order.

The risk of an adverse costs order seems to the Commission to be an inefficient mechanism for filtering frivolous, vexatious or unmeritorious claims and defences. Deterring unmeritorious claims and defences is more appropriately addressed by case management and other procedural controls designed to identify and deal with such claims and defences at an early stage of proceedings. (ALRC 1995, p. 33)

How can the justice system response be improved?

Prevention and management of querulous behaviour appears to provide a more targeted and effective approach to dealing with vexatious litigants than restricting access to justice as a last resort.

In Australia, the Victorian Government is currently reforming its legislation based on recommendations from the *Inquiry into Vexatious Litigants* (Victorian Parliamentary Law Reform Committee 2008; box 12.8). This inquiry's committee concluded that its preferred approach was to:

... prevent vexatious litigants wherever possible, and to manage one-off or infrequent vexatious proceedings more effectively without restricting general rights of access to justice ... access to the courts should only be restricted when there is clear evidence of an established pattern of vexatious litigation. (Victorian Parliamentary Law Reform Committee 2008, p. xxvi)

The Victorian inquiry considered two basic models for reforming Victoria's legislative provisions in relation to vexatious litigants:

- the Standing Council of Attorneys-General (SCAG) model (box 12.5), which retains an order as a sanction of last resort, but strengthens it in a number of ways (for example, by allowing a broader range of people to apply for orders; lowering the threshold test for making orders; expanding the definition of 'vexatious legal proceedings' so courts can consider a broader range of proceedings and conduct; and addressing 'forum shopping' between different Australian jurisdictions)
- a 'graduated system' such as the United Kingdom's system of civil restraint orders, giving courts the option of choosing between a series of orders which increase in severity depending on the extent of the problem.

The inquiry favoured the introduction of the United Kingdom's graduated system. The view was that, not only does it provide a more proportionate response by restricting access to justice only to the extent necessary to deal with their behaviour, it also offers more effective protection for the justice system and other parties by providing for vexatious litigation to be restrained at an earlier stage and not just as a last resort (Victorian Parliamentary Law Reform Committee 2008).

In addition to considering changes to the legislative regimes, changes in judicial culture may also be required. The need for the judiciary to be more assertive in managing vexatious behaviour was recognised in the United Kingdom:

The Working Group recommends that judges are strongly encouraged, through appropriate judicial leadership channels, to take a proactive and robust approach to dealing with vexatious litigants, in particular, where appropriate, by declaring claims or

applications “totally without merit”; and the use of appropriate orders restraining individuals from bringing or pursuing claims and applications without express permission of the court. (Judiciary of England and Wales 2013, p. 31)

Box 12.8 Victoria moves to reform its approach to vexatious litigants

The Victorian Parliament is currently considering the Vexatious Proceedings Bill 2014. The Bill proposes the introduction of a three tiered regime.

- At the lowest level, a limited litigation restraint order may be made where a person has made two or more vexatious applications in a proceeding. The order can prevent a person from continuing or making further interlocutory applications in the proceeding, without leave. This order encourages early intervention and sends a clear message that vexatious litigation of any kind will not be tolerated in the courts or VCAT.
- The mid-level order, an extended litigation restraint order, can be made where a person has frequently commenced or conducted vexatious proceedings against a specified person or other entity, or in relation to a specified matter. This order applies more broadly than a limited order and may prevent a person from continuing or commencing any proceedings against a person specified in the order or in relation to the matter specified in the order, without leave.
- The highest-level order is a general litigation restraint order, and can be made where a person has persistently and without reasonable grounds commenced or conducted vexatious proceedings. The order may prevent a person from continuing or commencing a proceeding in any Victorian court or tribunal, without leave. This order is reserved for the most serious vexatious behaviour, and in circumstances in which a lower-level order would be ineffective. Due to its gravity, the Bill gives the Supreme Court exclusive power to make this order.

The current regime has been of limited utility in controlling vexatious behaviour in the courts and tribunals. The introduction of the Bill aims to overcome these limitations by introducing a comprehensive new regime for the management and prevention of vexatious litigation.

The Bill also aligns the existing regimes in relation to vexatious litigants under the *Family Violence Protection Act 2008* and the *Personal Safety Intervention Orders Act 2010* with the new regime, ensuring that a single framework for managing vexatious litigation operates across Victoria. Persons who are sued by vexatious litigants and other persons with a sufficient interest in the matter will for the first time be able to apply for limited and extended litigation restraint orders. This provides a mechanism for such persons to protect their own interests and prevent vexatious litigation against them. However, to ensure that the process is not abused, the person will be required to obtain leave from the relevant court or VCAT before they are able to make an application.

Source: Clark (2014).

INFORMATION REQUEST 12.6

The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?

Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

13 Costs awards

Key points

- Costs awards are appropriate in many courts to compensate successful parties for their legal costs and deter unnecessary litigation. However, if not properly constructed, they may also increase litigation costs and deter potential litigants with meritorious cases.
- Where possible, amounts to be awarded for costs should be based on fixed scales (rather than activity-based scales) since these:
 - do not encourage parties to engage in excessive spending on legal costs
 - provide greater certainty to parties of the amount they will receive or be required to pay
 - limit the need for disputes to arise over party-party costs.
- The amounts set out in fixed scales should be determined by taking account of:
 - the stage reached in proceedings
 - the amount that is in dispute
 - the average legal costs incurred in cases with similar characteristics.
- Successful parties that are self-represented or represented on a pro bono basis should not be prevented from seeking costs according to these fixed scales.
- Protective costs orders should be used to safeguard public interest litigation between private parties and the government. Formal criteria should be established to assess the eligibility of a party for a protective costs order.
- A public interest litigation fund should be established to pay for adverse costs ordered against public interest litigants in disputes with other private parties.
 - Resourcing for the fund should be provided from costs awarded to successful public interest litigants.
 - The fund could be established as a standalone entity, or form part of existing legal services funds, such as test case funds and public purpose funds.
- Courts should continue to award costs on an indemnity basis against parties that are frivolous, vexatious or reject reasonable settlement offers.

The resolution of legal disputes in courts can come at a significant financial cost to the parties involved (see chapter 3). These legal costs are essentially transactions costs associated with the determination of a legal dispute, and are distinct from any compensation or outcome awarded in the judgment of a case. Courts have provisions to identify who should bear responsibility for legal costs and how much should be paid in reimbursement.

The effects of costs awards on access to justice are mixed. On the one hand, the potential awarding of costs may allow some parties to pursue claims that they otherwise would not have been able to afford. On the other hand, others may be discouraged from pursuing their legal rights by the risk of being faced with an unaffordable adverse costs award. Costs awards can also influence the behaviour of parties in other ways — affecting their incentives to settle and the amount of legal costs they are willing to incur during litigation.

This chapter begins by providing a general description of how costs are awarded (section 13.1), followed by a discussion of how costs awards can affect access to justice (section 13.2). Potential reforms to the structure of cost rules and scales are then described in section 13.3. Finally, section 13.4 outlines suggested changes to which parties should be subject to costs awards.

13.1 Overview of rules to award costs

There are two broad questions that describe rules for awarding costs between two parties to a dispute (party-party costs):

- ‘*Who pays?*’ — which party should be required to pay party-party costs?
- ‘*How much is paid?*’ — what method determines the amount of costs to be paid?

These aspects can vary both between tiers of courts and between jurisdictions.

Who pays?

There are two general approaches to awarding legal costs — the ‘English rule’ and the ‘American rule’. The English rule is based on the principle that ‘costs follow the event’, which means that the successful party is entitled to payment for legal costs from the unsuccessful party. Alternatively, the American rule requires litigants to pay for their own legal costs regardless of whether they are successful.

Most Australian courts award costs according to the English rule. However, there are some circumstances where these courts may deviate from the loser-pays

principle, including if a winning party has rejected a reasonable settlement offer, and protections afforded to specific cases on public interest grounds (section 13.4).

There are also a number of Australian courts and tribunals where the American rule is used, often referred to as ‘own-cost’ jurisdictions. In Australian courts that deal with family law disputes, costs awards are infrequent under longstanding conventions, with costs only awarded in exceptional circumstances, such as in vexatious or frivolous cases. In most tribunals, rules set out where costs may be awarded — generally only in more complex and expensive matters, or cases where a reasonable settlement has been rejected.

How much is to be paid in costs?

When awarding costs, courts must also determine the amount that should be paid by one party to another. Most Australian courts base the amount awarded on the amount of activity undertaken by the successful party. However, there are some Australian jurisdictions that award costs using fixed, event-based amounts.

Activity-based scales

Costs awards in most Australian courts are awarded on an activity basis, meaning that the amount of costs awarded is tied to the tasks performed by the winning party’s solicitor. These costs are generally calculated on what is referred to as a ‘standard basis’ using the scales of costs set out in the court’s rules. The scales assign a value to each task undertaken by a paid representative (table 13.1). In most jurisdictions, only those costs deemed to have been reasonably incurred and of proportional amount are awarded to the successful party.

Table 13.1 An example of an activity-based scale of costs

For selected tasks in the Federal Court of Australia, as of 9 May 2013

<i>Task</i>	<i>Units</i>	<i>Amount</i>
Attendance by a lawyer requiring the skill of a lawyer ^a	Per 6 mins	\$56.00
Preparing documents (excluding correspondence)	Per 100 words	\$51.00
Preparing correspondence	Up to 50 words	\$21.00
	Up to 100 words	\$41.00
	Over 100 words	\$51.00
Reading all documents (excluding correspondence)	Per 6 mins	\$56.00
Reading correspondence	Up to 50 words	\$15.00
	Up to 100 words	\$31.00

^a Including attendances in conference, by telephone, on counsel, appearing in court and travelling.

Source: *Federal Court Rules 2011* (Cth).

Lawyers generally charge their clients at rates higher than those set out in the court scales. As such, costs awarded on a standard basis usually only partially indemnify a successful litigant, with around 60 to 75 per cent of a litigant's fees covered by the costs award (QPILCH 2009). The difference between the actual amount paid by a successful party to its solicitor, and the amount awarded in party-party costs, is referred to as 'solicitor-client' costs.

In a small number of cases, costs are awarded on an indemnity basis, usually against vexatious or frivolous actions that have no basis in law. Unlike standard costs, indemnity costs take into account the costs agreement between the successful party and their solicitor. Unless the amount of costs is deemed unreasonable, indemnity costs will roughly match the actual costs incurred by the winning party. Indemnity costs not only fully compensate parties who are victims of vexatious claims, but also act to discourage such claims from being brought in the first place.

The capacity of many parties, particularly individuals and small businesses, to accurately predict their expected costs liability under activity-based scales is limited, regardless of whether costs are calculated on a standard or indemnity basis. While court scales clearly set out the value assigned on a standard basis to tasks undertaken, a party has little idea how many tasks their opponent will perform. Predicting expected liability is even more difficult on an indemnity basis, as parties may not be aware of the terms of their opponent's costs agreement.

Legal professionals in many jurisdictions are obligated by professional rules to provide their clients with an estimate of their potential liability for costs. However, activity-based scales limit the ability of professionals to provide an accurate estimate. Further, there is some evidence to suggest these estimates are not disclosed in all cases. A survey of court users in South Australia conducted by the Commission found that less than half of those respondents represented by a lawyer at trial were provided with an estimate of their potential liability for adverse costs.

Fixed, event-based scales

In some courts, costs are not awarded on the basis of each activity performed by the successful party's solicitor. Instead, these jurisdictions set out fixed, lump sum amounts in their court scales for each stage reached in the trial process, referred to as 'event-based' scales. The costs of solicitor activity to reach that trial stage are presumed to be captured in the lump sum amount. Event-based scales are currently used in the Federal Circuit Court of Australia (table 13.2), while the South Australian Magistrates Court uses a variant on event-based scales that takes into account the amount in dispute (section 13.3).

The extent to which a successful party is indemnified under a fixed scale is determined by the amount of work undertaken by their solicitor and the rate at which they are charged. Because the amount of costs recovered does not vary, a successful party which ‘over-services’ itself will recover less of its costs than a successful party that employs fewer resources. In most cases, parties are still unlikely to be fully indemnified under the current fixed scale systems.

Table 13.2 An example of a fixed event-based scale of costs

In the Federal Circuit Court, as of 11 June 2013

<i>Stage of proceedings</i>	<i>Family Law</i>	<i>Other Federal Laws</i>
Stage 1: Initiating or opposing application up to completion of first court day	\$1 994	\$2 663
Stage 2: Interim or summary hearing – as a discrete event	\$1 661	\$1 661
Stage 3: Up to and including conciliation conference	\$1 661	n.a.
Stage 4: Primary Dispute Resolution litigation intervention	\$1 661	\$2 793
Stage 5: Preparation for final hearing		
For a 1 day matter	\$4 250	\$5 988
For a 2 day matter	\$5 270	\$8 998
For each additional day	\$1 128	\$1 893
Stage 6: Final hearing costs for solicitor	\$271	\$271
Daily Hearing Fee ^a		
Short mention	\$271	\$271
Half-day hearing	\$997	\$997
Full-day hearing	\$1 994	\$1 994

^a For each stage, attendances at a hearing are charged at the daily hearing fee rates. ^b n.a. – not applicable.

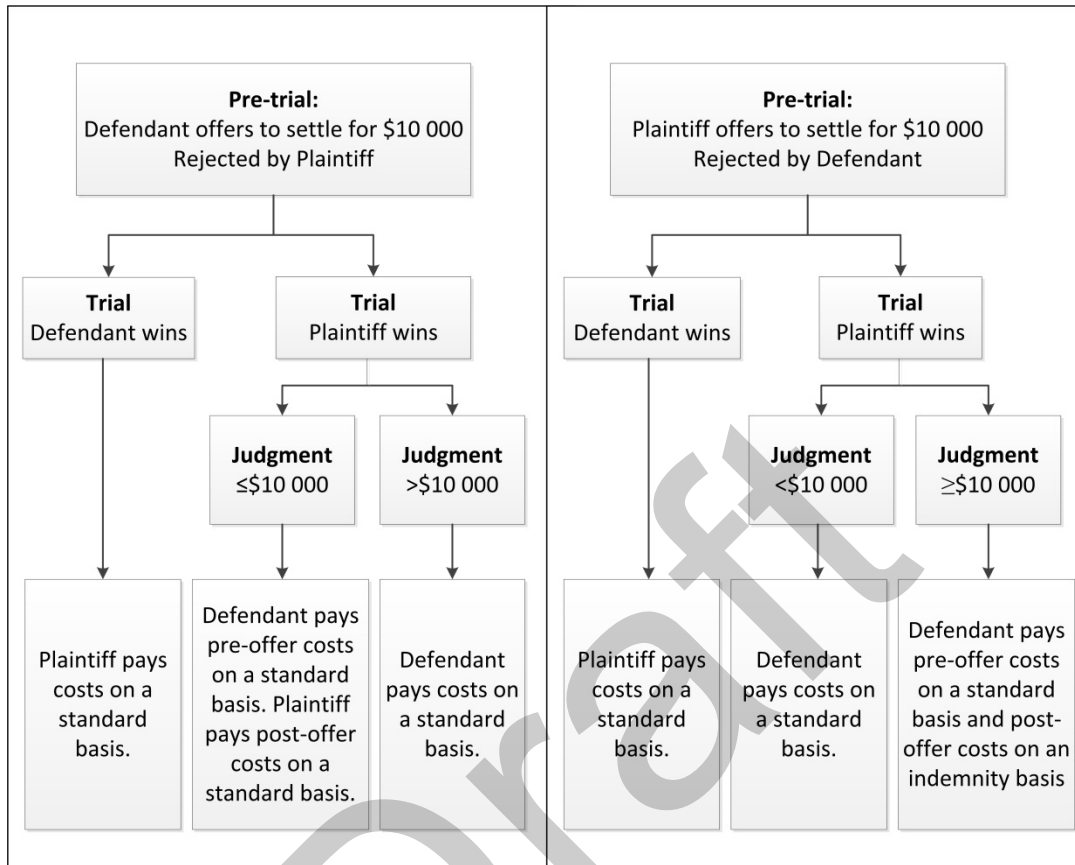
Source: *Federal Circuit Court Rules 2001* (Cth).

Settlement offers

Most Australian courts, and many tribunals, take settlement offers into account when awarding costs to parties, with the aim of encouraging reasonable settlement offers and avoiding unnecessary litigation. While the details of individual rules differ, typically if a party makes an offer which is rejected by their opponent, and the subsequent judgment is less favourable to their opponent than the offer, the party who made the offer is entitled to apply for payment for costs incurred after the offer was made (see figure 13.1).

Similarly, many overseas jurisdictions take settlement offers into account, such as Rule 68 of the *Federal Rules of Civil Procedure* in the United States, though this only applies when a settlement offer from the defendant is rejected by the plaintiff.

Figure 13.1 **Costs awards when a settlement offer is rejected — an example^{a,b}**



^a In New South Wales courts and the Federal Court of Australia, plaintiffs that reject a more favourable settlement offer must pay post-offer costs on an indemnity basis. ^b The Magistrates' Courts of Tasmania and South Australia use proportional costs rules to compare offer and claim amounts with the judgment sum.

Defendants that reject favourable settlement offers are generally required to pay post-offer costs to plaintiffs on an indemnity basis. By contrast, in most jurisdictions — with the exception of New South Wales and the Federal Court of Australia — plaintiffs that reject favourable settlement offers are only required to pay post-offer costs on a standard basis. It is unclear why most jurisdictions treat offers by plaintiffs and defendants differently in this regard. The result is an asymmetry between parties, with defendants having a stronger incentive to settle than plaintiffs. Requiring plaintiffs to also pay post-offer costs on an indemnity basis would strengthen the incentive for reasonable settlement offers to be made by defendants and accepted by plaintiffs.

DRAFT RECOMMENDATION 13.1

Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.

13.2 A framework for evaluating costs awards

When considering how to structure costs awards, it is useful to first consider their role in facilitating access to justice. Objectives commonly identified include:

- providing accessibility for meritorious claims by indemnifying successful parties
- deterring frivolous or vexatious claims or defences
- discouraging unnecessary costs from being incurred during litigation
- providing simplicity, clarity and predictability to litigants
- encouraging settlement
- giving courts discretion to address extenuating circumstances (ALRC 1995; Manitoba Law Reform Commission 2005).

However, these general objectives cannot all be fully satisfied by the same set of costs rules — they are mutually incompatible and so trade-offs will necessarily arise (ALRC 1995). For example, costs rules that better enable those without means to litigate are less likely to deter unmeritorious cases, as any deterrent based on costs is likely to be strongest for those with less money. Similarly, the greater the level of discretion given to the courts, the less predictable that costs will be for litigants.

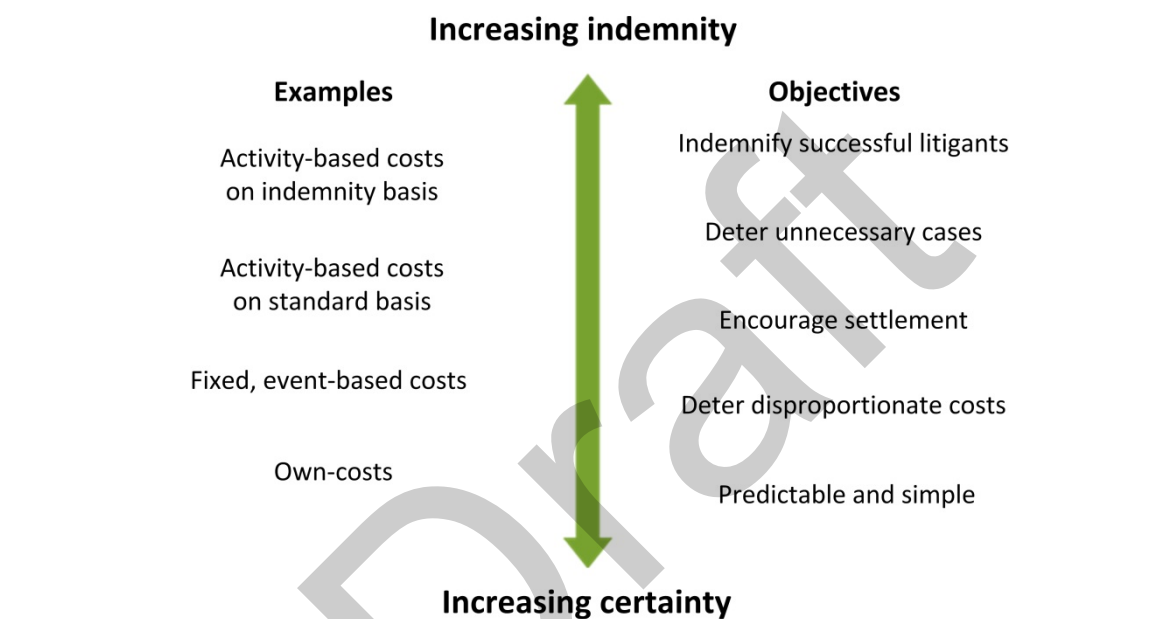
The tension between these objectives reflects the broader tradeoff (the indemnity-certainty tradeoff) between enabling successful parties to recover their costs and providing litigants with certainty in the awarding of costs (figure 13.2).

The indemnity-certainty tradeoff

Costs awards are broadly underpinned by the principle of indemnity, which suggests that a successful litigant should be able to recover at least some of their costs from the losing party. This is similar but distinct from the indemnity-basis on which costs can be awarded, where a party is compensated for their full solicitor-client costs. Costs rules that offer greater indemnity will increase the relative amount of costs recovered by a successful party, and thus increase the amount payable by a losing party.

However, prior to litigation, parties cannot determine with any certainty their chances of winning and the costs amount they will be entitled to receive or obliged to pay (ALRC 1995). As such, increasing the level of indemnity increases the amount that a party can expect to either win or lose — essentially increasing the ‘risk and reward’ faced by a party prior to litigation. As noted earlier, uncertainty with respect to costs is more pronounced where costs are awarded based on the activities of the opposing party.

Figure 13.2 Illustrating the indemnity-certainty tradeoff in costs awards



The fundamental difference between the English and American rules for awarding costs is how they trade off indemnity and certainty, with both rules sitting at opposing ends of the spectrum. Courts that apportion costs using activity-based scales under the English rule favour indemnity for successful litigants. Conversely, own-costs jurisdictions provide litigants with absolute certainty at the outset of litigation that they will not have to pay any costs to their opponent, regardless of the outcome. Fixed costs provide certainty of the amount of costs to be indemnified, but with uncertainty as to which party will have to pay.

This raises the question that underpins the choice of a costs award system — what is the appropriate balance to strike between indemnity and certainty? Arriving at the answer is made more difficult because any given indemnity-certainty tradeoff will affect parties in different ways, as individuals can vary widely in their resources and their appetites for risk.

What are the consequences of providing indemnity?

Indemnity for successful litigants enhances accessibility for those parties who otherwise could not afford to engage in litigation and believe that they have a strong case that is likely to win. In particular, parties represented on a speculative or contingent basis may rely on costs awards to finance their case (ALRC 1995).

However, awarded costs are generally less than the actual amount billed to a client:

Generally, recoverable costs (party-party costs) do not satisfy the entire costs of undertaking litigation ... The shortfall arises because frequently, the scale does not reflect the actual work required to properly prepare a case. Often, necessary work is not included in the scale. Often, the scale does not adequately reflect the market rates of undertaking the work or obtaining the evidence required in a particular matter. (Australian Lawyers Alliance, sub. 107, p. 14)

Thus costs awards currently serve to reduce the costs of litigation for successful litigants, rather than providing them with full indemnity. Partial indemnity impacts most on those seeking non-monetary outcomes, as they may not have an alternative source of funds to pay the difference between their total bill and the costs awarded.

Effect on the costs of litigation

Providing litigants with indemnity by awarding costs can encourage disputants to spend more on legal services, since increasing the amount of legal work undertaken by a party typically increases their chances of winning. As Posner observed:

It appears that, on balance, indemnity does increase the litigation rate ... For it encourages the optimistic litigant to spend heavily on the litigation because he expects that his costs will ultimately be borne by his opponent ... (1998, p. 790)

There are two reasons why greater indemnity encourages spending during litigation. First, awarding costs raises the stakes of litigation. The amount of costs to be paid, whether an activity-based or fixed amount, is added to the amount at stake for the parties. The benefits of winning — and the costs of losing — are now greater, and therefore parties are willing to spend more to increase their chance of obtaining a favourable outcome.⁴³ Second, where costs are awarded on an activity-basis, the amount of costs recovered also increases with additional legal spending by a party. The result is that the expected cost of each dollar of legal expenditure is decreased.⁴⁴

⁴³ In economic terms, awarding costs raises the expected marginal benefit of each additional unit of legal expenses purchased.

⁴⁴ The costs award effectively acts as a probabilistic subsidy, lowering the expected marginal cost of expenditure (Katz 1987).

The incentive for litigants to increase their legal spending under the English rule has been previously demonstrated in a theoretical setting by Braeutigam et al. (1984), and Katz (1987). Similar conclusions were also drawn by empirical research from Hughes and Snyder on litigation costs during Florida's experimental use of the English rule (1995).

What are the consequences of uncertainty?

As noted previously, disputants face a great deal of uncertainty surrounding their potential costs liability. Many parties are unable to assess the likelihood of different outcomes — this is generally referred to in economics as uncertainty — and are often more concerned about possible losses rather than possible gains (Reeson and Dunstall 2009). Faced with this uncertainty, individuals can make decisions that ultimately leave them worse off.

These individuals may decide to not pursue a meritorious claim or defence to avoid the potential of paying costs, thus denying them access to justice (ALRC 1995). For example, a party may focus on the unlikely but daunting possibility that costs will blow out to a large amount – essentially focussing on the worst case scenario rather than the range of possible outcomes. A number of submissions have attested to this behaviour occurring:

The prospect of adverse cost orders in the courts can act as a deterrent for our clients in pursuing legal action. (Consumer Action Law Centre, sub. 49, p. 10)

In our experience, the most significant barrier for people experiencing discrimination is the risk of adverse costs orders ... As a result of the risk of an adverse costs order, many complainants are reluctant to even lodge complaints ... preferring state-based tribunals where parties bear their own costs. (Kingsford Legal Centre, sub. 53, p. 5)

The ever present threat of an adverse costs order will either prevent proceedings being taken in the first place, or as proceedings continue will act as a pressure to compromise the action before a final determination. (Salvos Legal, sub. 122, p. 2)

Queensland Public Interest Law Clearing House suggested that this aversion to cost risks can be exacerbated by threats made by opposing parties:

We have noticed a common theme in the letters our clients receive from solicitors representing the opposing party. Often these letters are drafted in complex language and threaten to seek a costs order against the addressee should they not withdraw the proceedings. Unfortunately, this all too often results in the recipient of the letter withdrawing their action because they are intimidated by the threat. (sub. 58, p. 15)

Some stakeholders have suggested that aversion to costs awards can be a particularly strong deterrent to disadvantaged parties:

The Centre is aware of many cases where the cost implications of litigation have dissuaded disputants from pursuing resolution, particularly where the disputants are experiencing disadvantage. (National Pro Bono Resource Centre, sub. 73, p. 32)

Often pro bono providers cannot offer their services beyond the initial hearing because ... exposure to a costs order should the appeal fail makes the process too risky. Often this means that disadvantaged clients have no opportunity to appeal an adverse finding. (Springvale Monash Legal Service, sub. 84, p. 14)

Costs are also potentially a means of enabling a well-funded litigant to intimidate a less-well-funded litigant and it is clear that courts are mindful of concerns about the unfairness to parties with fewer resources. (Law Council of Australia, sub. 96, p. 102)

However, some contend that the risk of a costs award disproportionately impacts on those who lie between the extremes of the distribution of wealth — the so-called ‘missing middle’. For the very wealthy, the relative amount of a costs award may be insignificant compared to their available resources, while the very poor may not be concerned by the possibility of paying costs if they have very little to lose and much to gain from pursuing a claim (Cannon 2002). The remaining middle cohort however, may possess sufficient wealth to lose from an adverse costs order, but not enough for this expense to be insignificant.

Incentives to settle

One of the benefits ascribed to costs awards is that they encourage parties to settle by raising the stakes of litigation to include the possibility of paying the other party’s costs. Encouraging settlement, where reasonable, can help improve access to justice by facilitating early resolution, reducing amounts spent on litigation, and keeping court resources free to deal with other disputes in a timely manner.

However, some stakeholders have expressed concerns that the perceived risk from the threat of an adverse costs award may coerce risk-averse parties into settling cases when it is not appropriate or just. Kingsford Legal Centre outlined how aversion to the risk of a costs award affected a client’s willingness to settle:

Darren worked as a labourer. He lived in western Sydney with his young family and had a mortgage. He was sacked from his job as his employer believed he had a medical condition that could affect his job in the future. Darren disputed that he did have a medical condition and therefore did not believe it affected his ability to do his job. Darren’s doctor supported this.

Darren lodged proceedings with the [Australian Human Rights Commission] which failed to settle. A assisted Darren and told him that his case had the potential to be a test case. Darren lodged proceedings in the Federal Magistrates Court. Despite advice from the CLC and a barrister that his case was relatively strong, Darren accepted a low figure settlement at the Federal Magistrates Court mediation. Darren did this as he was worried about an adverse costs order and the subsequent risk that he may lose his

house. He wanted to seek justice but felt the risks just seemed too great. (sub. 53, pp. 5–6)

Legal Aid NSW also suggested that costs awards may be used to unjustly coerce disadvantaged parties to settle, observing:

... that workers with meritorious cases can be pressured into settling and forgoing their rights ... While it is rare for a worker to be ordered to pay legal costs if they lose their claim, it is not unknown for lawyers acting for employers to use the prospect of a costs order to pressure workers into a settlement. (sub. 68, p. 53)

13.3 Reforming the structure of costs awards

Ideally, costs awards would be structured in a way that:

- improves certainty for risk averse litigants
- does not encourage parties to spend more than is necessary on legal costs
- maintains some degree of indemnity for winning parties.

Activity-based scales of costs currently used in many Australian jurisdictions fail to deliver this outcome. Rather, the current arrangements result in an increased level of litigation spending and a loss of certainty for all litigants.

The flaws in activity-based scales have long been recognised:

... unless activity based scales are replaced with a cost shifting method with better incentives, improvements to court systems will founder. (Cannon 2002, p. 208)

The Commission considers that a range of reforms to costs awards are required.

Fixed, event-based scales for lower-tier courts

One approach to remedy the flaws in current arrangements is to use scales of costs that prescribe fixed amounts for each stage reached in the process. Under fixed scales, parties can determine with a high degree of certainty the amount of any potential adverse costs award. This will mean that parties no longer have to face the possibility of a costs order that exceeds what they might have expected to pay. The Australian Law Reform Commission previously concluded that costs award rules should enable parties to accurately estimate their potential exposure to costs at the beginning of proceedings (ALRC 1995). Fixed scales also reduce the incentive for parties to over-service, as the costs a party can recover are unrelated to activity.

One concern is that a fixed, event-based costs amount may not provide sufficient indemnity to some successful litigants whose necessary legal expenses exceed the fixed amount. This may occur when there is a wide range of necessary legal costs required by different cases of the same length and amount in dispute. Indeed, any system of scales that chooses a single, representative costs amount for cases of a given length and amount will not fully indemnify roughly half of the cases in that bracket, and will over-indemnify in others.

However, as previously mentioned, activity-based scales currently used in most courts already fail to provide successful litigants with full indemnity for costs. Further, as discussed in chapter 3, the spread of legal costs incurred across cases in lower-tier jurisdictions is relatively small compared to superior jurisdictions. So there are likely to be fewer outlying cases that are not sufficiently indemnified.

In some cases, a fixed scale of costs will provide greater indemnity than activity-based scales. For example, a fixed scale can afford full indemnity to a party that undertakes less activity than is expected. This essentially amounts to a reward for parties that are efficient and do not over-service. However, this should not lead to an incentive to ‘under-service’, as parties must still undertake sufficient activity to win the case in order to be awarded costs.

Fixed scales also reduce the need for courts to settle disputes regarding the amount of costs to be paid between parties when costs are awarded.

Fixed scales should be proportionate to the amount in dispute

The fixed, event-based amounts awarded in costs by lower tier courts should also be set in proportion to the amount that is in dispute. The amount in dispute can be defined as the amount awarded in the judgment sum for successful plaintiffs, and the amount claimed by the plaintiff for successful defendants. By tying the amount of costs awarded to the size of the claim or judgment sum, courts can encourage legal costs to remain in reasonable proportion to the dispute. Further, this principle could also discourage overly ambitious claims, as increasing the amount claimed also increases the plaintiff’s costs liability. Variants of this approach are already being employed overseas in Germany, England and Wales.

The South Australian Magistrates Court uses an event-based scale, where the costs awarded for each stage in the process are a percentage of the amount claimed. The percentage is altered for each stage in the process, as well as for some dispute types, and is not tied directly to the work undertaken by either side (see table 13.3).

In England and Wales, fixed costs regimes have recently been adopted to determine the amount of costs to be awarded in particular dispute types, such as fast track trials and cases within the Road Traffic Accident (RTA) Protocol. Parties are awarded costs based on a fixed lump sum plus an amount equal to a percentage of the awarded damages. Both the lump sum amount and the percentage of damages awarded increase as a case proceeds through each stage of litigation (Taylor 2013).

Table 13.3 An example of a percentage scale of costs

For selected events in the South Australian Magistrates Court, for a claim worth \$100 000, as at 26 April 2013

<i>Item</i>	<i>Action type</i>	<i>Rate</i>	<i>\$100 000 claim</i>
1. Pre-action notice	other than for personal injury	1%	\$1 000
	personal injury	2%	\$2 000
2. Filing an action or defence, including directions hearing	liquidated sum	3%	\$3 000
	other than for a liquidated sum	5%	\$5 000
3. Activity after the first directions hearing until the trial date is set	liquidated sum	10%	\$10 000
	other than for a liquidated sum	12%	\$12 000
4. Activity from trial date set until trial		10%	\$10 000
5. Preparing and filing a trial plan		2.5%	\$2 500
7. Fees for counsel at trial	First day	3%	\$3 000
	Subsequent days	2.5%	\$2 500
11. Court ordered mediation		2%	\$2 000

Source: *Magistrates Court (Civil) Rules 2013 (SA)*.

An evaluation one year after introduction of the RTA Protocol found that average costs in low value traffic claims had reduced by between 3 and 4 per cent, along with small reductions in general damages and delays before settlement (Fenn 2012).

Putting it into practice — the amounts to be contained in fixed scales

Calculating costs as a *direct* percentage of the value of the claim may not be the most effective means of estimating reasonable and necessary legal costs. As the Commission has shown in chapter 3, the costs of litigation currently do not increase in direct proportion with amounts in dispute. Rather, costs appear to comprise a larger proportion of lower value claims, as there will be some necessary costs of litigation that do not vary with the dispute amount. As such, a scale based on direct percentages of claim values may not sufficiently indemnify lower value claims.

Another option, and the Commission's preferred response, is for the costs awarded to reflect the average costs paid in a case of similar value reaching each given stage of a trial. This would have the added advantage of encouraging parties to taper back their legal expenditure to more closely match a reasonable amount.

The Commission has constructed a practical example of a fixed scale in table 13.4. This illustrative scale is based on data from previous surveys of litigation costs for cases of varying length and dispute type in the County Court of Victoria in 1993.

Table 13.4 Example of a fixed, event-based proportional scale of costs
1993 dollars, by stage & amount in dispute, for the County Court of Victoria

Stage of process	Less than \$20 000	\$20 000 to \$39 999	\$40 000 to \$99 999	\$100 000 or more
Event 1: Pre-trial conferencing to trial	\$1 065	\$1 420	\$1 775	\$3 550
Event 2: Trial	\$1 278	\$1 704	\$2 130	\$4 260
Event 3: Verdict	\$1 917	\$2 556	\$3 195	\$6 390
Total	\$4 260	\$5 680	\$7 100	\$14 200

^a This scale has been put together entirely for illustrative purposes. The figures above do not reflect estimates of the costs of litigation at present.

Sources: Commission estimates using estimates of costs in the County Court of Victoria from Worthington and Baker (1993) and Williams and Williams (1994).

In practice, any scale would draw on a wider range of more recent average costs data. Such an approach underscores the importance of more rigorous and consistent data collection in the courts system (chapter 24).

While the construction of such a scale might be complicated, its application need not be. Indeed, to the user the concept is relatively straightforward. Litigants need only know two things — the amount in dispute and the stage of proceedings they have reached — in order to identify their potential liability for costs.

DRAFT RECOMMENDATION 13.2

In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:

- *the stage reached in the trial process*
- *the amount that is in dispute.*

For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.

Fixed scales of costs should reflect the typical market cost of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories.

Costs in Superior Courts require greater discretion

While fixed, event-based costs may be appropriate for some superior court cases, in these courts there can also be a ‘long tail’ of cases for which the required legal costs may be relatively high (chapter 3). In these cases, a system to manage and limit costs awards may improve the incentives of disputants with respect to costs.

Parties in the Federal Court of Australia currently have the ability to seek an order from the Court specifying a maximum cap on the costs that can be awarded in a case, under rule 40.51 of the *Federal Court Rules* 2011 (Cth).⁴⁵ Though not a superior court, a similar provision also exists in rule 21.03 of the *Federal Circuit Court Rules* 2001 (Cth). As argued by the Public Interest Advocacy Centre (PIAC):

... the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis ... (This) has the potential to remove uncertainty about the level of risk of an adverse costs order, thereby allowing the applicant to proceed in cases where they otherwise might be unfairly inhibited from doing so. (sub. 45, p. 31)

However, Watters (2010) noted that since the introduction of order 62A in the Federal Court in 1992, less than ten reported decisions on its application have been made. It has been suggested to the Commission that the existing rules for capping costs are underutilised for a number of reasons:

One problem with the Order (and other similar costs-limiting orders in other jurisdictions) is its infrequent use, due to a lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. (PIAC, sub. 45, p. 31)

The Commission sees merit in the capping of recoverable costs at the outset of litigation being a standard part of the litigation process, rather than an order at the court’s discretion that must be sought by an individual party in each matter.

A system of costs management by courts was recently introduced in the County and High Courts in England and Wales. Parties in a case are required to file costs budgets with the court early in the proceedings (UK Ministry of Justice 2013). Each party’s costs budget provides a breakdown of each stage of the litigation, identifying costs already incurred and those estimated to be incurred thereafter (Kennedys 2013). While parties are encouraged to reach agreement on their budgets, in the absence of agreement the court may make a costs management order and determine the maximum costs recoverable by the parties. These maximum budget amounts can be updated during the course of litigation upon agreement, or if an update is warranted by significant developments in the case.

⁴⁵ Formerly order 62A of the *Federal Court Rules* (Cth)

Costs budgeting and management appears to offer many of the benefits of fixed costs, as it gives litigants greater certainty at the outset of litigation, while offering sufficient flexibility to provide reasonable indemnity for atypical cases. The Commission sees merit in adopting this approach in contested matters in superior courts where costs are awarded.

DRAFT RECOMMENDATION 13.3

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

13.4 Who should costs awards apply to?

There are some types of litigants that are currently not subjected to the same costs rules as other litigants. This includes some that are unable to seek costs under the current arrangements, such as pro bono clients and self-represented litigants. In addition, there are some public interest litigants that are currently shielded from paying costs.

Should eligibility to be awarded costs be extended to other parties?

Currently, only costs paid to a legal representative can be recovered by successful parties. This means that pro bono clients and self-represented litigants are precluded from being awarded costs, with the exception of some out-of-pocket expenses such as court fees and other disbursements.

Pro bono clients

Pro bono clients are not able to seek an order for costs against their opponent. The New South Wales Law Reform Commission explained the rationale as follows:

Lawyers acting pro bono cannot recover costs. The purpose of an order that the losing party pay the legal expenses or costs of the winning party is to provide an indemnity in relation to the whole, or usually part, of the contractual obligation incurred by the latter to pay the fees of his or her lawyers. If a successful party is under no legal obligation to pay lawyers' fees, the indemnity principle states that the successful party cannot recover costs from the opponent. (NSW LRC 2012, pp. 57–58)

However, as argued by the National Pro Bono Resource Centre, this principle leads to asymmetric payoffs at the expense of pro bono parties:

Under the current system a litigant who is represented pro bono may not be able to recover his costs even if his claim is successful, whilst still being liable for the other party's costs if his case is unsuccessful. The reverse is that an opponent of a litigant who is represented pro bono may benefit from not having to pay his opponent's costs, even if he is unsuccessful. (sub. 73, p. 36)

This asymmetry means that pro bono litigants face a worst-case scenario of having to pay costs, or a best-case scenario of receiving nothing.

One way to correct this asymmetry would be to provide pro bono parties with immunity from costs, meaning they can neither seek nor be required to pay costs. However, it seems inequitable to deny opposing parties the ability to recover their costs if successful simply because their opponent is represented on a pro bono basis. This would also provide a possible avenue for parties to use a pro bono arrangement to undertake unmeritorious, frivolous or vexatious litigation without fear of costs, leading to undesirable outcomes.

The current system also gives rise to asymmetric incentives where the opponents of pro bono clients have reduced incentives to settle, and are less likely to be deterred from bringing an unmeritorious case:

... where the opposing party knows that, based on the doctrine of compensation, they will not be liable for a costs order, such cost deterrents do not exist. Thus the pro bono litigant is in the disadvantageous position of having this vulnerability exploited. (National Pro Bono Resource Centre, sub. 73, p. 37)

... if costs are not recoverable, this delivers an unmeritorious windfall to parties against CLC or pro bono clients, and removes the checks and balances as to costs in litigation. (Consumer Action Law Centre, sub. 49, p. 25)

Denying costs awards to pro bono clients presents the opportunity for some parties to abuse the legal system to exploit disadvantaged groups that are likely to require pro bono services. Opponents of pro bono clients are aware that they will not have to pay costs, and thus have reduced incentives to settle or conduct litigation in an expedient or reasonable fashion.

One method that some pro bono lawyers have used in an attempt to work around the current restriction on awarding costs is to use a type of conditional fee agreement. The agreement requires the client to pay the lawyer an amount equal to the costs award if successful, otherwise no payment is due. According to the National Pro Bono Resource Centre:

... the experience of the Centre is that these costs agreements have been reasonably successful in establishing an indemnity relationship sufficient for the court to make a

costs order. However, current case law contains considerable uncertainty and ambiguity as to what constitutes the type of conditional costs agreement that accommodates the indemnity principle. (sub. 73, p. 37)

The Consumer Action Law Centre has expressed concern at the ambiguities surrounding these pro bono costs agreements with respect to costs awards:

Attempts have been made to draft a CLC or pro bono costs agreement that gets around the courts' application of the indemnity principle, but these are largely untested, and many pro bono practitioners and CLCs are either unaware of the issues, or fail to have 'compliant' agreement in place. Any doubt as to costs recovery results in uncertainty for: CLCs and pro bono lawyers; their clients; opposing parties; and the courts. It undermines and distorts the basis on which these parties may offer their services, enter into a retainer, and resolve litigation. (sub. 49, p. 25)

Given this uncertainty and ambiguity, there is value in formally recognising the right for pro bono parties to seek an award for costs. This conclusion has been previously supported by both the NSW Law Reform Commission (2012) and the Taylor Review in Scotland (2013).

How should costs awarded in pro bono cases be distributed?

There are several options for allocating the costs awarded to a pro bono case. Costs could be awarded to:

- the client
- the lawyer representing the client
- the legal centre or clearing house involved
- a general fund to support pro bono services.

Having been provided with a charitable service already, the client is an inappropriate recipient as they have not incurred any costs.

Distributing costs awarded in pro bono cases to lawyers may encourage a higher level of pro bono service provision. Submissions to the NSW Law Reform Commission (2012) have previously suggested that helping lawyers to recoup their costs and time would enable them to increase the amount of pro bono work they can afford to undertake. Further, lawyers may be more willing to undertake pro bono work on more difficult or lengthy cases if they can recover some costs back. This would likely improve access to pro bono services for disadvantaged parties.

Conversely, it has been argued that awarding costs may actually reduce the willingness of lawyers to undertake pro bono work, as it risks conflating pro bono work with contingency billing. This may corrupt the social incentive for lawyers to

undertake pro bono work, as their motives for undertaking such work may now be perceived as pecuniary, rather than charitable. This has been borne out in other areas of charitable work such as blood donations (Oakley and Ashton 1997).

The Consumer Action Law Centre suggests that there is a clear distinction between awarding of costs to pro bono representatives (where there is no expectation of fees, and any damages recovered are quarantined from fees) with contingency billing arrangements (where matters are taken on an assessment that they will be profitable, and success fees may eat into damages) (sub. 49). They go on to argue that:

... we fail to see the mischief if a small percentage of lawyers are motivated [to] take up matters pro bono because a small amount [of] party party costs might be recovered. There is considerable upside in allowing those CLCs and pro bono lawyers that are willing to undertake pro bono to recoup their costs, and by extension, provide services to other parties. (sub. 49, p. 26)

Distributing any costs awarded to the relevant bodies providing the pro bono services (rather than individual lawyers themselves) would help improve the resourcing of these organisations to provide more pro bono services to others. This may also lower the risk of corrupting the social capital of pro bono work – as money would not flow directly into lawyers pockets, but rather be used to fund a not-for-profit service. A potential shortcoming of this approach is that it may distort the incentives of pro bono providers towards providing representation in dispute types where costs are awarded, at the expense of no-costs disputes (such as tribunal actions and family law cases).

Alternatively, costs awarded could be allocated to a collective public fund for pro bono legal assistance services. This may be particularly appropriate for distributing costs awarded to those parties represented on a pro bono basis outside of any formal not-for-profit pro bono scheme or organisation. This would preserve two main benefits of awarding costs to pro bono parties — maintaining incentives for opponents to behave reasonably during settlement and litigation, and increase the funding available to pro bono service providers.

While the Commission supports the awarding of costs to pro bono parties, it is yet to form a view on the most appropriate way to allocate these funds when costs are awarded. Further input is sought from stakeholders, particularly those in the pro bono and community legal sectors, on this issue.

DRAFT RECOMMENDATION 13.4

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

INFORMATION REQUEST 13.1

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

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

The Commission is interested in any other options that could be examined.

Self-represented litigants

Self-represented litigants (SRLs) can currently only be awarded costs to compensate for out-of-pocket expenses, such as disbursements. In support of the status quo, the NSW Law Reform Commission has previously argued:

... the indemnity principle states that costs are awarded as indemnity for costs actually incurred and are not intended to be comprehensive compensation for any loss suffered by a litigant. The right to be self-represented was not intended as a means for litigants to earn ‘fees, charges or remuneration’; it is ‘a practice which enables them to save money, not to make money. (2012, p. 43)

However, it is unclear why ‘costs actually incurred’ necessarily applies exclusively to financial costs paid to a lawyer. The time and effort expended on a case by SRLs are still costs borne by them. While SRLs are not legal professionals, winning their case indicates that they likely expended as much, if not more, time and effort on their case than a lawyer would have in achieving the same outcome. As such, there is little logical basis for arbitrarily compensating the time and effort of one person over another, when the outcome attained by both is the same.

As with pro bono parties, there are also asymmetries that arise when SRLs are required to pay costs, but are unable to seek an award for their own costs. These asymmetries mean that SRLs have a stronger incentive to withdraw or settle for less than they may be entitled to, while their opponents are not compelled by the possibility of a costs order to conduct litigation in a reasonable or timely manner.

There may be a concern that SRLs pose an additional burden on court resources and should not be further encouraged to bring cases to court. Mitigating any such incentives will be the fact that the behaviour of litigants (and in particular risk-averse litigants) tends to be influenced more heavily by the prospect of an adverse, rather than a favourable costs order.

On balance, the Commission considers that successful self-represented litigants should be able to recover costs from the opposing party, subject to the costs rules of the relevant court, in the same way they are liable if they lose. This echoes a recommendation made previously by the Australian Law Reform Commission (1995). The amount to be recovered should be a fixed lump sum amount set out in scales, as outlined earlier in this chapter.

DRAFT RECOMMENDATION 13.5

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

How should costs be awarded in public interest litigation?

Any set of rules for awarding costs will necessarily carry some degree of uncertainty, which may deter risk-averse disputants from bringing forth meritorious cases. However, this deterrence will be particularly strong for public interest litigants, who may not have a significant private stake in the outcome of the case to compensate for the costs risk they would be exposed to by litigation (Watters 2010).

The result is that public interest cases may be deterred by the risk of an adverse costs order, resulting in a loss of the potential benefits to the wider community from the case being litigated (Consumer Action Law Centre, sub. 49; National Pro Bono Resource Centre, sub. 73; Salvos Legal, sub. 122). The decision not to pursue the case may be in the best interests of the private party, but leave society as a whole worse off. The following section discusses two possible approaches to addressing this problem — protective costs orders and public interest litigation funds.

Protective costs orders

In some cases, courts may decide in advance that a particular party should not have costs awarded against them. Most Australian courts generally do not have a specific legislative regime for addressing these situations. Rather, courts may use their discretion in exceptional cases to depart from the English rule and exempt a losing party from paying costs — often referred to as a protective costs order (PCO).

Courts consider a range of factors in considering whether to grant PCO. The NSW Land and Environment Court, which is one of the most active in making PCOs, has regard to whether the case affects many people and addresses important issues of statutory construction (PILCH 2011). In other jurisdictions, such as the Supreme Court of Victoria, the court has considered whether a potential public interest

plaintiff might otherwise be deterred by the chance of an adverse costs order. This was recently demonstrated in *Bare v Small* [2013] VSCA 204 (box 13.1).

However, some courts appear reluctant to grant protection to parties from costs orders. While protective costs orders are commonly discussed in the context of public interest litigation, the presence of a public interest in a case does not guarantee that a party will receive a PCO.

There is no general ‘public interest’ exception to the operation of the ordinary rule that costs follow the event. Australian courts have differed in their willingness to exercise their power to award costs to make PCOs in public interest matters ... case law provides little guidance on what will constitute appropriate circumstances for making a PCO. (National Pro Bono Resource Centre, sub. 73, p. 33)

Box 13.1 ***Bare v Small***

The recent case of *Bare v Small* is believed to be the first case where a PCO has been granted to an appeal against a decision of the Supreme Court of Victoria. The decision provides an example of a PCO being granted for a public interest case where the plaintiff might otherwise be deterred by the financial risk of a costs order.

Nassir Bare sought to appeal the Supreme Court’s previous dismissal of an application for judicial review of a decision by the former Office of Police Integrity. The Office had declined to investigate an allegation by Mr Bare that police had assaulted and racially abused him. Facing the risk of a significant costs order if unsuccessful, Mr Bare first applied for a PCO before lodging his appeal.

The Court of Appeal granted Mr Bare a PCO, determining that the issue was of public interest and that refusal of a PCO would likely lead to the appeal being abandoned.

The following factors were taken into consideration by the Court in its decision:

- Without a PCO, the appeal would have been abandoned by Mr Bare, as an adverse costs order would have likely bankrupted him.
- Mr Bare had previously sought to reach an agreement with his opponents not to seek costs if unsuccessful
- The application for a PCO was made early and efficiently
- No damages were sought by Mr Bare in the appeal
- The matter raised issues of public interest
- The claim was not frivolous or vexatious.

Sources: *Bare v Small* [2013] VSCA 204; Brennan (2013); Waters (2013).

A number of submissions suggested that powers to award PCOs should be expanded. The Nature Conservation Council of NSW argued that:

Relevant rules in each jurisdiction should be amended to provide that unsuccessful public interest litigants be exempted from paying costs. (sub. 124, p. 3)

A similar argument was also put forth by Salvos Legal:

... the threat of costs orders discourages public interest litigation. This barrier can be overcome ... through rules of Court which allow a party commencing an action to seek a determination at the outset that the proceedings will not involve a costs liability by establishing to the Court the public interest nature of the case. (sub. 122, p. 2) The National Pro Bono Resource Centre suggested that there is a need to provide greater certainty and clarity around rules for PCOs to both courts and parties:

... the uncertainty of how courts will exercise their discretion to make PCOs, or relying on the ‘goodwill’ of the defendant when deciding to pursue litigation in the public interest, is an unsatisfactory state of affairs that dissuades disputants from seeking resolution and submits that there is need for law reform to:

- (a) Confirm every relevant Australian court’s jurisdiction to make PCOs and thereby overcome any reluctance to make such orders due to concerns about ‘judicial legislating’; and
- (b) Clarify the factors that are relevant to the discretion to make a PCO in public interest matters, one of these criteria being whether the person is being acted for on a pro bono basis; and
- (c) Clarify the types of PCO that can be made, and that they can be ordered at any stage of a proceeding. (sub. 73, p. 34)

In addition to seeking a PCO at the outset of litigation, public interest litigants may obtain a ‘no costs’ order on the conclusion of proceedings if the case is not decided in their favour. This approach was first established in the case of *Oshlack v Richmond River Council* (1998) 193 CLR 72. There is a great deal of uncertainty surrounding the *Oshlack* principle — its use has been limited, and the power of judges to apply it is widely discretionary (QPILCH 2005). This uncertainty is further compounded by the fact that the costs orders to which *Oshlack* pertains are usually made at the end of proceedings (Watters 2010). Thus the possibility of pleading for a no costs order under *Oshlack* provides little assurance for public interest parties deciding whether to bring forth a case at the outset of litigation.

Public interest cases may include disputes between a private party and government, or between two private parties. PCOs appear to be appropriate in public interest cases involving government. If a matter has been brought before a court in the public interest, it does not follow that the government should be compensated by a private party for the costs of the matter being determined. Ideally — in addition to criteria determining what cases are in the public interest — the granting of PCOs in disputes with government should be tied to requirements for protected parties to conduct the litigation in a reasonable and expedient manner.

DRAFT RECOMMENDATION 13.6

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

Public interest litigation funds

The use of PCOs is problematic in public interest disputes between two private parties. PCOs shift the costs of public interest litigation onto private parties, by preventing successful opponents of protected parties from recovering their legal costs. It may not be equitable or fair to compel a private party to bear the full costs of a successful case in order to generate public benefits. Further, removing the ability for opponents of public interest litigants to recover their costs increases their incentive to settle out of court. This could unintentionally lead to a loss of the public benefits from a case being determined in court that PCOs aim to encourage.

An alternative means of protecting public interest litigants from the effect of an adverse costs award is the establishing of a public interest litigation fund (PILF), referred to by some stakeholders as a ‘justice fund’. Such a fund would pay for any adverse costs order against a public interest litigant, in exchange for a share of costs recovered in successful cases that it has funded, similar to existing funds for disbursements in pro bono cases (VLRC 2008).

Unlike a protective costs order — where the costs of the public benefits are effectively borne by the opposing private party — a PILF would pass the liability for costs awarded against public interest parties on to the government. This would seem to be a more appropriate means of addressing public interest cases between two private parties.

Governments already fund public interest litigation to some extent through test case funds, such as funding for Commonwealth public interest and test cases administered by the Attorney-General’s Department. This fund provides grants to cover legal fees and other expenses in cases that may settle an uncertain area or question of Commonwealth law. However, this scheme generally does not provide funding to pay for any costs awarded against public interest litigants (AGD 2012b).

Access to a PILF could be determined by an initial assessment by qualified legal experts of the merits and public interest elements of the case. The criteria used by courts to grant PCOs in disputes with government may provide an appropriate basis for assessment. In its previous recommendation to establish such a fund, the

Australian Law Reform Commission (1995) also suggested that courts should be able to order the fund to pay the costs awarded to a party in a public interest case.

Given the existing funding constraints facing much of the legal assistance sector, adequately resourcing a PILF may prove challenging. The extent to which the fund can be self-sufficient will depend on the relative share of cases that lose, requiring the fund to pay costs to opponents, and cases that win, injecting money into the fund. The ability for the fund to manage its potential losses and gains would be improved by adoption of the Commission's recommendations earlier in this chapter regarding fixing and capping costs awards in various courts.

Rather than establishing the PILF as a standalone entity, it may be more efficient to incorporate its functions into existing funds for legal assistance. This could include test case funds, public purpose funds, or within the responsibilities of state and territory Legal Aid commissions. The structure of the PILF — for example as a standalone entity or part of an existing fund — is likely to have implications for its governance and funding. The Commission seeks further input from stakeholders on the most appropriate arrangements for structuring a public interest litigation fund.

DRAFT RECOMMENDATION 13.7

Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.

These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.

INFORMATION REQUEST 13.2

The Commission invites comment on the most appropriate arrangements for the governance and funding of a public interest litigation fund (PILF), including:

- appropriate mechanisms and criteria to govern access to the fund*
- whether the PILF should be established as a new entity, or integrated into existing legal assistance funds or bodies.*

14 Self-represented litigants

Key points

- Context is important when considering the impacts of self-representation on the civil justice system. In some tribunals and lower courts, self-representation is the norm and poses few, if any, problems.
- Higher courts that deal with more complex disputes and questions of law are less suited to self-representation. While levels of self-representation in these courts are lower, some self-representation does occur and is inevitable.
- There are legitimate concerns about self-representation in higher courts, ranging from a reduced likelihood of a just outcome for the self-represented litigant, to the costs and obligations that self-represented litigants place on the courts and other parties.
- Little is known about the characteristics and impacts of self-represented litigants. Courts and tribunals should collect more data to inform policy.
- Courts and tribunals already provide users with significant amounts of information, and have substantially changed their processes to make self-representation easier. Duty lawyer schemes also offer help on the day in court. However, more should be done.
- Judges and court staff need training and clearer guidance on how they can assist self-represented litigants while remaining impartial.
- Unbundled legal services enable access to some legal advice when full representation is unwanted, unaffordable or unavailable. Basic unbundled legal services can efficiently assist self-represented litigants where most needed, such as in complex disputes in formal settings like superior courts.

The number of parties who represent themselves in tribunals and courts appears to be on the increase. Some see this as a problem because they believe that outcomes for self-represented litigants (SRLs) are not as good as for those who have legal representation. SRLs are also said to take up more court time and lead to more costly trials.

On the other hand, a number of participants, including members of the judiciary, told the Commission that parties should expect to be able to effectively represent themselves in tribunals and magistrates' courts. Indeed, individuals have a right to

self-represent in the ordinary course of litigation⁴⁶, and in all courts exercising federal jurisdiction.⁴⁷

This chapter begins by examining how many people self-represent and the characteristics of those who do so (sections 14.1 and 14.2). It then examines the variety of reasons why people self-represent (section 14.3), and the impacts of self-representation on the individual who is self-representing, other litigants, and the justice system more broadly (section 14.4). The final section examines the effectiveness of current measures to assist self-represented litigants and options for further reform.

14.1 How many people self-represent?

An SRL is a person (or business) looking to resolve a dispute without a lawyer. Sometimes called an ‘unrepresented litigant’, ‘litigant in person’, or ‘pro se litigant’, the term SRL is used in this report. SRLs may self-represent for the whole of a matter, or engage a lawyer for part of it. Two broad definitions include:

... an applicant or a respondent ... on track to appear in a court room in ancillary proceedings, who has given his or her own address for service on documents filed with the [court] ...

... anyone who is attempting to resolve any component of a legal problem for which they do not have legal counsel, whether or not the matter actually goes before a court or tribunal. (Richardson, Sourdin and Wallace 2012, p. VII, citing Family Law Council 2000 and Stratton 2011)

The second definition captures SRLs outside courts and tribunals, including those who resolve their disputes before or shortly after entering a court or tribunal (Richardson, Sourdin and Wallace 2012).

For the purposes of this report, the Commission has focused its attention on those parties who do not have legal counsel and are appearing, or on track to appear, in a court or tribunal. Choosing this definition represents a middle ground between the two definitions above, while still capturing those areas in which self-representation is of greater concern. Self-representation also occurs outside the formal justice system, but there is a lack of information on the extent or outcome of these matters.

While there is a perception that the number of SRLs has been increasing over time, the data on SRLs in courts and tribunals are patchy and inconsistent, and numbers

⁴⁶ *Collins (aka Hass) v R* (1975) 133 CLR 120, 122.

⁴⁷ Section 78 of the *Judiciary Act 1903* (Cth).

outside the formal justice system are unknown. Richardson, Sourdin and Wallace (2012) found that very limited data is collected in Australia, and that ‘perceptions of an increase may be greater than the reality’.

Across federal jurisdictions, the number and proportion of SRLs varies considerably — ranging from 17 per cent of final orders in family law matters in the Federal Circuit Court in 2006-07, to 93 per cent of immigration applications filed in the High Court in 2009-10 (Richardson, Sourdin and Wallace 2012). While the evidence suggests that overall numbers in federal courts and tribunals are higher than in earlier decades (Richardson, Sourdin and Wallace 2012), the proportion of SRLs in the Federal Court and Family Court has fallen over time.

There is even less information available on self-representation in state and territory courts and tribunals. From the limited data available, the proportion of SRLs seems to have increased slightly over time in some quarters. Further data on SRLs can be found in appendix F.

14.2 What are the key characteristics of SRLs?

From the limited information available, SRLs appear to be a diverse group. As the Victorian Law Reform Commission said:

Self-represented litigants are not a homogenous group, but exhibit a wide range of very diverse needs for information, advice and direction as well as exhibiting a wide range of emotional states and responses to litigation. (2008, p. 564, citing an internal report from the Supreme Court of Victoria)

Information collected by the Queensland Public Interest Law Clearing House (QPILCH) Self Representation Service suggests that its clients are mainly from low to middle-income households (box 14.1) .

Other studies found that SRLs are more likely to be male and be reliant on welfare payments (Hunter, Giddings and Chrzanowski 2003; Hunter et al. 2002). A report by Dewar, Smith and Banks (2000) found that SRLs in the Family Court were more likely (than the population as a whole) to have limited formal education, limited income and assets, and no paid employment, and that a significant group were dysfunctional serial litigants.

Box 14.1 Users of QPILCH's Self Representation Service (SRS)

QPILCH's SRS was established in October 2007 as part of Queensland's *accessCourts* initiative. Modelled on the Citizens Advice Bureau's self-representation service at the Royal Court of Justice in London, the Service offers discrete task legal advice to individuals, groups and small businesses from a number of Queensland courts and tribunals.

Clients of the Service include:

- *Older people*: one half of the clients are between 46 and 65 years of age. Since its inception, only 3 per cent of clients were below 30 years of age.
- *Men*: the service has been approached by more male than female clients (54 per cent and 41 per cent respectively, with 5 per cent being partners approaching together). In 2012-13, an almost even number of male and female SRLs sought assistance.
- *People with low incomes*: almost half of all clients are dependent on Centrelink for income, with 68 per cent on incomes less than \$26 000 per annum and 83 per cent earning below \$52 000 per annum.

Other barriers to access to justice experienced by clients include:

- *Disability*: almost one quarter of applicants state that they have a disability. In most cases it was not a 'mobility' disability or was not physically apparent, with most people not indicating that they needed special assistance.
- *Non-English speaking*: only around 3 per cent of clients require an interpreter.
- *Limited internet access*: just over half of clients indicate on their application form that they do not have access to the internet.
- *Impaired capacity*: these clients potentially account for about 10 per cent of the total client base.

Sources: Woodyatt, Thompson and Pendlebury (2011); QPILCH (2013).

14.3 Why do people self-represent?

SRLs either choose, or are forced by circumstances, to represent themselves. There is limited evidence on the relative dominance of these factors. Surveys of QPILCH's SRS clients⁴⁸ indicate a range of reasons for self-representation, with the main reasons cited being:

- the cost of representation (73 per cent)
- an inability to obtain legal aid (38 per cent)

⁴⁸ When the Service closes a file, it writes to the client sending an evaluation survey, which also asks the client why he or she self-represented.

- clients consider that they can handle their case themselves (31 per cent) (figure 14.1).

Figure 14.1 **Cost of representation and inability to obtain legal aid are main reasons**

Survey results from QPILCH's Self Representation Service ^a



^a Clients can indicate more than one response.

Source: QPILCH (sub. 58, pp. 21–22).

However, QPILCH SRS's clients may not be representative of all SRLs. Given that the Service specifically assists people who are unable to afford legal representation, the number of people citing 'cost of representation' could be biased.

Some self-represent by choice

Self-representation is appropriate in a range of cases, as reflected in the varied motives cited by people for their decision to self-represent:

- it can be a proportionate response*: for example, in cases where relatively little is at stake or where a dispute can be satisfactorily resolved in a forum set up for self-representation
- desire for control over proceedings, with a chance to be heard*: some people want to air their complaint in person and manage the case themselves. Others value someone respectfully listening to their case, regardless of the outcome
- belief that a lawyer is not needed*: in a United Kingdom study, the most common reason given was that the client considered a lawyer was not needed (cost was second). A key finding from research in the Family Court of Australia was that,

although the majority of SRLs could not afford legal representation, a significant minority did not want or consider that they needed legal representation

- some seek a *tactical advantage* from being self-represented — they hope to obtain a stay of proceedings indefinitely, or exhaust the other party’s resources
- *social changes*: growing expectations that the state should provide a system for resolving relatively minor disputes
- *simpler court and tribunal processes make it easier*: in recent years, most courts have simplified their procedures and rules and provide users with more information. Some legal service providers also run information sessions to assist individuals with low-level matters such as divorce applications and traffic infringements. Tribunals are intended to be geared towards self-represented parties (Dewar, Smith and Banks 2000; Genn 1999; Senate Legal and Constitutional References Committee 2004; Webb 2007).

Involuntary self-representation

The perception is that most individuals self-represent because legal advice is too expensive, and legal aid is unavailable for many civil cases. The data is mixed and not always representative of the entire SRL cohort, but it appears that lack of access to legal aid and affordability issues more generally are major reasons for people self-representing in courts (and possibly some tribunals). QPILCH said that:

The phrase ‘choose to represent’ implies a genuine decision that has been made between competing options. Very few self represented parties would identify as ‘choosing’ to represent themselves. (sub. 58, p. 21)

There is some mixed evidence to support this view. As noted above, the overwhelming majority (73 per cent) of people using QPILCH’s SRS report being self-represented because they could not afford a lawyer (figure 14.1). Woodyatt, Thompson and Pendlebury noted that:

... self-represented litigants include some of Queensland’s most financially disadvantaged citizens who are genuinely unable to afford legal representation. The cost of legal representation is obviously a significant (if not the most significant) factor contributing to the high number of self-represented litigants in the civil jurisdiction. (2011, p. 233)

Preliminary results from the Commission’s survey of South Australian court users reveal that close to half of partly or fully self-represented survey respondents cited either a lack of affordability, or rejection of an application for legal aid, as their reason for self-representing.

A number of participants said that cuts in legal aid for civil matters had resulted in higher levels of self-representation. For example, the Women's Legal Service Victoria (sub. 33) said that it had seen significant growth in the number of self-represented women in family law proceedings in 2014 due to recent changes to Victoria Legal Aid's guidelines⁴⁹; other participants echoed this view. There is also some evidence of a link between self-representation and legal aid funding (although there are mixed results: box 14.2). The Australasian Institute of Judicial Administration (AIJA 2001) suggested that some people do not bother applying for legal aid because of the *perception* that funding is not available.

Box 14.2 A link between self-representation and legal aid funding?

- The Australian Law Reform Commission (1999b) found insufficient empirical evidence to make the connection between levels of self-representation and levels of legal aid funding.
- The Senate Legal and Constitutional References Committee (2004) concluded (based on anecdotal evidence rather than comprehensive data) that lack of access to legal aid is at least one of the major reasons for an increased number of SRLs.
- In the Family Court, Hunter, Giddings and Chrzanowski (2003) found a strong relationship between legal aid funding for *family law* and self-representation. Around half of SRLs surveyed had applied for legal aid, with 50-67 per cent unsuccessful mainly due to means and merits tests and legal aid guidelines. Interestingly, 25 per cent appeared self-represented while holding a grant of legal aid. An earlier study (Hunter et al. 2002) found that legal aid cuts in July 1997 appeared to have little impact on levels of self-representation in the Family Court; several factors are said to explain this (for example, two out of three registries examined were in New South Wales and it was not until later that severe restrictions occurred in that state).

Sometimes there is a requirement to self-represent

As discussed in chapter 10, some tribunals require parties to self-represent, subject to limited exceptions. As the Council of Australasian Tribunals said:

The majority of Australasian tribunals operate under provisions requiring that parties may only be legally represented with the leave of the tribunal ... there remains, nevertheless, a discretion to allow representation when the proceeding is likely to involve complex questions of fact or law, another party is represented, or all parties have agreed to representation. (sub. 98, pp. 9–10)

⁴⁹ In family law cases, Victoria Legal Aid's new guidelines provide that if one party is unrepresented at trial, the other party will not be eligible for legal aid.

For example, the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) states that parties should represent themselves, unless the interests of justice require otherwise (sub. 98). The appropriateness and effectiveness of current restrictions on representation in tribunals is discussed in chapter 10.

No legal representative may be willing or able to act

Sometimes people cannot find a legal representative who is willing or able to act for them. This may be because of a perceived lack of merit, or difficulties with the personal conduct or behaviour of the litigant which may be the result of disability, mental illness or an inability to communicate effectively in English (AIJA 2001). While legal assistance is available for people experiencing disadvantage, only the most disadvantaged are eligible for grants of legal aid (chapter 20).

Partial representation

It is possible for people to obtain legal representation for only part of a matter. For example, a person may obtain initial advice from a community legal centre, or assistance from a duty lawyer when he or she reaches a court or tribunal. Hunter, Giddings and Chrzanowski (2003) identified three forms of partial representation connected to legal aid:

- litigants who, by choice or by necessity, commence their cases unrepresented and then go on to apply for legal aid, in many cases successfully
- litigants whose initial grant of aid is terminated or not extended but who go on to represent themselves
- litigants who are receiving legal aid and are represented but who make occasional court appearances on their own, for a variety of reasons.

SRLs in Australia sometimes obtain unbundled forms of legal assistance from publicly-funded programs such as QPILCH's SRS (section 14.5), but access to such unbundled legal advice from the private sector is limited (chapter 19).

14.4 What are the impacts of self-representation?

Self-representation is commonly seen to be a problem, particularly in the higher courts. SRLs are said to use up more resources, and to get in the way of the efficient administration of the justice system. Self-representation is also said to lead to poorer outcomes than having legal representation.

Impact on individuals

SRLs are typically disadvantaged on a number of fronts. A lack of knowledge of laws and procedures is common. The NSW Society of Labor Lawyers said:

Whereas the adversarial system generally operates on the assumption that all parties to a dispute are represented by skilled professionals, most self-represented litigants lack a proper understanding of court rules and the substantive law. (sub. 130, p. 20).

A United Kingdom Judicial Working Group on Litigants in Person (Judiciary of England and Wales 2013) found that SRLs frequently have difficulty:

- understanding procedural requirements
- understanding the concept of evidence and cause of action
- asking appropriate questions and cross examining
- identifying and focusing on the determinative issues in a case
- identifying and paying for expert evidence and interpreters
- working with opposing counsel.

In more adversarial settings with strict and formal procedures (like higher courts), SRLs can be particularly disadvantaged by their lack of knowledge. While the relative informality of tribunals should remove this handicap, some participants said that increasing legalism in tribunals and growing complexity of law in areas such as social security and taxation is making self-representation in tribunals more difficult.

SRLs can be less objective than a professional advocate in their approach to litigation (Webb 2007). When the other side has legal representation, participants said that gaps in competency, professional skill and objectivity can make SRLs vulnerable to intimidation and sharp practices from lawyers (box 14.3). This also occurs outside the formal justice system in certain forms of alternative dispute resolution.

In Australia, successful SRLs are unable to recover professional costs, creating disincentives for opposing parties to settle. This contrasts with the position in the United Kingdom, where an express statutory provision allows for costs to be awarded in such cases. The Australian Law Reform Commission (ALRC) has recommended law reform to allow SRLs to recover costs as well as disbursements (AIJA 2001). Recovery of costs for SRLs is further discussed in chapter 13.

Box 14.3 **When SRLs and lawyers go head-to-head, SRLs can come off second-best**

Legal Aid NSW said:

[In the Fair Work Commission, without] representation for workers there is a significant power and knowledge imbalance. It is the experience of Legal Aid NSW that workers with meritorious cases can be pressured into settling and forgoing their rights. In many instances, self-represented workers settle for amounts less than their unpaid legal entitlements. Some workers even settle for nothing more than a statement of service. While it is rare for a worker to be ordered to pay legal costs if they lose their claim, it is not unknown for lawyers acting for employers to use the prospect of a costs order to pressure workers into a settlement. (sub. 68, p. 53)

QPILCH also said:

Lawyers for parties in QCAT [Queensland Civil and Administrative Tribunal] often write as if they are involved in litigation in a superior court and this can cause confusion and potential delays where the other party is not represented, and that party is not familiar with the language and formality of legal communications.

An example which we have seen occur several times recently, is where solicitors representing clients in QCAT matters write to the other side, who is self-represented, threatening to seek a costs order if they do not withdraw the proceedings. We have seen several self-represented parties withdraw their proceedings in response to letters like this because they are intimidated and do not understand that costs are only awarded in very limited circumstances in QCAT. (sub. 58, p. 41)

Legal Aid NSW (sub. 68) cautioned on the ability for parties to effectively self-represent where they lack the capacity to self-help, for example, because they are illiterate, have English as a second language, or suffer from cognitive impairment, mental health impairment or low educational attainment. These factors are taken into account when assessing applications for grants of legal aid. As Legal Aid NSW said:

... workers with lower education and literacy levels struggle when self-represented at FWC [Fair Work Commission] conciliations and FWO [Fair Work Ombudsman] mediations. Very often self-represented workers do not fully understand the process or the settlement documents that may be used to record any settlement that is reached. The difficulties ... are exacerbated by the fact that employers are usually represented by experienced lawyers and assisted by human resource professionals and conciliators/mediators desire for a quick settlement. (sub. 68, p. 53)

Self-representation can also have social consequences for the litigant, including instability and loss of employment caused by the amount of time required to manage his or her case, and social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming (Macfarlane 2013).

Self-representation affects outcomes

The limited evidence that exists suggests that self-representation does lead to worse outcomes for the litigant. For example, Supreme Court of Victoria data show that the success rate of appeals by SRLs in the Court of Appeal was very low — 4 per cent in 2011-12, and zero in 2012-13, compared with 29 per cent for all appeals. An Australian Law Reform Commission (ALRC) survey of Administrative Appeals Tribunal (AAT) case files⁵⁰ also found that self-represented applicants were less likely to be successful:

... excluding agency appeals, applicants were successful in 42% of all the sampled AAT cases. An unrepresented applicant 'won' (albeit sometimes only in the sense of getting the case remitted) 23% of the time compared with 51% of the time for represented applicants. Where the applicant had a final hearing the figures were 17% 'success' for unrepresented applicants and 54% if represented. Research conducted by the University of Wollongong and the Justice Research Centre delivered similar results.⁵¹ (ALRC 2000, p. 795)

The New South Wales Bar Association also said that:

Data from the New South Wales Motor Accidents Authority shows that claimants with legal representation recover significantly more than unrepresented claimants with comparable injuries. Only a small percentage of the difference in payouts comes from the first group recovering legal costs that the second group does not incur. (sub. 34, p. 21)

The ALRC (2000) noted that some SRLs in the AAT abandon meritorious cases, or persist too long with unmeritorious cases. Webb (2007) claimed that SRLs make more serious errors than lawyers when bringing matters before the court (but around the same number of minor or middling errors).

International studies also suggest that self-representation negatively affects outcomes, but here too the evidence is limited and comparisons are difficult due to institutional differences. NSW Legal Aid (sub. 68) and Beg and Sossin (2012) cited Canadian and United States studies which show that representation positively influences outcomes. However, a recent United States randomised evaluation found no significant effect on outcomes and, following a review of the literature, virtually no credible quantitative information on the effect of an offer of or actual use of legal representation (Greiner and Pattanayak 2012).

⁵⁰ Information was collected from 1665 case files finalised during August, September and October 1997 which were considered representative of cases before the AAT during the 1997-98 financial year, with 'success' deemed if the decision subject to review was set aside, varied or remitted, either by AAT decision or consent (ALRC 1999a).

⁵¹ See Gamble and Mohr (1998).

Identifying whether self-representation *per se* affects outcomes is difficult because of the problems in separating the effect of self-representation from other factors, such as the merit of the claim or defence, or the skill of the litigant (ALRC 2000; VLRC 2008). Using Greiner and Pattanayak's expression, how do we separate the 'hopeless, sure-win, or representation-makes-a-difference cases'? (2012, p. 2209). These measurement difficulties mean that the studies above need to be interpreted with some caution.

How does self-representation affect the justice system?

Context is important when considering the impacts of self-representation on the justice system. According to the AIJA (2001), the extent to which SRLs have an adverse impact on the justice system varies based on a number of factors, including:

- the nature of the jurisdiction (for example, whether it is a court or tribunal)
- whether a matter is regarded as routine or complex.

An increase in SRLs applying for divorce is regarded as a success by the Family Court, although the presence of SRLs in contested matters is regarded as more problematic (AIJA 2001). Some small claims courts and most tribunals are geared around a norm of self-representation.

Self-representation is more problematic for higher courts. The adversarial nature of their proceedings place a heavy responsibility on parties to provide all relevant facts and law, which is why legal representation is expected (Stewart 2011). The AIJA said:

Of particular importance in higher courts are the rules of evidence. The court and tribunal systems are to varying degrees designed around professional people able to work efficiently in these environments. (2001, p. 4)

SRLs are said to create difficulties for courts by taking up more time and resources than legally represented parties. Legal Aid NSW (sub. 68) said (citing a Canadian study) that SRLs tend to: raise irrelevant concerns to the legal issues in question, cause frustration to judges; prolong the process; submit incomplete documentation; rely on judges to an extent that raises concerns about the appearance of bias; and rely on opposing counsel to an extent that raises concerns about their ability to properly represent the interests of their own client.

The Commission is aware that the Supreme Court of Victoria keeps track of the hours that staff spend with SRLs to assess the impact of self-representation. The Family Court monitors SRLs as a measure of the complexity of its caseload for contested matters. The Family Court said that:

Self-represented litigants add a layer of complexity because they need more assistance to navigate the court system and require additional help and guidance to abide by the Family Law Rules and procedures. (AGD sub. 137, p. 14, quoting the Family Court of Australia 2013a)

Although evidence of the effect of SRLs is mixed, most studies suggest that they do take up more court resources (box 14.4).

Box 14.4 **Mixed evidence that SRLs consume more court resources**

Most studies suggest that SRLs consume more court resources:

- The Supreme Court of Queensland (2008) said cases involving SRLs take longer to hear and determine because the standard of preparation and presentation can be poor, litigants may be unable to articulate clearly the real points of the case, and their outlines of argument may be filed late and sometimes not served on their opponents, resulting in case management, court mentions, adjournments, wasted court time and unnecessary costs.
- While a Senate Legal and Constitutional References Committee (2004) found little evidence of attempts to quantify the costs of SRLs, one submission from Westside Community Lawyers Inc estimated the additional costs of SRLs in the South Australian court system at \$4.8 million.
- Dewar, Smith and Banks (2000) found that, although matters involving SRLs in the Family Court have shorter disposition times, *so long as they remain in the system* those matters are more demanding of the time of judicial officers and registry staff, and can be wasteful of the time of the other party and their legal advisers.
- International studies also suggest SRLs impose higher costs on courts. One study found that cases in which both parties were SRLs had twice the median number of court appearances and a higher number of case conferences, and were more likely to have settlement conferences, trial management conferences and to proceed to trial (University of Toronto Faculty of Law 2011, cited in Legal Aid NSW, sub. 68).

But there are a few exceptions:

- *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Moorhead and Sefton 2005) found that civil cases with an SRL take no longer to resolve and in fact have fewer ineffective hearings (cited in Webb 2007).
- Some studies suggest that it is falsely assumed that SRLs settle less frequently, or have more failed hearings (for empirical work debunking such assumptions see Webb 2007).

There is also evidence that SRLs use more tribunal resources. Legal Aid NSW (sub. 68) stated that in social security matters before the AAT, some processes can take three times longer — for example, a preliminary conference which generally lasts 10 minutes can last at least 30 minutes when the applicant is self-represented, often with little progress. An ALRC (1999a) assessment of the impact of

self-representation on case events in the AAT (albeit dated and not taking into account recent reforms) also found that:

- cases where applicants are represented more often have consent outcomes and go to a hearing less often
- represented applicants had significantly more case events before finalisation
- self-represented applicants were more likely to ‘drop out early’, or ‘go the full distance’ to a final hearing.

Others suggested that the costs of SRLs are not properly quantified, despite the persistent anecdotal complaints. The ALRC (2000) commented that any additional costs caused by self-representation ‘remain unsubstantiated and unquantified’, while acknowledging judicial statements about the difficulties courts face when parties are self-represented.

Impact on others

Self-representation can have effects beyond the individual and the justice system. Legal Aid NSW observed that:

The economic and social cost of self-represented hearings is not just borne by the self-represented individual and the community, but also the other party to the litigation. (sub. 68, p. 51)

Dewar, Smith and Banks (2000) reported that judges, judicial registrars and registrars believed that, in 41 per cent of family law cases involving an SRL, the other party was disadvantaged. This is consistent with perceptions in other jurisdictions, for example:

In a Nova Scotia study 87.5% of judges thought that self-represented litigants were generally disadvantaged by a lack of representation, while 70% thought the other party was also disadvantaged. (Legal Aid NSW, sub. 68, pp. 51–52, citing University of Toronto Faculty of Law 2011, p. 21)

Perceptions of fairness on both sides of a case can be negatively affected by the participation of an SRL. The represented party may believe that the court has unduly assisted the SRL, while the SRL may feel that the court has failed to provide the level of assistance required to ensure that he or she could properly participate (Stewart 2011).

Several submissions raised concerns about the impact of self-representation on the other party where family violence is involved. The Women’s Legal Service Victoria (sub. 33) and the Law Council of Australia (sub. 96) raised this in relation to recent changes to the Victoria Legal Aid guidelines. These changes provide that, where

one party is unrepresented at trial in a parenting dispute, the other party is not eligible for legal aid (subject to limited exceptions). Legal Aid NSW noted that it:

... particularly holds concerns about cases where an alleged perpetrator of violence or abuse who is self-representing is allowed to cross examine the alleged victim or the converse. These practices have led to concern that self-representation can lead to further abuse through a court sanctioned process. These practices can result in the additional social and economic costs that arise from family violence. (sub. 68, p. 53)

Some jurisdictions have special procedures in place for cross-examining witnesses where a self-represented person is involved. For example, the *Restraining Orders Act 1997* (WA) limits the ability of a SRL who is bound by a restraining order to directly cross-examine a person with whom they are in a family relationship, or any child witness.

SRLs can make the job of the opposing party's lawyer more complicated by, for example, causing difficulties in meeting professional conduct requirements (QPILCH and Queensland Law Society 2013; New South Wales Bar Association, sub. 34). QPILCH noted that:

Anecdotally, members of the legal profession offer the opinion that a self represented opposing party makes a case more difficult, and that the Judge will go out of her or his way to provide advice and explanations to the self represented party. (sub. 58, p. 23)

The New South Wales Bar Association commented on the difficulty faced by barristers in situations involving SRLs:

The kinds of issues which arise surrounding self-represented litigants mean that some clarification is required regarding the application of the rules in these situations. For example, there is general prohibition restraining a barrister from conferring or dealing directly with the party opposed to the barrister's client. Further, a barrister must take reasonable steps to avoid the possibility of becoming a witness in the case. Very real difficulties may arise where, for example, a barrister deals directly with a self-represented litigant in relation to settlement negotiations and an issue later arises as to what was or what was not said in the relevant discussions and whether or not an agreement was reached in those discussions. (sub. 34, p. 5)

Although lawyers may prefer to deal with each other, they are becoming accustomed to SRLs. Dealing with SRLs challenges lawyers to work in a more open manner while advancing their client's case, and to communicate with clarity and without jargon (Pulsford 2010).

When assessing these impacts of self-representation — and any consequent policy responses — it is important to adopt a community-wide perspective. In a simple, court-based dispute, a litigant could be better off if they self-represent (for example, in cases where their expected return is not, or is only moderately, affected by having

formal legal representation). But in doing so, the SRL could raise the cost to courts. If the savings to the individual outweigh any additional costs imposed on the court system, the community as a whole is better off. Looking at one side of the ledger by, for example, focusing on the impacts on courts alone, can be misleading.

Conversely, where a party self-represents and this imposes substantial costs — to themselves, the opposing party and the relevant court or tribunal — the community as a whole may be worse off. The question becomes, how can these costs best be avoided? The response need not be through publicly-funded legal assistance services — a range of options are available. These are explored in the following section.

14.5 How effective are current measures, and what more could be done?

Faulks identified three ways to respond to self-representation:

... one is to get them lawyers, the second is to make them lawyers and the third is to change the system. (2013, p. 2)

Although many assume that the solution to the ‘problem’ of self-representation is to arrange for legal representation, the United Kingdom Judicial Working Group on Litigants in Person presented a different perspective:

... litigants in person are not in themselves ‘a problem’; the problem lies with a system which has not developed with a focus on unrepresented litigants. (Judiciary of England and Wales 2013, p. 6)

The former Ontario Court of Appeal Justice Osborne’s 2007 *Civil Justice Reform Project* also said that:

... the civil justice system must exist to serve members of the public — whether represented or not. (Beg and Sossin 2012, p. 197)

Although there is no clear line indicating when self-representation is and is not appropriate, minor or low-level disputes in informal settings with relatively clear and straightforward issues in dispute are more suited to effective and efficient self-representation. While some participants considered that legal representation in minor claims facilitates efficient proceedings (Adelaide Law School, sub. 16), others said that people should legitimately expect to resolve their disputes without legal representation in tribunals and magistrates’ courts.

Making it easier to use the system

Efforts to simplify and demystify Australia's civil justice system in recent decades have made it easier to self-represent. Courts and tribunals have assisted SRLs in a number of ways, including through more informal and flexible hearings, simplified forms and procedures, and assisting parties to understand procedures and the issues at hand. There is scope for many of these reforms to be more broadly adopted and further developed.

Simplifying the law

The law itself is a source of complexity in the justice system (chapter 3 and chapter 5), making it more difficult for people to self-represent. Participants noted that the average lawyer, let alone the average person, is struggling with increasing complexity in areas such as social security law and taxation law. QPILCH said:

Access to justice starts with participants having an understanding of the framework within which the players operate — the law itself. ... Having even a high level understanding of the law can help people recognise when they may require assistance with a legal problem, as well as enable them to use the legal system with more confidence. (sub. 58, p. 14)

Legislation that is difficult to read and understand is part of the problem.

Unfortunately, in recent times, legislation has reflected social patterns in becoming more complex as it addresses more challenging issues in the face of heavy scrutiny. However society's awareness and understanding of the law which governs it is heavily dependant on legislation being easily accessible and understood. (QPILCH, sub. 58, p. 14)

The President of AAT, and former Commonwealth Attorney-General, Justice Duncan Kerr commented to the Commission that the way legislation is drafted can be a problem, especially for people self-representing in tribunals. The Commonwealth's drafting style, ostensibly purposive but in practice more committed to the ideal of precision, was said to have generated legislation which was overly prescriptive, detailed, and often impenetrable. Not only in the obvious areas of taxation and corporations law, but also in the definition of welfare rights and their exceptions and when interrelationships with other legislation had to be considered. Altering any established culture of drafting would not be simple: new drafters follow established protocols unless educated otherwise. But laws passed by the Parliament should be intelligible to a well-educated reader — and regulatory costs for litigants, tribunals and courts increase when they are not. Legislation from jurisdictions such as New South Wales and Queensland were cited as being generally less detailed and easier to understand (pers. comm., 18 July 2013).

INFORMATION REQUEST 14.1

What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?

Simplifying court procedures and forms

While court rules and procedures are comprehensible to lawyers and judges, they can baffle SRLs. Lord Woolf observed:

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people. (Webb 2007, p. 167)

QPILCH said that the receptivity of Queensland's courts to SRLs has resulted in changes to rules and improvements to access, without compromising partiality (sub. 58). But despite efforts to simplify forms and procedures, concerns remain (chapter 3). Legal Aid NSW (sub. 68) argued that SRLs in the family law system are particularly disadvantaged by complex court processes, hampering their ability to resolve their problems and increasing costs for parties and legal assistance services. QPILCH suggested looking to other industries for ways to improve court forms:

Courts should consider engaging a plain English language expert to review court forms. While this may appear burdensome and impossible for the complexity of court forms in their current state, the task is not impossible given consumer facing industries such as banks often create disclosure packs for customers in plain English which explain complex provisions. (sub. 58, p. 13)

Strict court timelines also cause difficulties for SRLs. Timing can be confusing and unfamiliar, and failure to lodge documents in time can completely extinguish rights. QPILCH suggested that:

Registries could assist litigants to understand the complexity of court deadlines through providing a timeline of when documents need to be submitted at the time of filing court documents. This computer generated timeline could serve to alleviate the confusion regarding timelines. (sub. 58, pp. 12–13)

Although simplified procedures and court forms can help, they are an inadequate response on their own. As the AIJA (2001) pointed out, expert advice must be given in conjunction with simplified procedure and there is no advantage in creating forms that are simpler than the causes of action for which they are intended.

Shifting towards active case management

More active case management (chapter 11) redefines the role of a judge from a relatively passive role to a more activist one, providing scope for greater judicial intervention to accommodate SRLs where appropriate. Macfarlane's (2013) study of SRLs in Canada found that, although very few SRLs experienced case management, those who did were far more satisfied.

QPILCH (sub. 58) said that case management practices are largely focused on complex and commercial cases, and could be modified to better assist SRLs. It suggested a supervised case list complemented by a practice direction that would allow courts some flexibility for SRLs in litigation against represented parties. A number of courts and tribunals already have practice directions that deal with SRLs.

DRAFT RECOMMENDATION 14.1

Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.

- ***All court and tribunal forms should be written in plain language with no unnecessary legal jargon.***
- ***Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case. Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.***
- ***Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.***

Assisting those who deal with SRLs

Information and training for those in the civil justice system who work with SRLs can help shift attitudes on the legitimacy of self-representation. The judge's role is particularly important — the SRL's position of disadvantage can be ameliorated by the trial judge's duty to ensure a fair trial.

Training judges, court staff and lawyers

The Senate Legal and Constitutional Affairs References Committee (2009) recommended training for judicial and court officers on assisting SRLs. Faulks (2013) suggested that such training should be part of the orientation of new judges, and should address ethical issues in assisting SRLs as well as skills on managing

them in the court room. While many courts and tribunals already train, or encourage their staff and judicial officers to seek such training, efforts are inconsistent.

It has also been proposed that lawyers should receive training on how best to deal with SRLs. Faulks (2013) suggested that it should be a requirement for admission to practise, so that lawyers are aware of their obligations when an SRL is the opposing party. The New South Wales Bar Association educates its members on SRLs with its *Guide to Barristers on Dealing with Self-Represented Litigants* (sub. 34). Training and education of the legal profession is further discussed in chapter 7.

Clearer guidelines for those who work with SRLs

Clearer guidance on when, where and how to assist SRLs can increase the capacity of the civil justice system to accommodate self-representation. Currently, when it comes to SRLs, judges, court staff and lawyers are in a bind:

- judges need to remain (and be seen to remain) impartial and unbiased, while also providing SRLs some level of assistance so as to ensure a fair trial
- court staff must only offer procedural advice, without overstepping into the realm of legal advice
- lawyers must serve the interests of their client while satisfying their duties to assist the court and adhere to professional ethical obligations.

For judges, the degree and nature of assistance required varies on a case-by-case basis, with much of the guidance found in case law. QPILCH said:

The nature of assistance to be provided by the court to a self represented litigant depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case. (sub. 58, p. 23, citing case law)

The AIJA (2001) said that each court should have an SRL management plan to ensure that SRLs are dealt with in an appropriate and systematic manner. It has drafted suggested guidelines on how to conduct litigation involving SRLs. The guidelines provide a moderately active role for the judge, emphasising the need for neutrality and cover issues such as testing evidence, putting hypotheses to experts, questioning witnesses, identifying contradictions and inconsistencies in witness evidence, defining matters in issue at an early stage, and advising SRLs of their procedural and evidential rights (Webb 2007).

Some jurisdictions provide tailored guidance for judges on how to work with SRLs. For example:

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- decisions of the Family Court⁵² set out guidelines for trial judges in that court
 - in Queensland, while the *Equal Treatment Benchbook* (Supreme Court of Queensland Library 2005) provides a detailed set of guidelines, it leaves judges with a great deal of discretion (QPILCH, sub. 58)
 - New South Wales and Western Australia also have bench books that provide judicial officers with guidance on dealing with SRLs (Judicial Commission of NSW 2006; WA DAG 2009).

There are also guidelines for lawyers and barristers on how to deal with SRLs. For example, QPILCH and the Queensland Law Society have published guidelines (QPILCH and Queensland Law Society 2013), as has the New South Wales Bar Association (sub. 34).

DRAFT RECOMMENDATION 14.2

Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.

Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.

Providing information to SRLs

Courts and tribunals provide a variety of information to support effective self-representation. SRLs can access general guides and ‘how to’ brochures on law and procedure in both print and electronic form. Courts and tribunals sometimes develop these in consultation with stakeholders such as community legal centres (CLCs).

The information provided by the Federal Court on its website was singled out for praise by QPILCH, which said that it is:

... very easy to navigate, as information is well presented with many helpful links and the website doesn’t over burden the user with content. Rather, content is categorised clearly under one of six main headings (all using plain English) allowing the user to select the most relevant. (sub. 58, p. 13)

⁵² *In Marriage of Johnson* (1997) 139 FLR 384 and *In Marriage of F* (2001) 161 FLR 189.

Information needs to be constantly reviewed to reflect the changing circumstances of litigation and the needs of SRLs. The Family Court of Australia (2003) acknowledged that providing information is an ongoing process, and that relevant, comprehensive and comprehensible information at appropriate times during proceedings is better than simply handing out a ‘kit’ at the time of hearing. QPILCH (sub. 58) suggested a need to translate more information into other languages.

Providing general information to facilitate self-help assumes a degree of capability on the part of the SRL. Some suggest that information alone is not effective and needs to be accompanied by advice (AIJA 2001; QPILCH, sub. 58). The American Bar Association (ABA) said:

Many, if not most, litigants need more than the procedural assistance offered by these resources. They need to know more than which forms to use, how to docket their cases and what time to appear in court. They need assistance with decision-making and judgment. They need to know their options, possible outcomes and the strategies to pursue their objectives. In some cases, pro se litigants need advocates for some portion of their matter. These services can only come from lawyers. (QPILCH 2010, p. 2, quoting an ABA source)

The Senate Legal and Constitutional References Committee also cautioned against overreliance on information (alone) as a means to assist SRLs:

... undue reliance on legal information services is ill-conceived without ongoing evaluation of the extent to which they actually assist SRLs in resolving their matters. Such evaluation must focus on the extent to which they contribute to resolution of the legal problem and not merely the user’s satisfaction with those services. (2004, p. 198)

Some sources of information are more personalised and tailored — for example, the Supreme Court of Victoria’s Self-Represented Litigants Coordinator. Participants advised that people prefer this type of specific advice about their matter rather than general information. Canada is moving to introduce ‘triage desks’ in courts, with frontline staff providing litigants with information about where to take their case (Rassel 2014).

While clearer guidelines can assist courts to provide more tailored and useful advice, there are limits to the assistance they can provide. Also, despite the simplification of legal processes, situations may arise where SRLs find it extremely difficult to undertake part of a legal proceeding on their own — in these situations, retaining a lawyer may still be of great benefit (Beg and Sossin 2012).

Directly assisting SRLs

Direct assistance moves away from the self-help spirit of providing general information and expecting SRLs to join the dots. It allows for more tailored advice that is specific to people's needs and circumstances, and assists people who may be less able to self-help. Hunter, Giddings and Chrzanowski (2003) noted that interactive services such as legal advice sessions, telephone or in-person advice, assistance with documents and letters, and duty lawyers, were the services most frequently used by SRLs.

As discussed above, courts are encumbered by restrictions on providing legal advice, which limits the direct assistance they can offer. Woolf (1995) suggested a more open approach, recommending that court staff should be able to advise on remedies, the procedure to pursue those remedies, and the precise manner in which court forms should be completed. Some have also raised the need for court staff to be given qualified immunity so they can more freely provide assistance (Supreme Court of Queensland 2008; Woolf 1995).

Legal aid commissions (LACs) and CLCs (chapter 20) also provide SRLs with direct assistance.

Duty lawyer schemes

Duty lawyers provide free legal assistance to SRLs attending court, generally within or connected to the court building itself. Court staff are the prime referral source. Duty lawyer services are largely delivered via partnerships between LACs and courts, sometimes with the involvement of other agencies (box 14.5).

The private legal profession also coordinates a number of pro bono duty lawyer schemes. For example, the Victorian Bar's Duty Barrister Scheme commenced in July 2008, with duty barristers rostered to appear in the Melbourne Magistrates' Court on a daily basis, the Dandenong Magistrates' Court on Monday and Wednesday each week, and on an ad hoc basis in other courts (Victorian Bar nd). In October 2013, a pilot scheme was introduced in the Court of Appeal.

A number of tribunals also host duty lawyer schemes. For example, Legal Aid NSW operates a duty lawyer service at the AAT.

There is limited evidence on whether duty lawyers help to resolve self-represented matters effectively and efficiently. An evaluation of the Dandenong Family Court Support Program undertaken in 1999–2000 (Family Court of Australia 2003) found that:

- assisted cases are resolved more quickly and with fewer court appearances
- SRLs generally were satisfied with the legal advice given; very satisfied with the assistance received in the preparation of documents; and found the program very helpful overall
- the general opinion of judicial officers was that the program assists the court to function more efficiently.

Box 14.5 Examples of duty lawyer services in courts and tribunals

- The Federal Circuit Court partners with LACs and other organisations to make the services of lawyers available to assist litigants with family law on the day of their matter being heard. SRLs are assisted with legal advice, negotiating consent orders and, in urgent matters, the preparation of documents and representation, by duty lawyer schemes operating in capital cities and regional areas (FCC 2013).
- Victoria Legal Aid (VLA) provides duty lawyer services at a number of courts and tribunals across Victoria, using in-house lawyers or private lawyers funded by VLA (VLA 2014).
- The Legal Aid NSW Family Law Early Intervention Unit (EIU) provides duty services at the principle Family Court registries in NSW. The EIU works closely with counter staff at the registries to ensure that SRLs are referred prior to filing documents. While many of people referred to the EIU may fall outside the Legal Aid NSW means test, the EIU proactively assists SRLs to draft documents to ensure that they are pursuing an appropriate action, seeking appropriate orders and providing the court with necessary information to progress their matters, and judges commonly refer SRLs when difficulties arise (Legal Aid NSW, sub. 68).
- The Magistrates Court Legal Advice Service, operated by Adelaide Law School since 2002, is a free legal advice service for SRLs in the minor civil claims jurisdiction of the South Australian Magistrates Court, providing advice on process, merit, compromise and case management to approximately 120 litigants per year (Adelaide Law School, sub. 16).

The expansion of duty lawyer schemes has often been recommended. The Senate Legal and Constitutional References Committee (2004) considered that an expanded duty solicitor scheme would benefit the justice system by assisting SRLs to better prepare their evidence and narrow the issues in dispute. However, it also noted that lawyers who merely perform a role as a mouthpiece, consulted only minutes before the matter is heard, would not adequately address problems raised by lack of legal representation. The Committee recommended that:

... the Commonwealth Government and the state/territory governments provide funding to establish a comprehensive duty solicitor scheme in all states and territories of Australia. The scheme should offer, at the very least, a duty solicitor capacity in courts of first instance (criminal, civil and family) and should provide legal advice and

representation on all guilty pleas, not guilty pleas in appropriate matters, adjournments and bail applications, and assistance for self-represented litigants to prepare their evidence and narrow the issues in dispute. (2004, p. 201)

The Senate Legal and Constitutional Affairs References Committee (2009) endorsed this recommendation in its inquiry into access to justice.

Most duty lawyer schemes are limited by the fact that they provide services on the day of court. QPILCH pointed out that the Civil Justice Council (2011) said that earlier intervention had assisted SRLs in England and Wales:

While duty lawyers can give valuable assistance to SRLs on their trial or hearing day, there are serious limits to the amount of value that duty lawyers can really add to a case. In civil litigation, the pre-trial steps, the pleadings, discovery, are absolutely critical. The day of trial is often too late to amend a document. [QPILCH's SRS's] model of discrete task assistance throughout the proceedings addresses that gap in duty lawyer and other legal assistance schemes. (sub. 58, p. 26)

Macfarlane also found that:

While many SRL's appreciated the assistance they received from duty counsel or other *pro bono* legal services, the study also found dissatisfaction ... While this model works well for some SRL's, other find a time limited opportunity to speak with legal counsel leaves them more confused, and even panicked, than before. (2013, p. 13)

Unbundled legal assistance

Another way of directly assisting SRLs is via unbundled legal services, where lawyers provide some limited assistance and clients perform other tasks on their own. Unbundling is not new. Some argue that it is just a new label for existing situations in which lawyers provide limited representation, such as the role of duty lawyers (Beg and Sossin 2012). Yet unbundling is wider than the last-minute assistance duty lawyers typically provide at the court door. Legal aid providers and community groups already provide unbundled assistance:

... legal aid providers and pro bono groups recognized the emergence of a new normal in terms of the prevalence of pro se litigants decades ago. They began by making arrangements with local courts — arrangements of somewhat questionable status under then-existing ethical codes and civil procedure rules — to allow unbundled assistance in discrete litigation areas. (Greiner, Pattanayak and Jonathan 2013, p. 911)

A market more generally supportive of unbundled legal services means more SRLs could afford private lawyers to assist them with certain tasks, and may give more flexibility for government-provided aid, as discussed below. Greater prevalence of unbundled services could also address the concerns of some who feel that an absence of legal advice, even for small matters, affects access to justice.

The Commission considers that there are good grounds for unbundling legal services in the private market and this is discussed in more detail in chapter 19. The following section is focused on the subset of unbundled services that attract some form of public funding. Unbundled services can also be provided on a pro bono basis. Pro bono services are discussed more broadly in chapter 23.

QPILCH's Self-Representation Service (SRS)

A relatively recent initiative that provides unbundled assistance for SRLs is QPILCH's SRS (box 14.1). The Service offers assistance at all stages of litigation including drafting and amending pleadings, advice on disclosure and evidence, settlement negotiation and preparation for trial (Woodyatt, Thompson and Pendlebury 2011). SRLs can obtain initial advice and explanations on court processes, access to technology and, more recently, a free mediation service (CIJ 2013).

The basis of QPILCH's Self Representation Service is an acceptance of the reality that not everyone can be represented by a lawyer on their day in court. Funding of community legal centres and Legal Aid is not adequate, and the generosity of private practitioners working on a pro bono basis cannot fill the whole gap. (QPILCH 2013, p. 31)

SRLs who approach the Service are given an initial one hour-long appointment and ongoing assistance is provided to people who cannot afford private representation (Woodyatt, Thompson and Pendlebury 2011). The Service:

- does not act as a party's representative or advocate
- provides assistance in pre-arranged appointments
- offers appointments for 45 minutes to one hour in length (sub. 58).

This model of direct assistance provides a number of advantages.

- It enables a deeper relationship with the client (over door-of-the-court service). There is greater potential to develop trust and to influence the client to take appropriate steps, and more time to help them understand the litigation process. The benefits are two-fold: the client is assisted to better communicate their case; and the court receives the benefit of a better prepared participant in the proceedings (Woodyatt, Thompson and Pendlebury 2011).
- Independence from courts is seen as a benefit (Banks 2012).
- It may assist in 'screening out' frivolous, vexatious or unmeritorious cases and divert matters away from courts where appropriate so that court resources can be devoted to those matters that need to be adjudicated (AGD sub. 137).

The Service is offered Queensland-wide at an annual cost of \$300 000, funded by the Queensland Government from a mixture of recurrent and non-recurrent funding from the Legal Practitioner Interest on Trust Accounts Fund. In 2012-13, the Service received 317 new applications for assistance and conducted 559 appointments of at least one hour's duration (QPILCH 2013).

The evidence suggests that the Service helps divert people from the court system, and is supported by courts and clients alike (Banks 2012; box 14.6). For example:

- In 2012-13 the Service discouraged just over 60 per cent SRLs advised from commencing or continuing unmeritorious proceedings (QPILCH 2013; QPILCH, sub. 58).
- In Queensland's trial divisions over 2008–10, 82 clients were diverted from the Supreme and District Courts, saving an estimated \$800 000.⁵³ Of the 18 clients who went on to commence proceedings self-represented, 13 were counselled to pursue ADR, and eight continued to receive assistance (Woodyatt, Thompson and Pendlebury 2011).

Box 14.6 QPILCH's SRS — client evaluation surveys are positive

The general feedback from client surveys is positive. For example:

QPILCH solicitors have brought so much relief to my life. I learnt how to do my submission, index of exhibits, affidavits, request for subpoena as well as learning how to present all my exhibits. Finally someone has explained to me what a hearing is and that it is not the big drama I thought it would be. I think it is absolutely remarkable that with your solicitor's guidance, I was able to achieve so much in a short space of time. The solicitors would explain what I had to do and I went home and did it. With QPILCH's help I've been given my opportunity and I am so very pleased.

Based on an analysis of 43 responses received, when clients were asked whether they were satisfied with the service overall there were only five who were dissatisfied and 84 per cent who 'agreed' or 'strongly agreed' that they were satisfied. Further, 78 per cent of all clients who responded to the statement that the assistance they received was useful 'agreed' or 'strongly agreed'. Eighty-one per cent of clients said they would have accepted legal representation if it were available to them, while five preferred to represent themselves (12 did not answer the question).

Source: Woodyatt, Thompson and Pendlebury (2011, p. 237).

⁵³ A very rough estimate based on (AGD 2009), which reported that the net cost per service in the Federal Court in 2007-08 was \$17,590. As QPILCH's work in 2008-09 was in the Queensland Supreme and District Court jurisdictions, an estimated figure of \$10,000 per service was used as a rough estimate of cost in these courts.

In July 2013, following successful pilots conducted by QPILCH, former Commonwealth Attorney-General Dreyfus announced \$4 million funding over four years to enable a national rollout of the service to SRLs in the Federal Court and Federal Circuit Court for social security, discrimination, consumer law, judicial review, bankruptcy and employment law matters (CIJ 2013).

A further consideration for governments that fund this model is eligibility criteria. Interactions with eligibility for legal aid and other forms of legal assistance need to be assessed to ensure that government-funded discrete task assistance is targeted to those who cannot afford private advice or who do not qualify for other forms of legal assistance.

There may be opportunities in exploring alternative funding arrangements while leveraging the advantages of QPILCH's model. For example, JusticeNet SA, an independent not-for-profit organisation, operates a similar service in SA's Supreme Court. The recently-commenced 12 month pilot is staffed by pro bono lawyers, and project partners include Flinders University, private law firms and litigation funder IMF (Australia) Limited (JusticeNet SA nd).

The Centre for Innovative Justice (CIJ) (2013) suggested a publicly-funded model subsidised through fee-paying clients. It cited the Salvos Legal model, where litigants with means to pay for an unbundled service support work to assist other SRLs. Given that the SRS has recently been expanded on a national basis, the CIJ suggested that a pilot of the fee subsidisation model could be adopted at one site:

... legal aid commissions have, at various times, accepted a level of fee or contribution from some clients for a limited range of services or, as mentioned above, taken out a caveat over a home. It is feasible, then, for legal aid commissions to investigate the development of a fee for service model on a wider basis — in which clients with moderate means, who would otherwise be ineligible under Legal Aid guidelines, can elect to pay for representation by a legal aid lawyer, or a private lawyer who conducts legal aid work, on the basis of the relevant statutory scale. (2013, p. 35)

The Commission considers that there would be value in user contributions for unbundled services for SRLs who can afford it. This would create better incentives than subsidising unbundled services free of charge, and would also align with the practices of LACs. It could also offset costs to taxpayers so that funding could be used to assist more litigants.

INFORMATION REQUEST 14.2

There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?

Conflict of interest rules are a barrier

Organisations offering unbundled services can run foul of rules against conflicts of interest when they assist multiple parties to a dispute. When parties to the same matter seek advice from the same organisation, there is a risk that conflict of interest rules may apply even when they visit different locales and see different lawyers. As the CIJ said:

While adequate protections from conflict of interest are, of course, essential to the proper administration of the law, it is reasonable to ask whether there are certain situations in which the current provisions are simply overkill. If these rules mean that parties are denied initial, early advice on the merits of their dispute, for example – advice that CLCs often provide regardless of a party’s means – these same parties are propelled unnecessarily towards the private legal market, or are forced to proceed with the matter themselves. (2013, p. 31)

A strict application of the conflict of interest rules when there is little to no risk of actual conflict affects access to important legal advice. Some have suggested that services such as QPILCH’s SRS and CLCs, which rely on lawyers drawn from a large pool of volunteers and take care to avoid *real* conflicts of interest, should be protected from liability for *perceived* conflicts of interest:

Although QPILCH maintains files for each of its clients, it is relatively easy for the SRS for example to ensure that volunteers from any one firm do not assist more than one party to a proceeding. Volunteers only have access to client files during the client appointments, and only to the files of clients that they will be assisting. Perhaps the best protection would be provided by an amendment (or clarification) in the rules specifying that a community legal centre, providing discrete task assistance rather than full representation, would not fall foul of the rules by providing advice or assistance to multiple parties to the same proceedings as long as reasonable steps were taken to ensure the same solicitor/volunteer did not assist more than one party to the same (or related) proceedings. (QPILCH 2010, p. 9)

INFORMATION REQUEST 14.3

How widespread are problems around conflicts of interest for providers offering unbundled services? Do provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from discrete, one-off forms of advice from assistance services and if so, how might this best be done?

Assistance from non-lawyers

Non-lawyers provide SRLs with direct assistance in certain situations. Sometimes called ‘McKenzie friends’⁵⁴, it involves a layperson (non-lawyer) offering assistance to an SRL prior to and sometimes during court, subject to constraints: the litigant retains the rights to the litigation; they have no rights to be an advocate; and the court has discretion to exclude them (CIJ 2013). There are broadly three types of lay individuals who help SRLs:

... first, individuals who simply attend court with them to provide moral support or to help take notes; second, individuals who speak as advocates on behalf of the litigant during the hearing; and, third, individuals who conduct the claim for the litigant. (Judiciary of England and Wales 2013, p. 28)

The extent to which lay assistance helps SRLs and courts is unclear. Non-lawyer assistance is not generally common in the Australian civil justice system. While there is discretion to accept an application for such assistance, Australian courts have generally regarded such assistance as an ‘indulgence’, especially when a person has not applied for, or has refused, legal assistance (AIJA 2001).

Non-lawyer representation is sometimes specifically allowed. For example, some Australian jurisdictions expressly provide for the right of lay representatives (such as industrial advocates and migration agents), or other agents of a party, for example, section 84B of the *Native Title Act 1993* (Cth) (AIJA 2001). In the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), applicants may (with limited exceptions) only be assisted by registered migration agents. A registered migration agent assisted 57 per cent of MRT applicants and 73 per cent of RRT applicants in 2012-13 (MRT and RRT, sub. 14).

A migration agent, who may or may not also be a lawyer, can be of assistance to the tribunal member in the conduct of a review, but the inquisitorial nature of the review is such that an applicant without legal representation, or other migration assistance, is not disadvantaged. (sub 14, p. 1)

⁵⁴ Following the name of the English case *McKenzie v McKenzie* [1970] 3 All ER 1034, which set out the role of such lay assistants.

Despite the United Kingdom’s familiarity with McKenzie friends, consideration of its definition and scope is being urged — for example, to consider whether there may be value in better defining the circumstances in which a layperson may assist a litigant before court, as well as extending the notion of non-legally qualified advocates who are otherwise experts in a field (CIJ 2013, p. 44).

There is also concern about the increasing incidence of ‘professional’ lay advocates who charge for their services and who may not be subject to duties to the court (Judiciary of England and Wales 2013, p. 29). While citing the value of assistance from other professionals such as planning experts and financial planners in certain contexts, the Centre for Innovative Justice also suggested that:

Rather than encouraging an indiscriminate increase in legal work performed by non-lawyers, it is more useful to focus on effective identification of the work that requires qualified legal knowledge and the work that does not. The benefits of better targeting of legal knowledge and expertise are ... that consumers’ resources are more efficiently directed. ... The CIJ therefore suggests that separate inquiry be undertaken to identify further areas of the law which may operate successfully – and potentially more efficiently – without legal representation. (CIJ 2013, p. 45)

The Commission considers that there are potential benefits in identifying which areas of law, beyond those for which self-representation is the norm, could operate more effectively and efficiently with non-lawyer assistance. This issue is considered broadly in chapter 7.

DRAFT RECOMMENDATION 14.3

Governments, courts and tribunals should work together to implement consistent rules and guidelines on lay assistance for self-represented litigants.

Technology

Technology is used to support self-representation in two ways: to improve access to information and to support the delivery of services.

Courts, tribunals, LACs, CLCs and other organisations use the internet extensively to provide information on legal rights, responsibilities and enforcement options, which can be useful for early intervention before matters escalate. Information specifically targeted to the needs of SRLs is also available online, for example, Victoria’s *Guide for Self-represented Litigants in the Civil Jurisdiction of the County Court* (County Court of Victoria 2011).

While internet-based information is an efficient way of getting information to SRLs, it suffers from the general limitations of online information — it is mainly useful

for confident consumers with the skills to find and understand it and apply it to their personal circumstances.

Technology is increasingly being used to support the delivery of services that facilitate self-representation. For example, e-filing of documents is available for divorce proceedings in the Federal Circuit Court, Family Court, and the Family Court of WA. The Federal Magistrates Court (now named the Federal Circuit Court) reported that e-filing of divorce applications in that court has continually increased since its introduction in 2009, with an average of 150 divorce applications e-filed each week (FMC 2011).

Inquiry participants agreed that technology plays an important role in assisting self-representation, and that it could be exploited to a greater degree. Technology offers the potential to deliver more personalised, targeted information to SRLs, and should be used as more than a medium for disseminating information. Staudt and Hannaford's (2002) interdisciplinary investigation on how to improve access to justice for SRLs in the USA mainly put forward technological solutions, such as Archetype Finder, a system of web-delivered questions designed to help SRLs identify the legal choices and options available for selected types of cases, and can also be used to generate legal documents to be filed with the court.

Grainger (sub. 66) noted that Australian courts and tribunals lag overseas courts in the adoption of technology, and recommended that they focus on:

- access to the internet
- text message technology
- smartphone technology
- interactive DIY forms
- interactive web-based question and answer forums (based on Law Help New York's Live Help program)
- video conferencing technology.

Participants suggested that technological initiatives are currently siloed and individual organisations are reinventing the same wheel. There may be merit in consolidating and/or better disseminating efforts across the justice system, perhaps through partnerships between courts, tribunals, legal service providers and governments.

Yet technology does not offer a panacea. Participants said that maintenance can be very labour intensive and that it cannot be a one-size-fits-all approach. The role of technology in the justice system is further discussed in chapters 5, 10 and 17.

Learning more about the experiences of SRLs

Little is known about what it is like to self-represent in Australia. There is almost no qualitative data that explain their experience (Richardson, Sourdin and Wallace 2012). Internationally, a good example is the recent qualitative study of the experience of SRLs in three Canadian provinces (Macfarlane 2013).

Several reports have recommended further and ongoing research into SRL's characteristics and needs, so that services can be designed to meet those needs (AIJA 2001; Senate Legal and Constitutional References Committee 2004; VLRC 2008). These also recommended that data on SRLs be collected, analysed *and published* — yet little progress has been made.

Court and tribunal case management systems need to move beyond collecting data for immediate operational needs and move to collecting for evaluation and strategic planning. Richardson, Sourdin and Wallace (2012) reviewed the data on SRLs collected in the Commonwealth civil justice system and recommended that agencies:

- supplement existing case management IT systems with a mandatory SRL field
- develop and agree on a common definition of SRL
- collect information on the basis of this clear definition and report on a range of information about SRLs and how they interact with the civil justice system.

The need for more evidence and data is discussed in chapter 24.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

15 Tax deductibility of legal expenses

Key points

- The tax system allows parties that incur expenses in gaining or producing assessable income, including legal expenses, to deduct those costs from their taxable income.
- Not all parties who incur legal expenses do so in the course of earning income, and so the entitlement of disputing parties to deduct litigation costs can be asymmetric, with only one party — typically business — able to claim a deduction.
- The asymmetry of tax deductibility arrangements is seen by some as inequitable and considered particularly problematic where it accentuates imbalances of bargaining power in litigation — providing taxation relief to well-resourced parties and/or parties that are acting strategically.
- In practice, the asymmetric treatment of tax deductibility is only relevant in a very small subset of disputes between individuals and business.
- A range of solutions have been proposed for addressing the perceived inequities in tax deductibility arrangements and ensuring the tax treatment of legal expenses does not stymie incentives to resolve disputes early and efficiently, though few stand up to policy scrutiny. The few that do would be costly to implement.
- More targeted solutions, as set out elsewhere in this draft report, would be more effective in addressing imbalances in bargaining power than amending the tax law.

Arrangements governing the tax deductibility of legal expenses are commonly featured in reports on improving access to justice. Their perennial presence reflects two factors.

First, the ability of some parties to a dispute to claim their legal expenses as a tax deduction while others cannot is seen by many as inequitable, particularly where it further accentuates resource imbalances between parties.

Second, any measures to address these perceived inequities need to be considered not only through the lens of ‘access to justice’ but also through the lens of tax policy — with all of the latter’s associated complexities.

Suggested policy responses can vary markedly depending on the perspective adopted. So while the issue is often raised, solutions are seldom identified, with most reviews concluding that the issue warrants further analysis and investigation.

The chapter begins by briefly outlining current arrangements governing tax deductibility for legal expenses and how they impact on parties' access to justice (section 15.1). The following section (section 15.2) explores a range of proposals that have been put forward as a means of addressing the perceived inequities inherent in current arrangements. The final section (section 15.3) outlines a framework for considering potential policy responses — taking into account both the access to justice and tax policy implications.

15.1 Why does tax deductibility matter for access to justice?

Section 8-1 of the *Income Tax Assessment Act 1997* (Cth) (ITAA) allows parties that incur expenses, including legal expenses, related to producing or defending income to deduct those costs from their taxable income. These expenses are often referred to as 'revenue' expenses — examples include legal costs to recover debts owed to a business.

In contrast, costs or outgoings of a private or capital nature are not deductible. Hence, legal costs incurred in defending a Family Court proceeding or costs incurred by an individual in dispute about the provision of goods and services consumed in a private capacity are considered 'private' costs and are not tax-deductible.

It is not the tax deductibility of legal expenses per se that gives rise to access to justice concerns. Rather, it is that the entitlement to deduct litigation costs can be asymmetric, with one party — typically business — able to claim a deduction.

Sackville characterised the consequent imbalance in the following way:

Thus, in a sense, the general body of taxpayers is subsidising the business litigant's decision to litigate, to engage expensive legal representation (if this course is adopted), and to use the publicly funded court system. By contrast, the private litigant must bear the full costs of the litigation including court costs, unless he or she recovers costs from the opposing party in the proceedings. (1994, p. 219)

Further, some argue that tax deductibility works against the efficient resolution of disputes, including by reducing the deterrent effect of the costs indemnity rule (see chapter 13), since parties are also able to deduct costs associated with an adverse costs order.

Arrangements are seen as particularly problematic where they accentuate imbalances of bargaining power in litigation — for example, where they provide

taxation relief to well-resourced parties, or parties that are acting strategically. As the Law Reform Commission of Western Australia said:

While there are general obligations not to waste court time and resources, there is little attention paid to the meaning of these obligations when lawyers act for well-resourced clients who can, in practice, pursue every avenue for tactical purposes without regard to the taxpayer. The tax deductibility of legal fees as a business expense aggravates this problem. (1999, p. 331)

However, it is important not to overstate any imbalance. Legal expenses are only deductible to the extent that the litigant has assessable income from which they can be deducted and deductions are only available after the legal expense has been paid. And not all businesses seeking to deduct expenses are big, strategic players:

Care must be taken not to overstate this argument. Many business litigants are small businesses that are forced to resort to legal proceedings in order to recover debts, enforce contracts or otherwise pursue necessary commercial objectives. (Sackville 1994, p. 220)

Beneficiaries of current arrangements also argue that there are other incentives to discourage overly litigious behaviour:

Suggestions that tax deductibility of litigation expenses is in some way an incentive for a business to pursue litigation do not take account of the reputational consequences, the supervision of proceedings by the court and the potential for adverse costs orders for a litigant pursuing unmeritorious claims. (Australian Bankers' Association Inc., sub. 121, p. 4)

A further concern relates to the ability of business litigants to claim tax deductions for legal expenses without any assessment of the merit of the case or the reasonableness of the expense. However, tax deductions are generally available for any expenses incurred in gaining or producing assessable income. To do otherwise would put the tax authorities in the invidious position of having to determine what expenditure is, and is not, meritorious for a business to undertake. There is already a strong financial incentive for businesses to only incur those expenses for which it expects to gain. Even a full tax deduction only reduces the tax payable by the percentage tax rate that the business faces, not the total cost incurred.

What share and type of disputes are affected?

It is important to understand the share of disputes affected by asymmetric tax arrangements since it informs both the potential scope and gains from any proposed reforms.

Both parties can typically claim legal expenses in business to business disputes, and disputes between individuals tend to be of a private nature and so neither party is entitled to claim a deduction. Hence, asymmetry of tax deductibility only affects those disputes in which one party is an individual and the other a business.

The Commission has used unpublished *Law Survey* data to obtain estimates of what share of disputes may be affected.

Based on those data, disputes between individuals and businesses, financial institutions or employers constitute around 36 per cent of all disputes. However, not all disputes between individuals and businesses necessitate the use of a lawyer. Many disputes are minor and/or can be resolved through industry ombudsmen (insurance, finance, telecommunications, energy and water) (figure 15.1). These ombudsmen are funded by businesses on an industry-wide and per-case basis, and they provide services at no cost to consumers (chapter 9). Tax asymmetry is therefore not an issue.

Of the remaining disputes between individuals and businesses or financial institutions where ombudsmen services are not available, only 12 per cent involved a lawyer.

Less than ten per cent of all disputes relate to employment matters. Employees can generally claim deductions in disputes arising out of employment agreements — two fifths of employment problems — and so there is no asymmetry in these cases. Further, in employment disputes, employees sought advice from a union or other professional associations more often than from a lawyer (28 and 14 per cent of cases, respectively). Union costs can be claimed as tax deductions and raise no asymmetry issues. Excluding the cases where employees are entitled to deductions or unions are involved leaves less than half (45 per cent) of all employment matters, and further excluding cases where lawyers were not consulted leaves 6 per cent of all employment matters.

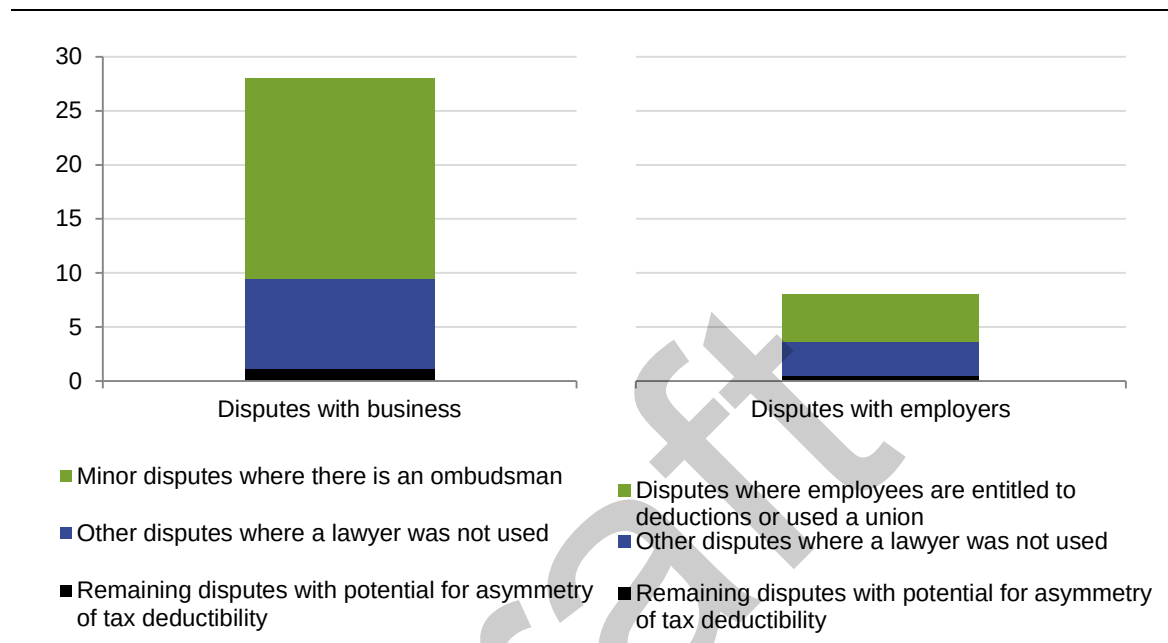
Where individuals are involved in class actions and/or meet their legal expenses through a litigation funder, there is again no asymmetry between the business and the litigation funder with respect to tax deductibility (chapter 18).⁵⁵

Therefore, out of all disputes between individuals and businesses, financial institutions or employers, less than 5 per cent involve an asymmetry of tax treatment and also involve substantive legal costs (using the cases where the individual consulted a lawyer as a proxy). This represents less than 2 per cent of all disputes (figure 15.1).

⁵⁵ As businesses, litigation funders are also able to claim tax deductions for legal expenses.

The small number of disputes for which asymmetry in tax deductions would make a substantial difference suggests that reforms are unlikely to yield significant benefits.

Figure 15.1 Disputes with potential asymmetry of tax-deductibility are rare
Measured as a share of all problems



Data source: Commission estimates based on unpublished LAW Survey data.

15.2 What options are there for improving current arrangements?

A number of reform proposals have been put forward, in the course of this and past inquiries, to address perceived inequities in current tax deductibility arrangements. These include proposals which seek to:

- withdraw deductibility for legal expenses either generally or where the other party cannot claim legal expenses as a deduction
- withdraw deductibility for particular aspects of legal work, with a view to bolstering incentives to compromise prior to litigation, such as allowing tax deductibility for alternative dispute resolution but not for litigation
- remedy any perceived inequity by extending deductibility to both parties, by permitting certain non-business litigation expenses incurred by individuals to be tax deductible, up to specified limits. (This would be akin to insurance arrangements, since it has been suggested that it would best apply to the category of costs that are 'over and above' those to be expected in the ordinary transactions involving most people (analogous to the medical expenses rebate))

-
- ensure that deductions can only be made where the costs incurred are ‘reasonable’.

15.3 A framework for considering the options

Looking through the lens of tax policy

As foreshadowed in the introduction to this chapter, any consideration of tax deductibility for legal expenses needs also to be considered through the lens of tax policy. In this context, equity takes on a different dimension — referring to the equity between income earners. As highlighted by the report on *Australia’s Future Tax System* (the Henry Review) with respect to deductions for the costs incurred in producing income:

There are important equity reasons for maintaining this approach; that is, it is fair to recognise that people with the same level of income may incur different costs in earning that income. (Australia’s Future Tax System Review Panel 2010, p. 53)

In addition to being equitable, ideally, the tax system should also be efficient — raising revenue at the least possible cost to economic efficiency and with minimal administrative and compliance costs — as well as easy to understand and comply with.

How do the options fare?

A number of suggested reforms can be quickly ruled out because they give rise to perverse incentives and are inequitable from a tax policy perspective.

Withdrawing tax deductibility

The Commission considers that proposals to remove tax deductibility entirely, or where another party cannot claim legal expenses as a deduction, would compromise equity between taxpayers. As Sackville observed:

From the point of view of taxation policy, there seems to be no obvious justification for removing the tax deductibility of business litigation expenses that satisfy the tests laid down by the ITAA and the courts. If litigation expenses are sufficiently connected with the earning of assessable income, or with the conduct of business carried out for that purpose, to make them deductible, there is no clear reason to distinguish them from any other legitimate business expense. (Sackville 1994, p. 219)

The Australian Bankers Association (ABA) expressed similar sentiments:

The ABA notes that banks may need to resort to litigation to recover loan funds from customers who default in their repayment obligations or to recover possession of property provided as security for loans.

The costs of legal proceedings to recover monies due to banks are a necessary and ordinary business expense that ought to be tax deductible. Recovery actions are a part of the management of lending risk.

... Tax deductibility of a business' costs in defending litigation is a legitimate and necessary tax deductible expense. (sub. 121, p. 4)

The impact of removing tax deductibility would also be questionable from an access to justice perspective. Such a proposal would not improve access to justice in disputes between businesses. And in relation to disputes between individuals and businesses, removing deductibility might discourage business from taking early legal advice, possibly increasing rather than decreasing litigation.

Limiting tax deductibility to particular types of work

The Commission also considers that options to limit tax deductibility to particular aspects of legal work — such as allowing tax deductibility for alternative dispute resolution but not for litigation — are a 'blunt' means of encouraging parties to resolve their disputes quickly and efficiently. These options would do little to enhance access to justice, particularly if the legal paths for which deductibility was allowed were not the right paths for a particular dispute. More direct policy measures aimed at achieving the quick and efficient resolution of disputes are canvassed in chapter 8.

This option also presents down-sides when it comes to tax policy. Aside from compromising equity between taxpayers, there are also questions about the administrative simplicity of such an arrangement. For example, what would be the tax deductibility treatment of alternative dispute resolution — either compelled or encouraged as part of litigation — and how would legal advice provided in support of alternative dispute resolution in this context be sensibly differentiated from advice in support of the litigation more broadly?

The Commission considers that withdrawing tax deductibility and limiting tax deductibility to particular types of legal activities do not warrant further consideration.

Special treatment for large and unusual costs

The Commission does not consider the tax system to be an effective way of mitigating the risk of legal costs that are 'over and above' those to be expected in

ordinary transactions. Many disadvantaged users pay little or no tax and so would gain little or no benefit from tax deductibility. There are many other, more direct avenues for enabling individuals to risk-pool to deal with high-cost, infrequent events. Chapter 19 directly addresses the role of insurance for legal expenses.

Deduction of 'reasonable' expenses

Using some test to restrict deductibility to 'reasonable' legal costs has limited precedent in other tax approaches. For example, if a business purchases a luxury car, it cannot claim the full depreciation — although the running costs are still deductible. However, this example does not apply under the general provision (section 8-1), and the general rule is stated in *Ronpibon Tin NL v FCT; Tongkah Compound NL v FCT* (1949) 78 CLR 47:

It is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent.

A 'reasonable' test would be harder to enforce in the legal sphere because there is no blanket definition of what is reasonable. Case by case determination of reasonable expenses would tie up valuable resources and would increase the uncertainty faced by businesses attempting to calculate the potential gains or losses from litigation.

One option is to assume that all costs associated with unsuccessful claims are 'unreasonably' incurred — thereby limiting deductibility to 'meritorious' claims or defences. However, there are many reasons for losing a case that do not imply that it was 'unreasonable' to pursue it. It is not in the interests of justice to deter litigants from pursuing reasonable claims where the result is uncertain. Further, this could have the unintended consequence of discouraging early settlement.

A variant on this approach with less perverse incentives would be to remove the capacity for parties to claim costs associated with an adverse costs order. While this option causes less distortions than some other options canvassed, it does not pass a test of taxpayer equity — that is, if a favourable order is taxable, an unfavourable one should be deductible. Realistically, cost awards are relevant only in the small proportion of disputes that actually go as far as adjudication by a court or tribunal in jurisdictions where costs are awarded. Therefore, it is not likely that the benefits outweigh the costs of implementation.

A second avenue for determining reasonable expenses in a simple manner would be to use amounts contained in a fixed event based scale of costs (chapter 13). Thus businesses would be able to deduct only the value calculated on the scale, rather than actual legal costs. Unlike excluding cost awards as deductible legal expenses,

these scales can account for differences in necessary costs between cases by varying with the size and length of a dispute. This would be less complex to implement but again would apply only in a small number of cases and, therefore, may not satisfy a net benefit test.

Alternative and superior ways of addressing the imbalance that can exist in disputes between individuals and businesses include model litigant rules or further powers for judges to manage the behaviour of parties (chapter 12).

DRAFT RECOMMENDATION 15.1

The Commission recommends that no change be made to existing tax deductibility of legal expenses.

Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

16 Court and tribunal fees

Key points

- Currently, court fees are not set according to a consistent framework, vary widely, and provide a significant subsidy to many who do not require such assistance.
- Cost recovery currently ranges from 3 per cent in the Family Court to 50 per cent in the Magistrates' Court of Victoria. Overall, cost recovery in Australian courts is low when compared with overseas courts, such as those in England and Wales.
- Low levels of cost recovery from parties mean that most court expenditure must be provided directly by governments, with the risk that fiscal pressures can reduce court resourcing and increase delay, undermining access to justice.
- There appears to be significant scope for Australian courts to increase and restructure their fees. This can be best achieved through a targeted approach that charges cost-reflective fees to most parties, but provides subsidies for some clearly identified groups or types of matters.
- Circumstances where such subsidies are justified include:
 - matters concerning personal safety or the protection of children
 - cases which seek to clarify or resolve untested areas of law
 - where fee relief has been granted to a financially disadvantaged litigant.
- Where cost-reflective fees are applied, they should recover the direct cost to the court of dealing with the case, along with making a contribution to the indirect costs of operating the courts. The contribution towards indirect costs should depend on:
 - the type of litigant, for example, whether they are a government agency, corporation, small business, not-for-profit or an individual
 - the amount in dispute (where relevant)
 - the number of hearing days.
- Tribunals should adopt the above principles to increase cost recovery in complex and commercial matters, while maintaining partial cost recovery in smaller matters.
- Subsidising access to justice via fee relief can be better targeted by:
 - establishing formal criteria to determine eligibility for fee relief
 - postponing fees, rather than waiving them, where parties succeed in recovering a monetary claim or an award for costs
 - granting fee relief on an automatic basis to the clients of state and territory legal aid commissions and approved pro bono and legal assistance providers.
- Significant increases in court fees may justify adoption of partial fee waivers for parties with lower incomes that are not eligible for full waivers.

When private parties litigate, society at large can also benefit from the strengthening of the rule of law and the development of precedents. This implies that society — effectively taxpayers — should partly subsidise some of the costs of running dispute resolution forums. This chapter focuses on the appropriate extent to which taxpayers should meet these costs, and the targeting of any such subsidies.

This chapter begins by considering the objectives of court and tribunal fees and their impact on the accessibility of the justice system (sections 16.1 and 16.2). Section 16.3 suggests a move towards increased cost recovery in Australian courts and tribunals, and the appropriate fee structures to facilitate this. Options for improving the use of fee relief, such as waivers, reductions and postponements, are explored in section 16.4.

16.1 The objectives of court and tribunal fees

Policymakers should have regard to three main objectives when structuring court and tribunal fees:

- recovering costs efficiently
- sending price signals to potential litigants to, where appropriate, first consider alternative means of legal resolution or assess settlement options
- ensuring reasonable access to justice is not impeded.

Cost recovery in courts and tribunals is currently low

In 2011-12, governments across Australia spent over \$820 million on providing courts for civil disputes (SCRGSP 2013). The Commission estimates that a further \$473 million was spent on civil tribunals in that year, bringing total expenditure on civil courts and tribunals to \$1.3 billion in 2011-12. Governments have historically sought to reduce this fiscal burden by charging fees to litigants.

Opposition to court fees commonly draws on longstanding traditions and notions dating as far back as the 12th century, as voiced by Justice Keane of the High Court:

User-pays theories are great for the Ministry of Finance, but for a long time — since [the] Magna Carta — to no one will we sell justice. The idea that one of the essential things that a state provides is justice is one of the core values of our tradition. (As quoted in Battersby 2013)

Others have also argued that it is inappropriate for courts to cost recover. In a submission to the Australian Senate inquiry into federal court fee increases, the Law Council of Australia argued:

It is a fundamental element of [the] maintenance of the rule of law in a civil society that citizens have fair and reasonable access to dispute resolution mechanisms. Given the courts are a ‘public good’, the state has a responsibility to provide access to these services on the same basis as other essential public infrastructure. (Senate Legal and Constitutional Affairs Committee 2013, p. 11)

However, as with many other essential public services (for example, the regulation of financial services, pharmaceuticals and air safety), the Commission believes there is a compelling argument to seek to recover some of the costs from the users of the services.

Ideally, from an efficiency perspective, court fees should reflect the net cost to the public of providing court services. If there was no public benefit associated with a case being heard, the parties involved should bear the full cost of the court or tribunal resources devoted to the case. Conversely, if a trial generated public benefits that exceeded the court’s expenses, the parties’ legal expenses should be subsidised — as is currently the case for some public interest cases funded by the Commonwealth Attorney-General’s Department, and tax law test cases funded by the Australian Tax Office.

However, there are two problems with the broad adoption of the above principles.

First, on practical grounds, it is very unlikely that governments would ever have sufficient information or resources to estimate the public benefits of each and every case and benchmark it against the public costs incurred. The costs of assessing court fees on a case-by-case basis would also likely exceed any potential benefits. The implications of public benefits for determining appropriate levels of cost recovery in the courts are discussed further in section 16.3.

Second, as emphasised throughout this chapter, other factors are relevant to the setting of court fees, including the capacity for some groups to realistically pay the full costs for courts, even in matters primarily relating to their own interests.

There currently does not appear to be a consistent methodology or framework guiding the setting of court fees in Australia. It seems that governments use general rules to set fee amounts (and thus cost recovery rates) based on budget priorities. This is evident in testimony from the Attorney-General’s Department to the Australian Senate’s inquiry into federal court fee increases:

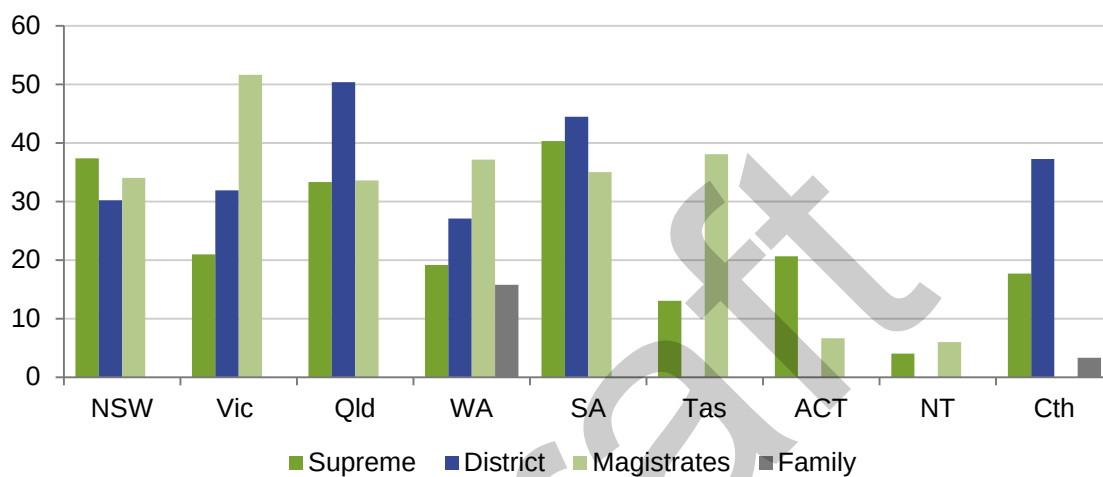
Court fees are automatically increased by [consumer price index] every two years. Other than that, it is really the decision of the government of the day as to what it wants to do with court fees in terms of overall budget settings. (2013b, p. 35)

The result is that cost recovery is highly variable across Australian courts and jurisdictions. Cost recovery in most courts is between 20 to 35 per cent, but varies

from around 3 per cent in the Family Court of Australia to just over 50 per cent in the Magistrates' Court of Victoria (figure 16.1). While data on cost recovery are patchy, the level of cost recovery in tribunals also appears low, with cost recovery in the Victorian Civil and Administrative Tribunal (VCAT) approximately 14 per cent (Vic DoJ 2012b).

Figure 16.1 Cost recovery in Australian civil court jurisdictions, 2012-13

Court fees collected as a proportion of civil expenditure, per cent ^{a, b}



^a Real recurrent expenditure, excluding payroll tax, with no revenue deducted. ^b For notation, supreme courts include the Federal Court, district courts include the County Court of Victoria and Federal Circuit Court. Tasmania, the ACT and the Northern Territory do not have a district court equivalent.

Source: SCRGSP (2013).

In some courts — such as the Federal Circuit Court — substantial revenue is foregone by providing fee relief, such as waivers and reductions, to disadvantaged parties (table 16.1). But fee relief is not the only subsidy to users of the court system. Even when fees waived or reduced for disadvantaged parties are counted as being recovered costs, the level of cost recovery in Australian courts is still low. This shortfall in cost recovery represents a subsidy to non-disadvantaged court users at the expense of the taxpayer.

Table 16.1 Adjusting cost recovery measures to account for fee relief
Selected jurisdictions, 2012-13

<i>Court</i>	<i>Cost recovery excl. fee relief</i>	<i>Share of cases granted fee relief^a</i>	<i>Total value of fee relief</i>	<i>Cost recovery incl. fee relief^b</i>
	%	%	\$	%
Federal Court of Australia	17.7	16.8	1 578 561	19.3
Federal Circuit Court	37.3	41.8	12 361 921	49.1
Family Court of Australia	3.3	23.1	1 122 763	4.5
Supreme Court of SA	40.3	5.3	122 062	41.6
District Court of SA	44.4	3.1	79 137	45.5

^a Fee relief refers to both waivers and reductions of fees. ^b Foregone revenue from fee relief is included.

Sources: SCRGSP (2014); Federal Court of Australia (2013a); Family Court of Australia (2013a); Federal Circuit Court (2013); Productivity Commission estimates using data on fee relief supplied by courts.

The low level of cost recovery in Australian courts can be contextualised by comparisons with similar jurisdictions overseas. Cost recovery through fee revenue is much higher in English and Welsh courts than Australian courts (table 16.2). The Ministry of Justice in the United Kingdom has also flagged its intention to move to full cost recovery by the end of 2014-15 (UK National Audit Office 2011).

Table 16.2 Cost recovery in civil courts of England and Wales
In 2010-11 pounds (sterling)

<i>Court type</i>	<i>Expenditure</i>	<i>Net fee revenue</i>	<i>Foregone revenue from fee relief</i>	<i>Cost recovery excl. fee relief</i>	<i>Cost recovery incl. fee relief^a</i>
	£mil	£mil	£mil	%	%
Family Courts	235.9	101.0	16.6	43	50
Magistrates'	20.0	18.7	0.1	94	94
Higher courts	342.1	327.6	11.0	96	99
Probate	14.5	16.7	0.01	115	115
Total	612.5	464	27.7	76	80

^a Foregone revenue from fees waived is included.

Source: Calculated from figure 4 in UK National Audit Office (2011, p. 28).

Recently, courts in New Zealand have also changed their fees to increase the level of cost recovery. New Zealand courts previously had lower cost recovery than many Australian courts, with rates around 20 to 25 per cent in the lower courts, and almost zero cost recovery in its superior and specialist courts in 2010-11 (New Zealand Ministry of Justice 2012). However, the recent changes are estimated to increase cost recovery in lower courts to around 35 per cent, similar to current levels in some Australian courts.

Given that the low rates of cost recovery in most courts and tribunals do not adequately reflect the balance of costs and benefits to the public and private parties,

increasing and restructuring fees to improve the level of cost recovery would be efficient and equitable (section 16.3).

Price signals can encourage parties to explore alternative means of resolution ...

Courts and tribunals are not the only settings in which legal disputes are resolved. Alternative settings include private negotiation, alternative dispute resolution (ADR), and ombudsmen.

Because formal proceedings in courts and tribunals come at a substantial cost to the taxpayer, governments should encourage disputes to only reach courts and tribunals where necessary (AGD 2009). To this end, it has been argued that court and tribunal fees should send a ‘price signal’ to potential litigants. While fees can partly achieve this goal, their current capacity to do so is limited — at present, court fees typically comprise a small share of legal costs for a represented disputant (Senate Legal and Constitutional Affairs Committee 2013).

... but fees need to be flexible to safeguard access to justice

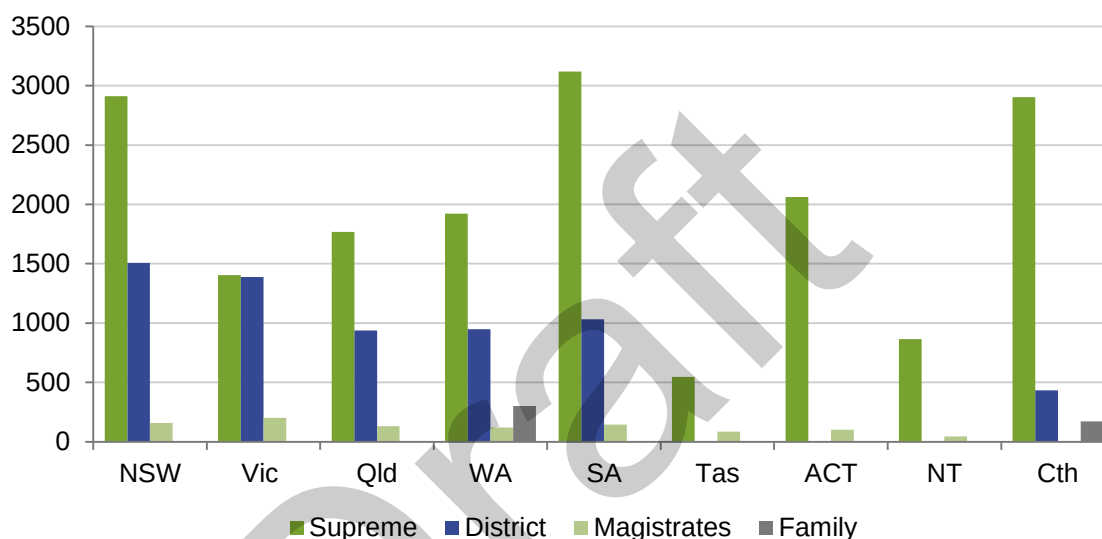
While the efficiency benefits of price signalling and cost recovery are desirable features of court and tribunal fees, the pursuit of efficiency should not undermine the equity of the system by unreasonably impeding access for those who need the assistance of formal process to resolve their disputes. Courts and tribunals are used by a diverse range of parties, who differ in their resources, legal costs, appetite for litigation and the availability of alternative dispute avenues. A fee level that encourages a well-resourced party to first attempt private negotiation could be an insurmountable barrier for a low-income party with no alternative avenue for obtaining justice. Fee arrangements need to be sufficiently flexible to accommodate these differences; for example, by using fee waivers, reductions and postponements — collectively referred to as ‘fee relief’ in this chapter — for disadvantaged parties (section 16.2 and 16.4).

Well-targeted increases in the overall level of fees in courts and tribunals may ultimately enhance access to justice. Greater levels of cost recovery can improve court funding, providing greater resources to reduce non-financial barriers to justice, such as delay. This is discussed in greater detail in section 16.3.

16.2 The impact of court fees on access to justice

Court and tribunal fees are part of the financial costs faced by potential litigants. In some jurisdictions, average court fees per case can be thousands of dollars (figure 16.2). Court fees are incurred in addition to other legal expenses such as solicitor fees, counsel fees and other disbursements (see chapter 3).

Figure 16.2 Average civil court fees collected per lodgment^a, 2012-13
In 2012-13 dollars



^a Some jurisdictions charge corporations higher fees than individuals, so that average fees do not always represent the average charge to individuals. For notation, supreme courts include the Federal Court. District courts include the County Court of Victoria and Federal Circuit Court.

Source: SCRGSP (2014).

Court fees currently have little effect on the demand for court services

At their current levels, court fees do not appear to significantly affect the decisions of most parties to go to court.

Parties' other costs are so high that the court fees have little role in any decisions that are influenced by cost factors. (Cannon 2002, p. 199)

Although data on the financial costs of litigation are relatively sparse, there is some quantitative evidence to support this view. The Commission has estimated that court fees comprised roughly one tenth of a party's legal costs.⁵⁶

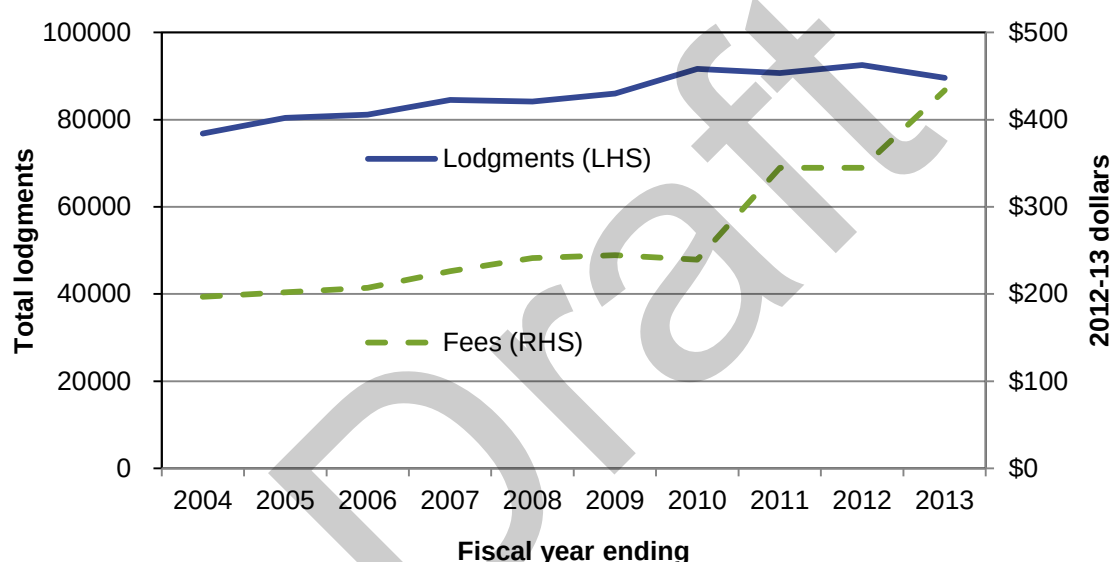
⁵⁶ This estimate is based on published data from studies of costs in the NSW Supreme Court and District Court, the Victorian Supreme Court and County Court, and the Queensland District Court by Williams and Williams (1994) and Worthington and Baker (1993).

Other studies support this view. As Marfording and Eyland said:

... court fees are not the primary reason for the concerns about litigation costs raised in the literature and by interview participants in New South Wales. Indeed, none of these interviewees mentioned court fees specifically as an issue. (2010, p. 60)

Recent evidence suggests that increases in fees in the federal courts since 2010 have not significantly reduced filings (Senate Legal and Constitutional Affairs Committee 2013). For example, total lodgments in the Federal Circuit Court remained largely unchanged following an 80 per cent increase in average fees paid over three years (figure 16.3).

Figure 16.3 Lodgments and average court fees in the Federal Circuit Court



Sources: SCRGSP (2009, 2014).

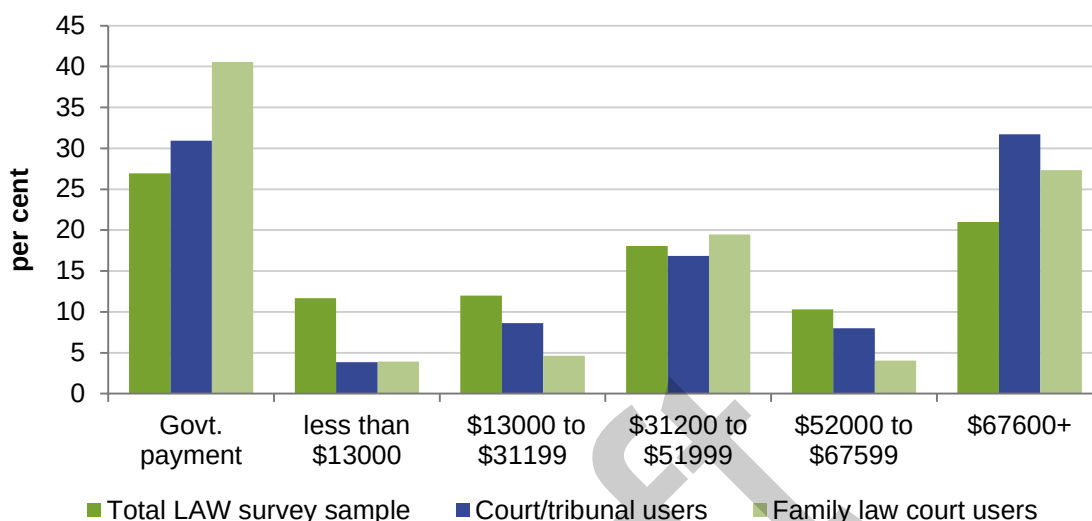
Fee relief can safeguard access to justice

A large share court and tribunal users either receive a means-tested government payment or have incomes below \$52 000 (figure 16.4).⁵⁷ In family law and human rights disputes, the share of individuals living on low incomes or government payments is particularly high according to the Commission's estimates using unpublished data from the *Legal Australia-Wide (LAW) Survey*.

⁵⁷ The latter is well below average weekly earnings among full-time adult employees, which were around \$60 000 in November 2008 (ABS 2008).

Figure 16.4 Estimated distribution of annual income for civil court and tribunal users ^{a, b, c}

In 2008 dollars, from the *LAW Survey* sample



^a Individuals receiving a means-tested government payment were counted as a separate income category, regardless of their actual income bracket. ^b Court/tribunal users were survey respondents who had a legal problem which led to court or tribunal proceedings. ^c Family law court users were survey respondents who had a family law problem that led to court (or tribunal) proceedings.

Source: Productivity Commission estimates using data from the *LAW Survey*.

The effect of court fees on access to justice may be particularly acute for financially disadvantaged individuals. The Queensland Public Interest Law Clearing House (QPILCH) has argued that:

While in the scheme of litigation fees, court fees may appear minimal, these fees can represent a large amount of a low income earner's salary. (sub. 58, p. 55)

Most courts and tribunals can waive, reduce or postpone court fees to ameliorate the impact they can have on financially disadvantaged parties. For example, financial hardship was the reason for roughly half of fee relief applications in the Melbourne registries of the Federal Court and the Federal Circuit Court in 2011, at 53 per cent and 43 per cent of applications respectively (AGD 2012a).

In many Australian courts, assessments of financial hardship are not based on any specified income or asset criteria. Rather, hardship is determined at the discretion of registrars or court officers, with consideration given to factors such as the individual's income, living expenses, assets and liabilities. In the federal courts and the Administrative Appeals Tribunal, fee exemptions can also be granted on the basis of other criteria or circumstances (box 16.1). Similar categories for fee exemptions are also used in Queensland, Western Australia and Tasmania.

Box 16.1 Fee exemptions in federal courts and tribunals

In federal courts and the Administrative Appeals Tribunal, a party is generally exempt from paying court fees in a proceeding if the person (or body):

- has been granted legal aid for that proceeding from a state or territory legal aid commission or an approved legal aid scheme or service
- has a health care card, a pensioner concession card, a Commonwealth Seniors Health Card or any other entitlement to Commonwealth health concessions
- is serving a sentence of imprisonment or is otherwise detained
- is under 18 years of age
- receives Youth Allowance, Austudy payments or ABSTUDY benefits
- has been granted particular assistance to bring proceedings under the *Native Title Act 1993* (Cth).

If a general exemption is established, it remains until the proceeding is finalised, provided that there is no relevant change in circumstances.

Individuals can also be exempt from paying court fees if, in the opinion of the court, paying the fee would cause financial hardship. An individual's income, day-to-day living expenses, liabilities and assets are taken into account for this decision.

Sources: Federal Court of Australia (2013b), Family Court of Australia (2013b).

Fee waivers in federal courts are targeted towards individuals with very low incomes, the majority of whom are unemployed. In the federal courts in 2011, the estimated average income of those granted a waiver on the basis of financial hardship was between \$17 500 and \$19 000 a year (AGD 2012a). This does not include those granted waivers for other reasons, such as receipt of legal aid, possession of a concession card, detention in prison, or being under 18 years of age.

Individuals represented by state and territory legal aid commissions generally receive automatic exemptions from paying court fees. While the National Pro Bono Resource Centre (NPBRC) previously identified filing fees as a significant barrier to pro bono legal work, the NPBRC also acknowledged that pro bono clients are likely to receive fee relief:

Anecdotal evidence from pro bono clearing houses around Australia, and from law firm pro bono programs indicates that most low-income Australians that are acted for on a pro bono basis are exempt from the payment of fees. (sub. 73, p. 39)

Stakeholders generally supported the use of fee relief:

Exemption from filing fees removes a significant financial barrier for disadvantaged individuals seeking to assert their rights (Hunter Community Legal Centre, sub. 26, p. 15)

Court fees can provide a barrier to the civil justice system for clients on low incomes. Many jurisdictions across the country, however, waive court fees for legally aided or legally assisted clients. (NSW Bar Association, sub. 34, p. 14)

Reforms to fee relief arrangements are discussed further in section 16.4.

16.3 Increasing cost recovery in courts and tribunals

Fees reflecting the full cost of courts should be the default principle

There is a strong case for increasing civil court fees in most Australian courts. This case is underpinned by a simple principle. *Full cost recovery should be the default*: courts should fully recover the cost of a dispute through fees, except where there is a justified basis for deviating from this principle. In some cases, there are compelling grounds for departing from cost-reflective fees on social policy considerations and for other public good reasons. Greater cost recovery could be achieved by increasing fee amounts and by restructuring fee arrangements. The Commission supports an increase in court fees to cost-reflective levels in most dispute types for several reasons, including:

- higher cost recovery is necessary to improve the resourcing of courts
- the costs to litigants do not sufficiently reflect the cost of the service they receive
- many public benefits of litigation can be addressed through targeted subsidies.

Court resourcing will be improved by charging cost-reflective fees to many parties

As governments face growing fiscal pressures, several courts have expressed concern at the impact of tightening budgets on service delivery:

Like many other courts, we have been under considerable financial pressure over recent years ... the reality is that there are very limited reductions to be made without having a serious impact on service delivery ... (Family Court of Australia 2013a, p. 2)

The Court's budget position continues to be affected by the government's tight fiscal position ... (Federal Court of Australia 2013a, p. 17)

It has been publicly acknowledged that the Court was never properly resourced, that a fundamental review of the Court's budget needs is overdue ... What is important is an adequate level of resourcing commensurate with workload. (FCC 2013, p. 3)

Inadequate resources lead to rationing of court services, which increases non-financial barriers to justice, such as delay:

The Law Council [of Australia] submits that funding to Federal, State and Territory courts has failed to keep pace with demand and the growing cost of service provision ... In recent years, courts have been subject to reductions in staff in a number of registries, which have led to significant delays in processing. (sub. 96, p. 46)

These fiscal pressures are likely to increase given the growing and competing demands for other government-funded services — particularly in age-related expenditure — and given existing policies to not raise taxes significantly (PC 2013a). To ensure the adequate provision of court services under these fiscal pressures, courts will need to reduce their reliance on consolidated revenue for funding. In the Commission's view, this requires an increase in the amount of revenue sourced from court users and reforms to court funding arrangements (chapter 17).

Under a fee-setting model that fully recovers the cost of services in many cases, there would be little incentive for governments to cut court resources, such as registry staff. Charging cost-reflective fees to a wide group of clients therefore has the potential to ensure sufficiently resourced courts and minimise rationing of court services in the face of fiscal pressures.

Charging fees at cost-reflective levels in many cases would rebalance the public and private costs of court services

The current low level of cost recovery in Australian courts means that litigants do not internalise the cost to society of resolving their private disputes. The pricing mechanism does not work well because the costs charged to parties to use the courts do not reflect the additional costs to society. As such, parties may not face adequate incentives to try lower cost alternatives before litigating through the courts.

For those parties who are ineligible for fee relief, an increase in court fees to cost-reflective levels would strengthen the pricing mechanism and ensure that they take into account the cost of court services when deciding to litigate. Moving to full cost recovery for such parties would require significant increases in the average court fee paid by disputants. For example, the average fee paid in many courts would have to be roughly doubled and, in the case of the Federal Court of Australia, would increase by approximately fivefold (table 16.3). At these levels, court fees would no longer be a small share of legal costs for many parties, and thus would divert people to lower-cost dispute settlement arrangements and discourage unnecessary or unnecessarily drawn out litigation.

Table 16.3 Projected average fees and revenue under full cost recovery
For selected courts, 2012-13 dollars

<i>Court</i>	<i>Current average fees per lodgment^a</i>	<i>Required average fees for full cost recovery^b</i>	<i>Increase in average fees under full cost recovery</i>	<i>Additional revenue per annum under full cost recovery^c</i>
	\$	\$	%	\$
Federal Court of Australia	3 490	18 043	517	70 231 223
Federal Circuit Court	746	1 518	204	40 265 463
Supreme Court of South Australia	3 294	7 927	241	5 503 634
District Court of South Australia	1 064	2 337	220	3 844 339

^a By those parties required to pay a court fee — note that the average fee currently charged to individuals may be less than this, as corporations pay a higher fee. ^b Assuming that the costs of any fees waived are funded by the government out of consolidated revenue. ^c Under the simplifying assumption that there would be no change in the court's workload or the frequency of waivers following an increase in court fees.

Sources: Productivity Commission estimates using data from SCRGSP (2014), Federal Court of Australia (2013a), Family Court of Australia (2013a), Federal Circuit Court (2013), and waiver data supplied by courts.

The public benefits of litigation can be addressed under increased fees

In addition to private benefits to disputants, court-based dispute resolution can produce wider public benefits. The Commission has previously noted that public benefits spilling over from the use of a service can have implications for cost recovery arrangements:

Spillover effects may have an influence on the way in which cost recovery is implemented and who is charged. Where a government supplied activity or product has positive spillovers, subsidies to decrease the costs to users may be appropriate. (PC 2002, p. 17)

However, as mentioned previously, it would be both impractical and inaccurate in most cases to assess the value of the public benefits arising from a particular court case. As such, the next best solution is to identify the possible public benefits that may arise, and how to best address them through the court fee system. In the Commission's view, three types of public benefits may arise:

- the setting of precedents or clarification of the law
- the protection of vulnerable parties for whom safety or liberty is at risk
- the broader 'rule-of-law' benefits, where the 'shadow' of the formal justice system helps enforce legal rights, deters parties from engaging in unlawful conduct, and encourages informal resolution when rights are breached.

These three types of public benefits are distinct and should be addressed through the fee system in different ways.

Establishing precedents and clarifying the law

In some cases, there is a public benefit from parties having their dispute heard in a court if the resulting decision resolves an uncertain area of law. As noted in the Rule of Law Institute's submission to the Senate's inquiry on federal court fee increases:

A determination by a court may not only provide finality for the parties concerned, it can provide other, broader benefits such as establishing precedents, evidencing open justice and elucidating the law. (Senate Legal and Constitutional Affairs Committee 2013, p. 10)

However, the provision of precedents and clarifications by some cases does not provide a rationale for subsidising all disputes. Rather, the Commission supports the notion that cases which significantly clarify untested areas of law should receive some funding assistance if they would not otherwise proceed. Given that these benefits can be attributed to particular cases, the most appropriate response is to reduce or waive fees for cases that sufficiently clarify or develop the law.

Minimal cost recovery should apply in matters involving the protection of vulnerable parties

The Commission recognises that there are many types of cases where there is a clear public interest in ensuring the safety of vulnerable parties. This is based on the premise that a justice system is intended to support social norms, of which the protection of vulnerable people who lack the means to defend their own rights is a key element.

Types of cases that may warrant negligible levels of cost recovery include matters involving family violence, child protection, deprivation of liberty and claims to seek asylum. In these cases, there is a clear public interest in ensuring that disputes can be readily resolved through formal processes where necessary. A high level of cost recovery may not correctly reflect the balance of public and private costs and benefits, and may lead to prohibitively high fee amounts that place vulnerable parties at risk. The Commission believes that increases in cost recovery are not justified in these cases.

Targeted fee relief can preserve the rule of law under cost-reflective fees

A broader public benefit arising from litigation — one that is much more difficult to quantify and attribute — is the ‘shadow’ that it casts over activities outside the civil justice system. This shadow helps to ensure that legal rights and obligations are respected, deterring unlawful behaviour, and encouraging parties to resolve disputes informally, where possible, when their rights or obligations are breached. This promotes the rule of law.

The effectiveness of this shadow is dependent on the accessibility of the justice system, and parties knowing that legal rights can be enforced by the courts in the event that a dispute arises. By contrast, the rule of law is weakened if a party has a reasonable belief that their opponent could not afford to enforce their rights in a court due to court fees. As such, some have expressed concern that increases to court fees would erode the rule of law (Senate Legal and Constitutional Affairs Committee 2013).

As the public benefits of the rule of law rely on the accessibility of the civil justice system to all, there are two possible approaches to account for this benefit when setting court fees:

- partially subsidising all parties by cost recovering at less than 100 per cent in all cases, or
- targeting the subsidy through fee relief at those who would otherwise be deterred by cost-reflective fees.

The first approach involves setting court fees at a rate that would not fully recover the cost of providing court services for any given case. It assumes that the ‘rule-of-law’ public benefits arising from each case are uniform across cases and litigant types. However, this approach has two primary shortcomings. The first is that a subsidy would be provided to improve court accessibility where it may not be needed. For example, there may be many disputants for whom the difference between a subsidised court fee and a full-cost court fee would not affect their decision to litigate. In these cases, the additional accessibility offered by the subsidy — and therefore the additional rule-of-law benefit — is minimal. The second shortcoming is that a subsidy to all disputants reduces fee revenue and consequently decreases the resources available to courts.

Because public benefits from the rule of law arise from the accessibility of the system, it follows that any subsidy should be targeted to those for whom accessibility is affected by court fees, such as those with fewer resources. Targeting the subsidy through fee relief, such as waivers and reductions, would allow costs to be fully recovered from better-resourced litigants in many cases. Delivering the

subsidy through fee relief would also improve the transparency of the system, as the extent of the subsidy can be measured by the number and value of waivers issued.

DRAFT RECOMMENDATION 16.1

The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:

- ***in cases concerning personal safety or the protection of children***
- ***for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.***

Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

Principles for implementing fully cost-reflective fees

When increasing fees as part of a move towards full cost recovery for many parties, it would not be advisable to simply impose large uniform increases in the quantum of existing fees in order to reach an overall cost recovery level of 100 per cent. For example, a cost recovery rate of 50 per cent — adjusted for the value of fee relief granted — does not imply that the existing fee schedule should simply be doubled in size. Such an approach would likely result in cross subsidisation between various services, and may come at the expense of access to justice for many disputants.

Rather, the Commission believes that the structure and quantum of fees should be designed to reflect the costs to the court arising from the service for which the fee is paid. In addition to these direct costs, the fees charged for various court services must also bear a share of the indirect costs of running the courts. These costs, and the approaches used to identify and allocate them, are discussed in further detail in appendix G.

Fee amounts should include the direct costs of services

Direct costs are costs that can be directly and unequivocally attributed to the particular service for which a fee is charged (appendix G). In the case of courts and tribunals, these costs are most likely to be the labour costs of court officers providing the service, but may also be for materials such as paper and printing expenses for the production of documents or transcripts.

Other than for subsidised parties, the fees charged for providing a particular court service should at a minimum reflect the direct cost to the court of providing that service. Doing so ensures a more efficient pricing mechanism, as the cost to disputants would reflect the cost to broader society. However, as discussed in the following section, fees must also incorporate a share of indirect service costs.

Indirect and capital costs should be apportioned using differential pricing

Cost-reflective charging under a fully distributed cost method would require most users to bear a share of the indirect and capital costs that are necessary to operate the court system. In the case of courts, fixed costs — such as judicial salaries and property expenses — can be quite high. For example, more than half of the Family Court’s costs are fixed in nature (Family Court of Australia 2013a).

Rather than allocating these unavoidable costs on a *pro rata* basis — for example, based on the share of staff or direct costs allocated to a particular case — the Commission considers the most appropriate approach to be differential pricing, by charging higher fees to litigants who are likely to proceed with actions even if a higher fee is charged, such as those with more resources or a greater stake in the outcome. Differential pricing of fees between different parties will not amount to cross-subsidisation between parties when it is indirect and capital costs that are being allocated on a differential basis (PC 2002). This approach is generally considered efficient as it closely reflects principles of Ramsey pricing.⁵⁸

A number of submissions to the Commission expressed support for differentiated court fees. The NSW Bar Association favoured a tailored approach, suggesting that:

... current court fees regimes should be reviewed with a view to ensuring that more appropriate fees are charged in each case ... The calculation of court fees may take into account matters which include:

- the nature of the dispute;
- the type of relief sought;
- relevant characteristics of the parties; and
- the financial means of the parties by reference to their income and/or assets. (sub. 34, pp. 14–15)

Differential pricing of court fees is already used in a number of courts (table 16.4). Methods of differentiation include basing fees on the type of litigant, staged hearing fees based on the number of hearings, and making fees dependent on the amount in dispute. These various approaches are discussed below.

⁵⁸ For a detailed explanation of Ramsey pricing, see Baumol (2008).

Table 16.4 **Current use of differentiated court fees in Australian courts**

As of December 2013, excluding family law courts

■ Yes □ No

	<i>Court</i>	<i>Type of litigant</i>	<i>Staged hearing fees</i>	<i>Amount in dispute^a</i>
Commonwealth	Federal Court	■	■	□
	Circuit Court	■	□	Small claims
New South Wales	Supreme	■	■	□
	District	■	□	□
	Local Court	■	□	Small claims
Victoria	Supreme	□	■	□
	County	□	■	□
	Magistrates'	□	□	■
Queensland	Supreme	■	■	□
	District	■	■	□
	Magistrates	■	□	■
South Australia	Supreme	■	□	□
	District	■	□	□
	Magistrates	■	□	Small claims
Western Australia	Supreme	■	□	□
	District	■	□	□
	Magistrates	■	□	■
Tasmania	Supreme	□	□	■
	Magistrates	□	□	Small claims
Australian Capital Territory	Supreme	■	■	□
	Magistrates	■	■	■
Northern Territory	Supreme	■	□	□
	Local Court	□	□	■

^a In some courts, lower fees are charged for small claims that fall under a specified amount in dispute.

Source: Productivity Commission analysis of fee schedules in Australian courts.

The type of litigant

Courts often distinguish between types of litigants when setting court fees, with corporations generally charged a higher fee than individuals for the same court-related activity. Broadly speaking, this method of differentiation is used in most state and territory courts, with the exception of Victorian and Tasmanian courts (table 16.4). Some tribunals — such as the ACT Civil and Administrative Tribunal (ACAT) — also charge different fees to disputants in this manner.

Some courts use more discerning categories. For example, the Federal Court and the Federal Circuit Court differentiate between publicly listed companies and public authorities; corporations; and small businesses, not-for-profits and individuals. Other jurisdictions, such as Western Australia, still use a general corporation-individual split but allow some small businesses and not-for-profits to apply for treatment as individuals for fee purposes.

The arguments underpinning differentiation of fees between corporations and individuals are twofold. First, corporations are often presumed to have greater access to resources than individuals — as well the ability to deduct their court fees for tax purposes — and thus may have higher capacity to pay. Second, cases involving corporations may be more complex, and thus consume more court resources.

A number of stakeholders expressed support for charging different court fees based on the type of litigant involved. The Consumer Action Law Centre suggested:

... [amending] court fees so that fees for businesses to access the public civil justice system are higher than fees charged to other users, on a formula that redistributes the cost burden of funding our legal system more equitably ... (sub. 49, p. 29)

Data from the courts appear to lend some support to the notion that charging disputants based on their corporation status may improve cost recovery while lowering costs to individuals. Some jurisdictions that charge higher fees to corporations and lower fees to individuals appear to have higher rates of cost recovery and higher average fees per lodgment than other jurisdictions of similar size and expense that charge the same fee to all disputants. The fees charged to individuals in some jurisdictions which price discriminate are lower than the fees charged to all disputants in some jurisdictions that do not differentiate (table 16.5). This suggests that courts using price discrimination may have lowered fee barriers to individuals while increasing fee revenue.

Table 16.5 Illustrating cost recovery when fees are differentiated

As of 1 July 2013, 2012-13 dollars

	<i>County Court of Victoria</i>	<i>NSW District Court</i>
Recurrent expenditure per finalisation	\$4 698	\$4 763
Average fees collected per lodgment ^a	\$1 388	\$1 508
Cost recovery	29 per cent	38 per cent
Filing fee for individual	\$769	\$606
Filing fee for corporation	\$769	\$1 212

^a Average fees are calculated by dividing total fee revenue by the number of lodgments. Fee revenue is sourced from a range of fees, including fees for filing applications, subpoenas, setting down and hearing fees.

Sources: SCRGSP (2014); fee schedules for the County Court of Victoria and the District Court of NSW.

However, the commonly used distinction between corporations and individuals can be blunt, as entities within the umbrella term of a ‘corporation’ can differ greatly in their size, complexity and resources. As the NSW Bar Association noted:

... the approach to the calculation of court fees presently charged to litigants in the various courts is inflexible with only limited distinctions made, for example, between corporations and individuals ... Further, no distinction is drawn between the fees charged to large companies and smaller entities. The same flat rate court fees cover sole director small businesses in the same way that they apply to multinational corporations. (sub. 34, p. 14)

Thus it would be of benefit to adopt refined disputant categories, as has been done in the Federal Court and the Federal Circuit Court, to account for differences between not-for-profits, small businesses, corporations and government entities.

Amounts in dispute

The amount of indirect and capital costs included in court fees should also be based on the amount in dispute. Such charging improves the efficiency of cost recovery by targeting the willingness to pay of a party — if the stakes are high it is worthwhile to pay a higher court fee. Parties may also be discouraged from claiming overly ambitious amounts when it will lead to higher court fees.

Fees structured on the amount in dispute are common in both tribunals and magistrates’ courts, where different fees are levied for civil claims of specified amounts (table 16.4). This practice is also commonly used in overseas jurisdictions, including England, Wales and Germany (Albert 2007; Marfording and Eyland 2010).

There may be particular benefit in extending this principle to family law disputes that purely involve financial matters, such as the division of property or assets. In 2012-13, applications for purely financial matters comprised approximately half of

final orders applications in the Family Court, and one third of final orders applications in the Federal Circuit Court (Family Court of Australia 2013a; FCC 2013). Both parties have a strong private pecuniary interest in the litigation of these matters, while the public benefits would appear to be minor. As such, the Commission believes that charging parties the full cost of the court's services is appropriate in these cases, with the amount of indirect and capital costs charged through fees set in proportion to the amount of assets or property in dispute.

There are some disputes that may not be over a monetary amount, but are still of substantial private interest to the parties involved — for example, in some matters where an injunction or other orders are sought in a planning or environmental dispute. In these cases, there may be grounds, in principle, to recover some indirect costs using differential pricing, but it may be difficult to quantify the private interests at stake. The Commission is considering a range of approaches to charging fees in disputes where a monetary amount cannot be specified, including:

- determining parties' contributions to indirect costs based only on other factors, such as litigant type and the length of proceedings
- charging fees in non-monetary disputes at the highest rate for monetary disputes, similar to the approach currently used by some magistrates' courts
- using an alternative amount to approximate the value of the dispute; for example any undertaking as to damages where an injunction is sought.

The Commission is yet to form a view on the most appropriate approach to the pricing of non-monetary disputes, and invites further comment from participants.

Staged hearing fees

A number of courts currently charge higher fees based on the length of proceedings, particularly through the use of staged hearing fees (table 16.4). Rather than charging a flat rate per day, courts with staged hearing fees charge a higher rate per day to disputants as the number of days spent in court increases. Staged hearing fees are more common in superior courts, where disputes are more likely to drag out across multiple trial days.

Staged hearing fees should be adopted where possible in courts and tribunals. This method of charging can be used to discourage delays and unnecessary activities, and facilitate faster resolution of disputes. Litigation that drags on through the courts for an extended period will consume a greater share of court resources at the expense of others who require the court's services. Thus, there is a public benefit in allocating a greater share of indirect court costs to these protracted disputes. Staged hearing fees

have been previously recommended by the Australian Law Reform Commission (2000) and by a review of fees in VCAT (Vic DoJ 2012b).

DRAFT RECOMMENDATION 16.2

Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.

The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:

- ***whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body***
- ***the amount in dispute (where relevant)***
- ***hearing fees based on the number of hearing days undertaken.***

INFORMATION REQUEST 16.1

The Commission invites views on the most appropriate means of determining fee contributions to indirect costs, based on the economic value at stake, in cases where a monetary outcome is not being sought, such as a major planning dispute.

Cost recovery in tribunals

As with courts, there are also some disputes dealt with by tribunals for which increasing fees to cost-reflective levels would not be appropriate (for example, matters concerning guardianship, mental health, human rights or migration).

Low levels of cost recovery may also be appropriate for minor disputes dealt with by tribunals, for example small claims, consumer, residential or tenancy matters. In these cases, cost-reflective fees may often exceed the amount in dispute. Given that most tribunals also do not award costs in their proceedings, this would reduce the incentive for many individuals to pursue small claims matters. The Commission considers low-cost and informal avenues for redress in these types of matters to be necessary for strengthening the shadow of the civil justice system.

However, the Commission believes that fees which reflect a tribunal's costs of service should be pursued in larger, more complex matters dealt with by tribunals — especially those that are commercial in nature. Examples of such cases may include planning matters, commercial building disputes or competition matters. Cost recovery in these cases may be increased by adopting the same principles for

differentiated fees that the Commission has recommended for courts. As noted previously, a number of tribunals have already adopted differential pricing to increase cost recovery in some case types (see table 16.6).

Table 16.6 Examples of tribunals currently using differentiated fees

For selected jurisdictions, as of January 2014

■ Yes □ No

State	Type of litigant	Staged hearing fees	Amount in dispute
New South Wales (NCAT)	□	□	■
Victoria (VCAT)	□	■	■
Queensland (QCAT)	□	□	■
Australian Capital Territory (ACAT)	■	■	■
Western Australia (SAT)	■	□	□

Source: Commission analysis of fee schedules in selected administrative tribunals.

DRAFT RECOMMENDATION 16.3

The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.

16.4 Reforms to fee relief arrangements

While there are strong reasons for fee relief measures for some parties (section 16.2), the arrangements need reform by:

- establishing formal criteria for determining financial hardship
- postponing fees where appropriate, rather than waiving them
- using automatic exemptions to simplify fee relief applications
- introducing partial waivers for individuals on lower incomes.

These reforms are examined below.

Establish formal criteria for financial hardship

Fee relief due to financial hardship in many Australian courts is granted at the discretion of registrars and court officers, rather than by formal criteria (section 16.2). While the Commission supports the existence of discretion for courts

and tribunals to grant or refuse fee relief in exceptional circumstances, its use should be the exception rather than the general rule.

Granting waivers and reductions primarily on a discretionary basis provides little guidance to potential disputants as to whether they will be eligible. Some stakeholders suggested that there is an increasing reluctance by courts and tribunals to grant waivers. For example, the Australian Lawyers Alliance (ALA) said:

Whilst there may be a theoretical relief available to a person seeking a waiving of the fee, ALA members report an increasing tendency towards denial by the various Courts and Tribunals. (sub. 107, p. 11)

Further, it is important to recognise that the granting of a fee waiver or reduction represents a taxpayer-funded subsidy to individuals. As such, the process by which fee relief is granted should be as transparent as possible, both to those applying for relief as well as the wider public that is funding them.

One way that the fee relief process can be made more certain and transparent is by governments establishing formal criteria to determine eligibility on the basis of financial hardship. For example, in the Supreme and District Courts of Queensland, eligibility for a fee reduction is dictated by an equation to calculate a party's available funds relative to a fee (Queensland Courts 2013). These criteria should be designed so that courts need only use their discretion to offer fee relief for financial hardship where a party faces exceptional circumstances that clearly fall outside those foreseen by the criteria.

Postpone fees, where appropriate

There may be some cases where the cost of paying a court fee is only a temporary barrier for a poorly resourced party. This is most clearly demonstrated in cases where a poorly resourced party is awarded costs or monetary damages on judgment. In these cases, the party could afford to pay court fees if successful, despite short-term liquidity constraints.

Rather than waiving fees entirely, it may be more appropriate in these cases to postpone the charging of court fees until after judgment. This practice has already been adopted in some jurisdictions. For example, fee guidelines in New South Wales currently stipulate that it is usually preferable to postpone fee payment until finalisation rather than waive the fee altogether (NSW DAGJ 2014).

Use automatic exemptions to simplify fee relief applications

Several stakeholders to this inquiry have expressed concern at the lack of ease, efficiency and flexibility in the existing processes used to grant fee relief to disadvantaged litigants. Burdensome application processes can raise the financial barriers to justice and increase the complexity of the system, by forcing disadvantaged individuals to navigate a complicated and time consuming system to obtain financial relief. Unnecessary means testing for waivers can also consume the time and resources of court staff and legal assistance providers.

Submissions have provided examples of complex and burdensome fee waiver processes. For example, the Consumer Action Law Centre said:

We have recently raised concerns with VCAT that its current fee waiver process may be excluding low income individuals from accessing the Tribunal as well as wasting resources of [community legal centres] and Tribunal staff ... In our view this process creates unnecessary duplication ... (sub. 49, p. 19)

The complexity involved in applying for a fee waiver can also be a barrier for disputants with limited language or literacy skills. This may be particularly problematic in the Federal Court and Federal Circuit Court, where migration matters are the most common type of case where waivers are sought (AGD 2012a). The NPBRC has previously described the process facing such a disputant as:

... lengthy and, for people already experiencing disadvantage, a difficult process with uncertain prospects of success. It requires completion of a four-page Statement of Financial Position and attesting in an affidavit about the veracity of the information provided. (sub. 73, p. 39)

These administrative and compliance burdens can be reduced by minimising the need for unnecessary and duplicative means tests. This may be achieved by identifying particular groups that have already undergone means testing to be considered financially disadvantaged, and setting out categories to grant them fee relief with no need for further information or means testing.

The federal courts currently provide an example of how categories for fee exemptions can be formally set out (box 16.1). Similar exemption categories are used in Queensland, Western Australia and Tasmania. The use of formal criteria and categories for fee exemptions in the federal courts has received support from some stakeholders, including the Public Interest Advocacy Centre (PIAC):

PIAC notes that currently federal courts have fixed categories of non-discretionary exemptions of fees ... As well as these categories, the federal courts and tribunals have the discretion to waive fees in circumstances of financial hardship. PIAC believes that the current system of fixed exemptions is clear and predictable and generally enables those with limited financial capacity to access the legal system. (sub. 45, p. 33)

In particular, there may be avenues to reduce the cost and complexity of applications for fee relief to individuals that are:

- receiving particular means-tested government benefits
- represented by legal aid commissions
- represented by a community legal centre or pro bono professional.

These categories are discussed in further detail below.

Individuals receiving means-tested government benefits

As discussed in section 16.3, the accessibility of the system may be best ensured by targeting fee relief at those with fewer resources. In 2008, roughly one third of civil court and tribunal users received means-tested government payments (figure 16.4).

Several participants in this inquiry suggested that there is little reason to require such individuals to undergo further means testing to qualify for a fee waiver:

... a recipient of Centrelink payment has already been means tested and found to be of low income. It appears wasteful for the Tribunal to then conduct its own assessment rather than accept the assessment of Centrelink ... We have requested that VCAT return to a previous policy of granting fee waivers on the grounds of hardship to applicants who establish that they are reliant on particular Centrelink benefits, for example, by providing a copy of a concession card. (Consumer Action Law Centre, sub. 49, p. 19)

A person in receipt of Centrelink benefits is clearly in a relatively poor financial position. This has been proven to the satisfaction of Centrelink. The ALA is of the view that receipt of such benefits should automatically entitle the person to the waiving of any fees. (sub. 107, p. 11)

Some courts already grant fee relief to individuals in possession of any Commonwealth concession or health card. The Commission sees some merit in this as a simple and low-cost approach to identifying those receiving government benefits — with the exception of the Commonwealth Seniors Health Card, which is available to individuals not receiving an income support payment.

However, a limitation to this approach is that many of these concession cards do not impose any form of asset test, meaning some individuals with the means to pay fees may receive a waiver. Depending on the resulting compliance and administrative costs, there may be merit in introducing an asset test to this exemption.

Alternatively, this fee exemption could be limited to those receiving a government pension or allowance at the full rate. This would ensure that some payment recipients with greater resources would be subjected to a more detailed means test,

and may be required to pay fees if they can afford to. However, determining whether a party is receiving a full rate payment may be administratively cumbersome. There will also be administrative costs that arise from the increased number of fee relief applicants to be means tested.

Ultimately, the most appropriate arrangement for automatically exempting those on government benefits will depend on the costs and additional revenue associated with more precisely targeting the exemption. The Commission seeks further feedback from stakeholders on this issue prior to its final report.

Legal aid commission clients

Some stakeholders have argued that despite being generally granted automatic fee waivers by their corresponding state and territory courts, clients of legal aid commissions (LACs) are still required to submit an application for fee waivers in Commonwealth jurisdictions. This is likely to create needless complexity for disputants, as suggested by Legal Aid NSW:

Currently legal aid clients are eligible for exemption but required to complete a form to receive the fee exemption. As legal aid clients are eligible for the fee exemption and generally receive the exemption, the application process appears to be unnecessary red tape and costly. (sub. 68, p. 76)

Indeed, given that individuals must already meet financial hardship criteria to receive LAC services, requiring them to apply for a fee waiver on the basis of financial hardship is duplicative and inefficient. Legal Aid NSW suggested that a simple solution to this would be for the federal courts to grant automatic fee waivers to LAC clients, similar to their state and territory counterparts:

In the State civil law jurisdictions Legal Aid NSW clients are automatically exempt from court fees. This exemption has reduced red tape and inefficiency as legal aid clients meet the requirement for financial hardship. Legal Aid NSW seeks a similar automatic fee exemption in Commonwealth jurisdictions. (sub. 68, p. 76)

However, in the Commission's view the existing arrangements in the federal courts for LAC clients applying for fee exemption appear to be satisfactory. Indeed, the fee exemption process for LAC clients in the federal courts appears to closely match the process used by New South Wales courts. Regardless, the Commission believes that all courts and tribunals in Australia should offer automatic fee relief to parties represented by a LAC funded lawyer.

Pro bono and community legal centre clients

Numerous submissions to this inquiry have called for automatic fee waivers for individuals represented by community legal centres (CLCs) and pro bono lawyers:

... [Hunter Community Legal Centre advocates] an exemption from filing fees in the Federal Courts for CLC clients, and other individuals in receipt of free legal assistance. (sub. 26, p. 15)

... a further exempt fee category to the current rules, specifically ‘those that are being acted for on a pro bono basis’, would provide greater efficiency for the court and the applicant. (NPBRC, sub. 73, p. 39)

... there should also be a category where the presumption is in favour of fee exemption for ... cases in which clients are represented by CLCs or by private solicitors on a pro bono basis. (PIAC, sub. 45, p. 33)

At present, there are almost 200 approved CLCs whose clients are eligible for automatic fee exemptions in the federal courts, as listed in the *Legal Aid Schemes and Services Approval 2013*. A similar exemption for clients of approved legal assistance providers is also used in Western Australia and Tasmania. Further, fee guidelines in New South Wales courts already require courts to postpone fees for parties receiving pro bono or legal assistance representation until a judgment is given (NSW DAGJ 2014). In other jurisdictions, such as Victoria, pro bono applications for fee waivers are generally viewed favourably, but there is no automatic exemption.

The NPBRC suggested that providing fee exemptions for pro bono clients would improve the efficiency of fee processes:

It would save time by avoiding the need to complete and assess lengthy applications submitted for fee waiver or deferral, and bring pro bono matters into line with the current treatment of matters where there is a grant of Legal Aid. (sub. 73, p. 39)

However, unlike LACs — which enforce financial hardship requirements on their clients — there do not appear to be consistent requirements ensuring that CLCs or pro bono lawyers exclusively service disadvantaged clients. Using unit record data provided by the Attorney-General’s Department, the Commission has estimated that 17 per cent of CLC clients were earning medium or high incomes in 2011-12. Further, a large proportion of clients did not have their income or income source recorded at all. Thus it would not seem appropriate to grant automatic fee relief solely on the basis of being the client of a CLC or pro bono representative.

However, the Commission supports granting automatic fee relief to the clients of CLCs or pro bono providers that adopt eligibility criteria for their clients commensurate with the financial hardship criteria used to grant fee relief. This

would be similar to the approach currently used by the Commonwealth, Western Australian and Tasmanian governments to provide exemptions to approved CLCs, but would also extend to approved pro bono providers.

Grant partial waivers, where appropriate

Some submissions to this inquiry have argued that fee waivers in Australian courts are excessively targeted at those experiencing severe financial hardship:

In our experience, the exemptions for divorce court fees for health care card holders and for reduced income women do not address the lack of affordability for many other women. (Women's Legal Service, sub. 117, p. 3)

Some people may face a degree of hardship that is just below the threshold for fee waivers, and may still struggle to pay court fees. As shown in figure 16.4, there is a sizable group of court users with incomes that are below-average but higher than the income of the average waiver recipient. This 'missing middle' can be faced with the same court fees as other individuals on higher incomes, while paying much more than those eligible for full waivers, but whose incomes may be only slightly lower.

Women's Legal Service Victoria provided an example of the barriers faced by low income individuals who were not eligible for fee waivers in family law matters:

... individuals on low incomes, who may not necessarily satisfy the test for financial hardship applied by the court, are unfairly disadvantaged by the current structure of fees in the family law jurisdiction ... For those who fall outside of the financial hardship test, full fees apply ... This is prohibitively expensive for a woman on a low income who may not satisfy the financial hardship test because she works and has a small amount of savings in the bank. (sub. 33, p. 23)

One option to assist affordability for these individuals would be to grant them a partial waiver of fees, essentially charging a reduced court fee. This approach may help reduce cost barriers faced by lower income individuals, while preserving some of the price signal and cost recovery benefits associated with court fees. A system of partial fee waivers is currently used in English and Welsh courts (box 16.2).

Alternatively, Women's Legal Service Victoria suggested that a sliding scale of fees — essentially equivalent to a system of partial waivers — should be charged based on the income of disputants. They proposed:

... a different approach to assessing court filing fees in the family law jurisdiction, which ensures a fairer, more accessible system for all users of the court system.

We recommend that filing fees be assessed according to an income scale. For example, a person earning \$35,000 pays 30 per cent of the full fee, a person earning \$50,000 pays 70 per cent and a person earning \$80,000 or more pays the full fee. (sub. 33, p. 23)

Box 16.2 Fee waivers in England and Wales

In English and Welsh courts, fee relief is granted by setting a maximum contribution that a party may be required to pay towards a fee. In some cases, the individual may be set a maximum contribution of zero, granting them a full waiver of any fees. Where the maximum contribution is greater than zero, it is essentially a partial waiver.

The maximum fee contribution for an individual is determined by three factors – income (including any partner's income), number of children and couple status. The maximum contribution is higher for singles, those with fewer children, and higher incomes.

Eligibility for a maximum contribution also depends on passing a disposable capital test, the threshold for which increases with the size of the court fee to be paid. Disposable capital includes savings, stocks or shares, and second homes. Some assets are excluded from the test, including first homes; home contents; vehicles; medical negligence or personal injury payments; and self-employed businesses.

For example, a single person with no children earning average monthly wages in England of £2077 would be set a maximum contribution of £495. If this person was charged a court fee of £600, and was under the disposable capital threshold of £3000, they would pay their maximum contribution of £495, with the remaining £105 waived. By comparison, a couple with two children on a combined income of £2077 per month would be set a maximum contribution of £170.

While the array of factors above would appear to be complex, this fee remission system appears to be straightforward for users in its application. A maximum contribution calculator is available online, which allows users to input their income, number of children and couple status, and calculates their maximum contribution.

Sources: Office for National Statistics (2014); HM Courts and Tribunals Service (2013).

When considering the use of partial fee relief, policymakers need to be mindful that the cost of administering and collecting the partial payment does not exceed the revenue. The federal courts introduced reduced fees in 2010, but abandoned them in 2013, with some arguing that the costs of pursuing payment of reduced fees exceeded revenues (Law Council of Australia 2013). However, these reduced fees were very low, and were charged to disadvantaged parties that had previously received a full fee waiver.

The rationale for a partial fee relief system is strengthened if court fees were generally charged at fully cost-reflective levels. The current level of cost recovery is so low that it does not make sense to introduce another layer of differentiated fees beneath that ceiling, especially if the appropriate partial fee would actually be higher than the current suppressed rate. So a shift towards greater cost recovery allows scope for a broader range of fee levels beneath full cost. As the average partially reduced fee may well be above the current highly subsidised rate, the implementation of partial fee relief would raise court revenue, not reduce it.

The Commission sees merit in using partial fee relief, similar to the maximum contribution system used in England and Wales, to offset the impact of suggested court fee increases on disputants with limited and moderate means. However, the Commission has some reservations about the potential administrative costs and burdens from processing a large number of partial fee waivers. Determining the incomes at which parties should be eligible for partial fee relief, and the levels of partial fees to be collected, will depend largely on the costs of administration.

DRAFT RECOMMENDATION 16.4

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

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

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

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

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

INFORMATION REQUEST 16.2

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

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

The Commission also seeks feedback from stakeholders on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

17 Courts — technology, specialisation and governance

Key points

- Australian governments have made significant investment in court technologies designed to:
 - make interactions between courts and their users more efficient
 - support efficient and effective case-flow management.
- However, investment has been uneven across jurisdictions and technology availability, quality and use varies widely. Greater investment in technology based on the needs of individual jurisdictions would allow for efficiencies in the delivery of court services to be achieved.
- Areas where investment in information technology has the potential to yield longer-term savings include case management software, e-lodgment facilities and electronic trial technologies.
 - Case management software allows better management and measurement of court workflow, and facilitates data collection and reporting critical to evaluating the effectiveness of procedural and other reforms.
- Courts should also extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate.
- The use of specialist courts, divisions and lists is common as a way to improve efficiency, although the extent and form of this specialisation varies across jurisdictions.
 - Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.
- As with any institutions, the performance of courts is impacted by their governance and funding arrangements. Most courts in Australia operate under the traditional 'executive' model of court governance with others adopting more innovative approaches which more closely align responsibility with authority.
 - A number of alternatives to current governance and funding arrangements could be considered to give courts greater financial autonomy.

Courts are fundamental to the civil justice system. As discussed in chapter 11, there are a range of ‘supply’ and ‘demand’ factors which affect the performance of the courts (table 17.1). This chapter examines a number of these factors.

The efficiency of the litigation process is influenced by both courts’ use of information technology and the degree of task specialisation. These issues are discussed in sections 17.1 and 17.2 respectively. The governance structure of courts is also a key determinant of court performance, and current models and options are examined in section 17.3. The capacity of courts to perform their role is also impacted by available resources. Section 17.4 looks at court and judicial resourcing trends over time and explores options for alternative funding arrangements.

Table 17.1 Factors impacting the ‘market for litigation’

Where the number of disputes in the community is given ^a

<i>Supply side factors</i>	<i>Demand side factors</i>
Court resourcing	Cultural traits and general economic conditions
The efficiency of the litigation process as influenced by:	The costs of accessing the service and cost shifting rules
- the degree of task specialisation	The incentives that apply to lawyers as shaped by the joint effect of the fee regulation and the organisation of the supply of legal services
- case-flow management	The availability of alternative dispute resolution (ADR)
- use of information and communication technology	Court processes and procedures
- conduct of parties	
- court process and procedures	
Court governance	

Source: Adapted from (Palumbo et al. 2013).

^a The number of disputes in the community is itself affected by a number of factors such as the structural social and economic characteristics of the economy, the business cycle, and the quality and quantity of legislation.

17.1 Technology

Significant investments have been made in court technology

Use of technology can improve the efficiency of court-based dispute resolution and court operations. In 1999, a report by the Victorian Parliamentary Law Reform Committee on the prospective impact of information and communications technology on the justice system predicted that:

Developments in technology offer the opportunity to transform the civil justice system into an accessible, inexpensive, transparent and efficient system, which is responsive to

the needs of the community. The effective use of IT in the justice system can entirely change the relationship between courts, governments and the public ... technology can ensure that everyday legal issues are processed without the need for expensive legal advice or long court processes. (1999, p. 23)

Similarly, in his final report on the civil justice system in England, Lord Justice Woolf expressed the view that:

IT will be the foundation of the court system in the near future and now is the time that it should be seen to be receiving attention at the highest levels. (1996, p. 284)

In the last two decades, many Australian courts and governments have recognised the importance of technology and implemented significant reforms aimed at improving case management systems and making court processes and operations more efficient and accessible (AGD 2012d). Key ways in which Australian courts are utilising technology include:

- providing online information to court users including via court websites and publishing court decisions online
- allowing court documents to be filed and court fees to be paid electronically
- providing online access to court documents
- enabling litigants and parties to communicate with the court about pre-trial issues using emails or other secure online environments
- conducting procedural hearings through tele- and video-conferencing or tailored 'virtual court' applications
- facilitating and providing technologies which make the running of a trial and giving of evidence more efficient (audio, video, transcript and evidence presentation systems)
- introducing sophisticated integrated case management systems, which better support efficient case management, work flow and performance measurement.

But there is scope for greater use of technological solutions

While there has been significant technological uptake, investment in information technology has been uneven across jurisdictions, with the availability, quality and use of technology varying widely between and within jurisdictions. Even relatively basic uses of information technology, such as conducting less complex directions hearings by telephone, do not appear to be utilised as fully as they might be. Variability in the quality and use of technology was raised by a number of participants in this inquiry.

Notwithstanding the general enthusiasm attending discussions around use of technology as a means of improving access to justice, the Law Council is advised that many court systems remain antiquated. (Law Council of Australia, sub. 96, p. 101)

[E]-filing is largely unavailable in [South Australian] courts and tribunals. When it is available it is sporadic and not uniform. In other words, whereas e-filing is available in some registries in others it is not. In one example where e-filing is not available in the registry it is available for interlocutory processes. There is no seemingly consistent approach even to that very basic subject ... Whereas one would expect information technology would be utilised effectively to assist in streamlining litigation, our court rooms largely do not extend to provide those facilities. (Law Society of South Australia, sub. 61, p. 18)

The availability, quality and use of technology [to improve the efficiency and scope of service delivery] already exists but it varies widely amongst Courts, Tribunals, ADR providers and legal practitioners in each jurisdiction. (Australia's Lawyers Alliance, sub. 107, p. 12)

Many submissions supported greater and more consistent use of technology to streamline the litigation process and overcome geographic isolation. For example:

[G]reater use of [technology] should be made ... If we are to improve access to justice, all Courts and Tribunals and their ADR offshoots and lawyers must embrace up to date technology. A minimum standard should be established in each jurisdiction and rolled out in stages as far as Courts, Tribunals and their ADR offshoots are concerned. The front end cost will likely be substantial but the time and cost savings in reduced Court, Tribunal and ADR attendances could ultimately be even more substantial. (Australia Lawyers Alliance, sub. 107, p. 12)

The Law Council strongly supports the greater use of technology in proceedings to improve access to justice and efficiency of court processes ... Increased reliance on technology could reduce litigation costs, eliminate unnecessary (and expensive) formal correspondence and save time through the electronic lodgement of various case material. Other telecommunications vehicles such as greater use of the telephone, video and email for direct communication between parties and the courts, will simplify procedures in routine applications, which can be dealt with without the need for parties to attend the court. (Law Council of Australia, sub. 96, p. 9, p. 54)

However, some submissions also cautioned that technology is not a complete solution to access problems:

While the use of technology, such as the Commonwealth Law Portal can streamline peoples' experience of the justice system, there are many clients who don't use technology for literacy and cost reasons. (Women's Legal Service, sub. 117, p. 4)

[I]ncreased reliance on technology to administer and deliver court services may have a disproportionately adverse impact on applicants who do not have ready access to online service, such as applicants in [rural, regional and remote] areas (including, for example, Indigenous communities) or in other disadvantaged circumstances. Accordingly,

equitable access should be ensured by continuing to provide ordinary access through court registries. (Law Council of Australia, sub. 96, p 101)

Low-cost technology options could be better exploited

Some technologies, such as telephone conferences, can be utilised by courts at relatively low cost and obviate the need for litigants or their legal representatives to attend court premises. As noted by the Commonwealth Attorney-General's Department, this has obvious implications for efficiency and accessibility:

[Reducing the need to attend court premises] significantly reduces the cost of conducting court proceedings and enhances the ability of people in regional areas to access court services. (sub. 137, p. 36)

Despite the clear benefits that arise from more fully exploiting low cost technologies, only some courts have rules and procedures in place to facilitate their use. For example, the Supreme Court of NSW has a dedicated conference call facility used principally for common law directions hearings before a Registrar. The practice of the Land and Environment Court is that if parties are in non-metropolitan areas, the court automatically lists the first directions hearing via teleconference — other parties may request a teleconference by contacting the court.

By comparison, in the United Kingdom, there is a broad based presumption that certain types of cases (largely procedural hearings and interim applications with a time estimate of less than one hour) be conducted by telephone unless the court orders otherwise.

In considering the impact of such reforms it is important to look at the community-wide costs and benefits. As Lord Jackson noted with respect to experience in the United Kingdom, while telephone hearings may be a less effective use of judicial time, this must be balanced against savings for parties (by eliminating travelling time) and savings in other court resources (such as reducing the need for court rooms or staff). Overall, the service has been well received (Jackson 2009b).

The Commission sees merit in the possibility of a similar presumption applying in Australian courts. This could be extended to use of online court facilities where available.

DRAFT RECOMMENDATION 17.1

Courts should extend their use of telephone conferences and online technologies for the purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.

Investment in technology is required to generate longer term savings and improved access to justice

In some cases, greater reliance on information technology would require an upfront investment by the courts. However, as noted in a number of submissions, the cost savings which result from greater use of up-to-date technology would offset the costs of those investments in the longer term.

This is consistent with the view of the OECD, which has found that justice systems devoting a larger share of the justice budget to information technologies display, on average, shorter trial lengths, as well as higher productivity of judges (where the productivity of judges is measured as the number of cases disposed of by each judge) (OECD 2013). As a senior court administrator in Australia commented:

... there are readily available technologies in areas such as customer relationship management, appointment and queue management, voice recognition, paperless workflows and digital signatures that could streamline file management. Courts may struggle to deliver what is required within the resources available over the long term if they do not begin to embrace some of the new technologies. (Foster 2012, p. 13)

The Commission has identified at least three areas where there is potential for investment in information technology to yield longer term savings — e-lodgment and electronic court file technology, electronic trial technology and case-flow management systems. Chapter 14 considers in more detail the role of technology in better supporting litigants who self-represent.

E-lodgment and electronic court file technologies

E-lodgment and electronic court file technologies provide a more efficient and convenient way for litigants and representatives to interact with the courts. A number of courts in Australia already facilitate some degree of e-lodgment and electronic access to court files. Some systems are open to all litigants. Others restrict access to lawyers, corporate litigants and government departments. For example, Western Australia's eLodgment service allows registration by Legal practitioners, major private organisations and Government departments.

As is the case in other areas of information technology, availability and technological take up vary across jurisdictions.

- The Federal Court and Federal Circuit Court utilise an e-lodgment system which is open to all court users. In 2012-13, 41 per cent of all documents filed in the Federal Court and Federal Circuit Court (general federal law matters) were filed electronically (Federal Court of Australia 2013a). The Federal Court is currently enhancing the system to completely replace use of paper files.
- E-filing is available to family law litigants and parties through the Commonwealth Courts Portal for a range of family law documents.
- E-filing has been available for civil documents in the County Court and Supreme Court of Victoria (Trial Division) since 2003 and 2007 respectively. The Supreme Court of Victoria has also recently developed an advanced online case management system, RedCrest, which, among other functions, facilitates e-filing. The Magistrates Court of Victoria utilises a Civil Electronic Data Interchange Program, introduced in 1993. It allows solicitors to electronically lodge civil complaints and other applications.
- The range of documents available for filing online in the Supreme, District and Local Courts of NSW through Online Registry was expanded significantly in 2013, with 42 civil forms available for online filing. The NSW Land and Environment utilises e-court for this purpose.
- E-filing has been operational in the Queensland Magistrates court since 2003, but is not yet available in the District and Supreme Courts. A system called 'eFiles' is currently being trialled in the Planning and Environment Court in Brisbane which, once more widely implemented, will make District and Supreme Court documents available to all court users online 24 hours a day, 7 days a week.
- In Western Australia, two systems are in operation, 'On-line forms' and 'eLodgment'. 'Online forms' is operational in the Magistrates Court and the Probate Office of the Supreme Court and is designed to assist non-regular court users to lodge forms electronically. 'eLodgment' is operational in the Supreme Court, District Court and Magistrates Court and is described as a 'work in progress,' which will be expanded as resources become available (District Court of Western Australia nd). It is designed for law firms and government agencies or municipalities who have knowledge of court processes.
- In South Australia, e-filing is available for civil claims in the Magistrates Court.
- In Tasmania, an electronic lodgments pilot project was established by the Supreme Court of Tasmania in September 2013.
- No e-filing appears to be available in the Northern Territory or the ACT.

Electronic trial technology

Technologies that support electronic trials and the use of video conferencing for the giving of evidence can also be more efficient for the court and parties. Over the past decade, electronic trials have been conducted in a range of Australian jurisdictions, typically for large and complex litigation.

Initially, these trials were run with the assistance of commercial service providers, with parties bringing to the courtroom all of the technology they required to support their case — computers, flat screen monitors, digital projectors, a visual display system, and file servers containing databases with images of the documentary and other evidence to be presented at trial. The associated costs were borne by the parties.

Over the last decade, jurisdictions have increasingly moved toward developing their own court-provided technology, with some jurisdictions significantly further advanced than others. New court buildings are incorporating many of the features found in electronic courtrooms as part of standard infrastructure. The use of modern information communication technology (ICT) facilities in courtrooms is no longer restricted to complex or longer trials. Use of ICT has also become more selective, with parties drawing on technology that suits the needs of their particular case, rather than having to use a whole system (Wallace 2009).

There is international evidence to suggest that overall cost and time savings from the use of electronic trial technology is in the vicinity of 25-30 per cent in larger matters (Jackson 2008). The benefits of electronic trial technology have been shown to be particularly significant in the context of large and complex litigation in Australia as well (box 17.1).

Savings are not restricted to large and complex cases — a US report suggests minimum savings from the use of evidence presentation technologies of about 10 per cent even in a short, one hour case with only a few documents (Lederer 2003).

Participants in this inquiry argued that use of electronic trial technology has also been beneficial in Australia. For example, Allens submitted that:

The cost of electronic court systems has decreased significantly in the past 5 years ... We believe there is significant benefit to litigants' access to justice when courts have invested in the necessary infrastructure. (sub. 111, p. 12)

Box 17.1 Great Southern proceedings — Supreme Court of Victoria

The Great Southern proceedings, which commenced in the Commercial and Equity Division of the Supreme Court of Victoria in October 2012 and concluded in October 2013, was the largest set of group proceedings commenced to date in the Division — comprising in excess of 22 000 group members and individual plaintiffs.

The proceedings raised important issues involving the *Corporations Act 2001* (Cth) in regard to managed investment schemes and other matters.

Various claims against the Great Southern entities and their directors included whether certain product disclosure statements complied with this legislation and whether the Great Southern entities breached their statutory duties as a responsible entity of managed investment schemes. There were also issues relating to whether there was misleading and deceptive conduct on the part of various parties in the context of the relevant product disclosure statements.

A special ‘referee’ was appointed to manage the discovery process, in which there were over 10 million potentially discoverable electronic documents.

An analysis of the benefits of running the trial utilising e-trial services looked at three areas of savings – time reduction, hard-copy court book cost and hard-copy court book management. The trial judge estimated that the trial time required would have increased by 25-30 per cent without the benefit of the technology utilised. The net benefit of utilising e-trial services was estimated at \$2.4 million.

Source: Supreme Court of Victoria (pers. comm., 27 February 2014).

Information technology can support efficient case-flow management

In addition to creating efficiencies in the pre-trial and trial stages of litigation, information technology also critically supports efficient and effective case-flow management. Case management software enables courts to more efficiently allocate their resources in terms of scheduling judicial workloads, listing matters and allocating hearing rooms.

Perhaps most importantly, case management software allows better measurement and management of court workflow and facilitates data collection and reporting critical to evaluating the effectiveness of procedural and other reforms. The OECD has found:

An important condition for the implementation of case flow management techniques is the systematic collection of detailed statistics on case flows, trial length, judges’ workload and other operational dimensions. With some exceptions ... trial length appears to be shorter in systems with a higher production of statistics. (OECD 2013, p. 6)

The International Framework for Court Excellence makes the point this way:

Without reliable measurement systems courts will be unable to adequately assess how they are performing or whether any of their strategies or initiatives is actually effective. What may appear to be a sensible solution of requiring greater pre-hearing issues disclosure could well impose unacceptable costs upon parties or add further delay to case finalization. Measurement is vital to effective assessment of performance and progress. (International Consortium for Court Excellence 2013, p. 30)

Not all jurisdictions appear to have adequate technology for this purpose. For example, as noted in a 2011 review of case management and listing procedures in the ACT Supreme Court:

Consultation with other jurisdictions, reviews of case management in other jurisdictions, and the Auditor-General's reports of 2005 and 2010 all emphasised the need for reliable and routine statistics on Court performance in order to implement and maintain an effective case management system ... The current practice in the Supreme Court Registry is to manually collect and analyse information on cases. (Penfold and Leigh 2011, p. 42)

Subsequent to this 2011 review, in 2012-13 the ACT Government provided \$8.2 million over three years for a new case management system to be rolled out across all ACT Law Courts and Tribunal jurisdictions by 2015.

However, there still remain jurisdictions which are relying on out-dated technology. In particular, the Chief Justice of South Australia has commented on the urgent need to upgrade the information technology systems supporting South Australian courts:

The provision of modern technology infrastructure for the courts is as urgent as the need for a new courts building. The courts in many other Australian jurisdictions have installed, and are extending the use of, information technology which enables electronic filing and file management and allows internet access to the parties. Our technology is primitive in comparison. (Annual Report, 2012, p. 6)

Funding for court technology

Currently, governments have a central role in funding technology in courts and tribunals. For self-administering courts, the Government does not usually provide a specific budget allocation to IT — courts and tribunals make their own allocations from their budget. Arrangements for courts that are not self-administering vary, however judicial officers have less control and input into the process (Alford, Gustavson and Williams 2004, p. 39).

In 2012, the National Centre for State Courts in the United States developed a set of principles for judicial administration. Principle 23 is that the court system should be

funded to provide technologies needed for the courts to operate efficiently and effectively and to provide to the public services comparable to those provided by the other branches of government and private businesses. The Commission considers that this principle is relevant to Australian courts.

DRAFT RECOMMENDATION 17.2

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

INFORMATION REQUEST 17.1

The Commission seeks views on how best to enable courts to identify their technological needs and service gaps, and promote work practices that maximise the benefits of available technologies. In particular, the Commission seeks views on whether, and to what extent, this involves greater use of court information technology strategic plans and/or greater coordination and leveraging of technology solutions across and within jurisdictions. Investment in which types of technologies, including those to better assist self-represented litigants, would be most cost effective? What are the likely costs of addressing the different technological needs of different courts?

17.2 Specialisation

Task specialisation is often advocated as a way to enhance the performance of the courts (Palumbo et al. 2013). As Australia's formal civil justice system has developed, there has been a trend towards greater specialisation.

Two factors have contributed to the increase in specialisation:

- greater legal complexity, especially with growth in legislation
- increased specialisation of the legal profession — which means that newly appointed judges and magistrates may not have the same breadth of experience as in the past, and that practitioners appearing in the courts expect a level of expertise on the bench (Mack et al. 2012).

Specialisation has taken a number of forms including the creation of:

- separate stand-alone courts that deal only with a particular subject matter — for example, the Family Court of Australia, which specialises in matters under the

Family Law Act 1975 (Cth) and the Land and Environment Court of NSW which deals with a range of environment, planning and related legislation

- divisions or special programs embedded within existing court structures that deal with particular subject matters — for example, drug courts or family violence courts
- specialised court lists in which certain categories of cases are heard, often by dedicated judges — for example, commercial lists, building lists and intellectual property lists.

All of the above forms of specialisation are, at times, referred to as ‘specialist courts’ (ALRC 2010).

Specialisation varies across jurisdictions ...

Australian courts differ with respect to the extent and form of specialisation in civil matters (and between criminal and civil matters), and jurisdictions differ in their use of courts and tribunals for this purpose.

Some specialised ‘courts’ are expressly established by legislation. Others operate as a matter of practice, and their structures are established through administrative mechanisms. It has been noted that an advantage of the latter approach is that it enables the court to more easily adjust the structure (independent of the legislature) if, for example, the specialisation is later perceived as unnecessary or there is a desire to change its focus. It also enables the court to deploy its judicial workforce more flexibly, across the whole range of the court’s work (Mack et al. 2012).

Most magistrates’ courts have, within their structure, a range of specialist ‘courts’, divisions or programs. For example, the Local Court of NSW has a Children’s Court, Coroner’s Court and a Chief Industrial Magistrate’s Court. In Tasmania, statutory provision is made for the Magistrates Court to sit in six divisions — Civil, Coronial, Youth Justice, Childrens, Administrative Appeals and Mining.

The advent of many specialist courts at this level, such as drug courts, family violence courts and Koori courts, reflect developments in ‘therapeutic jurisprudence’ and primarily deal with preventing criminal behaviour and reducing imprisonment related to mental health, drug and other issues. These specialist courts have been said to be characterised by ‘legislative reform, specialist staff and judiciary, multi-disciplinary teams, tailor-made processes and additional resources’ (Spencer 2012, p. 4).

Courts higher up the hierarchy also utilise specialist ‘courts’, divisions or lists, which can be managed and heard by judges with specialist expertise. The number and subject matters of these lists vary according to the jurisdiction and workload of individual courts. Most superior courts and some intermediate courts have specialist commercial ‘courts’ or court lists, with larger jurisdictions having a larger number of other specialist lists.

The Federal Court has established panels of Judges in some registries to hear and determine particular types of matters such as competition, corporations, industrial and patents matters. Similarly, the Federal Circuit Court has established specialist panels in some registries for commercial, admiralty, migration, human rights, industrial and national security matters.

Some jurisdictions also utilise specialist courts for environmental, land, planning and industrial matters, for example, the NSW Land and Environment Court and the NSW Industrial Court.

... and the costs and benefits are context specific

Arguments for specialisation are that it enhances court efficiency and improves the accuracy, timeliness and quality of decision making because judicial officers have more detailed knowledge of the relevant area of law and familiarity with the relevant processes, and that it is likely to guarantee better consistency of decisions.

But these benefits need to be weighed against the downsides of specialisation. It has been argued that specialisation may introduce rigidity (and potential inefficiencies) in the use of resources, limiting the possibility to reallocate judges from one area to another. Specialisation is also thought to impact on skills and job satisfaction, including limiting the ability of judicial officers to benefit from ‘knowledge spillovers’ (OECD 2013), contributing to narrowing of their expertise, ‘de-skilling’ and ‘burn out’ (Mack et al. 2012) — all of which can, in turn, negatively affect job satisfaction levels. Concerns have also been raised that specialisation can lead judicial officers to become fixed in their viewpoints (Sage, Wright and Morris 2002).

It has been noted that despite the increasing popularity of judicial specialisation and specialist courts across the common law world, there have been few assessments that weigh up the benefits and costs of specialisation (Baum 2009).

The Law Council of Australia’s submission to this inquiry indicates, in general terms, that specialist courts have had a positive impact on the efficiency of dispute resolution:

The Law Council is advised that specialist courts are effective and efficient due to the capacity to specialise and appoint judges or members with extensive practising experience in the relevant areas of law. (sub. 96, p. 82)

However, whether the benefits of specialisation outweigh the costs in a particular context will depend on a wide range of factors. These include:

- how the specialisation is structured (ie. in stand-alone court or embedded in an existing court)
- the rigidity and formality of the specialisation structure (whether it is administrative or legislatively imposed)
- the nature of subject matter in question
- the size of the court
- the volume of matters it deals with
- whether the specialisation is full or part-time, short-term or permanent
- how clearly the standards or requirements for skills and expertise for particular types of work are defined.

For this reason, no conclusion on the costs and benefits of specialisation can be reached in the abstract. This is reflected in the discussion below in respect of two forms of specialisation raised in submissions — use of specialist court lists and specialisation in environmental matters.

Specialist court lists

Although many courts are increasingly utilising specialist lists, often staffed by panels of judicial officers with relevant expertise, there is little empirical research on the impacts of this form of specialisation.

In its submission to this inquiry, the Law Council of Australia was supportive of existing specialist court lists, noting:

Specialisation within courts is common. For example, most supreme courts have separate lists, commercial lists and property lists. Equity courts and other lists have been established in most jurisdictions to enable judicial specialisation, which in turn enables the Court to deal with complex matters efficiently. (sub 96, p. 82)

This is consistent with the findings of research into the NSW court system in which solicitors interviewed expressed a desire for more judicial specialisation (Marfording and Eyland 2010).

A similar picture emerges from overseas experience. In the course of his costs review in England and Wales, Lord Jackson received the clear message from court

users and practitioners that specialisation by judges was welcomed and leads to savings of cost. He recommended that, as far as possible, cases should be assigned to judges who specialise in that type of case for both case management purposes and for hearing (Jackson 2009a). There is also OECD data which suggests that specialisation in commercial matters is associated with shorter trial length (OECD 2013).

However, as noted above, while specialisation can promote efficiency through greater expertise, if too rigid, it can potentially result in inefficiencies if it means that a matter in a high volume court has to wait for a judicial officer who has expertise in a particular subject matter to become available. Principles of fair work allocation and transparency also come into play.

Based on the submissions made to this inquiry, the Commission does not see a need for more legislatively prescribed specialisation within courts. However, the Commission sees merit in courts continuing to facilitate the allocation of cases to judicial officers with relevant expertise to the extent possible — while remaining sensitive to the need to balance the efficiencies to be gained from specialisation with the potential disadvantages.

The Commission notes that while not mutually dependant, greater specialisation can enhance the benefits brought about by docketing, such as savings in preparation time for judicial officers (chapter 11) (Taylor and Fitzpatrick 2012).

DRAFT RECOMMENDATION 17.3

Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.

Specialist environmental courts

Two submissions to this inquiry called for the creation of specialist environmental courts in those jurisdictions lacking such a court. It is suggested that these courts be modelled on the NSW Land and Environment Court.

The Australian Network of Environmental Defender's Offices (ANEDO) submitted that specialist environmental courts are 'particularly well-placed to manage the complexities of environmental litigation with maximum efficiency' (sub. 9, p. 17), with the expertise of the decision-maker being identified as an important factor. This proposition was supported by the Conservation Councils of Australia (sub. 124).

The NSW Land and Environment Court is a superior stand-alone court. South Australia and Queensland each have specialist environmental courts at the District Court level — the South Australian Environment, Resources and Development Court and the Queensland Planning and Environment Court. A separate Land Court also operates in Queensland that deals with certain environmental matters.

Victoria, Western Australia, Tasmania, the Northern Territory and the ACT do not have specialist environmental courts. However, tribunals are used to differing degrees. These include the Victorian Civil and Administrative Tribunal, the Western Australian State Administrative Tribunal, the Tasmanian Resource Management and Planning Appeal Tribunal, the NT Lands Planning and Mining Tribunal and the ACT Civil and Administrative Tribunal.

While the NSW Land and Environment Court is highly regarded, the Commission notes that moves to create stand-alone superior environmental courts in other jurisdictions would be a major structural change. The Commission further notes that whether specialisation in environmental matters takes the form of a specialist court or a specialist tribunal or list in a tribunal is not determinative of their effectiveness and accessibility:

... the status and authority of successful [environment courts and tribunals] located throughout the world does not necessarily correlate with the ECT [environment court or tribunal] being a court rather than a tribunal or a court at a higher level in the hierarchy of courts. Some of these successful fora have been established as a superior court of record whereas others have been established as inferior courts of record or tribunals with one or more environmental divisions or streams. (Preston 2013, p. 2)

The evidence available to the Commission leads it to a very similar view to that expressed above by Chief Justice Preston of the Land and Environment Court. Any move to establish more specialist environment courts and tribunals, or indeed to amalgamate existing ones into more general bodies, should only occur if there is a strong demonstration that benefits would exceed costs. The Commission therefore seeks additional information on this issue.

INFORMATION REQUEST 17.2

The Commission seeks feedback from stakeholders on the extent to which existing jurisdictional arrangements for planning and environment matters present problems for access to justice in those Australian jurisdictions lacking a specialist environment court, and cost effective options for improving current arrangements.

17.3 Court governance and administration arrangements

The OECD has identified the governance structure of courts as a key determinant of court performance, noting that an important dimension in this respect is the allocation of responsibilities over jurisdictional and managerial tasks. OECD research has found that systems in which the chief judge has broader managerial responsibilities — over areas such as the organisation and supervision of judges, the supervision and appointment of administrative staff, and the administration of the budget — also display shorter trial lengths (OECD 2013).

Courts in Australia operate under different court governance arrangements. New South Wales, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory follow the traditional ‘executive’ model. Under this model, the executive branch of government provides funding for the courts (and to a significant extent regulates the use of those funds), owns and manages the courts buildings and facilities and employs and supervises court administration staff (Sallman and Smith 2013).

In New South Wales, for example, the Courts and Tribunal Services Division of the Department of Attorney General and Justice administers the court system, employing registrars who manage the courts and tribunals, and a network of registry staff, reporting services, Sheriff’s Officers, library services and an alternative dispute resolution directorate.

In contrast, the federal courts are all responsible for their own administration and can allocate resources from within their own budgets.

South Australia utilises what has been termed the ‘judicial autonomous’ model in which a judicial council — consisting of the Chief Justice, the Chief Judge and the Chief Magistrate — and a separate Courts Administration Authority together provide administrative facilities and services to the South Australian courts.

Victoria has recently announced it is moving to a model similar to that operating in South Australia. It has introduced legislation to establish a new independent body, ‘Court Services Victoria’, to provide, or arrange for the provision of, the administrative facilities and services necessary for the performance of the judicial and administrative functions of the Victorian courts and the Victorian Civil and Administrative Tribunal (Court Services Victoria Bill 2013). Courts Services Victoria is to be governed by the Victorian heads of jurisdiction and will come into operation on 1 July 2014.

In introducing the legislation the Victorian Attorney-General commented:

[W]hile the Crown needs to provide the administrative support for the courts, it is bad in principle and bad in practice for that support to be provided via a government department. It is bad in principle, because it opens the potential for executive government to interfere in the operations of the courts, and bad in practice because it has meant that much of the operational functioning of the courts has been outside of the courts' control. Court administrations have, for example, been heavily dependent for facilities construction, IT and personnel services on other parts of the Department of Justice, parts which also have responsibilities for supporting diverse other functions of the Department. (Clark 2013, p. 230)

Problems with the Executive model

Each model of court administration presents its own governance challenges. However, there has been a long running debate as to whether there is a structural deficiency or 'fundamental flaw' in the organisational design of the executive model of court administration. Some argue that the executive model represents a significant obstacle to the strategic long-term planning of the courts' activities and is not optimal for judicial independence, efficiency and quality (Alford, Gustavson and Williams 2004; Barr et al. 2006). It has been suggested that both judicial independence and better management results are likely to be achieved by the judiciary having more rather than less involvement in court policy and administration (Church and Sallmann 1991).

Some of the shortcomings attributed to the executive model include:

- courts lack stable funding and discretion over expenditures, which create obstacles to strategic and long-term planning
- there is a lack of a single source of clear leadership and accountability
- court administrators often have divided loyalties to executive and judicial officers which can undermine the effectiveness of court administration
- there exists a likelihood that the courts' interests may become subsumed by the policy priorities of the government of the day (Barr et al. 2006).

The authors of a 2004 Australasian Institute of Judicial Administration (AIJA) report into court governance arrangements in Australia put it this way:

... the traditional model is clearly problematic in terms of the efficiency and effectiveness of the courts. It sets up a misalignment of authority and responsibility, in which those who have the core operational responsibility (judges) lack clear authority over the necessary resources to carry out that responsibility. (Alford, Gustavson and Williams 2004, p. 86)

In respect of lack of control over funding, the authors stated:

The net result is that the courts lack an adequate say at two stages of the budgetary process. Firstly, they have no direct input at the point where government as a whole determines the budget for each of its agencies and programs. And secondly, they lack authority over the management of finances within programs once they have been allocated, and indeed sometimes find out after the fact that monies have been reallocated without consultation. (Alford, Gustavson and Williams 2004, p. 86)

The authors recommended that the most suitable governance arrangements are ones in which, among other things:

- the authority of the Executive is confined to employing judges and providing a global budget for a specified set of outputs, while the judiciary has clear control over the remainder of the functions of court administration: staff, infrastructure, operations and outputs
- court staffing and infrastructure and some operations are controlled jointly by all of the courts in the smaller jurisdictions, and by some of the courts in the larger jurisdictions.

Where to from here?

While models of court administration have important implications for the efficient operation of courts, the issue was not raised in consultations or submissions to this inquiry. Further, while reports of various bodies identify a number of problems with the executive model which may lead to inefficiencies in the operation of courts, there does not appear to be empirical analysis which would allow conclusions to be drawn that one model of court administration makes for a more efficient and effective court system than another. In particular, it is not clear whether improvements in efficiency and effectiveness to be gained from aligning responsibility with authority, are greater than the obvious economies of scale to be achieved by executive government departments administering courts.

Much may depend on the degree of collaboration that exists between the judiciary and the relevant government department in those jurisdictions utilising the executive model, and the clarity of governance arrangements that exist with respect to court administration (Alford, Gustavson and Williams 2004, pp. 94–95). In 2005, the Auditor-General of the ACT recognised this in his findings in respect of ACT court administration, concluding:

- The current governance arrangements for the ACT Courts system indicate a lack of alignment between responsibilities and accountability.
- Clear accountability is difficult to achieve. The Courts Administrator has conflicting accountabilities to the Attorney-General, the Chief Executive of [the

Justice and Community Safety Directorate], the Chief Justice, and the Chief Magistrate. Some financial accountability issues are also unclear. For example, judicial officers effectively make some expenditure decisions, but legally they are a departmental decision

- There are opportunities to clarify accountability through a review of overall governance structures, and through better budgeting and reporting.
- Significant administrative efficiency can be achieved with greater cooperation between the judiciary and the Department in court management (ACT Auditor-General's Office 2005, pp. 3-4).

The authors of the 2004 AIJA study commented that on the need for change to court administration arrangements in Australia in this way:

Our interviews and other evidence made it clear to us that court administration across the jurisdictions, however governed, reaches a standard which the community regards as acceptable, often in the face of difficult constraints. But we also heard that these systems are not without their problems, and that in particular they cause frustration for those who have to work in and with them Good people can make bad structures work. But good people can work even better within good structures. It would be valuable to the community, for instance, if more or better-quality justice could be dispensed at the same cost to taxpayers, or if the currently high quality of justice could be maintained at less cost. If governance arrangements can contribute to these aims, then it is worth considering how they might be improved. (Alford, Gustavson and Williams 2004, p. 93)

INFORMATION REQUEST 17.3

The Commission seeks feedback from stakeholders on whether changes to current court administration arrangements are desirable to facilitate more efficient and effective court operations.

17.4 Is there a case for greater financial autonomy?

Currently, the Australian and state and territory governments are responsible for allocating funding to courts in their respective jurisdictions with their annual expenditure funded by budget appropriations out of consolidated revenue. Generally, the Attorney-General or Minister for Justice in the respective jurisdiction will prepare a budget proposal, with input from the judiciary. Any revenue from the collection of court fees is returned to consolidated revenue. As noted above, courts have differing levels of control over how this funding is spent due to different court governance arrangements.

Some stakeholders have criticised the existing arrangement of court fees being directed towards consolidated revenue. For example, the Law Council of Australia argued:

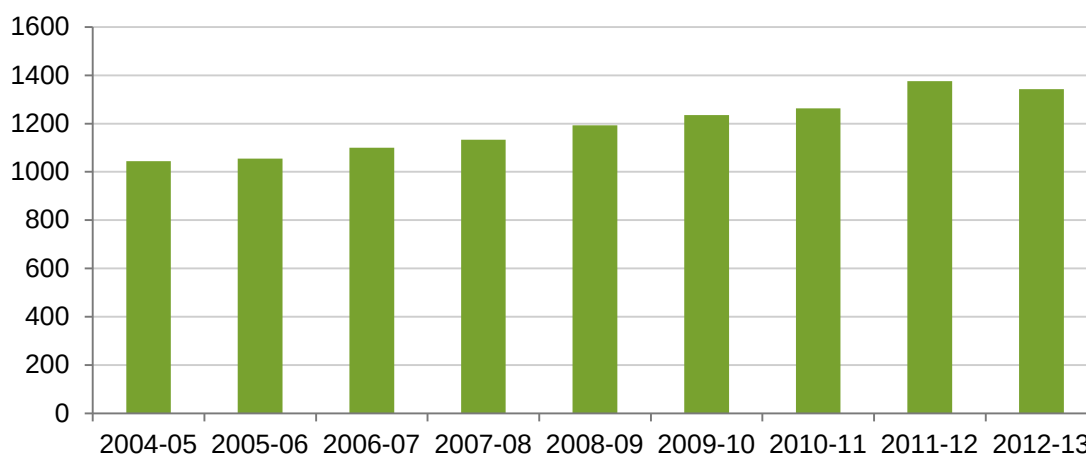
The Law Council strongly opposes the emerging practice of effectively taxing federal court and tribunal users to fund other essential government services. (Senate Legal and Constitutional Affairs Committee 2013)

This argument is rather disingenuous, given that cost recovery is currently well below 100 per cent in any Australian court. As such, any fee revenue returned to the government currently only serves to reduce the fiscal impact of providing court services, rather than cross-subsidising any other government activities.

However, the current funding system does have some limitations, such as exposing courts to cuts to their resources during periods of fiscal tightening. A cut to court funding is likely to decrease outlays while leaving fee revenue largely unchanged. While this may improve a government's fiscal position (noting that court expenditures are not a major budget item), the result can be an under-provision of court services, increased rationing of services and greater backlogs, ultimately reducing access to justice.

The available data suggest that these concerns have not yet been realised. Despite growing fiscal pressure, and contrary to popular belief, overall levels of civil court funding have remained relatively stable. At the same time, civil court lodgments have declined — from 794 190 in 2004-05 to 605 123 in 2012-13 — resulting in slight increases in real recurrent expenditure and judicial officers per civil lodgments (figure 17.1 and 17.2 respectively).

Figure 17.1 Real recurrent expenditure on civil courts
In 2012-13 dollars, per lodgment



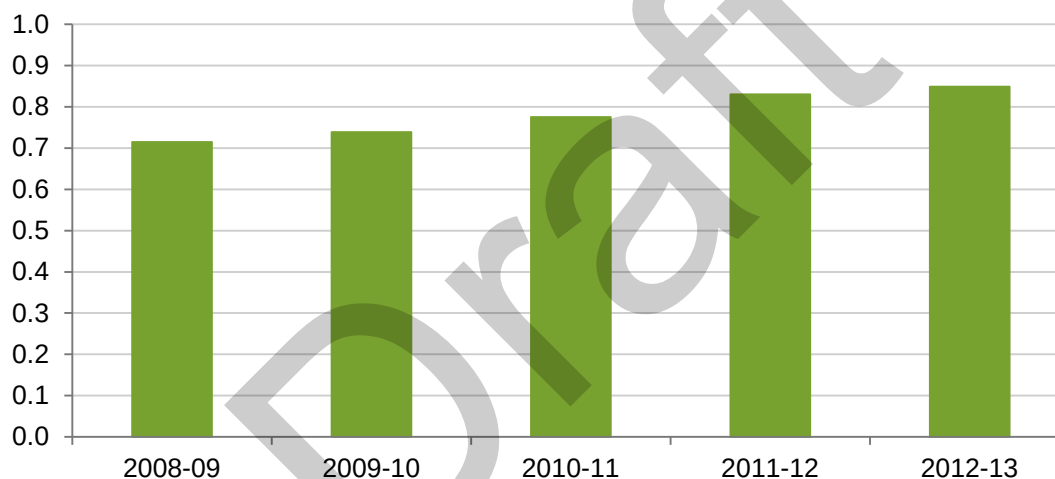
Data sources: SCRGSP (2009, 2014).

A number of variations to existing court funding arrangements have been raised previously. Chief Justice French has suggested a separate court Appropriation Act for the High Court of Australia, observing:

The virtue of a separate appropriation for judicial funding lies in its disconnection from funding for Executive agencies. In such a case, at least at a formal level, the finances of the court would not be affected by internal trade-offs between elements of the Executive arm of government. A separate appropriation can be effected consistently with Executive determination of the appropriate level of funding and ministerial accountability to the Parliament. The level of funding in such a case would also take account, as it properly should, of other important governmental priorities. (French 2009, p. 26)

Figure 17.2 Judicial officers per 1000 finalisations in civil courts

All civil courts, including family courts and the Federal Circuit Court



Data source: SCRGSP (2014).

Separating the funding for judicial salaries from the funding for court services more generally was recently recommended by the Skehill Review into small and medium agencies in the Attorney-General's portfolio (Department of Finance and Deregulation 2012). This recommendation applied to the Federal Court, Family Court and Federal Circuit Court.

The argument for a separation along these lines is that when judicial salaries and funding for court services are included in a single appropriation, reductions in this appropriation must be borne entirely by cuts to court services. This is due to the constitutional protections that apply to judicial salaries. The impact of this is most noticeable in the context of efficiency dividends — the base for the dividend is the entire appropriation amount, but reductions in expenditure must be absorbed by the non-judicial share of the court's budget, increasing the 'effective' efficiency

dividend. Use of separate appropriations for judicial salaries could improve the application of funding and efficiency measures to court services.

The Commission's recommendation to substantially increase cost recovery in the courts (chapter 16) opens up a further option whereby the courts are funded directly through fee revenue. Under such a system, fee revenue would be hypothecated to the courts and constitute the bulk of court funding. Fee amounts and the level of court expenditure would continue to be determined by the government, along with policies for waiver eligibility.

Under this model, revenue from fees would likely fall short of the required level of funding for court expenditure. This shortfall would be due to foregone revenue from fee waivers, as well as a lack of full cost recovery in some dispute types due to specific policy objectives, such as ensuring the welfare of children. Any shortfalls in fee revenue would then be met through contributions from consolidated revenue.

This approach is currently used for funding the courts through fee revenue in England and Wales, where 82 per cent of expenditure is funded through court fees. The remaining 18 per cent comprises fee income lost through waivers and those fees set below full cost pricing. This share is covered out of general revenue as part of the UK Ministry of Justice budget (HMCS 2011).

INFORMATION REQUEST 17.4

The Commission seeks input from stakeholders on the most appropriate mechanism for funding courts and allocating fee revenue. Options to consider may include:

- *maintaining existing funding and revenue arrangements*
- *reforms to appropriations, which may include use of separate appropriations for judicial salaries*
- *a hypothecated model where courts are funded through retained fee revenue (with fees set by the government) and payments received from government in lieu of fees that have been waived. Alternatively, such a model could allow courts to set their own fees and levels of expenditure.*

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

18 Private funding for litigation

Key points

- Lawyers and third party litigation funding companies can provide a range of billing agreements to clients in which the fee depends on the outcome of the legal action. This enables the client to pursue an action they otherwise would not have the financial capacity to pursue, thus increasing access to the civil justice system.
- In Australia, lawyers can offer 'conditional' billing where the fee depends on whether the legal action is successful. Typically, no fee is charged if the legal action is unsuccessful and an 'uplift' percentage is added to the lawyers' fees if successful.
- In some countries, lawyers can offer 'damages-based' billing where the lawyer receives an agreed share of the amount recovered by the client. This is prohibited in Australia because of concerns it creates adverse incentives for lawyers. The Commission recommends this prohibition be removed for most civil matters.
- Litigants can also engage a third party litigation funding company. The company funds the litigation in exchange for a share of the amount recovered, typically agrees to pay any adverse costs ordered and often manages disputes on behalf of clients.
- The Australian market for litigation funding is small but well established — having operated for two decades. Funded cases typically relate to insolvency, large commercial claims and class actions. The market has been facilitated by three features of the legal landscape which, in combination, are unique: prohibition on damages-based fees; the 'cost-shifting' rule; and the absence of after-the-event insurance.
- Both opponents and supporters of litigation funding agree that it increases the volume of litigation.
 - Supporters highlight the access to justice benefits of litigation funding, particularly in relation to class actions, where litigation funders can level the playing field for claimants who are in dispute with better resourced and more experienced defendants.
 - Opponents are concerned litigation funding generates frivolous litigation. Whilst acknowledging the potential for this, the Commission has not received evidence that would lead it to believe this is a current or likely future problem, or that current court procedures are not adequate to deal with problems if they emerge.
- The Commission recommends that to guard against risks to consumers, litigation funders should be licensed as providers of financial products and be subject to explicit ethical standards and be monitored by the Australian Securities and Investments Commission (for financial purposes) and the courts (for conduct).

Most individuals and businesses that encounter a legal problem will privately engage a lawyer and meet any legal fees with their own resources. However, legal fees can be large (easily running into the tens of thousands of dollars) and are often unexpected or escalate due to the actions of the opposing side, meaning costs may fall outside a client's available funds at any given time. This has given rise to alternative modes of billing that make meeting lawyers' fees more manageable for clients (chapter 6). For some forms of billing, discussed in this chapter, a fee (or a part of it) is only charged if the legal action is successful. These billing agreements can be made between clients and their lawyers or through the involvement of a third party litigation funding company. By withholding fees, the lawyer or third party effectively provides up front funding for the claim.

Private funding is commonly used in cases involving money claims, as the lawyer or litigation funder shares in the financial risk of litigation in exchange for a share of the payoff. It is especially suited to money claims where plaintiffs are only able to pay their legal fees by virtue of receiving their claim. Private funding can provide an important avenue to accessing justice for litigants who lack (liquid) financial resources but have meritorious claims.

Proponents of third party litigation funding also argue that it has brought expertise and 'commercial objectivity' to the management of cases, especially by coordinating class actions. Conversely, others are concerned that having a financial stake in a claim can create adverse incentives for lawyers and funders in their interaction with both the client (particularly because many plaintiffs have little experience of the legal system) and the court system.

This chapter describes funding agreements and the regulatory framework in which they operate; and examines whether regulation strikes the appropriate balance between protecting consumers and avoiding unnecessary barriers to access to justice.

18.1 Private funding by a lawyer

A lawyer can agree to only charge a client for (some or all) services if the legal action is successful. In a conditional agreement the fee is based on the lawyer's regular rate, and in a damages-based (or 'contingent') agreement the fee is based on the amount recovered. Conditional billing is permitted by statute for most civil matters in Australian jurisdictions, while damages-based billing is prohibited.

Conditional billing

In a conditional agreement some or all of the lawyer's service fees depend on whether the legal action results in a successful outcome. A 'no win no fee' agreement is a type of conditional fee where no service fees are charged unless the outcome is successful. The lawyer will often charge an 'uplift fee' — a percentage in addition to their regular rate (usually based on hours worked) to compensate for the risk of not being paid at all if the legal action is unsuccessful. The uplift fee can also be justified as a form of interest for deferred payment, because conditional fees can result in the lawyer not being paid for an extended period, sometimes several years (Qld LSC 2011).

The client is still responsible for paying disbursements, including fees for court filing, barristers and experts. In addition, under the cost-shifting rule, the client bears the risk of paying the other party's costs if the outcome is unsuccessful, and if successful will have some costs paid by the other party. Typically, around 60-75 per cent of the winning party's costs are paid by the losing party (chapter 13). Conditional billing is most commonly used in matters involving money claims, such as personal injury, workers compensation, will disputes and defamation. This is because lawyers tend to only offer these agreements when there is, or is likely to be, money available to pay legal costs after the matter is finalised (Qld LSC 2012).

How is conditional billing regulated in Australia?

Conditional billing is allowed under the legal profession acts of each Australian jurisdiction for most civil matters and is prohibited for criminal and family matters. There are also further restrictions in Western Australia, South Australia and Tasmania for matters related to children and migration. Conditional billing is considered appropriate for financial matters, but not matters related to the assertion of rights. This is because litigants do not make a financial recovery from cases relating to rights, and so may be unable to pay lawyer's fees even if they win. Moreover, in relation to family matters, under a conditional fee the lawyer has an incentive to prioritise winning over conciliation, which is undesirable for resolving the dispute, particularly where there must be some form of ongoing relationship (for example, involving joint custody of children).

For 'litigious matters' — those that are likely to involve proceedings in a court or tribunal — there is an upper limit on the uplift fee of 25 per cent over the regular legal costs payable (excluding disbursements).

Conditional billing is also subject to disclosure requirements in each jurisdiction, which are waived for 'sophisticated' clients (chapter 6), including informing the

client prior to agreement of: the practice's legal costs; the uplift fee or the basis for its calculation and an estimate; and the reason why the uplift fee is warranted. The *Legal Profession Uniform Law* ('uniform law'), which has passed the Victorian Parliament and New South Wales has agreed to adopt (chapter 7), removes the requirement to provide a reason why the uplift is warranted.

In New South Wales, law practices are allowed to enter conditional fee agreements but are prohibited from charging an uplift fee in relation to damages claims.⁵⁹ Several submissions commented that this unnecessarily disadvantages lawyers in New South Wales compared to other jurisdictions as they are not compensated for risk in damages claims (see, for example, submissions 34 and 59). The New South Wales rule in relation to damages claims will align with other jurisdictions once the Government implements the uniform law.

In addition to an upper limit on uplift fees, the acts in Victoria, Western Australia, Tasmania and the Australian Capital Territory require lawyers to be reasonably confident of a successful outcome in order to charge uplift fees (on top of normal fees in a conditional agreement):

The agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely. (for example *Legal Profession Act 2004* (Vic) s. 3.4.28.4(a))

While in South Australia the opposite condition has been introduced as part of recent amendments to legal profession regulation:

The agreement must not provide for the payment of an uplift fee unless the risk of the claim failing, and of the client having to meet his or her own costs, is significant. (*Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA) s. 5.26.4(a))

Since the uplift fee compensates lawyers for the risk they bear, the South Australian rule appears more appropriate as it only provides for uplift fees in cases where the risk of the lawyer not being paid is relatively high. The contrasting rule in other jurisdictions provides for an uplift fee where the risk of not being paid is relatively low. This is likely intended to encourage lawyers to offer conditional fees for cases with higher 'merit'; however, as discussed below, conditional billing provides this incentive without the need for uplift fees. More generally, the Commission is of the view that restrictions on charging uplift fees based on lawyer beliefs about the likelihood of success are not appropriate, because regulation of judgments involved in lawyer risk assessments is difficult to enforce in practice.

⁵⁹ *Legal Profession Act 2004* (NSW) s. 324(1).

How extensively is it used?

Information on the use and quantum of conditional billing is very limited and lacks the detail required to inform policy judgments. Lawyers' fees, together with the uplift percentage, can substantially reduce the amount of the award the litigant ultimately receives. As the Centre for Innovative Justice noted:

Sometimes this means that even successful disputants are left with little but vindication once they have settled their legal bills (CIJ 2013, p. 13)

The Queensland Legal Services Commission's *Billing Practices Checks* (2013b, 2013c) provide some information on the extent of conditional billing in Queensland.⁶⁰ Respondents were asked whether they 'always', 'sometimes' or 'never' used various billing practices. The responses revealed that:

- Smaller firms rarely used conditional fees — 80 per cent reported never billing on a 'no win no fee' basis, while 60 per cent reported never using other conditional fee arrangements.
- Larger firms were more likely to use conditional fees — with 73 per cent sometimes charging on a 'no win no fee' basis and 55 per cent sometimes using other conditional fee arrangements.

This disparity is unsurprising since smaller firms are unlikely to have the capital to pay for litigation up front and have less capacity to bear risk.

On the size of uplift fees, while information is limited, there are some sources that can provide an insight. One such source is Funds in Court, an office of the Supreme Court of Victoria which reviews solicitor-client fee agreements as part of its role administering funds held in Court on behalf of people under a legal disability.⁶¹ Funds in Court has found that in conditional fee agreements that include an uplift fee, lawyers almost invariably charge at, rather than below, the full 25 per cent (Funds in Court, pers. comm., March 2014).

⁶⁰ *Billing Practices Check for Smaller Law Firms 2013*: 322 responses to a survey sent to 1600 managing partners and directors of law firms with six or fewer practising certificate holders and to principals of sole practices. *Billing Practices Check for Medium to Large Law Firms 2013*: 70 responses to a survey sent to 180 managing partners and directors of law firms with seven or more practising certificate holders.

⁶¹ Meaning they are under 18 years of age or are unable to manage their own affairs by reason of an intellectual or physical disability.

Arguments for and against conditional billing

Following a comprehensive review in the UK, Lord Justice Jackson concluded in favour of conditional fee agreements:

In my view, there can be no objection in principle to lawyers agreeing to forego or reduce their fees if a case is lost. Nor can there be any objection to clients paying something extra in successful cases as compensation for the risks undertaken by their lawyers, provided that the extra payment is reasonable. (Jackson 2009a)

Conditional billing undoubtedly creates opportunities for litigants to pursue cases they otherwise could not, but some concerns remain. The first is that conditional fees can lead litigants to pursue ‘weak’ or unmeritorious cases, because they do not have to pay lawyers’ fees if they lose. However, lawyers are only paid for successful outcomes, which creates a strong incentive for them to reject cases that are unlikely to be successful (Cabrillo and Fitzpatrick 2008). As explained by Slater & Gordon Lawyers:

... the no win-no fee model also allows lawyers to act as an early gatekeeper for the judicial system, ensuring that the cases brought forward are those that have reasonable prospects of success. (sub. 56, p. 8)

Also, clients are discouraged from pursuing unmeritorious claims because they still pay disbursements and face the threat of paying the other side’s legal fees if they are unsuccessful. To be a fully effective deterrent, however, litigants need to be well informed about disbursements and both the likelihood and value of an adverse costs order.

The second concern about conditional billing is that having a financial interest in the outcome can create a conflict of interest for lawyers. The Consumer Action Law Centre provided an example:

... it might be in a lawyers’ interest to accept a “low-ball” settlement offer so they get their fee even where the client wants to reject the settlement and have a matter proceed to determination, where there remains a risk of losing (and where the lawyer might not be paid at all). (sub. 49, p. 27)

The *Australian Solicitors Conduct Rules*, guidelines to which lawyers are expected to adhere, provide a source of consumer assurance against potential conflicts, including the requirement that:

A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor’s fair remuneration for legal services provided to the client. (Law Council of Australia 2011a, p. 10)

In practice such protections are difficult to enforce because of the information imbalance between consumers and lawyers. Consumers have relatively little

capacity to recognise any conflict or wrongdoing on the part of the lawyer. Professor Prue Vines outlined the difficulties faced by clients:

... although the costs agreements are given to clients it appears that they often do not understand them. They often do not understand what ‘disbursements’ means, nor do they understand how much of a compensation payment will disappear – this seems to commonly be between 20-40% of a compensation award. Further, as approximately 90% of compensation payments are settlements, clients may have very little understanding of how the cost agreement fits in with the amount they ultimately receive (sub. 17, p. 2).

The disclosure rules described above, and in chapter 6, are intended to counteract this imbalance.

Damages-based billing

Damages-based billing is prohibited in all Australian jurisdictions. In a damages-based agreement the lawyer receives an agreed percentage of the amount recovered for the client and is not paid if the legal action is unsuccessful. This is commonly termed a ‘contingent’ agreement, including in Australian legislation. However, conditional and contingent fees are sometimes confused in policy discussion due to jurisdictional differences and the fact that, under the broad definition of the word, they are both ‘contingent’ on the outcome of legal action (Jackson 2009a). For clarity, the Commission will employ the term ‘damages-based’.

Overseas, regulation of damages-based billing varies. It is prohibited in several countries including Belgium, Denmark and Singapore and permitted in others, including Finland, Italy, Japan, the United States, Canada and more recently the United Kingdom (Jackson 2009a). Box 18.1 describes regulatory arrangements in a selection of countries where damages-based billing is permitted.

Arguments for and against damages-based fees

There are a number of objections to permitting damages-based fees. Some are similar to those that arise about conditional fees — for example that it will increase ‘weak’ or unmeritorious litigation. Many commentators have noted that Australia’s cost-shifting rule should act as an effective deterrent to frivolous litigation, even if damages-based billing were introduced. Although, for cost-shifting to be an effective deterrent, litigants need to be well informed. Maurice Blackburn Lawyers submitted that:

Jurisdictions such as Ontario in Canada and more recently the United Kingdom demonstrate that the introduction of contingency fee arrangements together with the retention of a loser pays costs rule will see an increase in access to justice without an explosion of frivolous claims. The US, on the other hand, does not have a loser pays costs rule, has a more activist judicial culture and a greater willingness to award exemplary (as opposed to compensatory) damages; all of which provide considerable incentives to potential litigants to ‘chance their arm’. (sub. 59, p. 13)

Box 18.1 Examples of damages-based billing rules where it is permitted

United States

Damages-based billing is in common use, usually in personal injury cases, breach of contract claims and class actions. It is prohibited for divorce and criminal matters. Regulation varies between jurisdictions and includes capped percentages, sliding percentage scales and requiring court review of reasonableness. For example:

- In Oklahoma percentages are limited to 50 per cent of the amount recovered.
- In California, for medical liability cases, percentage caps are on a sliding scale: 40 per cent of the first US\$50 000 recovered, 33.3 per cent of the next US\$50 000, 25 per cent of the next US\$500 000, and 15 per cent of any amount exceeding US\$600 000.

Canada

All provinces in Canada allow damages-based billing, with Ontario, the most populous jurisdiction, the last to permit damages-based fees in 2004. Regulation varies by province, for example, British Columbia has a 40 per cent limit on personal injury cases while other provinces require fees to be ‘reasonable’ (and subject to court approval to be enforceable). In Ontario, in the event of success, the lawyer’s fee may either be a multiple of the ordinary fee or a percentage of the amount recovered — meaning either an ‘uplift’ premium, as in Australia, or a damages based fee.

United Kingdom

In the UK, damages-based billing was introduced in 2010, following consultation by the Ministry of Justice, for matters before the employment tribunal. It was expanded to all civil litigation in April 2013 on recommendation from the Jackson review. The fee is capped at 25 per cent of damages in personal injury cases, 35 per cent of damages on employment tribunal cases and 50 per cent of damages in all other cases. The Commission understands that take up of damages-based billing by law practices has been very limited to date.

Sources: Jackson (2009b); Antonow (2010); UK Ministry of Justice (2013).

Moreover, lawyers have a financial incentive to reject cases with low prospects of winning as they are not paid in the event of loss. The Australian Lawyers Alliance explained:

Each State and territory has legislation governing the conduct of the legal profession. Malicious prosecution of claims (if this even occurred) is controllable under the professional regulations ... We are unaware of any legal practice which would seek to engage in “wild” litigation when there is no merit in the claim, as the legal practice will be bearing the cost of the litigation and face little to no prospects of success. It is economic suicide to contemplate such action. It simply does not and would not occur. (sub. 107, p. 20)

Some argue that damages-based billing has more potential for conflicts of interest than conditional billing. This arises from concern about clients paying lawyers with their damages which, in areas such as personal injury, are intended to cover the costs of future care. For example, Allens submitted that by contrast to conditional fees:

... contingency fees are charged as a percentage of any award or settlement, effectively giving the lawyer a purchased share in the litigation. It is this direct financial interest in the litigation, and not the fact that the fee is charged on a 'no win, no fee' basis, which gives rise to conflicts of interest. (sub. 111, p. 17)

However, the argument that linking fees to damages creates a more pronounced conflict for lawyers is based on a false delineation of the funds used to pay for legal action into ‘damages’ funds and other funds held by the litigant. Legal fees under any billing agreement reduce the litigant’s overall financial gain from legal action and can be measured as a proportion of the amount recovered. Damages-based agreements simply make this proportion explicit at the outset of the agreement. The Commission remains unconvinced that, compared to conditional billing, this is a distinguishing feature of damages-based billing that leads to worse incentives for lawyers.

Moreover, others contend that damages-based billing aligns the incentives of the lawyer with their client more effectively than conditional billing. The argument is that the fee under conditional billing is typically time-based and so increases with hours worked. As a result, the lawyer has no reason to limit their hours and, by extension, the client’s costs under conditional billing. Under damages-based billing the lawyer’s fee is result-based and does not increase with the hours worked. This creates an incentive for the lawyer to keep costs low in order to increase their net payoff from the case. Or put another way:

Contingency fees [damages-based] align the interests of the lawyers with those of their clients. The incentive for both parties is for the largest payout in the shortest possible time. Time billed becomes irrelevant, while inefficiencies and delay become the enemy of the lawyer as well as the client, whereas in traditional litigation, lawyers who are paid by the hour benefit from the convoluted road taken to resolve disputes. (Maurice Blackburn, sub. 59, p. 13)

Emons and Garoupa (2006) found the incentives of lawyers are aligned with clients more efficiently under damages-based billing, compared to conditional billing, because lawyers adjust their effort to the amount at stake.

As they are result-based, damages-based fees also offer the benefit of being a ‘proportional’ payment for the client, unlike conditional billing where the outcome may be successful but with only a nominal amount recovered which could leave the client without sufficient funds to pay the lawyer’s full fee and uplift. Some evidence of this can be found in the United Kingdom’s Jackson review which published data for clinical negligence cases closed or settled in 2008-09. It showed that, in many cases funded through conditional billing, the claimant costs were higher than the damages received — in a subset of these cases claimant costs were as high as 400-700 per cent of the damages (appendix 2, Jackson (2009b)). In addition, given that complaints about the complexity of billing and uncertainty of final costs are common, damages-based billing is arguably a simpler fee structure for clients to understand provided that, as with conditional fees, clients understand their obligations in relation to disbursements and potential adverse cost orders.

Finally, there is some concern that if conditional and damages-based fees were to coexist, lawyers would offer conditional agreements for low value claims and damages-based agreements for higher value claims (where they may receive a larger sum without a corresponding increase in effort). Lawyers may have the ability to discriminate between methods due to consumers’ imperfect information (chapter 6). A way to deter this is to impose percentage caps on a sliding scale as in California (box 18.1) or as recommended by the Taylor review in Scotland (2013). A sliding scale tapers the growth of the lawyer’s portion of the settlement. While the lawyer’s payment still increases, it does so at a progressively slower rate as certain thresholds are passed. This ensures that lawyers’ fees for large claims are not out of proportion to their costs.

The way forward for private funding by lawyers in Australia

There is little controversy about the operation of conditional billing in Australia — stakeholders generally agree that it promotes access to justice. Conditional billing is also subject to regulatory requirements including: its use being limited to particular civil matters; additional disclosure requirements and; for litigious matters, a 25 per cent limit on the uplift fee. These regulations seem to provide an appropriate framework for consumer protection.

The 25 per cent limit on uplift fees provides a threshold for the amount of risk lawyers accept, prevents them from inflating fees to unreasonable levels, and

ensures that cases with limited prospects are filtered out. This is because the level of risk a lawyer will tolerate increases with the size of the uplift, as this increases their expected return. With an uplift of 25 per cent, lawyers should be willing to accept cases that have an 80 per cent chance of success. This is a relatively high success threshold compared to the 100 per cent limit in the UK, under which lawyers should be willing to accept cases that have a 50 per cent chance of success. Since the key concern about conditional billing is that it will promote unmeritorious claims, limiting the risk lawyers are willing to tolerate should ensure that only worthwhile cases are accepted.

The successful operation of conditional billing raises the question of whether damages-based billing could provide similar benefits if it were introduced in Australian jurisdictions.

Some submissions recommended a lift on the prohibition on damages-based billing, including Maurice Blackburn (sub. 59) and the Australian Lawyers Alliance (sub. 107). Others recognised the access to justice benefits but were more cautious, noting the importance of consumer protection. Legal Aid NSW stated that:

Subject to there being adequate consumer safeguards, Legal Aid NSW has no objection to relaxing the restrictions on private practitioners charging contingency fees. Use of contingency fees would provide a market mechanism to enable private practitioners to undertake matters that they are currently unwilling to take on a conditional fee basis, because the risk of conducting complex litigation is not adequately rewarded by the chance to recover their ordinary fees. Contingency fees being a percentage of the damages recovered will make it worth taking the risk in some cases. (sub. 68, p. 105)

The Consumer Action Law Centre also considered that consumer protection could be achieved through measures other than prohibition:

We would encourage the Commission and policy makers to consider how best these conflicts can be managed, rather than limit access to these forms of litigation funding (which can limit access to justice). (sub. 49, p. 27)

The Commission considers that the restriction on damages-based billing should be removed and is further considering the appropriate restrictions that will ensure adequate consumer protection.

DRAFT RECOMMENDATION 18.1

Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.

- ***The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.***

INFORMATION REQUEST 18.1

The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:

- Is the 25 per cent limit on uplift fees for conditional billing appropriate? What are the benefits and costs of changing this limit?*
- Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration be given to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?*

18.2 Private funding by a third party

A litigation funding company is a private third party, not related to a dispute, that provides up front funding for plaintiffs in exchange for a share of the amount recovered. The funder is not paid if the case is unsuccessful. Litigation funding companies are not prohibited from charging damages-based fees.

Litigation funders provide the financial resources to bring a case — often including agreeing to pay any adverse costs ordered by the court, which can be a strong deterrent for resource constrained plaintiffs, particularly when the defendant is well resourced (chapter 13). In addition to financial support, the litigation funder often brings experience to the case by managing the dispute on behalf of the plaintiff, for example by instructing the lawyer on day-to-day 'machinery' decisions. The litigation funder also assists in developing the case by collecting information to assess the viability of the claim and, in the case of class actions, identifying, contacting and organising members of the class.

The Standing Committee of Attorneys-General (SCAG) indicated that the share of payouts from successful cases that are paid to litigation funders is typically between one-third and two-thirds of the proceeds, though in some insolvency cases it has been as high as 75 per cent of the award (SCAG 2006). More recently, Barker (2011) observed commissions ranging between 20 and 45 per cent.

Litigation funders are sometimes framed as providing a similar service for plaintiffs to that provided by insurers for defendants. However, Grave et al. (2012) argued that the analogy should be drawn with caution because funders and insurers are regulated differently, set different contractual terms and have differing degrees of financial interest in, and control of, the litigation.

The market for litigation funding in Australia

The development of the Australian litigation funding market has been aided through a unique combination of circumstances — lawyers are prohibited from charging damages-based fees; the cost-shifting rule (chapter 13); and the lack of after-the-event insurance.⁶² Put simply, ‘commercial funders have filled the gap that lawyers were not permitted to enter’ (Hodges et al. 2012, p. 49).

The rapid growth of the market has also been facilitated through endorsements of individual funding agreements by courts. The market has operated for two decades, initially funding only insolvency cases and gradually expanding into funding large commercial claims and class action claims. Australia pioneered litigation funding for non-insolvency matters (Attrill 2012). Nevertheless, litigation funding is not commonplace — it constitutes less than 0.1 per cent of the overall civil litigation market by volume (Barker 2011).

A small number of well established firms operate in the local market. The two largest are listed on the Australian Securities Exchange: Bentham IMF Ltd and Hillcrest Litigation Services Limited. Other funders in the market include LCM Litigation Fund Pty Ltd, Litigation Lending Services Pty Ltd and Claims Funding Australia Pty Ltd. Several Australian funders have invested in litigation overseas, and international litigation funders have also entered the Australian market in recent years including Comprehensive Legal Funding LLC, International Litigation Funding Partners Pte Ltd and Quantum Litigation funding Pty Ltd (Grave et al. 2012).

Bentham IMF is the largest litigation funder in Australia and its track record provides an example of the activities of funders. It began by funding insolvency cases before broadening its reach to commercial litigation and class actions. As at June 2013, in the 12 years since its listing (in October 2001) it has funded 149 cases. It reported that it had:

- lost 5 cases (3 per cent)
- withdrawn from 35 cases (23 per cent)
- settled 95 cases (64 per cent)
- won 14 cases (9 per cent).

The total income generated from these completed cases was \$1.278 billion, of which two thirds went to the claimants and one third to Bentham IMF. Kalajdzic et

⁶² After-the-event insurance is purchased after the legal claim arises (for example after an accident), usually to insure against having to pay the costs of the other party in the event the case is lost (chapter 19).

al. (2013) observed that its payouts for lost cases have been modest while recovered amounts in successful cases have been substantial.

Hillcrest Litigation Services Limited (HLS) also reports annually on its funding activities. According to its annual reports for the last five financial years (see for example HLS (2011)), it has resolved a total of 15 cases. Of these: one was lost; HLS withdrew from three; ten were settled; and one was won. HLS does not include the amount recovered by claimants in its reporting, though it described fees as falling in a typical range of 25-45 per cent of the amount recovered (HLS 2011).

While the funders' fees may seem like a large proportion of the amount recovered some, such as Attrill (2012), contend that given the costs, risks, time to resolve and the potential for adverse costs orders, the returns to funders do not appear to be excessively high. As opposed to a lawyer in a conditional or damages-based fee agreement, the funder often covers all of the costs of litigation (including disbursements) and provides indemnity for adverse costs.

Is litigation funding beneficial to the justice system?

Both opponents and supporters of litigation funding agree that it increases the volume of litigation — supporters highlight that it promotes access to justice while opponents are concerned it generates frivolous litigation.

Opponents are concerned about the motives of funders

Whilst acknowledging the potential for frivolous litigation highlighted by opponents, the Commission has not received evidence that would lead it to believe this is a current or likely future problem. Litigation funders, similar to lawyers using conditional and damages-based billing, perform a gatekeeping function by assessing the viability of claims. This means litigation funding is restricted to cases where the return is expected to be relatively high, and the risk is low:

The legal experience, expertise and risk aversion of commercial litigation funders in Australia has served to prevent unmeritorious claims rather than facilitate them. Commercial funders usually assume the risk of paying adverse costs if the case is not successful so that their threshold requirement of merit is very high. (Kalajdzic et al. 2013, p. 142)

For example, Bentham IMF noted that given its stringent criteria, less than 5 per cent of the applications it receives are funded (sub. 103, p. 3). In addition to gatekeeping by funders, judicial supervision provides a further barrier to frivolous litigation.

Opponents raise other concerns about the possible extent of influence that litigation funders have on cases, noting that they may take advantage of plaintiffs for their own gain. The Australian Institute of Company Directors (AICD) argued that class action litigation can impose costs on the public in the form of higher consumer prices, the diminution of share value, and decreased tax revenue (as corporate profits decline):

The operation of litigation funders in the Australian market place has allowed third parties, with no interest in the litigation (other than profit), to be involved in and to exercise a substantial degree of control over, large scale litigation against corporations. (AICD 2012, p. 1)

In response to a Victorian Law Reform Commission (VLRC) consultation paper the Victorian Bar expressed similar unease about the influence of litigation funders:

... the profit motive is naturally very powerful, and can be overbearing. The object of the administration of justice is the impartial adjudication of civil disputes according to law, and the giving of compensation to make good the loss suffered by a wrongdoing. That is the *compensatory* ideal. The restlessness in the mentality of most barristers is that one way or another the funder will ‘run the show’ because its financial interests are acutely at stake. (Victorian Bar 2006, pp. 87 – 88)

Undoubtedly, some of the disquiet about litigation funding relates to the fact that it tips the balance of power away from corporate defendants towards plaintiffs. However, given that plaintiffs face several barriers to pursuing claims, and that defendants are often in a better position to bear legal expenses, the Commission is of the view that litigation funding can play an important role in promoting corporate accountability. By providing funding for plaintiffs, funders prevent ‘deep pockets alone from making companies immune to legal pressure on wrongdoing’ (Rich Krasnoff, sub. 100, p. 1). Litigation funders are effective in this role, specifically because their involvement is based on financial interest:

Australian Securities and Investments Commission chairman Greg Medcraft said class action litigation was “very good at equalling up the tables” and was “a good market-driven solution”. “I think they democratise access to the law,” he told the Financial Review Legal Conference in Sydney on March 30. “If done responsibly, I think they are a good thing.” Australian Competition and Consumer Commission chairman Rod Sims said ... “From our point of view that is terrific, because if companies are trying to enforce the act that means less that we have to do,” he said. “If companies feel aggrieved, the more they take the action themselves rather than through us, the better.” (AFR 2012)

However, there is also concern that, if unmonitored, funders or law firms could commit ethical violations which eliminate the ‘equalizing effect’ between corporate firms and plaintiffs that litigation funding is intended to create (Kalajdzic et al. 2013).

Many of the concerns about litigation funding would be alleviated by appropriate regulation (discussed below). Opponents do not tend to advocate a prohibition on litigation funding but rather promote regulation as a remedy for their concerns. The AICD supports direct regulation of funders through licensing requirements (sub. 40). The Victorian Bar (2006) considered that it should be for the courts to decide on whether a litigant is abusing processes, and that the role of the legislature ought to be confined to the consumer relationship between litigation funder and plaintiff.

Proponents highlight the access to justice benefits

Litigation funding can promote access to justice because funders provide finance for the prosecution of genuine claims by parties who would otherwise lack the resources to do so. This is particularly the case in complex matters where the initial costs of investigation and collecting expert evidence may be prohibitive. Litigation funding may help level the playing field by assisting plaintiffs to take action against wealthy or insured defendants. There may also be an advantage for the opposing party as the litigation funder has better resources to meet an adverse costs order should the case it is funding fail (SCAG 2006).

Just as important as financial support, litigation funders benefit their clients because of their expertise and experience. Funders can supervise the provision of legal services and ensure that costs are minimised, keeping the lawyer accountable on behalf of the client. The litigation funder's supervision is more effective because, unlike many clients, they have extensive commercial and legal experience.

Litigation funders also perform a key coordination role in class actions where it would otherwise be unfeasible for a group of plaintiffs to organise themselves. Moreover, they remove the liability for adverse costs, which is a particularly pronounced disincentive in bringing class actions because non-representative group members are statutorily immune from costs ordered against the representative party (Grave et al. 2012). This means the representative party is normally liable for all adverse costs ordered, but is only entitled to a share of the payout.

The first involvement by a third party funder in a class action in Australia occurred in 2001 when Insolvency Litigation Fund Pty Ltd (a subsidiary of Bentham IMF) funded an industrial dispute relating to the termination of waterfront worker contracts.⁶³ There were a further 17 third party funded class actions in subsequent years (Morabito 2010).

⁶³ *Batten v CTMS Ltd* [1999] 1576 (Federal Court of Australia).

Though there have been few funded class actions, they can have a wide impact. For example, in a class action being funded by Bentham IMF currently before the Federal Court, 43 500 group members are seeking \$57 million in damages from ANZ bank.⁶⁴ This translates to an average claim of only \$1300 per group member, highlighting the scale economies that can be achieved through the involvement of a litigation funder. The benefits of this class action will also likely spread to other consumers in the event that ANZ and other banks change their policies in response to the federal court ruling.

While litigation funding brings access to justice benefits in class actions, there has been some criticism of funders favouring ‘opt in’ groups — where group members need to have signed a funding agreement or a retainer with the law firm. This is opposed to ‘opt out’ groups where a group member is anyone affected by the action. Funders understandably prefer excluding potential group members who have not signed a funding agreement up front, in order to prevent ‘free riders’ benefiting from the legal action without contributing to its cost.

To get around this problem, a novel approach was recently adopted in a class action brought by shareholders against the National Australia Bank.⁶⁵ Shareholders were represented by Maurice Blackburn and funded by Singaporean company International Litigation Funding Partners Pte Ltd (ILFP). For the first time, the court gave notice to potential group members that did not join the action up front, inviting them to register to partake in settlement. The notice stated that if the action resulted in a successful outcome and the group member received compensation they were required to pay a commission of 30-40% (depending on the number of shares they held) of their compensation to the funder, and a share of the legal costs and expenses incurred by the representative plaintiffs in conducting the proceedings. The notice also provided that:

In no circumstances will group members be required to pay more in legal costs and commissions than they receive in compensation. (Supreme Court Of Victoria 2012, p. 4)

This demonstrates that court processes are well equipped to overcome concerns relating to third party funding of class actions. Overall, class actions promote access to justice for inexperienced claimants — who, given the scale of costs and benefits, might not have taken action on an individual basis — and the Commission supports the role of litigation funders in facilitating them.

⁶⁴ *Paciocco v Australia and New Zealand Banking Group Limited* [2014] 35 (Federal Court of Australia).

⁶⁵ *Pathway Investments Pty Ltd v National Australia Bank Limited* [2012] 72 (Supreme Court of Victoria).

Is there scope for litigation funding to be used more widely?

Fundamentally, as with conditional and damages-based billing, litigation funders are involved in monetary claims. Because litigation funders choose cases based on commercial viability, their involvement lends itself to cases with large payouts and relatively low risk such as insolvency, commercial litigation with large claims or class actions. This means that litigation funding is unlikely to increase access to justice for litigants with human rights, civil rights or other public law based claims. It is also difficult to fund class actions involving product liability and personal injury claims due to the need to prove individual causation (Kalajdzic et al. 2013). The Law Council noted that most personal injury and workers compensation claims are funded on a no win no fee basis by lawyers rather than by third parties (Grave et al. 2012). Some litigation funders also have self-imposed restrictions on the types of cases they accept, which satisfy their preference for low risk and high return.

While providing improved access to justice for some people, at present the benefits of litigation funding are limited to litigants in very specific circumstances. Although, funders are likely to accept more risk and lower returns if competition in the market increases.

How is litigation funding regulated?

While Australian consumer protection laws apply broadly to litigation funders, there has been little government involvement directly in the market. Indeed, government involvement through specific legislation has been limited to responses to individual court decisions. To date regulation of litigation funding has largely been through the decisions of courts rather than the legislature (box 18.2).

Historically, improperly encouraging litigation ('maintenance') and receiving a share of gains in return for maintaining a case ('champerty') were torts and crimes in all Australian jurisdictions. These laws stemmed from concern that the judicial system should not be the site of speculative business ventures. But the primary aim was to prevent abuses of court process through vexatious litigation, elevated damages, suppressed evidence, and bribed or intimidated witnesses (Barker 2011).

Two decades ago, the NSW Law Reform Commission (1994) had already noted that the public policy concerns relating to maintenance and champerty were giving way to recognition of the access to justice benefits of legal and financial assistance to litigation. In 1995, a statutory exception to the rule against champerty developed, which meant insolvency practitioners were able to contract for the funding of cases if these were characterised as company property (SCAG 2006). Third party

litigation funding in Australia arose under this statutory exception and subsequently diversified into non-insolvency plaintiff cases.

Box 18.2 Key decisions on litigation funding by Australian courts

***Campbells Cash and Carry v Fostif (Fostif)* — High Court 2006**

A challenge on appeal by the defendant (Campbells) to the plaintiff's (Fostif) third party funding agreement based on the common law grounds of maintenance and champerty. The funding agreement was upheld by the High Court on the basis that it provided social utility and could foster the aims of class action legislation. The High Court decision also expressed confidence that existing processes in courts would be sufficient to deal with a funder that manipulated due process or breached professional duties.

***Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (Multiplex)* — Federal Court 2009**

The Full Federal Court found that the funding agreement for that class action constituted a 'managed investment scheme' under the Corporations Act (s9) that needed to be registered.

***Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd (Jeffrey)* — High Court 2009**

In 2000, Richard Constructions Pty Ltd (plaintiff) commenced proceedings against Jeffrey & Katauskas Pty Ltd (defendant). The plaintiff entered a funding agreement with SST Consulting Pty Ltd which did not include indemnity for an adverse costs order. The plaintiff's action was dismissed and the plaintiff was ordered to pay the defendant's costs but was unable to pay. The defendant sought an order of costs from the trial judge against SST Consulting, alleging the funding agreement constituted an abuse of process. The High Court dismissed the appeal, by majority, holding that the funding agreement did not constitute an abuse of process. This ruling clarified that litigation funders are not required to provide indemnity for adverse costs (though they tend to do so in practice).

***International Litigation Partners Pte Ltd v Chameleon Mining (Chameleon)* — NSW Court of Appeal 2011**

The NSW Court of Appeal held that the funding agreement was a 'financial product' within the meaning of the Corporations Act and that the funder required an Australian financial services licence.

Sources: Hodges et. al. (2012); Grave et. al. (2012); NSW OLSC (2012b).

The majority of Australian jurisdictions have abolished the torts and crimes of maintenance and champerty and it appears likely they are obsolete as crimes under Australian common law (Grave et al. 2012). SCAG (2006) noted that in over 20 court challenges to litigation funding agreements since 1998, none had been struck down — although, in some cases the funder and lawyer were ordered to alter contracts to provide sufficient information to facilitate informed consent by plaintiffs.

Since the *Fostif* decision of the High Court, debate on litigation funding has shifted away from concern about permissibility of third party funding to whether and how it should be regulated. The *Fostif* decision recognised that litigation can be made more efficient through the ‘commercial objectivity’ of the funder.

The *Multiplex* and *Chameleon* decisions made litigation funding agreements subject to the provisions of the Corporations Act which were designed to regulate managed investment schemes and to protect investors in those schemes. The then Minister for Financial Services, Superannuation, and Corporate Law noted that the Federal Court decision in *Multiplex* effectively halted all existing class actions, as none complied with the managed investment scheme provisions (Bowen 2010).

As a result of the then Minister’s concerns, the Australian Securities and Investments Commission (ASIC) provided temporary relief from the Corporations Act requirements through class orders released in 2010. In a longer term response the Australian Government introduced the Corporations Amendment Regulation 2012 (No 6). That regulation excluded funded class actions from the definition of a managed investment scheme. It also provided an exemption from the requirement to hold an Australian financial services licence (AFSL) for persons providing funding as part of either a single-party or multi-party litigation if they had appropriate processes in place for managing conflicts of interest. ASIC (2012) published a regulatory guide to assist funders that had been exempt from the licence requirement with managing conflicts. In setting out the reasons for the exemptions, the Explanatory Statement to the regulation said that:

The government considers that these requirements are not appropriate for litigation funding schemes. The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. (Explanatory Statement, Select Legislative Instrument 2012 No. 172)

Finally, a recent application to the Federal Court could have had profound implications for the litigation funding market. Claims Funding Australia Pty Limited (CFA) was seeking approval from the Federal Court to co-fund an equine influenza class action which was being run by Maurice Blackburn. Maurice Blackburn’s Chairman is a CFA Director and all of the firm’s principals are beneficiaries of the discretionary trust formed to set up CFA. Approval was sought because the novel relationship between the litigation funder and the law firm running the case raised questions about whether the prohibition against lawyers charging damages-based fees was contravened by the agreement. The application was due to be heard in February 2014, but was withdrawn with the following explanation provided by Maurice Blackburn:

The new Commonwealth Attorney-General has plainly stated that he is proposing to introduce further regulation of litigation funding and that he is strongly opposed to litigation funding companies, that are owned by the principals of law firms, funding lawsuits in which that law firm represents the claimants. In these circumstances it seems likely that even if Court approval were obtained the co-funding arrangement will be prohibited by regulation. (Maurice Blackburn Lawyers 2014)

The class action will proceed with alternative litigation funding, with group members set to pay the alternative funder a commission of 27.5 per cent, 2.5 per cent higher than the commission they would have paid to CFA (Maurice Blackburn Lawyers 2014).

If the CFA application had been approved, the decision could have potentially created direct competition between lawyers and litigation funders as outlined by Bentham IMF:

... the way will be clear for lawyers in Australia to effectively side-step the prohibition on lawyers charging contingency fees by providing funding to their clients through a funding business established by the lawyers. If so, lawyers will potentially become direct competitors with third party funders. (sub. 103, pp. 13–14)

Maurice Blackburn also explained the potential for this to lower prices in the market:

Currently funding commissions are in the range of 25% to 40% with lawyer's fees (in class actions) averaging 12%. If lawyers are permitted to charge contingency fees the overall costs to the consumer are likely to be substantially less than the combined costs of a third party funder and lawyer. (sub. 59, p. 14)

The withdrawal means that, for the time being, there will not be competition in the litigation funding market from lawyer-owned funds. However, competitive benefits could still be achieved if, as recommended by the Commission, the prohibition on damages-based billing by lawyers were removed — although, litigation funders and lawyers offer different services. Unlike lawyers, litigation funders pay the full costs of litigation, manage cases financially and provide indemnity for adverse costs. As such, it is likely the two will specialise to some degree into niche markets — for example litigation funders may specialise in class actions while lawyers provide damages-based agreements for personal injury and product liability.

Are current regulatory arrangements adequate?

Concerns have been expressed over the adequacy of the regulation of litigation funding. The perceived risks that give rise to calls for regulation of the market can be summarised as follows.

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- Agreements may be struck unfairly (for example, with excessive commissions for funders) because consumers have limited capacity and experience compared to funders.
 - Funders may exercise too much control over proceedings, and may place pressure on the court system.
 - There are potential conflicts of interest between funders, lawyers and plaintiffs.
 - There is a lack of prudential supervision and therefore no measures to ensure that the funder has sufficient capital to meet their financial obligations.

Only the concern about conflicts of interest is addressed by current regulation. The regulation does not require litigation funders to be licensed as envisioned in the *Chameleon* decision, nor does it provide any protection if an unregulated funder defaults on its obligations or engages in serious misconduct. If litigation funders were required to hold an AFSL, entry to the market would be limited to firms that meet the licence requirements, which include:

- providing financial services efficiently, honestly and fairly
- having in place adequate arrangements to manage conflicts of interest
- taking reasonable steps to ensure compliance with financial services laws
- having adequate financial, technological and human resources
- having dispute resolution processes and compensation arrangements in place for ‘retail clients’
- having in place adequate risk management systems (IMF, sub. 103).

This ensures participants in the market are sufficiently competent, by empowering ASIC to exclude those that do not satisfy the requirements. Submissions were divided about whether the AFSL was the appropriate licence for litigation funders. Bentham IMF, which held an AFSL between 2005–2012, considers it a good fit to achieving the regulatory goals relating to litigation funding (sub. 100). The AICD advocates a tailored licence regime through the creation of a separate category of licence in chapter 7 of the Corporations Act, though it acknowledges that an AFSL would be appropriate (sub. 40). The Commission is in favour of a licence regime for litigation funders, but considers that the appropriate licence conditions should be determined by a proper consultation process around draft licence regulations. Further, although the Commission understands that licensing and capital requirements could create some barriers to entry and advantage incumbents in the market, it nevertheless considers these are justified to ensure that only reputable and capable funders enter the market.

In addition, the NSW Legal Services Commissioner (2012b) considered that too much focus has been given to regulation of the financial aspects of litigation funding. The Commissioner argued that funders should be bound to conduct rules that apply to other legal service providers and need to be accountable to the courts and other regulators of legal services.

Litigation funders are already regulated by courts to some extent. As noted above, courts have previously ordered funding agreements to be rewritten to facilitate informed consent. However, this is predicated on courts being aware that a funder is involved in a case, and has jurisdiction over the funder. Spender (2008) noted that although courts have inherent jurisdiction to make orders binding on funders, because funders are not officers of the court and not necessarily bound by the rules of the court, sanctions for contempt of court or abuse of process may be slower and more difficult to impose. To this end, the VLRC, in its *Civil Justice Review* (2008), recommended that a set of ‘overriding obligations’ in relation to conduct in civil proceedings should apply not only to litigants and legal practitioners, but also to third parties, such as litigation funders and insurers, to the extent that they influence proceedings. To facilitate this, the VLRC also recommended that:

Parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding. The court should have discretion to order disclosure of a party’s insurance policy or funding arrangement if it thinks such disclosure is appropriate. (VLRC 2008, p. 476)

The Federal Court, as of July 2010, requires that for class action proceedings, litigation funding agreements must be disclosed prior to the initial case management conference and provides for redaction ‘to conceal information that might reasonably be expected to confer a tactical advantage on the other party’.⁶⁶

Some direction on appropriate conduct for litigation funders could be taken from the United Kingdom, where a self-regulatory approach has been adopted via a *Code of Conduct for Litigation Funders* published by the Association of Litigation Funders of England and Wales (ALF). Members of the association agree to abide by the Code, which sets out requirements relating to the conduct of funders, including for example:

- ensuring promotional literature is clear and not misleading
- observing the confidentiality of all information relating to the dispute

⁶⁶ Practice Note CM 17 — Representative Proceedings Commenced under Part IVA of the *Federal Court of Australia Act 1976* (issued June 2010, commenced 5 July 2010)

-
- not taking any steps that would lead the client's lawyer to breach their professional duties
 - not seeking to influence the client's lawyer (ALF 2011).

The Code also sets out capital adequacy requirements. While such requirements are important, the Commission considers they are more appropriately set out in enforceable legislation and regulated under a financial services licence, rather than by an industry code.

Overall, the Commission considers there would be some value in the industry developing a similar code in Australia. Ultimately it could serve as guidance for the courts in overseeing the behaviour of litigation funders.

DRAFT RECOMMENDATION 18.2

Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.

Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.

19 Bridging the gap

Key points

- Disputes span all income levels. But many Australians say that they could not afford a good lawyer if they had a serious legal issue. Legal assistance providers also said that those refused a grant of legal aid (on the basis of means) cannot necessarily afford to engage a private lawyer — there is a ‘justice gap’.
- Many forms of information and legal advice are available free of charge, including helplines, limited up-front advice and self-help kits. Legal assistance providers note that these services are provided, in part, because of the recognised ‘justice gap’.
- The expanded use of informal dispute resolution mechanisms, complaint handling bodies and contingent billing arrangements are also available to help people resolve disputes in a way that is proportional and appropriate to the dispute.
- Unbundling — a half-way house between full representation and no representation — is one way of making legal costs more manageable and predictable. Changes to professional conduct rules, however, will be required to facilitate a shift towards greater unbundling of legal services.
- Legal Expenses Insurance (LEI) could make legal representation more affordable for middle-income earners, but challenges on both the supply and demand side of the market for LEI (adverse selection problems; uncertainty over legal costs; lack of knowledge about risks of legal problems and a lack of an appetite for the product) limit the extent and coverage of such insurance.
- A legal expenses contribution scheme (LECS), that is an income-contingent interest-free loan, could provide a tool for those on lower-middle incomes to pursue cases of merit. Under such a scheme, those who qualify for a loan would pay it back to the government by contributing a percentage of their income over the period of the loan. The loan could be immediately repaid in the case where there was a sufficient award of damages.
- While similar arrangements to a LECS are already operating within some legal aid commissions, a LECS could apply to a larger group and to a wider range of legal matters (currently civil matters are thinly covered by legal assistance services). A LECS could be administered by the legal aid commissions with the added advantage that their bargaining power could be drawn on to purchase legal services at favourable rates.

Resolving a civil law matter can amount to many thousands of dollars. Civil law matters are also often not predicted, and therefore not something that Australians save or budget for. As Community Law Australia said:

It is impossible to plan for when many legal issues might arise. People don't budget for legal fees for issues like marriage breakdown, unfair dismissal, eviction, discrimination, getting ripped off or debt problems ... For a mother escaping a violent partner and trying to protect herself and her children with an intervention order and appropriate family law orders, or for grandparents whose retirement home, where they invested their life savings, has gone into administration, or for a pregnant woman discriminated against by her employer, the costs of paying for advice and taking action can be extremely prohibitive. (2012, p. 4)

Mounting a civil case also often requires meeting upfront costs, and when combined with the risk of an adverse cost order, this can be a significant barrier to access to justice for Australians who lack financial resources, but have a meritorious claim. As the Centre for Innovative Justice (CIJ) recently said:

For a great many in the Australian population, the prospect of seeking professional help to resolve a civil legal problem can be too costly to contemplate. In fact, many people perceive professional assistance in some areas of the law to be out of reach to all but those with either the greatest, or the least, economic resources. (2013, p. 7)

This chapter looks at some alternative funding options for those people who have a meritorious case that warrants the services of a lawyer, but are not eligible for a grant of legal aid or ongoing legal assistance, despite not being able to afford legal advice or representation (commonly referred to as the 'missing middle'). Section 19.1 explores the dilemma of the 'missing middle', including the nature of their legal needs and what options are currently available. Unbundling of legal services is discussed in section 19.2. Two complementary funding approaches — legal expenses insurance and a legal expenses contribution scheme — are examined in sections 19.3 and 19.4. Section 19.5 looks at the Salvos Legal Model, a legal assistance model involving the not-for-profit sector.

Third party litigation funding and conditional and damages-based billing by lawyers are discussed in chapter 18.

19.1 A 'missing middle'?

Disputes or legal problems span all income levels (table 19.1). But the Commission heard that the high costs of legal services meant that many Australians are unable to pay for a lawyer to represent them (box 19.1). The Law Society of South Australia, for example, said:

An ancient legal axiom states that the law, in all its majestic equality, ‘forbids the rich as well as the poor to sleep under bridges’. That majestic equality, which provides legal aid for the poor and ready access to the legal process for the rich, is flawed in modern times by an embarrassing lacuna — the cost of accessing the law is prohibitive to many ordinary South Australian middle income earners. (sub. 61, p. 18)

The legal aid commissions (LACs) reported not being able to assist many low income Australians because of tightened eligibility criteria (chapter 21). The Northern Territory Legal Aid Commission, for example, said:

Centrelink recipients fall within the Commissions mean test, however, there are many other people who are ‘working poor’ with significant expenses who are not eligible for legal aid. (sub. 128, p. 12)

National Legal Aid (NLA) also said that being refused a grant of legal aid does not mean that you can afford to pay for a private lawyer:

When a person is refused a grant of aid on the basis of means, it does not mean that they can afford to engage a private practitioner as tests are stringent and market rates are markedly different to legal aid rates. There is consequently a significant justice gap. (sub. 123, p. 22)

A person with a problem requiring resolution by a court who can neither afford legal representation nor qualify for legal aid, essentially has two options:

- self-represent (chapter 14) or
- walk away from a dispute and the civil justice system (they could use other services to reach a resolution or their legal problem could remain unresolved).

The Public Interest Advocacy Centre spoke about a ‘U-shaped’ relationship between income and lawyer use — that is, people eligible for legal aid and those with high incomes are more likely to use lawyers than middle income groups:

The impact of cost is mitigated for those on lowest incomes with problems where there is low or no cost assistance available from legal aid or community legal centres, indicating the success of those programs in broadening the accessibility of legal services. Lawyers are used most often by those on higher incomes. (sub. 45, p. 40)

Law surveys undertaken in New Zealand, Canada, the Netherlands and the United Kingdom (countries with established legal aid schemes) all point to a ‘U-shaped’ distribution, while in countries with little in the way of legal aid, the relationship between income and lawyer use is ‘almost linear’ (Legal Services Research Centre 2011).

Box 19.1 Participants point to a ‘missing middle’

The New South Wales Society of Labor Lawyers:

Faced with an overwhelming demand for legal assistance, CLCs [community legal centres] have been forced to limit eligibility for legal assistance to the most disadvantaged clients. This has led to a growing ‘middle ground’ of people who do not qualify for the assistance of either Legal Aid or the services provided by CLCs, but who are nevertheless unable to afford legal [representation] on a commercial basis. (sub. 130, p. 19)

Prue Vines:

It would seem that the legal profession may be pricing itself out of the market, in that a very large part of the middle class finds fees far too large to contemplate. (sub. 17, p. 2)

Community Law Australia:

The high price of legal services means that many Australians would find it difficult to pay for a lawyer for anything but the most basic legal issues. When people who can’t afford a lawyer turn to government funded legal assistance services, they find that due to chronic funding shortages, ongoing help is often restricted to those on the lowest incomes, and then only for a limited range of mainly family law and criminal law issues. Unlike the health and education system in Australia, there is no universal safety net for legal help. (2013, p. 3)

Using the *LAW Survey*, Pleasence and Macourt (2013) found that in Australia lawyers are most often used by those on higher incomes. To some extent this could reflect the greater monetary value of the issues faced by those on higher incomes (although the analysis did control for problem severity). Also, for those problems for which assistance is available from LACs and community legal centres (CLCs) at little or no cost (such as family problems), the costs appear to be mitigated for Australians on the lowest incomes. Alternative funding mechanisms (such as ‘no win no fee’ arrangements) also appear to have broadened the accessibility of legal services. Pleasence and Macourt said the findings:

... point to the potential difficulty faced by those on lower-middling incomes in obtaining legal services, and suggests the existence of a ‘U’ shaped relationship between income and lawyer use in the case of family problems. To the extent that this is driven by cost concerns, financial assistance and alternative payment mechanisms may be effective in broadening access to legal services. (2013, p. 4)

The Australia Institute survey asked respondents if they could afford a good lawyer if they had a serious legal issue. Less than half of all respondents (43 per cent) said they could (Denniss, Fear and Millane 2012). One in four people in households (24 per cent) with an income below \$20 000 per year said they could afford a lawyer if they needed one, while two in three respondents (65 per cent) in households with a combined income of more than \$100 000 said that they could afford a lawyer.

However, the evidence also suggests that when it comes to the use of lawyers, problem type tends to swamp other considerations. For example, Kritzer drawing on data across seven countries (the United States, England and Wales, Canada, Australia, New Zealand, the Netherlands and Japan), found that the decision to use a lawyer was more a function of the nature of the dispute and was dictated by an evaluation of the costs and benefits of hiring a lawyer (Kritzer 2008).

Legal problems of the ‘missing middle’

International evidence suggests that as incomes rise so does the incidence of employment and consumer problems and problems relating to assets (wills, estates and directives) (Pleasence and Balmer 2012).

Results from the *LAW Survey* (excluding those respondents who had *only* a criminal problem) shows that regardless of income, the most common legal problem faced was a ‘consumer’ problem. For middle income groups, housing and money problems featured as the second most common legal problem. In contrast, for people on means tested income support payments, the second most common problem type was with governments or their agencies, while for those in the lowest income group it was housing (mostly issues related to public housing) (table 19.1).

Table 19.1 Prevalence of problem by income category^a

<i>Income group</i>	<i>Most common</i>	<i>2nd most common</i>	<i>3rd most common</i>
Means tested government payment	Consumer (43%)	Government (31%)	Housing (29%)
Up to \$12 999/ per year	Consumer (41%)	Housing (24%)	Crime (23%)
\$13 000-\$51 999 per year	Consumer (43%)	Crime (22%)	Government (21%)
\$31 200-\$51 999 per year	Consumer (47%)	Housing (26%)	Crime (22%)
\$52 000-\$67 599 per year	Consumer (49%)	Money (22%)	Crime (22%)
\$67 600+ per year	Consumer (48%)	Government (22%)	Housing (22%)

^a Weighted.

Data source: Commission estimates based on unpublished *LAW Survey* data.

Affordability of legal services for the missing middle

Lawyers’ fees are commonly cited as a reason why middle income Australians do not seek help for legal problems. The *LAW Survey* found that in 23 per cent of problems where a legal adviser was used, cost was the most common barrier to obtaining help from legal advisers.

In contrast, cost was an infrequent barrier to obtaining help from dispute-handling bodies (2 per cent) or government advisers (2 per cent). Coumarelos et al. (2012) concluded that:

... the results suggest that cost is unlikely to be a key impediment for the majority of legal problems that people prefer to handle outside legal services, such as via self-help strategies or consultation with non-legal professionals. However, cost is likely to be a major barrier for many of the legal problems for which people wish to obtain expert legal advice (p. xix)

Kritzer (2005) noted that in addition to the cost of purchasing legal expertise, the cost, or potential cost, of what happens when you lose and have to pay the other side (known as the ‘downside risk’) can hinder access to justice. Also, that the downside risk is particularly important for the middle income group:

The downside risk is most important for the middle class because it does not pose a risk to those with no wealth because they have nothing to pay to the other side if they lose and those with substantial wealth can afford to take risks, at least in relatively typical kinds of cases.

... The middle class gets squeezed by both sides of the cost equation: they cannot afford really to go out and hire lawyers without depriving themselves of life’s necessities, and they cannot afford the downside risk of losing if they do pursue a case with any significant risk of losing. (pp. 258–9)

What is available for the missing middle?

As discussed in earlier chapters, many forms of information and legal advice are available to *all* Australians, including websites, helplines, information sheets, community education sessions, self-help tools (often provided by LACs and CLCs). Legal Aid NSW said these services are provided, in part, because of the recognised ‘justice gap’:

While the priority of Legal Aid NSW is the provision of legal assistance to the disadvantaged, it provides a wide range of services including information, referral, community legal education and legal advice and minor assistance to the broader community. In part, these services are provided in recognition of the ‘justice gap’ for a large section of the community including the so called ‘working poor’. (sub. 68, p. 11)

Middle income Australians are more likely to have higher levels of education and therefore greater capacity to navigate the legal system (chapter 5). With the right information about possible options (including the costs of the various options), many Australians within the ‘missing middle’ group should have the capabilities to access appropriate help for their legal problem.

As the Legal Services Commission of South Australia said:

While the cost of litigation is beyond the means of most people, timely advice can help to counsel against unnecessary legal action and reduce costs. (sub. 93, p. 15)

In recent years, significant effort has gone into expanding the use of informal dispute resolution mechanisms and complaint handling bodies (such as ombudsmen) to help Australians resolve disputes in a way that is proportional and appropriate to the dispute (chapters 2, 6, 7 and 8). As NLA said:

The reality for Australians with legal needs is that the various forms of dispute resolution available through a variety of forums are more likely to offer a pathway which will offer an acceptable outcome for all parties. LACs provide dispute resolution services and also refer people to other [family dispute resolution] service providers where it would be appropriate to do so and in accordance with various arrangements/protocols between providers. (sub. 123, p. 24)

Courts and tribunals have also sought to simplify processes so that it is easier for people to navigate their way without the need for assistance by a lawyer (chapters 10 and 11).

In addition, some professional associations offer assistance for the payment of disbursements in civil law matters. The South Australian Litigation Assistance Fund, a charitable trust established by the Law Society of South Australia, is one example. It aims to assist plaintiffs (both individuals and businesses) to proceed with civil litigation where they would otherwise be unable to. Assistance is only available for civil matters (not family matters) and covers inheritance claims, personal injury and professional negligence claims and commercial disputes. To qualify an applicant:

- can have a gross household income of up to \$130 000 and assets such as a house and a car, of ‘reasonable value’ (this is considerably more generous than the means test for LAC grants of legal aid)
- must pass a merit test — the merit of cases are considered by a panel of three experienced legal practitioners.

The Fund is made viable by deducting 15 per cent of the damages awarded or settlement monies awarded by the court or upon settlement of cases (Legal Services Commission of South Australia).

19.2 Unbundling legal services

Unbundling of legal services — a half-way house between full representation and no representation — is one way of making costs more manageable and predictable.

‘Unbundling’ separates a package of legal services into parts, and the client and lawyer agree to what parts of the package the lawyer will provide.

Unbundling is also known as ‘discrete task assistance or provision’, or ‘limited scope representation’. Lawyers can offer the unbundled component for a fee or pro bono. Governments also publicly fund lawyers to provide discrete task assistance (chapter 20).

There are three broad categories of unbundled legal assistance:

- general counselling and legal advice
- preparation or assistance with drafting of documents or pleadings
- limited appearances before the court (QPILCH 2010).

Unbundling is not new. LACs and CLCs have provided unbundled assistance to disadvantaged Australians for some time (as a way of rationing limited budgets), and unbundling is growing in some sectors of corporate practice. But it has not been widely employed or marketed as an option for legal services to individuals in Australia (CIJ 2013).

Benefits of unbundling for clients and lawyers?

Offering unbundled services can mean the difference between some level of legal assistance, or none at all. As Beg and Sossin said:

Unbundled services would soften the harshness of the ‘all or nothing approach’ by being a midway point between full representation and no representation. This model would also allow the informed litigant to ‘play to her strengths’ — purchasing representation to assist with the identification of arguments or the preparation of materials or the advocacy, but not necessarily all three.

... Unbundling is a way of ensuring that the perfect does not become the enemy of the good, or, as Tracey Tyler succinctly put it, ‘lawyers could be cheaper *a la carte*’. (2012, pp. 199–200)

Unbundling offers more than just cheaper options. As the Centre for Innovative Justice (CIJ) said:

... in giving potential consumers access to services from which they would otherwise be excluded, this approach also gives consumers greater control over an otherwise disempowering legal process – electing not just where, but how to spend what limited funds they have. (2013, p. 31)

The cost of legal representation and/or the unavailability of legal aid are the main reasons why Australians self-represent (chapter 14). If someone can afford \$5000

towards litigation but no more, the only real option is to forge ahead unrepresented. In an unbundled market for legal services, \$5000 could buy a set of discrete legal services. As Beg and Sossin said:

... the primary rationale for developing unbundling is the empirical claim that it will enhance accessibility, especially for middle income litigants. While more evidence is needed to sustain this claim, it continues to animate the case for unbundling. (2012, p. 198)

Other potential benefits include:

- accelerated litigation proceedings — partial representation can make it easier and cheaper for courts to determine the relevant points in a litigant's case
- increased fulfilment of demand for legal services — unbundling could see more receiving the assistance of lawyers (the counterfactual being the traditional lawyer-client relationships)
- consumers being better informed about costs — while it can be difficult for consumers to predict the costs of a contested divorce proceeding, it is likely to be easier to predict the cost of drafting a statement of claim or a separation agreement. Unbundling could also make it easier for clients to compare lawyers' rates with respect to limited retainers, allowing clients to be better informed consumers of legal services
- increased quality and effectiveness of court and tribunal submissions — litigants who in the absence of unbundling would have been unrepresented should be better equipped to navigate the complexities of their legal problem (Beg and Sossin 2012).

Greiner, Pattanayak and Jonathan (2013) argue that the effectiveness of unbundled legal assistance can be assessed from at least two perspectives:

- how much a potential client gains from limited assistance as compared to a baseline of nothing
- how limited assistance compares to full representation.

Evidence from a number of pilot projects offering limited scope representation in the United States suggests a range of benefits. For example, citing an evaluation of a pilot project undertaken in Massachusetts, Judge Cohen said:

Judges reported that as a result of limited assistance representation, they saw better pleadings from self-represented litigants, the litigants were more realistic about their cases, the filing of frivolous motions was reduced and the litigants understood the process better. (cited in Eaton and Holtermann 2010, p. 39)

Seventy five per cent of the lawyers who responded to a survey about the Massachusetts pilot project reported a high level of satisfaction with representing clients on a limited basis. Cohen described Massachusetts' experience with limited representation as a 'win-win for the bar and self-represented litigants'.

Another limited representation pilot project in Kansas found that lawyers were seeing more cases than prior to the pilot (Eaton and Holtermann 2010).

But there are some barriers around unbundling

Possible barriers for consumers and lawyers wishing to enter into an agreement for unbundled services include:

- information asymmetry — consumers can lack the technical knowledge to discern which aspects of a matter could benefit most from legally-qualified assistance. Limited representation will not be suitable for everyone. Lawyers will need to make judgments about whether the capabilities and circumstances of clients are suited to unbundled services
- market regulation — legal professional rules may not give lawyers the confidence to offer discrete services without fear of client or professional retribution. Restrictions on advertising of legal services (chapter 7) also means that consumers may not easily find lawyers that offer unbundled services. With more relaxed advertising rules in the United States, it is now not uncommon for lawyers to advertise unbundled services.

Unbundling can also disrupt the norm of a comprehensive lawyer-client relationship which raises a number of concerns:

- the on-again, off-again nature of the representation could lead to inconsistencies and oversights
- there often is no neat division between different stages of a proceeding
- it can decrease consideration of a legal problem as a whole (Beg and Sossin 2012).

Some stakeholders expressed concerns about whether the current regulations support unbundling. As an example, courts have noted that, without leave being granted, the duty owed by the practitioners to the court can demand that they continue to perform certain functions in order to satisfy the proper administration of justice (CIJ 2013).

There are also concerns about the ethical implications of unbundling. In a market with substantial information asymmetry, consumers may find it difficult to discern

which features of litigation they need assistance with. However, these concerns arise in any lawyer-client relationship for which professional rules of conduct and fiduciary duties at law aim to ensure lawyers act in their client's best interests.

Unbundling could also have implications for lawyers' exposure to liability. For example, recent changes to federal immigration law, which provide for cost awards against practitioners who represent a client in matters with no reasonable prospects of success, could place lawyers offering unbundled assistance in a precarious position given the heightened possibility that the lawyer may not be privy to all the relevant information in a matter (CIJ 2013). The lack of guidelines creates some uncertainty for lawyers:

While a number of states in the USA have facilitated unbundling of legal services through revised ethical and procedural rules, so far Australian professional and civil procedure rules have largely ignored these services. This unresolved issue can lead to reluctance by some lawyers to undertake pro bono discrete task assistance due to concerns of liability and thus limits the assistance which may be provided. (QPILCH 2010, p. 1)

Additional guidelines for lawyers and regulators who supervise the rules of professional conduct in the unbundled context may be required to ensure that ethical standards accompany the move to unbundling.

But the risks and challenges are not insurmountable

There is no doubt that unbundling comes with some risks and challenges. However, the Commission does not consider these to be insurmountable, as evidenced by the fact that some Australian law firms are currently providing discrete tasks. Affording Justice is one example (box 19.2).

The risks around unbundling can be minimised by ensuring:

- informed consent to the arrangement
- appropriate professional guidelines
- carefully defined professional liability where discrete tasks are being offered.

There are a number of ways in which clients can provide informed consent to unbundled assistance. Before undertaking a discrete task, clients and lawyers should agree to the limited nature of the retainer and clearly outline the scope and limitation of the services being provided by the lawyer.

Box 19.2 Affording Justice

Affording Justice is a law practice that aims to be 'an affordable and independent first step for everyone' (Affording Justice nd). It gives step by step guidance to people who cannot afford full legal representation.

Affording Justice offers three main services:

- Legal Diagnosis — advice about how the law applies to a person's situation and the processes available to solve the problem
- Legal Advice — advice about a person's best options and how to take the next step
- Legal Talk Help — writing documents and letters, negotiating, step-by-step guidance for procedure.

Where a person can resolve the matter themselves, they can elect to use the Legal Advice and Legal Task Help services. The defined tasks have fixed prices.

Services are provided by staff over the phone, by web-conference and by email. Affording Justice states that 'our services are particularly useful to people who:

- need to know where to start with using the law to solve a problem, or
- need an affordable alternative to the traditional way of engaging a lawyer for full representation'. (Affording Justice nd)

The firm is Queensland based and as such provides assistance on matters occurring within that state, but also assists with Commonwealth law matters (family law, consumer law, dealing with Centrelink and bankruptcy).

According to the Centre for Innovative Justice (CIJ), initial concerns from the firm's insurer about liability for discrete task assistance were alleviated by consultation with the insurer, and by the development of standard form advices. The CIJ was told that the practice does not go on the court record.

Sources: Affording Justice (nd); CIJ (2013); and Shearer Doyle (sub. 21).

Regulatory barriers to unbundling and concerns about professional liability can be addressed by amending the professional conduct rules so that lawyers and their clients are confident entering into unbundled agreements.

In the United States, the American Bar Association has developed Model Rules which specially permit lawyers to limit the scope of their representation. Around 40 states have adopted amendments to their professional conduct rules to implement the Model Rules. The rules address issues such as:

- whether the client's consent to limited representation should be in writing
- what disclosure is required when a lawyer prepares a document but does not appear

-
- how a lawyer withdraws from a case when he or she makes a limited scope appearance
 - how practical issues are addressed, such as communications with opposing counsel
 - how to protect clients from unscrupulous lawyers offering limited scope representation (American Bar Association 2014; CIJ 2013).

In the United Kingdom, the Law Society has also released a Practice Note to offer guidance to lawyers on unbundling, including consideration of relevant case law. The Practice Note provides guidance on: duty of care to clients; clearly defining and staying within the retainer's limits; professional conduct duties to the client and the court; professional indemnity insurance and fees; suggested schedules of services provided and not provided; and limited representation at court as a 'McKenzie friend'.

In 2011, the Law Society of Upper Canada also updated its rules to include a general requirement for written confirmation of the limited scope retainer (with some exceptions), with changes also dealing with interpretation (a definition of limited scope retainers is now included), professionalism, duty to clients and responsibility to the profession (The Law Society of Upper Canada 2013).

In Australia, the Queensland Public Interest Law Clearing House (QPILCH 2010) suggested that lawyers' conduct rules include definitions of limited representation, the effect of a client's consent to such a limitation and a model consent form.

Clear and explicit rules that deal with unbundled assistance provide the foundation for dealing with professional liability concerns, and support the development of a market for appropriate indemnity insurance. QPILCH (2010) suggested that statutory immunity should apply to exempt lawyers and legal service providers from liability where clients have agreed by informed consent to limited representation.

Given the potential benefits of unbundling legal services, the Commission considers that changes to professional conduct and court rules are warranted to facilitate a shift towards more unbundling of legal services. The proposed changes include:

- clarification of professional liability where matters fall outside the scope of lawyer's retainers for unbundled matters
- specific disclosure and communication requirements with clients
- the removal of practitioners from the court record in line with their limited roles.

Developing unbundling rules, as well as professional guidelines (including model retainers for typical unbundled services) is a critical first step to increased

acceptance of the role of unbundling in the culture of both the profession and the courts. Unbundling also represents an important tool for giving Australians access to legal services they would otherwise not be able to access.

As Beg and Sossin said:

While unbundling is not without risks both to litigants and to lawyers, and while further data will be needed before any empirical conclusions become possible, our view is that, at this stage, the potential benefits outweigh the potential downsides. ... While only one piece of a massive puzzle, unbundling, in our view, represents a significant and positive step toward a more accessible civil justice system. (2012, p. 221)

DRAFT RECOMMENDATION 19.1

The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- ***how to define the scope of retainers***
- ***the liability of legal practitioners***
- ***inclusion and removal of legal practitioners from the court record***
- ***disclosure and communication with clients, including obtaining their informed consent to the arrangement.***

DRAFT RECOMMENDATION 19.2

The private legal profession should work with referral agencies to publicise the availability of their unbundled services.

19.3 Legal Expense Insurance

Legal expenses insurance (LEI) is another option for making legal services more accessible to the ‘missing middle’. Bailes, the South Australian Law Society president, said legal insurance:

... enables those caught in the gap — who are either not sufficiently wealthy to pay their own fees or are so underprivileged that they have entitlement to legal aid — to access the justice system.

It is time that we started thinking smartly about our options rather than risk diluting our excellent standard of law and justice in this country. Legal insurance is one such idea. (sub. 131, pp. 1–2)

LEI operates like other types of insurance — customers pay a premium based on insurers' assessment of risk, and when required are provided with legal services.

As discussed earlier, it is difficult for anyone to anticipate their need for legal assistance (and as such they are unlikely to save for such an event). The fact that legal expenses are often unpredictable, and have the potential to be very high (in some cases 'catastrophic'), points to the need for a mechanism that pools the risk of legal costs.

LEI spreads the risk of legal contingencies and provides protection against the costs of bringing or defending legal action to resolve a dispute. There are 'before-the-event' and 'after-the-event' legal expenses insurance policies. Before-the-event insurance policies, as the title implies, cover legal expenses of events that are yet to occur, while after-the-event policies cover future legal expenses (including any adverse cost orders) of disputes where the issue in dispute has occurred but proceedings have either not commenced or are not well advanced.

After-the-event policies are likely to only be available for cases where the chances of winning are high (otherwise an insurer will not be prepared to take it on). Also, because of the substantially higher likelihood of the costs insured against being incurred (compared to before-the-event insurance), the cost to consumers of after-the-event insurance is typically higher. After-the-event policies can be taken out in conjunction with 'no win no-fee' arrangements. Under such policies, the insurance company pays for disbursements unless these are recoverable from the other party, and the other party's costs (the downside risk of losing) if the claim is unsuccessful (CIJ 2013). Similar services are provided by litigation funders (chapter 18).

What do LEI typically cover?

LEI providers usually offer customers a telephone help line for legal information, advice and referral to other services. Policy holders are typically referred for further legal assistance (such as letter writing and making phone calls) or legal representation, subject to a deductible, a waiting period and/or an assessment of the merit of the case by the providers' lawyers (Canadian Bar Association 2013).

LEI coverage varies by policy type. However, LEI typically covers civil disputes (employment, tenancy, neighbour disputes; some cover driving offences), but not family law matters. As an example, in Canada DAS Legal Protection Insurance offers access to a hotline for advice on common legal problems and a lawyer if the client needs to go to court. DAS has several different plans to choose from. One example is the 'living' option which includes employment disputes, contract

disputes, property protection, injury, tax protection, employee legal defence and court attendance expenses (DAS Canada nd).

Providers can have in-house lawyers or they may contract with law firms. Some providers of LEI allow policy holders to consult a lawyer of their own choice to be reimbursed at a later date. Some providers refer policy holders to law firms for services not covered in the policy (with guaranteed reductions in rates charged).

Availability of LEI

LEI schemes are in place in Europe, the United Kingdom, the United States and Canada (introduced recently).

LEI has been in place in Europe for many decades — since 1905 in France and since 1928 in Germany. About half the population in Germany are holders of LEI, accounting for around 25 per cent of lawyers' fees (Kilian 2003). Most LEI plans in Germany are stand-alone policies. In Sweden, it is estimated that around 90 per cent of households have LEI policies (LEI is included at little or no additional cost with most household insurance policies) (Millan 2009).

In the United Kingdom, around 60 per cent of people have some form of legal protection insurance (it is mostly sold in the form of an add-on to home contents or motor vehicle insurance, but it is available as a stand-alone product).

Policies in the United States are mainly pre-paid legal service plans for predictable and specific events that are low cost, routine and high frequency (Regan 2001). They typically exclude monetary claims (with such claims handled under 'no win no fee' arrangements). Around 30 per cent of the population are estimated to have a pre-paid service plan. LEI has only recently been introduced in Canada and has mainly taken hold in Quebec (around 10 per cent of Quebec residents have insurance cover) (Canadian Bar Association 2013; Choudhry, Trebilcock and Wilson 2012).

There have also been attempts to establish LEI in Australia. A stand-alone legal insurance scheme established by the Law Foundation of NSW and the GIO operated in NSW between 1987 and 1995 but did not prove viable. Initially the scheme was designed to improve access to legal services for low to middle income Australians, but over time it was also developed for specific groups of workers (such as childcare workers) (Regan 2001).

Uncertainty over legal costs and a lack of appetite by Australians for LEI are said to have inhibited uptake in NSW. According to the Australian Law Reform Commission:

A barrier to LEI in Australia has been the uncertainty over legal costs. The success of European LEI schemes, such as those in Germany, has been linked to their more predictable, fixed litigation costs. ... A further challenge for providers of LEI in Australia has been the marketing of the product. ... if LEI is to enhance access to justice for low to middle-income earners, it must provide a broad, general coverage at an affordable cost, and remain commercially viable. Commercial viability requires bulk savings and risk spreading. (ALRC 2000, pp. 315–317)

The Law and Justice Foundation of NSW also noted that it was difficult to design LEI benefits and premium levels in the absence of fixed fee schedules or predictable litigation costs (Goodstone 1999). In many European countries there is a body of law developed by civil codes (rather than judicial precedents) which lends itself to greater cost predictability. The suggestion is that this means that insurers and legal assistance schemes are better able to manage risk. As Goodstone said:

In Europe the inquisitorial or dossier system, in which judges are charged with the responsibility of gathering facts and questioning witnesses, tends to better define the length of court hearings, and provides a fairly tightly structured legal costs system. The unpredictability of legal fees and court costs in Australia hampers legal expense insurers' ability to offer modest premiums, and results in a legal expense insurance market that is regarded as unattractive by insurers. (1999, p. 15)

The Law Society of South Australia, however, has run a legal fees insurance scheme for members of the Public Service Association of South Australia (the union for public servants in South Australia) since 1991. Users of the scheme are provided with legal assistance for a variety of minor matters including family law, motor vehicle, personal and consumer protection, minor criminal matters and other common legal complaints (sub. 61). The majority of assistance provided is advice and mediation with few cases proceeding to court.

Regan (2001) noted that the legal fees insurance scheme in South Australia is significant because it demonstrates that it is possible to establish well-designed and targeted legal fees insurance in Australia. But the success story 'has had a weak demonstration effect — it has not resulted in other trade unions or other organisations establishing similar schemes' (p. 296).

The Law Society of South Australia also said:

Uptake has been limited in other jurisdictions, mainly due to issues relating to the size of the premium pool, difficulties in convincing consumers of the benefits of legal fees insurance, brokers and agents' unfamiliarity with the product and the public's wide misconception that they are eligible for legal aid.

While the Society acknowledges that the uptake of legal fees insurance has experienced difficulties in other jurisdictions, we remain optimistic about its potential and suggest further exploration, including quantitative and qualitative analysis about how legal fees insurance could be a commercially viable product that is available to ordinary Australians for a low premium. (sub. 61, p. 19)

Some of the challenges presented by LEI

Adverse selection is one the challenges of legal expenses insurance (as it is with all forms of voluntary insurance) — that is, people who take out legal insurance cover are likely to be those with the highest risk of having a legal problem (and therefore most likely to need legal advice). Adverse selection problems can be reduced by adding legal expenses insurance to other types of insurance (for example, as an add-on to home insurance or motor vehicle insurance as in the United Kingdom).

Moral hazard refers to the tendency for insurance protection to change the behaviour of policy holders to be less vigilant in preventing disputes from occurring. For example, a policy holder could be less careful checking contract details knowing that they have LEI and therefore will not bear the full cost of any legal action. Also, once insured, individuals may have an incentive to engage in litigation and to pursue a claim at much greater intensity than a self-financed person (Bowles and Rickman 1998). This can result in LEI being expensive.

Evidence from Europe suggests that insurers have found ways to overcome such problems and include ceilings on the amount of coverage, the exclusion of certain types of matters (including family law matters); co-insurance (where some of the risk is passed back to consumers) and merit tests.

An essential requirement for risk to be insurable is that an insurer has a sufficiently large pool of policy holders over which to risk pool. As Schepens (2007) put it:

... an insurer must have a sufficient volume of business. In insurance terms this means that he must be able to group a sufficiently large number of policyholders in a risk-pool. This allows him to diversify risk and become a more efficient risk bearer - which is essential for insurance to be feasible. (p. 27)

As noted earlier, the Law Foundation of NSW and the GIO insurance scheme failed in part because Australians did not see the value of insuring against legal events. Goodstone said:

Convincing potential consumers of the benefits of legal expense insurance was a major challenge. ... Potential consumers largely failed to perceive the benefits of purchasing legal expense insurance. Brokers and agents lacked familiarity with the product and did not promote it strongly. The public's perception of the general availability of legal aid resulted in there being reduced interest in LEI. (1999, p. 2)

With the tightening of legal aid to Australia's most disadvantaged people this may have changed. Public education campaigns could increase public awareness about the potential benefits of LEI.

The price of LEI (and coverage) will also affect demand. And, there is a trade-off between making premiums attractively priced and ensuring that the premium is sufficient to make the scheme viable.

Asymmetric information is also an issue. Bowles and Rickman (1998), stated that asymmetries of information are 'endemic':

The insurer has imperfect information about the work being done by the law firm and about the insured's preferences and riskiness. The lawyer has imperfect information about the insured's position. The client has imperfect information about the work being done on her behalf by the lawyer. ... Unless some sort of control is built into the contract, there is a significant danger that the lawyer and the client will collude against the insurer, since both the client and the lawyer may see it as being in their interest to invest more legal inputs in a case than the insurer would wish or would be efficient. (p. 199)

Fully insured clients (so fully insulated from costs) would have an incentive to encourage lawyers to raise inputs into the case. Insurers could seek to control for this through the insurance contract (for example, by getting clients to pay some proportion of the costs or by setting a ceiling on the amount of coverage offered by the policy).

LEI is being put on the table as a way of improving justice

Studies from both Canada and the United Kingdom have recently recommended LEI as a way of improving access to justice (Choudhry, Trebilcock and Wilson 2012; Jackson 2009a; Trebilcock 2008; Young 2012).

A report from Consumer Focus, a United Kingdom watchdog, however, warned that LEI needs to more clearly explained, more consistent in its offerings, better promoted and offer customers more choice in terms of legal representation. It also recommended an independent appeals process for rejected claims (Bello 2011).

A study of the German LEI experience also concluded that while LEI had increased access to people on middle incomes and higher, it also found that most lower income Germans did not have LEI (Kilian 2003). This suggests that it would be Australians at the higher end of the middle income group that would benefit most from LEI.

Where does that leave us?

LEI would allow risk-averse Australians to insure against the possibility of high legal expenses, and be a way of improving access to justice for the missing middle in Australia. However, a key question is whether the coverage of LEI could be expanded in Australia.

Some of the information gaps that made it difficult to design legal expenses benefits and premium levels have been, or are being, addressed. Australia-wide surveys of legal need now provide important information on the propensity of different groups to experience legal problems, while reforms to cost awards outlined in this report would address a great deal of uncertainty around legal costs associated with adverse cost orders. More broadly, the insurance market has adopted more sophisticated methods for pricing risk since the inception of the original LEI back in 1987.

But even if information gaps could be addressed, and LEI offered, as has been the experience in Australia, some parties might not take full advantage of risk-spreading opportunities because they do not accurately perceive the existence of risk or because they are unfamiliar with the market's potential for addressing the risks they face.

Whether there is a viable market for LEI in Australia is largely up to the insurance market to decide. What is important is that there are not any unnecessary legislative restrictions on LEI being offered by the private sector.

INFORMATION REQUEST 19.1

The Commission seeks feedback on the prospects of legal insurance being offered by private providers and whether there are any public policy impediments to such an offering.

19.4 Legal Expenses Contribution Scheme

An alternative funding option proposed by some participants is the use of an income-contingent loan.

A legal expenses contribution scheme (LECS) is an income-contingent interest-free loan akin to Australia's Higher Education Contribution Scheme (HECS, now called the Higher Education Loan Program, HELP).

Income-contingent loans have been available to Australian university students to pay for course fees since 1989. No real interest is charged on HECS-HELP loans,

however, the debt is indexed each year to reflect changes in the Consumer Price Index to maintain its real value. Students who use a HECS-HELP loan are required to pay their debt through the tax system when they earn above the minimum threshold for compulsory repayment.

Income-contingent loans have also been proposed in other areas of social policy, such as paid parental leave (PC 2009).

A key argument put forward for public provision of an income-contingent loan scheme is that borrowing from private banks for legal expenses is not possible for most people due to a lack of collateral as security for a loan (as is the case for course fees and to finance parental leave).

Income-contingent loans for legal expenses could address the financial constraints faced by low-middle income Australians who are not eligible for grants of legal aid, but who cannot afford to pay for legal advice or representation.

Under such a scheme, a person who does not qualify for legal assistance could apply for a legal aid loan. The recipient would then repay the loan through a percentage of income over the period of the loan. A key feature of a LECS is that decisions regarding pursuing a legal matter are in the hands (and wallets) of the client (subject to a merits test). This potentially means efficient choices regarding whether a case is worth pursuing.

How might a LECS operate?

Any LECS requires a range of detailed parameters to be defined which the Commission has not, at this stage, considered. The Australia Institute (Denniss, Fear and Millane 2012), however, suggested that a LECS *might* operate on the following basis.

- If someone did not qualify for legal aid under a means test, they would have the option of applying for LECS support.
- LECS applicants earning below the top-tax bracket would be able to qualify for an income-contingent loan to cover some or all of their legal expenses, depending on where their income sits in the tax scale.
- Applications would continue to be subject to a merit test conducted by qualified lawyers to determine eligibility. Only legal matters with a declared ‘reasonable prospect of success’ would attract LECS funding.
- The merit test for LECS funding would be expansive enough to incorporate a range of situations in which people encounter problems which can only be

solved through pursuing civil legal action (for example, against governments or corporations).

- Following the conclusion of a matter, the recipient pays the Commonwealth a percentage of their income over the length of the loan, with payments set at a higher rate for recipients on higher incomes. Recipients would also have the option of repaying the loan immediately in a civil action with an advantageous and sufficient award of damages.
- Where a matter ends badly for a LECS recipient (they find themselves in jail or facing a substantial damages bill), they would be shielded from extreme poverty or bankruptcy and have the opportunity to rebuild and continue to contribute to the community while paying back their loan.

Similar arrangements currently already operate within some LACs, however, the proposed LECS scheme would apply to a larger group of Australians and to a wider range of legal matters (including civil law matters). It could also allow people a longer period over which to repay their loan. The Australia Institute points out that the fact similar schemes already exist suggests that it is already a proven concept.

The fact that such schemes are already in place suggest that a LECS-style initiative is not a radical departure from current arrangements, but rather an extension of a proven concept. (Denniss, Fear and Millane 2012, p. 27)

Some of the benefits of the proposed LECS are that it would:

- apply to civil matters that are currently only ‘thinly covered’ by LACs (LACs priority areas of law are criminal and family law matters, chapter 20)
- allow a longer period for applicants to make contribution payments (by spreading payments over a longer period of time the immediate financial burden is reduced)
- improve equity (by providing another avenue for those who miss out on government funded legal assistance to pursue cases of merit that do not involve monetary claims).

These benefits would not come without costs, indeed it is unlikely that any LECS program would be self-funding. There is also the question of where to draw the line for eligibility.

A survey conducted by the Australia Institute found considerable support for a LECS — three in four survey respondents (74 per cent) said that they would support providing interest-free loans to people who would not otherwise be able to afford a lawyer (Denniss, Fear and Millane 2012).

Adverse selection is less of an issue under a LECS than LEI as individuals are subject to sufficient personal risk for there to be a disincentive to pursue unnecessary legal action (and the application for the loan takes place after the event).

Who would administer a LECS?

An income-contingent loan could be administered by the LACs (in some cases extending existing arrangements) or a newly created body. Given that the LACs are the main information hub they could either play the role of referrer or administrator. It is important that the administrator is separate from government (given cases could be against governments).

One of the advantages of the LACs administering a LECS is that as large purchasers of legal services they could use their buying power to purchase services at favourable rates for those clients who did not wish to use their own lawyer.

By its very nature, an income-contingent loan scheme would involve financial flows that potentially cover many years. In the event that such a scheme did not work well (or there proved to be little demand for such a scheme), winding it up would involve a considerable period of time and administrative expense.

INFORMATION REQUEST 19.2

The Commission seeks feedback on the strength of the case for a Legal Expenses Contribution Scheme and views on any relevant design features, including what legal expenses should be covered and whether it should be limited to particular matters.

19.5 Legal assistance models involving the not-for-profit sector

The Salvos Legal Model

The Salvos Legal Model is an example of a legal assistance model involving the not-for-profit sector.

Salvos Legal is an incorporated commercial and property law practice. It acts for corporate, government and non-for-profit clients. Fees on commercial and property transactional law (less expenses) are used to fund the operation of the 'legal aid'

sister firm — Salvos Legal Humanitarian. Salvos Legal Humanitarian is a full service free firm for the disadvantaged and marginalised in NSW and Queensland. Both Salvos Legal and Salvos Legal Humanitarian are solely owned by the Salvation Army.

Salvos Legal Humanitarian offers assistance in areas such as criminal law, children's and family law, debt, housing, Centrelink and refugee law. Clients of Salvos Legal Humanitarian are almost all on government support or have low incomes (but have not qualified for Legal Aid). According to Salvos Legal 'certainly none of these people could afford a lawyer to act on their behalf and in most cases without one, they would very likely be unable to properly fight for their rights in Court' (box 19.3).

Box 19.3 **Salvos Legal — means and merit test**

Salvos Legal Humanitarian is a free legal service that aims to provide access to justice through full-time representation to those who could not otherwise obtain it.

When assessing the level of assistance to provide in each particular case, Salvos Legal Humanitarian considers three things:

1. **Can the client afford to pay for legal representation or is there another, more suitable, service available to the client who we can refer them to?** Salvos Legal Humanitarian offers preliminary assistance to all clients but those who have sufficient income or assets to enable them to afford legal representation will not generally be considered for full-time representation.
2. **Can we make a difference in this person's life?** Salvos Legal Humanitarian aims to represent those clients who have a genuine desire to deal with the broader issues in their lives that have brought them into conflict with the law. If they feel they are unable to achieve any form of positive outcome for a client, then they are unlikely to provide full-time representation.
3. **Is it consistent with the mission of the Salvation Army to act in this matter?** Salvos Legal Humanitarian is a service provided through The Salvation Army and as such, operates the service within the parameters of The Salvation Army's own social and mission objectives. Salvo Legal Humanitarian's discretion to act in each particular case is exercised in accordance with The Salvation Army's desire to achieve equality, oppose discrimination and fight for social justice.

Source: Salvos Legal website (nd).

Salvos Legal Humanitarian provides a holistic approach to helping clients with legal needs — recognising that clients often have other complex problems, clients are also helped to engage in other Salvation Army social and pastoral services, such as

drug and alcohol recovery, employment assistance, welfare, counselling, financial management and aged care.

Salvos Legal Humanitarian currently funds over 200 free Humanitarian cases each week, employing 26 people (18 lawyers) and having over 150 volunteer solicitors, migrant agents and paralegals across 10 offices in New South Wales and Queensland.

A number of participants upheld the Salvos Legal Model as a good one but did not see it being universally applied.

- QPILCH said that it is ‘an excellent model, but unlikely to have universal application’ (sub. 58, p. 7).
- Victoria Legal Aid said that models where legal services are provided on a commercial basis to fund legally aided services are not ‘scalable or appropriate’ for mainstream legal aid (sub. 102, p. 9).
- The Attorney-General’s Department said that while there was not an evaluation of Salvos Legal, the Department considered that ‘the underlying concept of collocating various services and facilitating referrals for clients to address their different needs best facilitates the delivery of holistic, ‘joined-up’ services’ (sub. 137, p. 20).

The Salvos Legal model is effectively a private ‘cross-subsidisation’ model. The Centre for Innovative Justice suggested that it might be feasible for the LACs to:

... investigate the development of a fee for service model on a wider basis — in which clients with moderate means, who would otherwise be ineligible under Legal Aid guidelines, can elect to pay for representation by a legal aid lawyer, or a private lawyer who conducts legal aid work, on the basis of the relevant statutory scale. (CIJ 2013, p. 35)

In many ways legal assistance providers are already adopting this model. A proposed model of charging self-represented litigants who can afford to pay for unbundled services (chapter 14) is one example, another is the LACs co-contributions for clients of more moderate means.

INFORMATION REQUEST 19.3

The Commission seeks feedback on whether there are any policy barriers that unnecessarily obstruct not-for-profit provision of legal services.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

20 The legal assistance landscape

Key points

- There are four government-funded legal assistance services: legal aid commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS).
- While all four providers offer a mix of services from education initiatives to casework for individual clients, the targets for their services differ as do their size.
 - LACs are the largest providers, with almost \$580 million in government funding in 2012-13. They prioritise their services to disadvantaged people and primarily service the criminal and family law needs of this group.
 - CLCs are smaller (with \$68 million in government funding in 2012-13) and work alongside LACs to fill civil and family law gaps, mainly for disadvantaged people.
 - ATSILS and FVPLS focus on meeting the legal needs of Aboriginal and Torres Strait Islander Australians. ATSILS (with \$68 million in 2012-13) are the larger of the two, with a heavy focus on criminal law matters. FVPLS (with \$19 million in 2012-13) focus solely on family violence matters (for victims not perpetrators).
- All four employ mixed service delivery models, with a focus on holistic services.
 - LACs use a mix of in-house and private practitioners.
 - CLCs rely on a mix of in-house lawyers and pro bono and volunteer services.
 - ATSILS and FVPLS primarily offer in-house legal assistance but use field officers and interpreters to provide culturally competent services.
- Commonwealth and state and territory governments are the primary funders of the four main providers. In 2012-13, government funding totalled almost \$735 million.
 - About a third of this was provided by the Commonwealth Government.
 - Different models determine the funding allocations for each of the four providers.
 - Indigenous-specific providers generally only receive Commonwealth funding.
- Real government funding for the legal assistance sector has been increasing. But the picture at a provider level is more mixed.
 - Some sources (such as those from solicitors' trust accounts) have declined, leading to recent falls in per capita funding for LACs.
 - Both total and per capita funding has increased for CLCs, but some states and centres have fared better than others.
 - Real funding for FVPLS has grown more quickly than the population of Aboriginal and Torres Strait Islander people, seeing an increase in per capita funding for this service. Funding for ATSILS, while steady, has failed to keep pace with Indigenous population growth leading to a decline in per capita funding.

20.1 Who are the main players?

Government-funded legal assistance services play a key role in improving the accessibility of the justice system for many Australians with limited means to pay for legal services. There are four key legal assistance providers:

- legal aid commissions (LACs)
- community legal centres (CLCs)
- Aboriginal and Torres Strait Islander legal services (ATSILS)
- family violence prevention legal services (FVPLS) (figure 20.1).

Together, these providers received almost \$735 million in government funding from the Commonwealth and state and territory governments in 2012-13 for legal assistance services.

The private sector also plays a relatively small, but nonetheless important, role in assisting those with limited means to access legal services through the provision of pro bono services (chapter 23).

LACs are the main providers of legal assistance services

LACs service most Australians who receive publicly-funded legal assistance. They also receive the majority of public funding. The LACs are independent statutory authorities (established under state or territory legislation). They provide legal assistance services in criminal, family and civil law matters.

The LACs' focus is on providing legal assistance for disadvantaged Australians. As the Law Council of Australia said:

LACs are the central pillar of the legal assistance sector and a primary mechanism through which disadvantaged Australians are likely to obtain legal assistance. (sub. 96, p. 15)

There are eight LACs in Australia, one in each of the states and territories. With the exception of the Australian Capital Territory (ACT), the LACs provide services through a number of regional offices and remote communities (through outreach and by attending circuit court visits and providing legal educational programs). Legal Aid NSW, for example, delivers services across New South Wales (NSW) through its 21 offices and 164 regular outreach locations (Legal Aid NSW, sub. 68).

Figure 20.1 The four government funded legal assistance providers
2012-13

	Legal aid commissions (LACs)	Community legal centres (CLCs)	Aboriginal and Torres Strait Islander legal services (ATSILS)	Family violence prevention legal services (FVPLS)	
Where are they located?	8 LACs - In all states and territories - Metropolitan, regional and remote services including regional offices	200 CLCs 140 funded by the Commonwealth - In all states and territories - Mainly in metropolitan and regional areas	8 ATSILS - One in each state, two in the NT, ACT serviced by NSW - Majority of outlets in regional and remote areas	14 FVPLS - In all states and territories except ACT and Tasmania - Service 31 high need regional, rural and remote areas	
Funding arrangements	Commonwealth	\$212.6 m	\$36.7 m	\$68.2 m	\$19.1 m
	State & territory ^a	\$366.5 m	\$30.9 m	--	--
	Other ^b	\$30.4 m	\$22.0 m	--	--
	National Partnership Agreement (NPA) and funding administered by the state and territory governments	Funding administered by LACs in all states except SA where provided through the Attorney-General's Department (SA). NT and ACT administered by the Commonwealth Government	Funding administered by the Commonwealth Government	Funding administered by the Commonwealth Government	
What are their objectives?	- Provide access to assistance for the vulnerable and disadvantaged - Provide the community with improved access to justice and legal remedies	Contribute to access to legal assistance services for vulnerable and disadvantaged members of the community and/or those whose interests should be protected as a matter of public interest	Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people	Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault	
Who do they target?	- State and territory communities - Focus on vulnerable and disadvantaged people	- Local communities, except specialist CLCs who service their state/territory community - Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection	

^a Includes contributions from public purpose funds. ^b For LACs, 'other' comprises self-generated income. For CLCs, 'other' includes fee income, philanthropic donations and other government funding sources but does not include the value of pro bono or volunteer contributions. Providing information on 'other' non-Community Legal Service Program income is not compulsory and is likely to be underestimated for 2012-13. Unpublished financial data showed considerable variation in this type of income from around \$25 to \$80 million over the previous three financial years. A portion of this income may also include unspent monies from previous years.

CLCs work alongside the LACs

CLCs are community-based not-for-profit organisations. They play a distinct role in the legal assistance landscape assisting Australians who cannot afford a private lawyer but who are unable to obtain a grant of legal aid (NACLC, sub. 91; box 20.1).

CLCs provide mainly civil and family legal assistance. They prioritise their services towards those on low income and otherwise disadvantaged individuals and groups in the local community, as well as those with special needs and whose interests should be protected as a matter of public interest. As the Law Council of Australia noted:

They are a key component of Australia's legal assistance system, and provide services which complement and extend the services provided by [LACs] and the private profession. (sub. 96, p. 122)

CLCs are diverse organisations — some CLCs seek to meet the general legal needs of a given geographic community, while other centres specialise in a particular areas of law (such as child support, credit and debt, environmental law, welfare rights, mental health, disability discrimination, tenancy, immigration, employment law and so on) or in meeting the needs of a particular client group (such as children and young people, women, refugees, prisoners, homeless people and so on) where they typically service a broader geographical area (NACLC 2013). There are also 'hybrid' CLCs that offer both generalist and specialist services.

There are around 200 CLCs operating across Australia (NACLC 2013). Of these, around 140 receive Commonwealth government legal assistance program funding.

ATSILS and FVPLS focus on meeting the needs of Aboriginal and Torres Strait Islander communities

ATSILS are normally incorporated Aboriginal associations with Indigenous management committees. They focus on providing legal services to Aboriginal and Torres Strait Islander Australians in criminal, family and civil law matters. There are 8 ATSILS — two in the Northern Territory (NT) and one in every other state (with one for the ACT and NSW). The vast majority of service outlets are located in regional and remote areas.

FVPLS specialise in family violence law matters involving Aboriginal and Torres Strait Islander people. Their aim is to prevent, reduce and respond to incidents of family violence and sexual assault. They provide culturally appropriate legal assistance and counselling in a safe environment to adults and children who are

victim-survivors of family violence, including sexual assault/abuse, or who are at immediate risk of such violence.

In 2012-13, there were 14 service provider units in 31 ‘high-need’ geographic locations in regional and remote areas across all states and territories except Tasmania and the ACT.

20.2 What type of services are provided?

Providers offer a mix of services from broad based education initiatives through to casework for individual clients

All four legal assistance providers offer a wide spectrum of services across criminal, civil and family law matters, including:

- online and face to face legal information and resources
- community legal education and other prevention and early intervention services
- initial legal advice and legal and non-legal referrals
- minor assistance services
- duty lawyer assistance
- case work
- advocacy, law reform and policy development.

In addition to these ‘baseline’ services, some legal assistance providers offer some more specialist services. For example, some LACs and CLCs are registered family dispute resolution providers, while FVPLS offer counselling for the victims of sexual assault.

While the nature of services are broadly similar, the quantum differs

In 2012-13, Australia’s LACs provided:

- 16 million information/referral services, community legal education (CLE), publications, and website page reviews
- 374 000 instances of legal advice and minor assistance
- 382 000 duty lawyer services
- 137 000 grants of legal aid for legal representation

-
- 8000 family dispute resolution conferences involving at least two parties (National Legal Aid, sub. 123).

CLCs provided services on a much smaller scale. In aggregate, in 2011-12 CLCs provided:

- 167 500 information services
- more than 3000 community legal education projects
- 237 200 advice services
- opened around 51 800 cases. Of these, the number of test cases, cases with public interest and advices with public interest was relatively small. For example, in 2011-12 test and public interest cases represented less than 2 per cent of all cases opened in that year.

Nationally, ATSILS delivered services for around 196 000 matters in 2012-13. Total service activities in 2011-12 were split between advice matters (44 per cent), case matters (42 per cent) and duty matters (14 per cent). No information on the number of community legal education activities or projects is available for ATSILS.

The scale of services provided by FVPLS is much smaller — consistent with the extent of government funding they attract (section 20.7). They also have a much stronger focus on non-legal services. FVPLS nationally delivered around 2400 legal advice services, 11 100 non-legal advice services and opened approximately 2100 cases in 2012-13. Around 560 non-case work projects were initiated during 2012-13 and of these, 41 per cent were for community legal education, 15 per cent for early intervention and prevention and 5 per cent were law reform and legal policy.

20.3 Who are services targeted at?

Access to information, basic advice and community legal education services is generally made available to all members of the community. In contrast, eligibility for individualised services, such as case work, tend to be targeted at vulnerable and disadvantaged individuals, as well as those with special needs.

Eligibility for a grant of legal aid is tightly targeted

Grants of legal aid are targeted at those Australians who do not have sufficient financial means to obtain legal representation before a court (or to initiate a court proceeding).

Eligibility for a grant of legal assistance for legal representation is based on an applicant's means (based on income and assets); the merit of the matter; and competing priorities in an environment of limited funds (box 20.1). Any special circumstances that might be relevant to incapacity to self-help are also taken into account (National Legal Aid, sub. 123). Within this broad framework each LAC has developed their own criteria for legal aid funding grants (these are discussed in detail in the following chapter).

These eligibility criteria sit within the broad framework of the National Partnership Agreement (NPA) — an agreement between the Commonwealth Government and each state and territory government, which sets out the broad objectives and priorities of legal aid services for Commonwealth law matters (box 20.1, NPA Schedule A and B).

Eligibility for assistance from CLCs is determined by more flexible guidelines

CLCs generally determine their own eligibility criteria for case work and (minor and major) advice. Most criteria act as a guide only with flexibility built into many of the criteria. Reflecting the broad aims of CLCs, criteria are typically based on the extent of economic, social or cultural disadvantage and broader life circumstances of those that are affected by a legal problem. According to the Federation of Community Legal Centres Victoria (FCLCV):

Each CLC has different eligibility guidelines as to who they can help, what legal issues they can help with and how much help they can provide. As a general rule, when assessing eligibility, a CLC will look at issues including:

- the type of legal matter;
- the availability of other assistance (private lawyer or legal aid);
- the merits of your matter (whether it has a good chance of success);
- your ability to help yourself; and
- the capacity of the centre to assist. (FCLCV nd)

Box 20.1 Who is eligible for legal aid?

While each state and territory have specific eligibility criteria, applications for legal aid are generally assessed against three broad criteria:

- *a means test* — the means test is used to determine the financial eligibility of an applicant to receive a grant for legal representation. It has two parts — an income test and an assets test. If a person does not satisfy the assets component of the financial eligibility test they may still be eligible for legal aid if they cannot reasonably be expected to borrow against their assets (for example, age or disability pensioners with significant equity in their property). In such cases, a legal aid commission can determine whether it is appropriate to impose a client contribution and/or secure a charge over the property, to allow recovery of the contribution upon sale or transfer of the property
- *a merits test* — the legal aid commission (LAC) must be satisfied that an applicant has reasonable prospects of success and that the matter is an appropriate expenditure of public legal aid funds (that is, that the costs of the proposed proceedings do not outweigh the potential benefits). Where the matter has no reasonable prospects of success, legal aid is refused
- *fit within the legal aid commission's guidelines* — applications for legal aid are assessed under the applicable state or commonwealth guidelines. Legal aid is available for criminal, family and civil law. It is not normally provided for: business or commercial matters; buying property; building contracts and disputes; defamation; intellectual property law; pay disputes and work injuries; and wills and deceased estates.

Most LACs also have a general 'availability of funds' test which effectively operates as a fourth eligibility test after means, merit and guidelines.

Special/exceptional circumstances

The specific guidelines can be waived in cases involving special or exceptional circumstances. These can include hardship — financial or otherwise — to the applicant if legal assistance were not provided; or emergency situations in which the liberty, livelihood, possessions or physical and mental wellbeing of the applicant and any dependents are threatened. Indeed, most LAC CEOs have the discretion to exceed a funding ceiling or cap in exceptional circumstances.

Funding caps/ 'cost ceiling'

For some legal issues there are caps on the amount of legal aid granted. Where a case is identified to be an 'expensive case', no aid or extension of existing aid beyond set funding caps will be granted.

Sources: COAG (2010); National Legal Aid website (nd); AGD's *Expensive Commonwealth Criminal Cases Guidelines* (2012c).

Eligibility criteria for ATSILS are clearly defined and differ from those used by LACs

Access to individualised assistance provided by ATSILS is also subject to a means, matter and merit test. Individuals seeking help must also be an Aboriginal or Torres Strait Islander person or the partner or carer of an Aboriginal or Torres Strait Islander person.

Guidelines for income tests appear to be slightly more generous than for the LACs while the guidelines for assets tests appear to be less generous than for LACs. For example, all applicants for legal casework assistance must satisfy one or more of the following requirements:

- under 18 years of age or
- main source of income comes from Community Development Employment Projects (CDEP) participant wages or Centrelink (or equivalent) benefits or
- gross personal income is under \$46 000 per annum (AGD 2011b).

The means test on income also takes into account the number of people in the applicant's household who are dependent on the applicant's income, as well as the income of any financially associated person that forms part of the applicant's gross household income.

The ATSILS assets test sets out the level of net assets below which services are provided free of charge and those above which an applicant is not entitled to receive free legal assistance services. The assets of any financially associated person also forms part of the applicant's assets test. Although some assets are not included, the test allows for the value of assets above certain thresholds to be included (for example, equity in a family home above \$146 000 or equity in a car above \$16 000 is included in the ATSILS assets test). Where net assets are valued between a lower and an upper threshold (for example, \$870 and \$3970 for single households), client contributions are payable according to a scale ranging between \$20 to \$1580. For those with assets above the top threshold, contributions are payable on a dollar for dollar basis (AGD 2011b).

By comparison, the income test for Legal Aid NSW has a threshold of around \$16 500 per year based on the applicant's net assessable income (which comprises gross assessable income less allowable deductions such as income tax, housing costs, allowances for dependants and child care costs). As well, an applicant's net

assessable assets⁶⁷ must be less than \$100 to obtain a grant of legal aid. Above this amount, the amount of contributions payable depends on the value of assets. Those with net assessable assets above \$3000 are required to contribute \$1724 plus 100 per cent of their net assessable assets over \$3000 (Legal Aid NSW 2010a, 2010b). However, grants of legal aid are refused when the contributions imposed exceeds the estimated cost of proceedings. For example, as the Legal Aid NSW grants management system uses a figure of \$1475 as the ‘cost of proceedings’, an applicant who is assessed to pay a \$1500 contribution will be ineligible for legal aid unless discretion is exercised (Legal Aid NSW, pers. comm., 21 March 2014.)

FVPLS do not have means or merit based eligibility criteria

There is no means or merit test for FVPLS; the only eligibility test is that the applicant must generally be of Aboriginal and/or Torres Strait Islander descent, identify as such, and they must not be a perpetrator of family violence (AGD 2010).

Services can be made available to the partners or carers of Aboriginal or Torres Strait Islander people, but may only be provided to a non-Aboriginal or non-Torres Strait Islander person where such services will provide a direct and substantial benefit to an Aboriginal or Torres Strait Islander person.

Consistent with targeted eligibility criteria most LAC and CLC service users are disadvantaged

Most users of LACs’ services are disadvantaged. For example, Legal Aid NSW reported that just over 10 per cent of their clients in 2012-13 were Aboriginal and Torres Strait Islander Australians, just under a half were in receipt of Commonwealth government income support payments, 17 per cent were aged under 18 years of age and 14 per cent were born in non-English speaking countries. They also reported that three quarters of their clients were male and 43 per cent were living in rural and regional areas (Legal Aid NSW 2013).

The demographic profile of Victoria’s Legal Aid services also points to significant disadvantage among users. In 2012-13, 55 per cent were in receipt of a government pension or benefit, 19 per cent reported they had a disability or suffered from

⁶⁷ Net assessable assets are the applicant’s gross assessable assets less the value of excluded assets above given thresholds. Examples of threshold values of excluded assets are: home equity above \$521 100 (or above \$260 550 for commonwealth family law matters where there has not been a property settlement); motor vehicle equity above \$15 100; or assets above \$1310 for a single person (Legal Aid NSW 2010a).

mental illness, 22 per cent were from culturally and linguistically diverse backgrounds, 3 per cent were Aboriginal and Torres Strait Islander Australians and 30 per cent were living in rural or regional areas (VLA 2013a).

The profile of intensive users differs from the average user of LACs. For example, Legal Aid NSW profiled the fifty highest users of their legal assistance services over a five year period from mid-2005. This showed intensive users of legal aid services tended to be relatively young — around 80 per cent were aged 19 years and under and 82 per cent had their first contact with Legal Aid NSW by the time they were 14 years of age — and all required assistance to deal with a criminal matter. They also shared a common history of mental health issues, exposure to domestic violence, time spent in correctional facilities, low levels of educational attainment, and poor behaviour while attending school. Compounding this history were a range of factors such as weak attachment to the labour force, dependence on income support, relative income poverty and exposure to community dysfunction (van de Zandt and Webb 2013). Further detail on the characteristics of intensive users of legal aid is in appendix H.

The majority of CLC clients are also from disadvantaged groups. Commission analysis of the Commonwealth's administrative data for CLCs revealed that in 2011-12:⁶⁸

- the most common CLC client is one with low income (that is, less than \$500 per week) and on government payments (43 per cent of CLC clients). This is consistent with the ACOSS estimate that close to half of CLC clients were reliant on income support (2013)
- around 6 per cent of CLC clients were of Aboriginal and Torres Strait Islander origin, with the NT and Western Australia (WA) having the highest proportions of clients identified as Aboriginal and Torres Strait Islander Australians
- around 5 per cent of clients spoke little or no English
- about 15 per cent of clients indicated they had a disability
- almost 5 per cent of clients were classified as being at risk of homelessness
- about 19 per cent of clients were single parents.⁶⁹

⁶⁸ The Commission notes that the quality of administrative data is mixed, with high levels of missing data.

⁶⁹ Based on 2011 census data, 3 per cent of the population were Aboriginal or Torres Strait Islander Australians, 3 per cent spoke little or no English, 5 per cent were disabled, 0.5 per cent were homeless and 10 per cent of families were one parent families (ABS 2014; Homelessness Australia 2012).

However, the extent of disadvantage among CLC users is not uniform. As discussed in the following chapter and appendix I, those CLCs located in ‘better off’ areas tend to serve ‘better off’ clients.

ATSILS and FVPLS largely service disadvantaged Aboriginal and Torres Strait Islander Australians

ATSILS clients are overwhelmingly Aboriginal and Torres Strait Islander Australians, with only 0.2 per cent of matters in 2012-13 being for people who were non-Indigenous Australians. The majority of clients were also facing financial disadvantage — most of the aid given for case matters in 2012-13 was awarded on the basis of the clients being a Centrelink beneficiary (85 per cent), CDEP participant (1 per cent) or aged less than 18 years (8 per cent).

While the eligibility criteria for FVPLS may not be technically as ‘strict’ as for other services, the nature of the services provided means that all clients generally display a number of indicators of disadvantage — namely people of Aboriginal and Torres Strait Islander origin experiencing, or at risk of, family violence. In 2012-13, around 90 per cent of clients were female and just over two thirds were aged between 18 and 49 years. Many (around half) were ongoing clients. The proportion of active clients that were ongoing clients in 2012-13 was largest in the NT, with 2 of the 3 FVPLS in that jurisdiction indicating that almost 80 per cent of active clients were ongoing.

20.4 What areas of law can people get assistance with?

LACs, CLCs and ATSILS provide assistance across a range of civil, criminal and family matters, while FVPLS specialise in family violence matters. In practice, however, a number of factors affect the ability to service need in these different areas of law.

LACs focus on criminal and family matters

For LACs, a major consideration is the need to devote resources to represent those with an indictable offence and who are unrepresented. In *Dietrich v R.* (1992) 177 CLR 292, the High Court held that when a person charged with an indictable offence cannot afford legal representation, the right to a fair trial means that the court should only proceed in exceptional circumstances. In practice, this means trials are often put on hold until LACs make resources available.

Another is the NPA, which provides guidance to LACs about the legal matters that should attract Commonwealth funding. Priority matters include those relating to the wellbeing of children or people who have experienced, or are at risk of, family violence. Commonwealth funded civil law priorities include matters relating to social security benefits, consumer law, employment law, equal opportunity and discrimination cases.

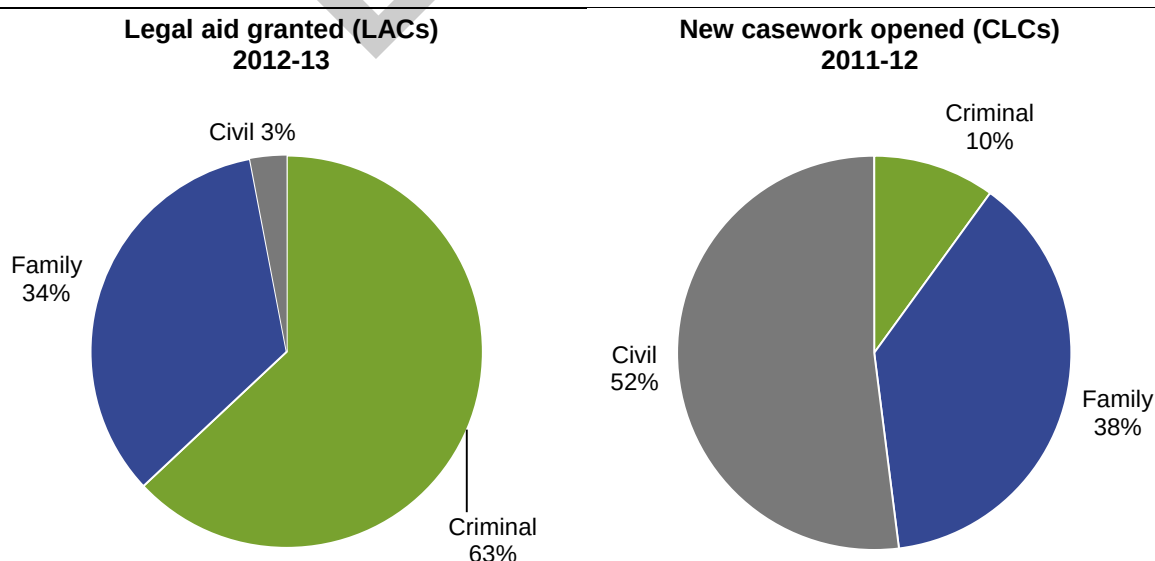
Commonwealth funding is to be used only for Commonwealth law matters. Of the 30 000 or so Commonwealth-funded grants of legal aid approved in 2012-13, 94 per cent were for family law matters while only 4 per cent and 2 per cent were for criminal and civil matters respectively. In other words, the Commonwealth Government funded around 600 civil grants of legal aid in 2012-13.

Funding for state law matters comes from state or territory governments. However, preventative and early intervention services, and legal representation where matters are a mix of Commonwealth family law and state or territory family violence or child protection matters, can attract Commonwealth funding.

The LACs also have the flexibility, subject to funding, to provide civil law assistance relevant for acute situations, for example, providing legal assistance to the public as part of natural disaster recovery (National Legal Aid, sub. 123).

More than 60 per cent of legal aid approvals in 2012-13 were for crime matters. Just 3 per cent of aid granted was for civil matters compared with 34 per cent for family matters, including family dispute resolution (FDR) services (figure 20.2).

Figure 20.2 Aid granted and cases opened by law type — LACs & CLCs



Data sources: AGD unpublished data (CLCIS); National Legal Aid website (nd).

More generally, the LACs focus their efforts on areas of civil law where private practitioners are not providing services. Legal Aid NSW said their civil law division:

... specialises in areas such as consumer law, employment, government law, access to services, insurance, mental health and issues affecting homeless people, older persons, prisoners and veterans. These areas of law are not commercially viable for private practitioners because they are:

- often in no cost jurisdictions
- do not involve a dispute (and therefore costs from an opposing party)
- impact on people who cannot afford to pay a private solicitor to assist them. (sub. 68, p. 79)

CLCs tend to focus on civil and family law matters

CLCs' primary focus is in civil and family law. Many of their clients are those who miss out on legal aid and it is here where CLCs can focus their efforts.

In 2011-12, around 60 per cent of clients visited CLCs for civil matters, 33 per cent for family matters, and 8 per cent for criminal matters. The new casework matters opened in that year broadly reflected the same pattern (figure 20.2). Within the family and civil law areas, assistance was provided for a broad range of disputes (figure 20.3).

ATSILS focus heavily on criminal matters

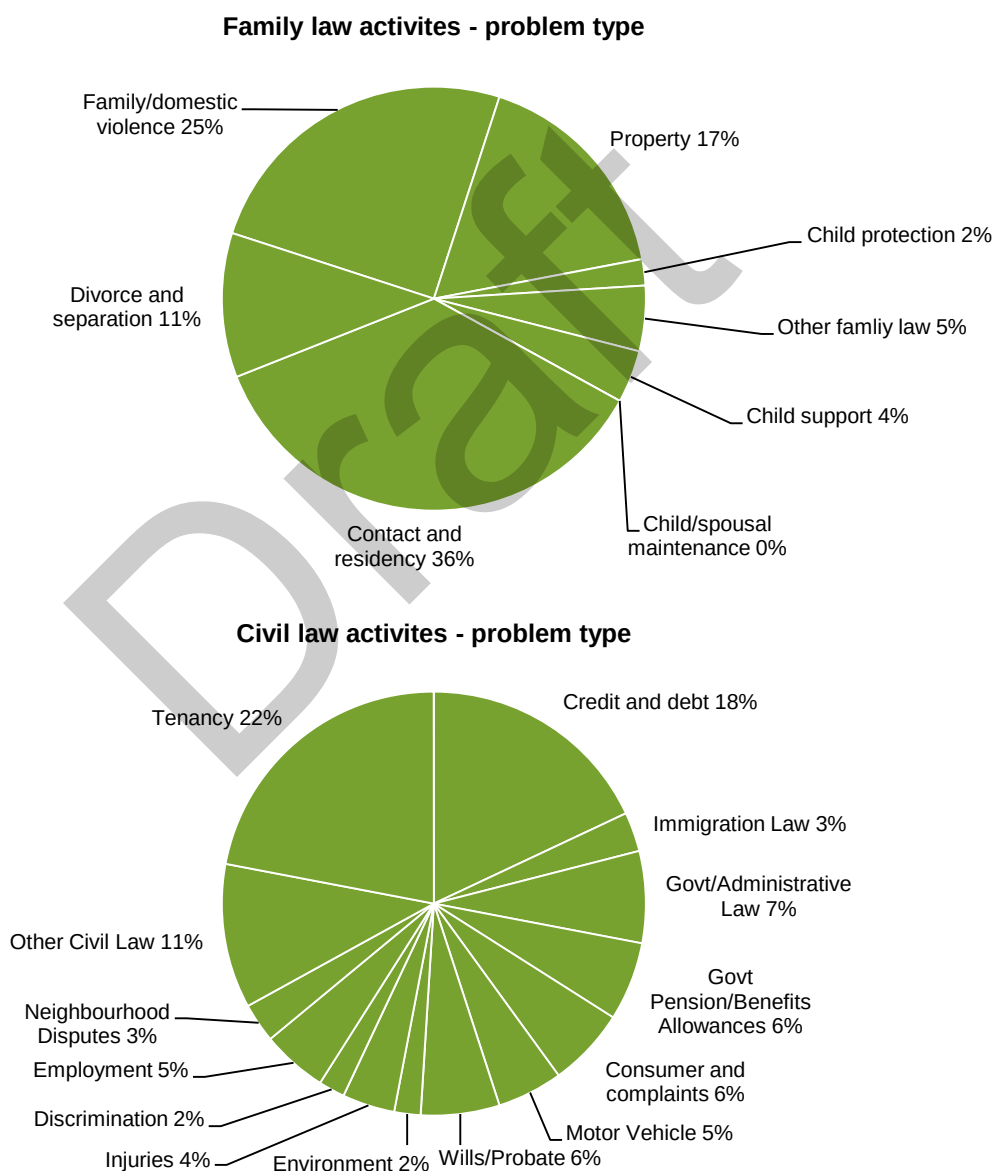
ATSILS main focus is on criminal law matters. In 2012-13, around 83 per cent of ATSILS matters were in (typically state-based) criminal law matters. Further, over 90 per cent of casework and duty matters were in criminal law in 2012-13.

Family and civil law services made up less than 18 per cent of matters in which ATSILS provide assistance (11 per cent in civil law matters, 5 per cent in family law matters and 1 per cent in violence protection matters) in 2012-13.

The mix of civil, family and criminal matters varies by state. ATSILS in Tasmania, the NT and Queensland deal with relatively greater proportions of civil and family matters (62, 26 and 21 per cent, respectively). The lowest proportions of civil and family matters are observed in NSW (4 per cent) — reflecting a service focus on criminal law and children's care and protection law in that state — and Victoria (5 per cent).

The mix also varies within states with family and civil law services only available in some offices — mainly those located in major metropolitan centres. Similarly, only some provide more specialised services such as mental health legal services, financial counselling services, prisoners' legal services or suicide prevention programs (NPBRC 2009a).

Figure 20.3 **CLCs family and civil law activities by problem type**
2012-13



Data source: NACLC (sub. 91, p. 19).

FVPLS focus solely on family violence matters

Consistent with their focus on family violence, FVPLS deal with a limited range of legal matters, these include:

- family violence restraining orders
- child protection, including legal assistance to children and mandatory reporting requirements
- victim's compensation
- family law including child support (where it relates to family violence).

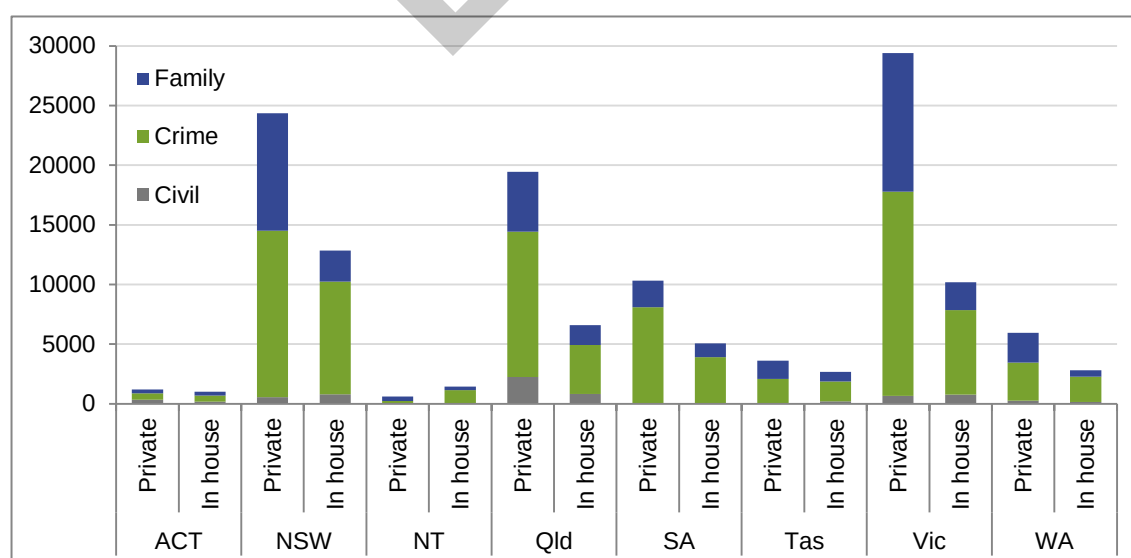
20.5 What do their service delivery models look like?

LACs employ a mixed service delivery model

LACs use a mixed service delivery model — that is, they use both in-house lawyers and private practitioners to deliver legal aid services.

At a national level around 70 per cent of LACs services are provided by private practitioners and 30 per cent by LAC in-house lawyers (National Legal Aid, sub. 123, p. 18). However, the use of private practitioners varies across the LACs and law matter (figure 20.4).

Figure 20.4 **Legal aid approvals by type of practitioner and jurisdiction**
2012-13



^a Excludes a small number of unknown practitioner types.

Data source: National Legal Aid website (nd).

CLCs employ a diverse mix of service delivery models

Many CLCs also employ a mixed service delivery model, but do so by harnessing pro bono and volunteers rather than paid private practitioners. Based on a survey by NACLC (sub. 91), the Commission estimates that the net contribution of pro bono and volunteers across the CLCs in 2012 was nearly 480 000 hours per year — around 246 full time equivalent employees⁷⁰ (box 20.2).

Box 20.2 The contribution of pro bono and volunteers to CLCs

CLC staff are supplemented by volunteers across a range of legal and non-legal areas.

An estimate of the contribution of volunteers and pro bono was undertaken by NACLC (sub. 91) in 2012. Based on 106 responses to a survey of around 200 Australian CLCs, they estimated that:

- around 3600 volunteers contributed around 8400 hours per week to CLCs, providing support across a variety of areas but mostly in direct legal service delivery
- about 57 000 hours were contributed in one year (or almost 1100 hours per week) by pro bono partners. While most pro bono contributions were for CLC clients, other pro bono contributions were directed to CLCs in the form of accountancy and governance advice, marketing, design and printing, free venues and catering for meetings or training, and fundraising.

However, as the Public Interest Advocacy Centre (PIAC, sub. 45) noted, volunteer and pro bono does not equate to 'free' services as there are costs associated with training and supervising lawyers to undertake this work. Indeed, NACLC estimated that around 12 300 hours per year (or close to 240 hours per week) was invested by the 106 responding CLCs in providing training for pro bono and volunteers.

Hence, the 'net' contribution of pro bono and volunteers across the 106 CLCs in 2012 was around 9200 hours per week (or close to 480 000 hours per year).

NACLC argued in their submission that these volunteer and pro bono estimates would be higher with a higher response rate but it may be the case that non-responding CLCs were those that did not utilise volunteers or pro bono services. For example, as the Commonwealth noted in its review of the Commonwealth Legal Services Program:

The lack of availability of volunteers mostly impacts regional, rural and remote community legal centres, which have difficulties incorporating volunteer assistance into their service delivery models. (Commonwealth of Australia 2008, p. 30)

Sources: NACLC (sub. 91); PIAC (sub. 45); Commonwealth of Australia (2008).

But valuing these pro bono and volunteer contributions is not straightforward. The Commission estimates that if pro bono and volunteer contributions were about the same as the Commonwealth's funding contribution (that is, \$36.7 million per year),

⁷⁰ Assuming full time work is 37.5 hours per week.

they would be valued at around \$76 per hour. Alternatively, at average weekly earnings (around \$38 per hour (ABS 2013b)) their contribution would be valued at around \$18.2 million per year.

While legal services are generally provided in-house by an employed solicitor or by a volunteer, service delivery models differ across providers. Examples include: night advice clinics (often staffed by private lawyers providing pro bono services); partnerships with universities to deliver clinical legal education and other pro bono partnerships; and outreach clinics (delivering advice and community legal education).

Some CLCs provide statewide or national services primarily via telephone and email. These types of service delivery models are common in specialist services, particularly in the areas of consumer credit, environment and welfare.

Support for people from within the community plays an important role in the ATSILS service delivery model

Each ATSILS serves regional and remote locations through a combination of regional offices and outreach services, including court circuits and bush courts. Services are provided by in house lawyers but can be briefed out in exceptional circumstances.

Field officers with an understanding of Aboriginal and Torres Strait Islander culture and community — generally Aboriginal and Torres Strait Islander people or those with significant community connections — play an important role in the ATSILS' service delivery model. While precise duties differ across organisations, field officers generally assist clients to access legal services and with issues related to their legal problems, including through client communications and relationship building.

FVPLS employ two distinct service delivery models

The FVPLS program is delivered through one of two models — regionalised provision and auspice arrangements. Regionalised models involve a single provider servicing multiple high need areas. The auspice model involves provision across a single high need area through an intermediate organisation, which provides business support to the FVPLS provider at arms-length.

Of the 31 high need areas currently serviced, 24 areas are serviced by seven regionalised providers. The remaining seven high need areas are each serviced by an auspiced provider.

As with the ATSILS model, services are generally provided by in-house solicitors but can be briefed out as funds permit. Providers typically deliver a proportion of their services through outreach, including by following bush court circuits. Some providers deliver almost all of their services in this way.

All four providers emphasise a holistic approach to services

The objectives and priorities for LACs are based on the *Access to Justice Framework* (AGD 2009). This framework promotes inclusive, preventative and holistic service delivery as a means to enhance access to justice. Indeed, one of the outcomes to be achieved by LACs under the NPA includes increased collaboration and ‘joined up’ services for clients to help them address their legal and other problems.

CLCs also seek to adopt an holistic approach to service delivery. According to the National Association of Community Legal Centres (NACLC sub. 91), CLCs typically view the legal problems of clients in conjunction with other factors affecting the client.

NACLC said that CLCs ‘have been at the forefront of developing both targeted and integrated models of service delivery’ (sub. 91, p. 3). Examples of integrated legal and non-legal services include consumer credit and financial counselling. CLCs also seek to collaborate with other community service providers to provide ‘wrap around’ legal services in locations such as homeless shelters, shopping centres and community centres.

Indigenous-specific providers also seek to provide holistic services with a culturally competent focus. The North Australian Aboriginal Justice Agency (NAAJA) provided a number of case studies to demonstrate their work with other community services to achieve holistic and effective outcomes for their clients and said:

In our experience, meaningful access to justice for our clients comes through understanding and responding to Aboriginal peoples’ disadvantage in a holistic and practical way. (sub. 95, p. 12)

The FVPLS model is designed to provide holistic and culturally appropriate services which engender trusting relationships with Aboriginal and Torres Strait Islander people and their communities. Counselling is also provided alongside legal assistance services (QIFVLS, sub. 46; NFVPLSF, sub. 97; and AFVPLSV, sub. 99).

20.6 What are their governance arrangements?

Governance arrangements for LACs are relatively straightforward

The NPA — a four year agreement between the Commonwealth Government and each state and territory government (effective from 1 July 2010) — was established to support a holistic approach to the reform of the delivery of legal assistance services by LACs, CLCs, ATSILS and FVPLS.

However, its primary focus is on setting out the broad objectives and priorities of legal aid services for Commonwealth law matters (box 20.3).

Directors/Chief Executive Officers of each of the LACs combine at a national level to form National Legal Aid (NLA), and one of their number is, on a rotational basis, elected as Chair. The NLA has also formed an alliance with the Legal Services Agency of New Zealand to facilitate the sharing of information, the showcasing of initiatives, and contribute to the development of best practice (NLA 2011).

At the provider level, while there are some differences between individual state and territory legislative arrangements, LACs are independent statutory bodies whose broad policies and strategic plans are generally established by a board and have employees who are state or territory government public servants.

Governance arrangements for CLCs are more complex

Governance arrangements for CLCs are varied and complex; operating at the government, industry and centre level.

Some CLCs report directly to a Commonwealth program manager, others report to state program managers based in LACs, and in South Australia (SA), CLCs report to the South Australian Attorney-General's Department. While CLCs are not directly funded by — or governed by — the NPA, the Community Legal Services Program (CLSP) (box 20.4) does form part of the NPA. The small number of CLCs (estimated to be around 24) who are not funded under the CLSP remain outside of this governance framework.

At the industry level, NACLC has established a national accreditation scheme with a view to improving service delivery and promoting good practice. Accreditation coverage is near universal — by being members of NACLC, CLCs obtain reduced indemnity insurance premiums.

At the centre level, CLCs are governed by a management committee and CLSP funding guidelines require them to be incorporated.

Box 20.3 The National Partnership Agreement on Legal Assistance Services

The National Partnership Agreement (NPA) on Legal Assistance Services is an agreement between the Commonwealth of Australia and the state and territory governments aimed at finding better ways to help people resolve their legal problems. The objective of the Agreement is:

A national system of legal assistance that is integrated, efficient and cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.

The outcomes to be achieved by legal aid commissions providing efficient and cost-effective legal aid services for disadvantaged Australians include:

- a) earlier resolution of legal problems for disadvantaged Australians that, when appropriate, avoids the need for litigation
- b) more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing, social exclusion
- c) increased collaboration and cooperation between legal assistance providers themselves and with other service providers to ensure clients receive 'joined up' service provision to address legal and other problems
- d) strategic national response to critical challenges and pressures affecting the legal assistance sector.

The objectives and outcomes of the Agreement are to be achieved through:

- a) legal assistance providers increasing the delivery of preventative, early intervention and dispute resolution services
- b) comprehensive legal information services and seamless referral for preventative and early intervention legal assistance services within each State and Territory
- c) delivery by State and Territory legal aid commissions of efficient and cost effective legal aid services (consistent with the access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness), including:
 - i) preventative legal services such as community legal education, legal information and referral
 - ii) early intervention legal services such as advice, minor assistance and advocacy other than advocacy provided under a grant of legal aid
 - iii) dispute resolution services, duty lawyer services, litigation services and post resolution support services.

Source: COAG (2010).

Box 20.4 Community Legal Services Program (CLSP)

The CLSP commenced in 1978 with national funding of \$175 000. Funding was provided on a grants-based arrangement with little or no performance reporting obligations. Today, CLCs funded through the CLSP receive funding via a single joint service agreement (with common accountability and administrative requirements) between the Commonwealth, the relevant state government and each funded CLC.

There is a memorandum of understanding between the Commonwealth and each of the LACs (or Attorney-General's Department in the case of SA) setting out the purchasing arrangements for the provision of state program manager services.

CLSP-funded CLCs may not duplicate the work of LACs.

CLCs normally receive funding on a recurrent basis from the CLSP, subject to satisfactory performance under the service agreement. Additional funding from governments may be provided on a one-off basis. CLCs are also allowed to carry over up to 15 per cent of funding (except for one-off funding) between financial years. At the beginning of each three-year contract, CLCs must submit a CLSP Plan that includes annual service delivery targets.

Most CLCs funded under the CLSP receive both Commonwealth and state or territory government funding. However, some only receive state government funds and others only receive Commonwealth funds.

The reporting requirements of CLCs include a triennial CLSP Plan, annual report, budget and service targets, biannual progress report, quarterly funds report and monthly data report.

ATSILS and FVPLS have similar governance arrangements

Both ATSILS and FVPLS report directly to the Commonwealth Government.

At the 'industry' level, almost all ATSILS are members of a peak body, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). FVPLS also have a national forum — the National Family Violence Protection Legal Services Forum (NFVPLSF) — but not all FVPLS are members.

Many ATSILS and FVPLS are also members of NACLC (the CLC national peak body). Those that are members, are undergoing the same accreditation process as CLCs.

At the provider level, operating guidelines require ATSILS and FVPLS to be incorporated associations. In providing culturally competent services they are also community-controlled organisations (NATSILS, sub. 78). For ATSILS, the boards of management comprise local Aboriginal and Torres Strait Islander representatives

and they may have a specialist director who provides guidance on finance and corporate governance.

At the provider-level, FVPLS governance arrangements differ depending on whether they are regional or auspiced units. Under the regional model, a unit is an incorporated body which operates with one main coordinating office and a series of regional offices. The auspice model is where the unit operates under the auspices of another organisation. For auspiced units, there is a memorandum of understanding with a steering committee, which makes recommendations to the auspice unit's board but it has no day-to-day involvement.

Among ATSILS, three are incorporated under the *Corporations Act 2001* (Cth) and hence regulated by the Australian Securities and Investments Commission (ASIC) while the balance are registered associations under state or territory legislation and regulated by the relevant state or territory authorities. In contrast, most FVPLS providers are incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and are regulated by the Office of the Registrar of Indigenous Corporations (ORIC) and the balance (three) are regulated by ASIC.

Coordination across providers is facilitated by the Australian Legal Assistance Forum

All four national peak bodies — the NLA, the NACLC, the NATSILS and the NFVPLSF — are members of the Australian Legal Assistance Forum (ALAF) along with the Law Council of Australia. ALAF was established to:

- promote cooperation between service providers
- regularly disseminate information and promote communication among service providers
- inform governments on the needs of clients and practical delivery of legal assistance services
- assist governments in the development of policies to enhance access to justice (ALAF nd).

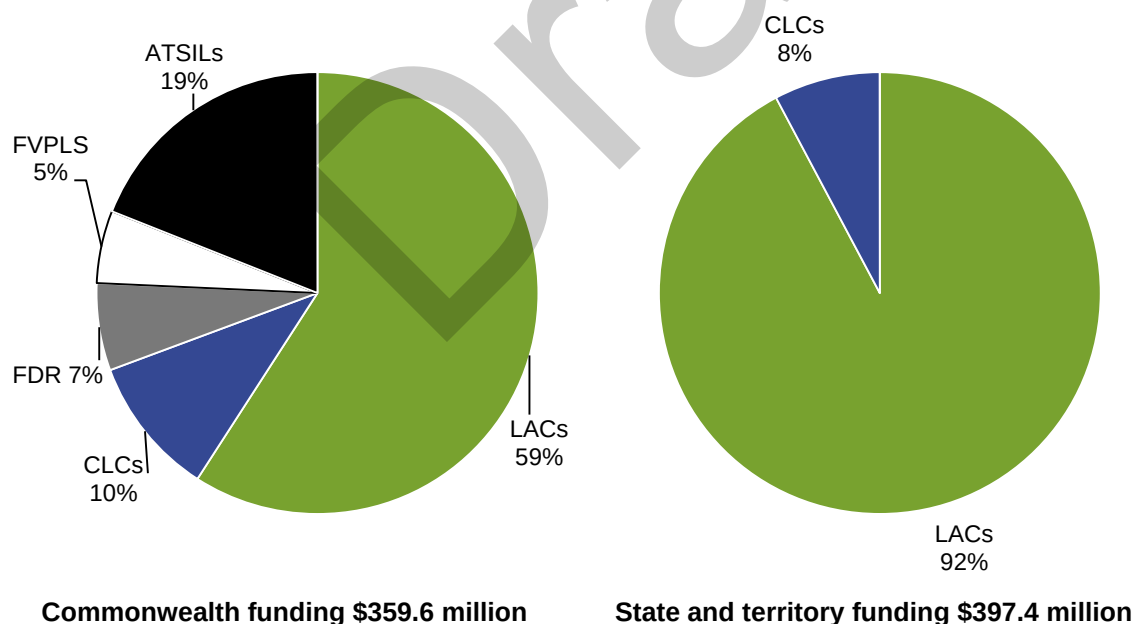
20.7 What are the funding arrangements?

Governments are the primary contributors and their funds are mainly directed towards the LACs

Across all four providers, Commonwealth and state and territory government funding sources dominate. Government funding contributions are set out in a series of funding agreements.

The Commonwealth contributed about \$352.8 million in funding (including around \$22.9 million to Family Relationship Centres for family dispute resolution (FDR) (chapter 8). State and territory governments contributed around \$397.4 million (including interest on solicitors' trust accounts), primarily to the LACs and the CLCs (figure 20.5).

Figure 20.5 **Distribution of Commonwealth^{a, b} and state and territory^c government payments to main legal assistance providers**
2012-13



^a Excludes \$56.9 million in Commonwealth funding provided to Other justice services excluding courts (\$13.6 million), Other Indigenous justice services (\$13.5 million) and Stronger Futures in the NT (\$28.8 million). ^b Around \$14.5 million in payments to LACs was reported in AGD's Portfolio Budget Statements. Another \$198 million was reported in the Australian Government's Final Budget Outcome for 2012-13 in payments to states and territories for legal assistance services. This amount totalled \$212.6 million, of which a small percentage is withheld to fund program improvements. This total is slightly different to the total of \$205.9 million in 2012-13 reported on National Legal Aid's (NLA) website. ^c Includes public purpose trust fund contributions from state and territory governments. In 2012-13, these amounted to \$90.1 million to LACs. State-based PPF contributions to CLCs were unable to be separately identified and are included in state and territory government funding contributions.

Data sources: AGD Portfolio Budget Statements (various); unpublished administrative data; NLA website (nd).

The relative importance of supplementary funding sources (such as contributions from the interest on solicitors' trust accounts, fee revenue, cost recovery and in-kind contributions from pro bono services and volunteers) varies markedly for each of the four providers and between jurisdictions.

Government funding for LACs is relatively structured

The LACs total budgeted income in 2012-13 was just over \$600 million. The states and territories were the primary contributors (46 per cent). Funding from the Commonwealth represented just over one third of funds (table 20.1).

Table 20.1 LACs budgeted income by funding source, 2012-13
\$ million

<i>State/Territory</i>	<i>Commonwealth grants^a</i>	<i>State grants</i>	<i>Spec. Trust & statutory interest</i>	<i>Self-generated income</i>	<i>Total income</i>
New South Wales	65.0	100.8	39.5	8.4	213.8
Victoria	47.5	61.3	25.7	6.7	141.1
Queensland	42.8	46.6	18.9	3.9	112.3
South Australia	15.7	19.5	3.6	2.7	41.4
Western Australia	20.6	32.3	1.0	6.2	60.1
Tasmania	5.9	5.9	0.0	0.3	12.1
Northern Territory	3.9	4.8	0.0	1.4	10.1
ACT	4.4	5.3	1.4	0.7	11.8
Total	205.9	276.4	90.1	30.4	602.8

^a In 2012-13, total Commonwealth outlays for legal assistance services to LACs totalled \$212.6 million, of which a small percentage is withheld to fund program improvements. This total is slightly different to the total of \$205.9 million in 2012-13 reported on National Legal Aid's (NLA) website.

Source: NLA website (nd).

The allocation of Commonwealth funding for the states and territories to deliver legal aid services through LACs is based on a legal aid funding distribution model.

The model uses measures such as population size, demographic characteristics and socioeconomic variables to provide an indicative distribution for Commonwealth Government legal aid funding.

In some states, government funding is bolstered by income from 'special trust and statutory interest' (also known as solicitors' trust accounts or Public Purpose Funds (PPFs)):

... these funds receive interest earned on deposits in solicitors' trust accounts, and are administered by a body that allocates grants to organisations such as Legal Aid

Commissions, community legal centres or other justice and legal-related organisations. (NACLC, sub. 91, p. 43)

In 2012-13, income from PPFs represented around \$90 million, or 15 per cent of total income of LACs. Most people who receive legal aid are required to pay a contribution towards the cost of legal representation (based on their income and assets) — termed ‘self-generated income’. Certain cases are exempt. At the conclusion of the case or the legal aid grant, LACs may recover the total costs of a matter when the applicant has recovered a sum of money or other assets or there is a substantial improvement in their financial circumstances. In 2012-13, self-generated income was around \$30 million, representing around 5 per cent of LACs revenue in that year.

Funding for CLCs is far less structured and comes from a wider range of sources

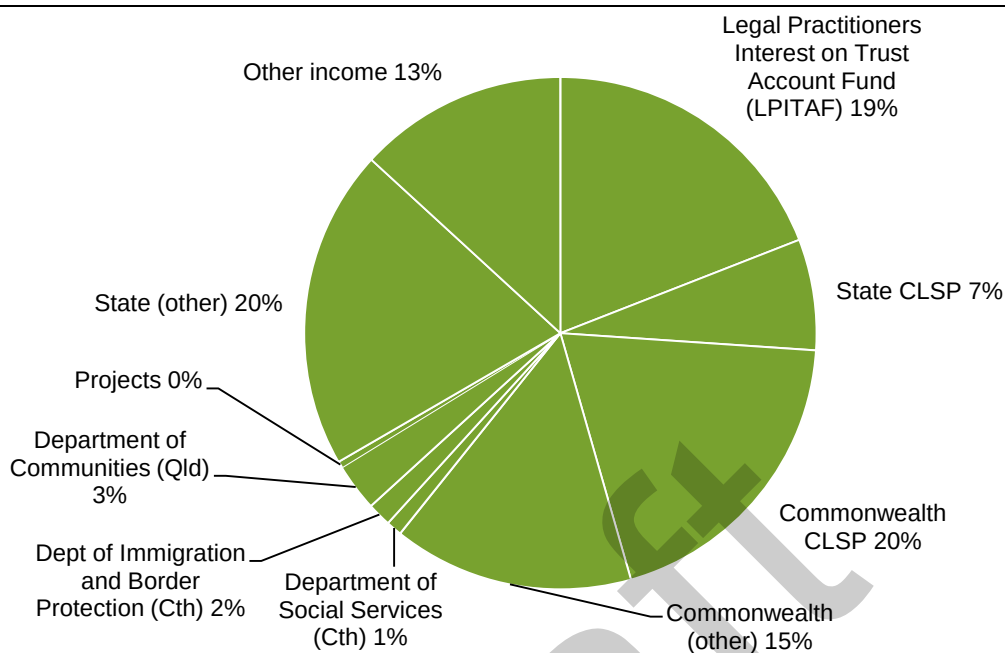
Funding for CLCs varies markedly by centre. Some CLCs generate sizable proportions of their revenue from government funding, while others receive very little or no funding and are largely or entirely staffed by volunteers. Those CLCs that receive government funding, can do so from a wide variety of government departments and agencies (figure 20.6).

CLCs attracted over \$32 million in Commonwealth CLSP funds during 2012-13. Commonwealth funding is provided through application-based grants under the CLSP. Under these grant arrangements, Commonwealth funding is allocated to CLCs on an historical basis and includes an indexation factor. In contrast with the systematic approach for allocating Commonwealth funds to LACs and ATSILS, there appear to be no metrics for allocating Commonwealth funding to CLCs.

The split of Commonwealth funding across jurisdictions delivers the largest proportion to NSW (26 per cent) followed by Victoria (22 per cent), and Queensland (15 per cent) and WA (14 per cent).

State and territory government funding of CLCs amounted to around \$30 million in 2012-13. The extent of state and territory government contributions to the CLSP varies across jurisdictions. In 2012-13, Victoria accounted for almost 40 per cent of the total \$30 million funding envelope, followed by NSW (27 per cent), Queensland (22 per cent), WA (9 per cent) and SA (3 per cent). Tasmania, the ACT and the NT governments did not contribute any funding.

Figure 20.6 **A wide range of funding sources — Queensland CLCs example^a**
2012-13



^a Based on self-reported data from Queensland CLCs to the Queensland Association of Independent Legal Services. Given that centres' audited financial reports can classify income in different ways, some centres may have reported CLSP funding administered by Legal Aid as income from 'State (other)', some income streams are reported by project, rather than by funding source and some centres report 'miscellaneous grants'.

Data source: NACLC (sub. 91, p. 43).

The state and territory government funding contribution includes funds from the PPF. Outside of Queensland and NSW (where contributions from the PPF amounted to around \$8 million in 2012-13), states and territories tend not to separate out this contribution.

CLCs are also able to access funding from other sources, including fee income, fundraising, philanthropic donations, seeking contributions from clients⁷¹ and other government funding outside of the CLSP.⁷² In 2012-13, contributions from these sources was estimated to be around \$22 million. In-kind funding through volunteers and pro bono contributions can be significant for some CLCs. As NACLC (sub. 91) stated:

[CLCs'] capacity to attract, train, utilise and retain large numbers of quality volunteers is a major feature that sets them apart from other legal service providers. (p. 48)

⁷¹ Under the guidelines for Commonwealth funding, any CLC policy to seek contributions from clients for legal services must not cause clients to be excluded from assistance if they are not able to contribute financially.

⁷² In 2006-07, Australian Government funding to CLCs outside of the CLSP represented around 6 per cent of total funding to CLCs and affected 12.5 per cent of CLCs (AGD 2008).

Funding for ATSILS is structured and is sourced solely from the Commonwealth

The Commonwealth has a formula-based approach to allocating the ATSILS' funding envelope between 37 Aboriginal and Torres Strait Islander regions. This model considers differences in the need for services, alongside factors influencing the cost of supply. Proxies for need in a given region include unemployment, school completion, income, stolen generation status and single parent families. Metrics on the supply side include language needs and remoteness. The model aims to provide an equitable level of service in each of the 37 regions, irrespective of disadvantage and remoteness.

Both the NT-based ATSILS also receive funding as part of the *Stronger Futures* (formerly the NT Emergency Response) initiative. No ATSILS receive state or territory funding to assist in the delivery of Commonwealth legal assistance services.

FVPLS receive Commonwealth funding according to a 'bottom-up' model

Each of the 14 FVPLS has a three year standard funding agreement with the Commonwealth.

The Commonwealth's funding model for FVPLS is an input-based approach where funding is provided for core positions of coordinator, two solicitors and one Aboriginal support worker or counsellor for each FVPLS provider plus office accommodation and other costs. Funding is equally distributed to the 31 'high need' areas with some minor variations between services.⁷³ These variations are based on qualitative data from service providers (individual unit budgets are assessed during three yearly applications for continued funding and agreed with the department) and family violence-related and demographic data.

Any unspent funds may be recovered by offsets and redistributed to other organisations with a greater need. Each FVPLS is able to request additional funding, with requests assessed on the basis of need, priority and available funding.

⁷³ At the commencement of the program in 1998-99, an equal amount of funding was provided to each of the 13 FVPLS providers. Refinement has occurred over the years, including from regionalisation.

20.8 What's been happening to funding levels over time?

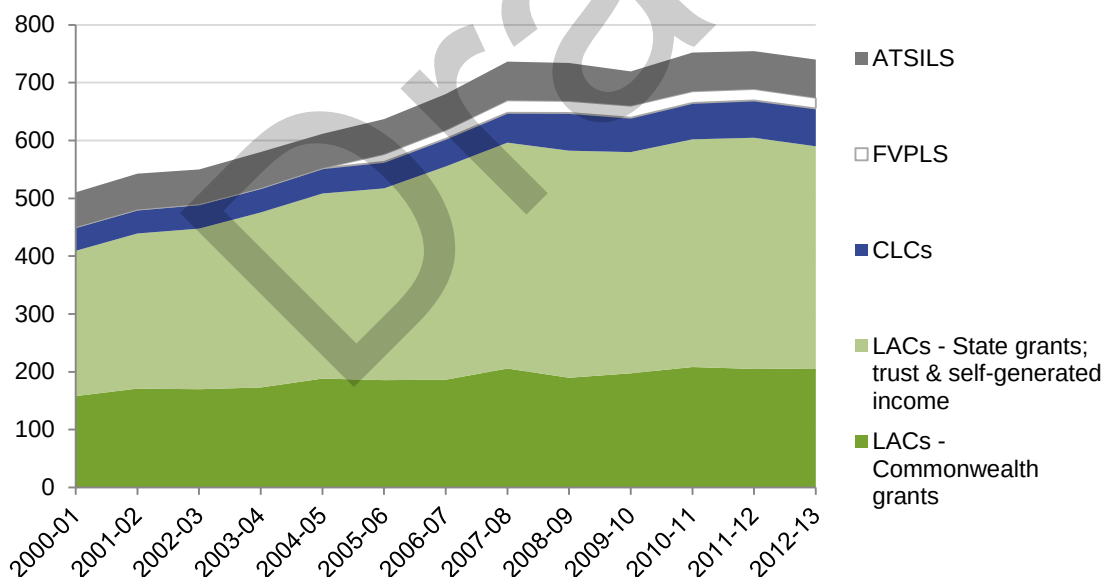
Government funding for legal assistance has been increasing

In real terms, government funding for the four main legal assistance services has increased by around 40 per cent between 2000-01 and 2012-13 (figure 20.7). In late 2013, the Commonwealth Government (2013) announced a cut of \$43.1 million in funding over four years from 2013-14. This cut removed funding support for policy reform and advocacy activities provided to the four legal assistance providers. The Government indicated that funding for the provision of front line legal services would not be affected.

However, the picture at each of the four provider levels is more varied.

Figure 20.7 **Legal assistance funding — 2000-01 to 2012-13**

Millions, expressed in 2011-12 dollars



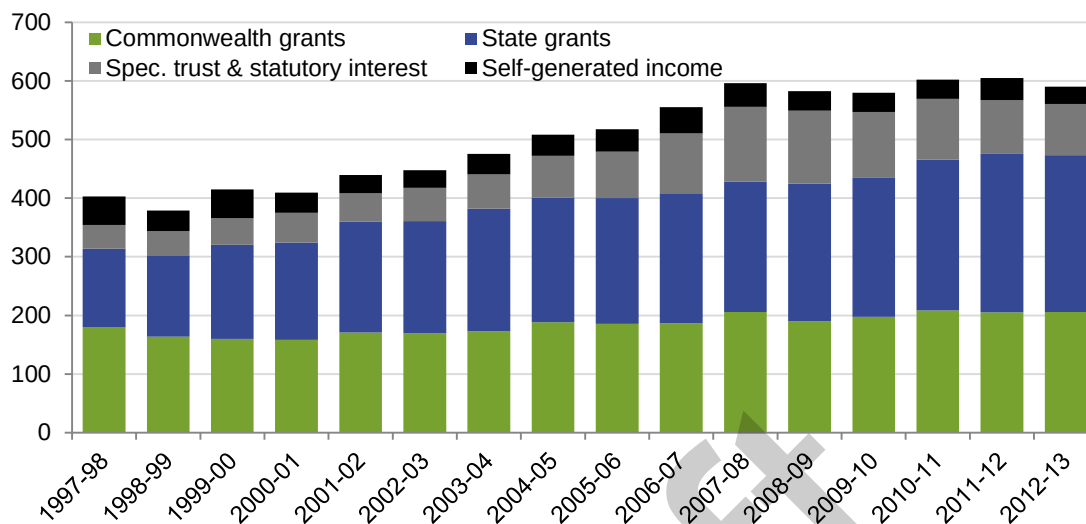
^a Funding series for FVPLS begins in 2005-06.

Data source: AGD unpublished data.

Some LAC funding sources have been in decline ...

Real government funding to LACs has grown steadily over time. By contrast, funding contributions from PPFs and self-generated income has been variable (figure 20.8).

Figure 20.8 Real funding growth to LACs by source of funding
1997-98 to 2012-13, expressed in 2011-12 dollars.



^a Deflated using wage price index, ABS Cat. No. 6350.0.

Data sources: NLA website (nd); ABS Cat. No. 6350.0.

In real terms, the annual contribution from PPFs to LACs was about \$41 million in 1997-98. By 2008-09, it had reached \$124 million but it has been falling gradually since that time (with lower interest rates). In 2012-13, the contribution to LACs from this source was around \$87 million.⁷⁴

The relative importance of self-generated income to LACs revenue base has also declined in real terms over time. In 1997-98 self-generated income was around \$48 million and by 2012-13 it was \$29 million reaching highs of \$49 million in the intervening period.⁷⁵

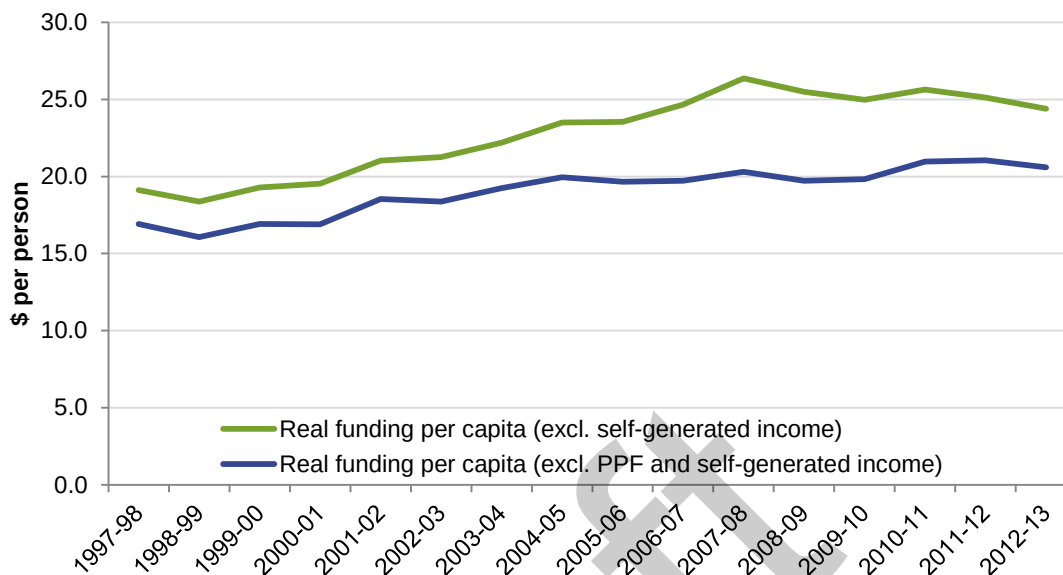
... leading to recent falls in per person funding

In per person terms, real government funding has grown steadily, increasing by around 26 per cent since around 1997-98. However, contributions from PPFs have been more variable — shifting in line with interest rates. Since 2007-08, the level of per person funding has declined marginally (figure 20.9).

⁷⁴ Expressed in 2011-12 dollars.

⁷⁵ Expressed in 2011-12 dollars.

Figure 20.9 Real LACs funding per person, 1997-98 to 2012-13^a
Expressed in 2011-12 dollars



^a Based on Commonwealth and state and territory government payments deflated by the wage price index and divided by estimated resident population.

Data sources: ABS (Cat. Nos. 3201.0, 6345.0, 6350.0); NLA website (nd).

The trend in per capita funding in each state and territory broadly tracks national trends, however, in some states and territories, such as the NT, the fall has been more pronounced (figure 20.10).

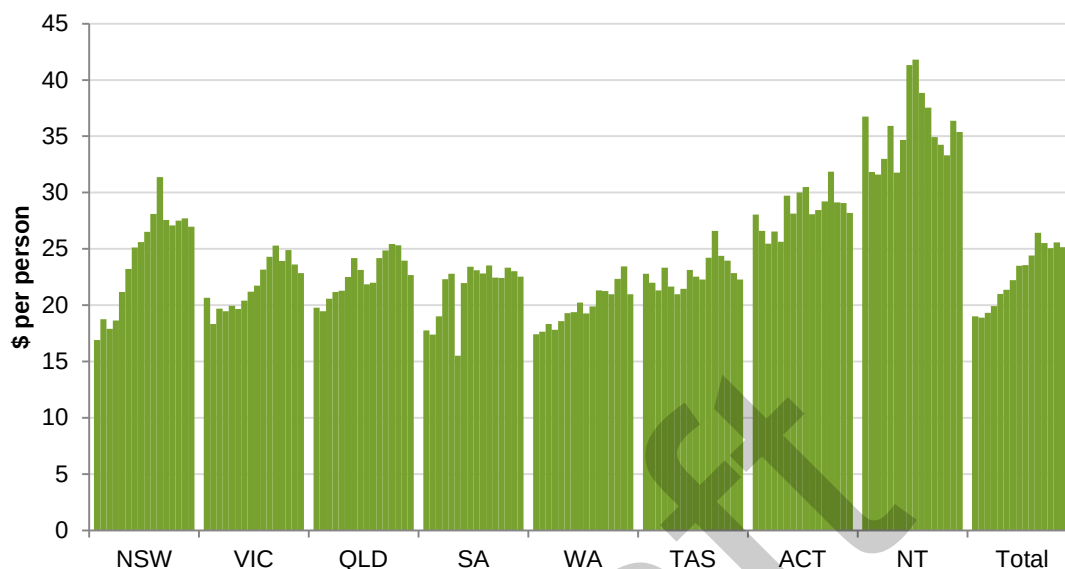
At a national level, funding for CLCs has been increasing including at a per capita level

Real funding growth to CLCs from both the Commonwealth and state and territory governments (including from PPFs) has increased steadily over time. At various points in time (notably in 2008-09) one-off funding by the Commonwealth has provided a noticeable boost (figure 20.11).

Commonwealth funding has not grown as quickly as other funding sources and so the share of Commonwealth funding to CLCs as a proportion of all government contributions (including from PPFs) has fallen over time (figure 20.11), from around 70 per cent in 1996-97 to around 54 per cent in 2012-13.

Figure 20.10 Real LACs funding per person by state and territory, 1997-98 to 2012-13^a

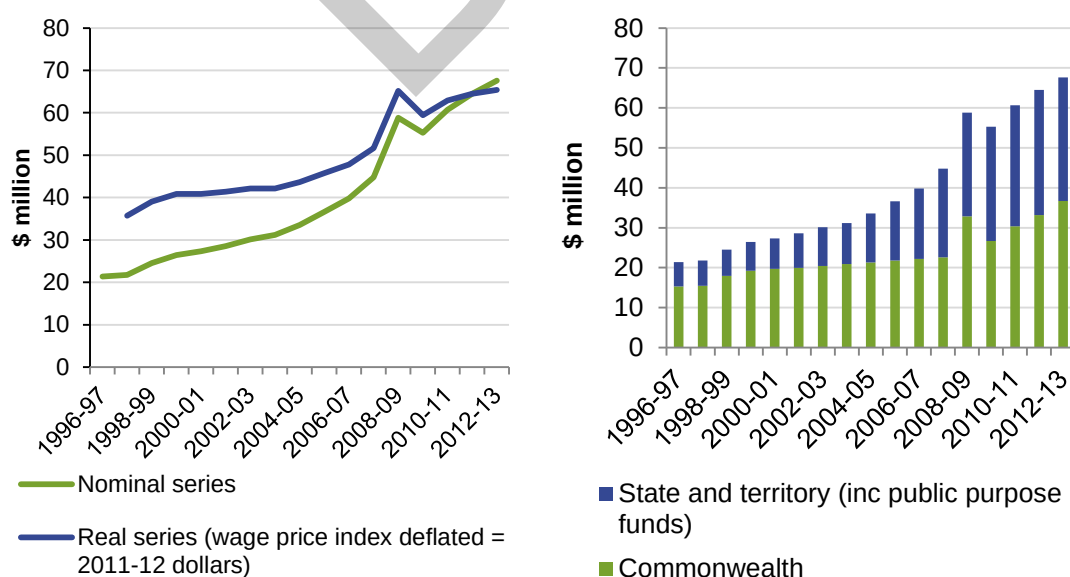
Expressed in 2011-12 dollars



^a Based on Commonwealth and state and territory government payments (including PPFs) deflated by the wage price index, ABS Cat. No. 6350.0; divided by estimated resident population. Note that the data in this chart are not consistent with those of figures 20.7 to 20.9, as the data used in this figure come from a different data source that allows disaggregation at the state level.

Data sources: ABS (Cat. Nos. 3201.0, 6345.0; 6250.0); NLA website (nd).

Figure 20.11 Government funding to CLCs — growth^a and distribution
1996-97 to 2012-13

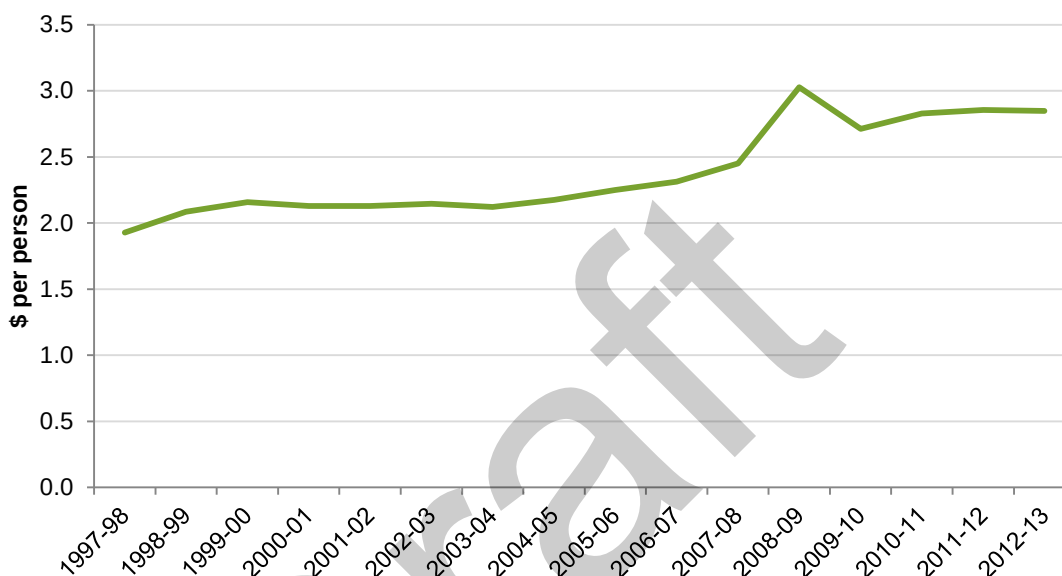


^a Deflated using wage price index, ABS Cat. No. 6350.0. Expressed in \$2011-12.

Data sources: AGD unpublished data; ABS Cat. No. 6350.0.

With population growth broadly keeping pace with CLSP funding, real funding per person has been relatively flat over the early 2000s, up to the one-off funding boost in 2008-09. Subsequently it has fallen back to around trend growth (figure 20.12).

Figure 20.12 Real Community Legal Services Program funding per person, 1997-98 to 2012-13^a
Expressed in 2011-12 dollars



^a Based on Commonwealth and state and territory government payments deflated by the wage price index and divided by estimated resident population.

Data sources: ABS (Cat. Nos. 3201.0, 6345.0); unpublished AGD data.

But the picture varies at the state and territory and centre level

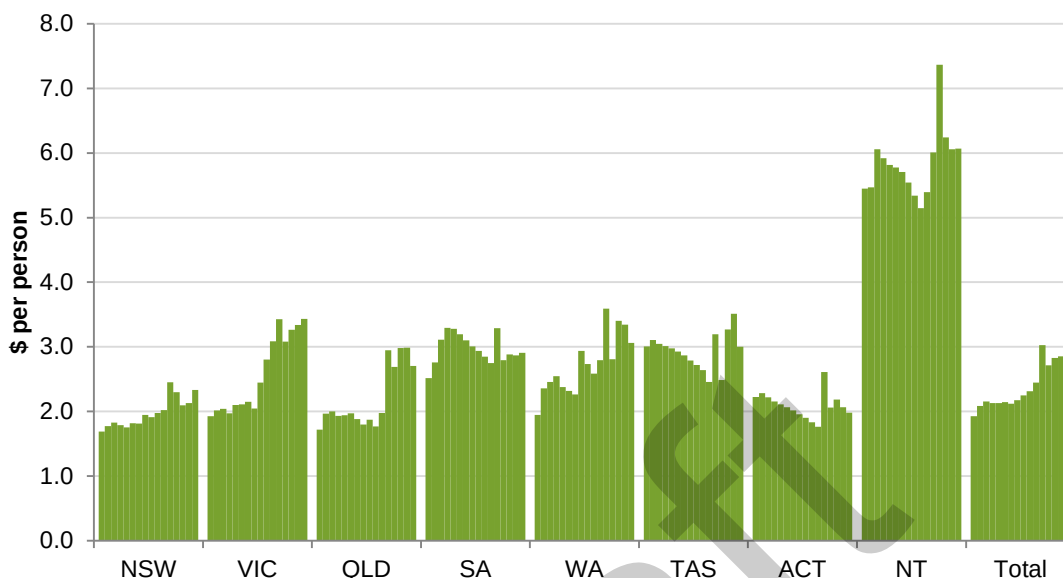
When these data are disaggregated by state and territory a different pattern emerges (figure 20.13).

There are substantial differences in the level of funding per person between the states and territories, with a relatively high level of per person funding directed to the NT. The pattern of per person funding growth also differs between states. In part this reflects the extent to which some jurisdictions rely on funding from the PPF. As NACLC (sub. 91) argued:

A significant proportion of state funding for community legal centres in Queensland and NSW is derived from the interest on solicitors' trust accounts, so global factors, such as declining economic activities and market fluctuations, can have a significant impact on funding for legal assistance services through this funding ... (p. 43)

Figure 20.13 Real Community Legal Service Program funding per person by state and territory, 1997-98 to 2012-13^a

Expressed in 2011-12 dollars



^a Based on Commonwealth and state and territory government payments deflated by the wage price index and divided by estimated resident population.

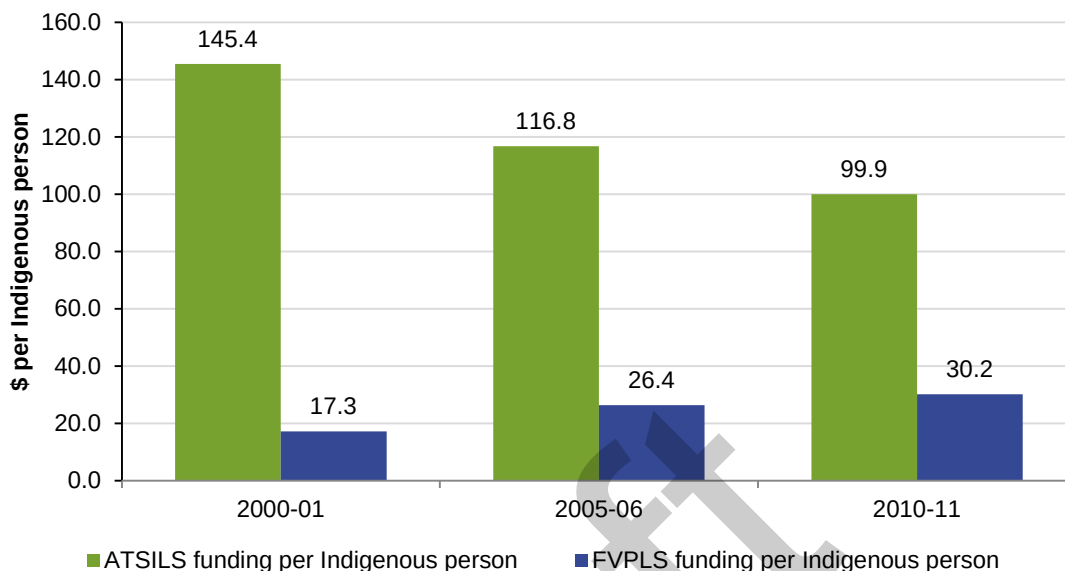
Data sources: ABS (Cat. Nos. 3201.0, 6345.0); unpublished AGD data.

Increases in funding — particularly one-off boosts — have not been spread evenly across centres. Moreover, the number of centres has been growing, with funding dollars being spread across a larger number of providers.

Per capita funding for ATSILS has fallen while it has grown for FVPLS

Real government funding to ATSILS has remained relatively steady over time, while the funding for FVPLS increased from around 2007-08 (when the program was expanded) and has remained steady since then (see chapter 22). At the same time, the Indigenous population has grown relatively strongly (in part due to the greater number of individuals identifying as an Aboriginal or Torres Strait Islander person). Hence real funding per person for ATSILS fell markedly but increased for FVPLS (figure 20.14). When funding is aggregated across both providers real funding per person declined by about 20 per cent between 2000-01 and 2010-11.

Figure 20.14 Real funding per Indigenous person for ATSILS and FVPLS^a
Expressed in 2011-12 dollars



^a Deflated using wage price index, ABS Cat. No. 6350.0.

Data sources: AGD portfolio budget estimates (various); ABS (Cat. Nos. 3238.0.55.001 and. 6350.0).

20.9 Where to from here?

While the purpose of this chapter has been to provide an overview of the legal assistance landscape, it gives rise to a number of questions:

- are there grounds for having four separate providers, and if so, is the current division of responsibilities appropriate?
- are the right types of services being provided?
- what areas of law should be prioritised?
- who should have access to government funded legal assistance?
- are legal assistance services available in the ‘right’ locations?
- how effective is the ‘mixed model’ of service delivery?
- are the current governance arrangements fit for purpose?
- is the level and distribution of legal assistance funding appropriate and is the PPF a sustainable funding source?

These questions are explored in the following two chapters — chapter 21, which considers reforms to LACs and CLCs, and chapter 22, which examines Indigenous-specific services.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

21 Reforming legal assistance services

Key points

- Rationales for governments providing legal assistance include — ‘equity’ in terms of accessing the justice system; flow-on benefits (economic and social) to the community; and addressing market failures.
- Legal assistance providers have a clear role to play providing information and community education. That said, it could be easier for people to navigate the system, and legal assistance dollars could go further, if a more coordinated approach to providing legal information, advice and referrals were adopted. Information and early advice can prevent cases from escalating and resulting in more expensive legal solutions.
- Numerous Australian and overseas studies show net public benefits from legal assistance expenditure.
- Legal assistance providers are uniquely placed to identify systemic problems affecting disadvantaged Australians (given the number of cases that they see). Advocacy can also be an efficient way to use limited taxpayer dollars.
- Providing legal advice and representation for people who do not have the financial or personal capability to deal with legal problems can lower the costs of a dispute to the affected individual, the justice system and other government services.
- Civil law matters are the poor cousin in the legal assistance family. Australia's most disadvantaged people are particularly vulnerable to civil law problems and adverse consequences resulting from the escalation of such disputes. Assistance for civil matters should be funded for the most disadvantaged.
- While legal aid commissions’ (LACs) service models are informed by mapping of legal need and where service providers are located, the positioning of community legal centres (CLCs) is largely historically based. A more systematic model based on legal need and costs of provision is needed for the funding of CLCs.
- The LACs and CLCs both target disadvantaged Australians, but the eligibility criteria for grants of aid are different (LACs means tests are tight while the CLCs are more lax). The eligibility tests need to be made consistent.
- The mixed model of legal assistance service provision (using in-house lawyers, private lawyers and volunteers) is successful, but the sustainability of the model is in question. Financial incentives will be required to attract practitioners to perform essential legal assistance work, particularly in rural and remote areas.
- The National Partnership Agreement on Legal Assistance Services is not working as a national agreement. It should involve commitments from both the Commonwealth and the states and territories and cover issues such as national priority areas of law, priority clients and eligibility.

Legal assistance services are essential for the operation of the civil justice system. The four legal assistance providers — legal aid commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS) — have different and specialised but complementary roles in the legal assistance landscape (chapter 20). But taxpayers' funds are limited (and dollars spent on legal assistance services are dollars not spent on other services) and so it is critical to establish that legal assistance dollars are well spent. Also, that the current arrangements are the most efficient and effective way of providing legal assistance services.

Key components of an effective legal assistance system are set out in figure 21.1.

Figure 21.1 **Components of an effective legal assistance system^a**



^a Based on a figure in *Transforming the Legal Aid System: Final Report and Recommendations*.

Source: New Zealand Ministry of Justice (2009).

This chapter looks at policy reform options for the legal assistance landscape with a focus on LACs and CLCs. It explores a number of questions.

- Are the right mix of services being provided (section 21.1)?
- Is the 'balance' right in terms of the areas of law covered (section 21.2)?
- Are legal assistance services in the 'right' locations (section 21.3) and targeting the 'right' people (section 21.4)?
- Is the service delivery model the right one (section 21.5)?
- Does the distribution of funds need changing (section 21.6)?
- Is the quantum of funding adequate (section 21.7)?
- How well do the governance arrangements work (section 21.8)?

ATSILS and FVPLS are discussed in the following chapter.

21.1 Are the right mix of services being provided?

Legal assistance is an integral part of ensuring that the justice system is accessible to all. As discussed in chapter 4, government involvement in legal assistance services can be justified (at a conceptual level) on a number of grounds:

- positive spill-over or flow on effects to the wider community from providing legal assistance services. Legal assistance services can prevent or reduce the escalation of legal problems, which in turn can mean reduced costs to the justice system and lower costs to other taxpayer funded services (in areas such as health, housing and social security payments)
- market failures. These include information gaps, asymmetric information, and thin markets (especially in rural and remote areas)
- ‘equity’ or ‘fairness’ in terms of accessing the justice system — it is generally agreed that Australians should not be denied an opportunity to seek justice because of an inability to pay, a lack of personal capabilities or because of where they live. But the reality is that some are not able to afford legal advice or representation. Others — such as people with intellectual or mental health disabilities, or poor English skills — can lack the personal capabilities and skills to understand legal processes or defend a case.

But while there are in-principle grounds for government involvement in providing legal assistance, this does not of itself justify particular policy responses. In an environment of constrained resources, it is important to establish that legal assistance providers are providing the ‘right’ mix of services in the different areas of law and taxpayers are getting value for money.

As discussed in chapter 4, decisions about how to spend limited legal assistance dollars, and who should receive them, should be based on a comparison of benefits relative to costs. Under such an approach, resources are likely to be deployed where legal needs are greatest, legal problems have the most significant consequences (including any potential consequences if problems remain unresolved), and where the market does not provide services. As funding models for legal assistance are location based, both the allocation of funds within a location and funding across locations needs to be guided by the ‘greatest benefit’ principle.

The LACs and CLCs provide a continuum of services covering information, community education, dispute resolution, duty lawyers, representation in courts and tribunals and advocacy. In terms of the number of services, information, minor assistance and community education score highly (chapter 20). However, in terms of costs, duty lawyers and legal representation services are the most expensive.

Information, education and minor advice

As discussed in chapter 5, the law can be complex (including the language used) and difficult for anyone not trained in the law to understand. Not being familiar with procedures and institutions can also make accessing the justice system daunting for some people.

Access to good quality information about the law and how to navigate the justice system is therefore important for ensuring all Australians (not just disadvantaged Australians) can access the justice system. Knowledge about rights and responsibilities can also give individuals the confidence to enter into personal and business relationships, facilitate more informed choices and empower people to resolve disputes on their own.

Information has some ‘public good’ qualities (for example, information accessed by one person is still able to be used by another). Power imbalances between parties can also be reduced with information. As National Legal Aid said:

The importance of improving the access to and usability of civil dispute information is an effective response to the issue of information asymmetry. ... Removing the negative aspects of information asymmetry reduces the power imbalance between parties in the civil justice [system] and assists with a more efficient market for legal information. (sub. 123, p. 27)

Given the ‘public good’ nature of information and education, and the importance of understanding the justice system to access it, governments have a clear and important role to play in providing general public information and community education about the law and the legal system.

The National Partnership Agreement on Legal Assistance Services (NPA) emphasises the early resolution of legal problems through information, referral, community legal education, and advice and minor assistance. Free information and community legal education is available to all Australians from the four legal assistance providers. Minor assistance is provided to more disadvantaged clients (Legal Aid NSW, sub. 68).

Legal information services and initial upfront advice are relatively low-cost services because once information is produced it can be provided to additional people at little or no cost (for example, information provided in pamphlets and on websites). Responding to specific inquiries to provide the right information or minor advice is more costly. Legal Aid Western Australia (Legal Aid Western Australia 2013) estimated the average cost per legal information service in 2012-13 was \$34 and \$199 per legal advice.

But while information can empower people to resolve disputes on their own (including with the use of self-help material), as discussed in chapter 5, the most disadvantaged people often do not have the capacity to self-help. While information and community education should be available for all, it should not be at the expense of assisting the most vulnerable and disadvantaged people in the community.

An efficient use of funds?

Legal assistance providers told the Commission that it is their experience that investing in information, advice and community education is efficient because it reduces pressure on other more cost intensive services (Legal Aid NSW, sub. 68). As one LAC lawyer said ‘the earlier we can get to people the less we spend later’. Victoria Legal Aid also said:

While often construed as secondary or optional, community legal education, information and strategic advocacy are statutory functions and rightly form part of core business. Our experience demonstrates that modest investment in these areas ensures our services are still accessible to those most in need whilst reducing pressure on our other more resource and cost intensive services. (sub. 102, p. 7)

Many submissions also spoke about the critical role played by the CLCs providing information and education. Slater & Gordon Lawyers, for example, said:

CLCs ... provide value for money because of their capacity to provide initial advice on the nature and merits of a dispute, thereby preventing some disputes from escalating or being pursued in an inappropriate and expensive forum. ... By providing information and education to keep community members better informed about their options, entitlements and low cost methods for avoiding disputes, CLCs not only facilitate access to justice, but reduce pressure on the wider legal system. (sub. 56, p. 4)

Participants provided many examples illustrating how access to information, early advice and assistance can play a large role in earlier resolution of legal problems and reducing or avoiding potential adverse consequences (box 21.1). However, in terms of studies examining the effectiveness of information and early advice services, the evidence is thin and is an area where the evidence base needs building (chapter 24). But assessing the effectiveness (and establishing causality) of early interventions is difficult. Often there are a range of factors at play, making it hard to measure the impact of a particular service. Also, simple measures of output can fail to capture the complexity of the clients’ needs addressed by the service. As the Citizens Advice Bureau put it:

... clearly there is evidence demonstrating the positive impacts of advice on peoples’ lives. The difficulty with translating this evidence into data for any cost benefit analysis of advice remains quantifying the actual impact of advice — a process that is highly dependent on measuring outcomes and knowing what the inputs have been ...

Another difficulty to factor in is the extent to which problem types are ‘clustered’. (2010, p. 8)

Box 21.1 Examples of early intervention preventing the escalation of problems

The **Hunter Community Legal Centre** provided an example of a client who was a recently arrived refugee from a non-English speaking background who was assisted with a Centrelink payment dispute. The client had received a phone call from Centrelink telling him that his benefits had been suspended and that he owed a debt. Written correspondence had previously been mailed to him but he had been unable to read the documents because he was blind. The client relied on his Centrelink payments to pay his rent. The CLC was able to assist him to resolve the dispute with Centrelink and have his payments reinstated (sub. 26).

Legal Aid NSW provided the following example:

P had separated from her husband two years earlier and was in financial difficulty. Her husband had relied on joint credit cards to make repayments on a business he had purchased from his father, resulting in a \$33 000 debt. P’s mother had also refinanced her house to put \$60 000 into the business. After the business failed the bank foreclosed on P’s and her mother’s homes.

To manage the \$50 000 debt, P cashed part of her superannuation early resulting in costly tax implications. Her husband moved his superannuation into a self-managed superfund to avoid a claim by her. The stress of financial difficulties led P to experience mental health issues for which she was hospitalised.

Prior to visiting the Family Law Advice Clinic, P was unaware that she may have a valid claim for a portion of her husband’s superannuation. She was also unaware that she could seek orders in respect of the debts of the relationship and have the percentages of liability reassigned. There were also legal avenues available for P’s mother which she could investigate as a third party to the property settlement. The Civil Law Advice Clinic also provided assistance with the credit card debt (sub. 68).

There is also a growing body of work that seeks to analyse and measure the costs to government of unresolved civil justice problems, including greater use of other government services and costs to the community (box 21.2). The Attorney-General’s Department, pointing to analysis undertaken by the Citizen’s Advice Bureau, said:

If left unmet, legal needs can potentially spiral into other non-legal problems and result in additional costs to government, as the affected individuals will require more intensive and costly interventions from a wider variety of services in an attempt to address their complex needs. (sub. 137, p. 7)

Box 21.2 Studies point to the costs of unresolved civil justice problems

The Citizens Advice Bureau (Citizens Advice Bureau 2010), using data from the England and Welsh Civil and Social Justice Survey and the Legal Services Commission's outcomes data from legal aid work, looked at how adverse consequences associated with civil justice problems, and the downstream costs for other public services, can be mitigated by advice. Factors considered included: homelessness prevented, poor health outcomes averted, work productivity and client financial gains. The study proposed that:

- for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34
- for every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98
- for every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80 and
- for every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.

The paper concluded that a cost benefit analysis approach to legal aid demonstrates that there can be 'substantial economic savings to the public purse and wider economy from public funding for advice, by providing worked examples' (p. 2).

Another UK report — *Getting earlier, better advice to vulnerable people* — sought to quantify the costs to government as a direct result of legal issues and disputes. The report concluded that the costs of public services were significant (more than £1.5 billion annually), with loss of employment, physical and stress-related illness and violent behaviour resulting from the stress of problems being the key contributors. Lost income was estimated to be £2 billion giving a total cost to the economy of over £3.5 billion each year. However, the authors suggested that the true figure is likely to be significantly higher as this only includes those costs to individuals and governments that can be clearly identified and given a monetary value.

Sources: Citizens Advice Bureau (2010); Department of Constitutional Affairs (2006).

Of the four legal assistance providers, the LACs are the best resourced, and have demonstrated that they have the capabilities to be the main information providers. As National Legal Aid said:

LACs have the critical mass of legal resources, accompanied with a robust administrative infrastructure, which are capable of delivering the very high volume of services demanded across the country in hundreds of locations. (sub. 123, p. 15)

The same cannot be said of some of the CLCs. Many CLCs are small with limited capacity to produce original information and to keep up to date with legislative changes. As discussed in chapter 5, there is evidence of duplication — all four

service providers provide information and websites and operate helplines (some CLC helplines operate for only a few hours on a couple of days per week).

To get more out of the legal assistance dollar, duplication needs to be reduced — the CLCs, ATSILS and FVPLS should leverage more off the LACs in the area of information and resources and only add original information in specialised areas where material is not available. An example of this already occurring is an agreement between Legal Aid NSW and the Aboriginal Legal Services to work together to share information and resources (sub. 68).

As discussed in chapter 5, the Commission considers that there is value in legal assistance providers adopting a more strategic and co-ordinated approach to providing legal information, advice and referrals. A single entry point — a central telephone service to provide legal information, referrals and advice supported by a website — has the potential to improve the quality of information and referrals and ensure that services across the legal assistance landscape complement (rather than duplicate) each other. Improved co-ordination across service providers will also make it easier to navigate the justice system and for the legal assistance dollar to be ‘stretched’ further.

Awareness of legal assistance providers

For the information (and other services) supplied by legal assistance providers to be used, Australians need to be aware of what is available and how to access it. According to the *LAW Survey*, of all the legal assistance services, the Australian public are most aware of the LACs:

Legal Aid was the only not-for-profit legal service that had very high recognition rates in all jurisdictions. (Coumarelos et al. 2012, p. xvi)

Community awareness about CLCs and LawAccess was found to be considerably lower.

Legal assistance providers have been engaged in activities such as outreach services to make people (particularly disadvantaged Australians) more aware of the services that are available. Results from the *LAW Survey* (Coumarelos et al. 2012) also provide clear evidence of the clustering of problems (chapter 2) which points to the scope for ‘targeting’ of information to particular groups. As the Victorian Council of Social Services (VCOSS) put it:

Ensuring that community legal education is targeted to the demographic groups and type of legal problems that arise for those groups will improve the knowledge of our legal system and is the best approach to avoiding the pitfalls that can interrupt the smooth resolution of disputes and other legal problems. (sub. 132, p. 7)

Limited awareness of legal assistance services points to the need to raise awareness about the services available and ‘who’ the services are targeted at. As discussed in chapter 5, disadvantaged groups are often not aware that they have ‘legal’ problems. Services should be most heavily advertised in places visible to disadvantaged groups (such as medical centres, Centrelink offices, homeless shelters) and on issues or areas of law that impact most on these groups.

Duty lawyer services

LACs and CLCs provide duty lawyer services. Duty lawyer services include advice and representation at a court or tribunal. Duty lawyers have been described as the ‘emergency room professionals’ (Buckley 2010) of courts and tribunals. They provide short, timely intervention (helping people complete forms and documents, seek adjournments, apply for legal aid), rather than ongoing casework.

While traditionally duty services were mainly for criminal matters, duty lawyers are now available for family law matters and administrative law (with services available at the Administrative Appeals Tribunal and the Social Security Appeals Tribunal).

Duty lawyer services are generally not subject to a means test, but are targeted at disadvantaged self-represented litigants. Duty lawyer services are a relatively cost-effective way to deliver legal advice. Based on NPA reports, the average cost of a LAC duty lawyer service was around \$375 in 2011-12.

There is limited evidence on the effectiveness of duty lawyers.

- An evaluation of the Dandenong Family Court Support Program found that the program assisted the court to function more efficiently (chapter 14).
- An evaluation of Legal Aid NSW’s Early Intervention Unit Duty Service at Parramatta Family Law Courts found that the service was effective in directing inappropriate matters from the court and ensuring appropriate court documents were filed (box 21.3).

Legal Aid NSW also reported that after getting legal advice at tribunals, clients often withdrew their appeal or obtained the evidence they needed to qualify for a payment (sub. 68).

Box 21.3 Family Law Early Intervention Unit

The Family Law Early Intervention Unit (EIU) is a state-wide specialist service of Legal Aid NSW, funded under the National Partnership Agreement on Legal Assistance Services. The broad goals of Family Law EIU duty services are to:

- increase access to earlier, expert legal assistance for self-represented individuals seeking legal help at Family Law Courts in NSW
- assist clients to take timely and appropriate action to progress or resolve their family law matters efficiently and effectively
- help reduce the impact of self-represented litigants on the workload of the Family Law Courts.

An evaluation of the EIU duty service at the Parramatta Family Law Courts found that, while duty services are not means tested, the EIU duty services reached and assisted disadvantaged clients because of the placement of the duty service (placement of EIU duty services in Family Law Courts and geographically accessible to a range of relatively disadvantaged areas, communities and clients). Also the 'triage' function of the EIU duty lawyers meant that priority is based on urgency, capacity and need.

Advice was provided in around 84 per cent of matters (in four out of five matters clients received more than one type of assistance). While the service was found to reach some clients 'early' (as they walked into the court for the first time having just separated from their partner/spouse), it also assisted clients in finalising matters before the court. As Legal Aid NSW said, 'a critical feature of family law duty service is its availability at the time and site of the crisis' (sub. 68, p. 59).

Minor assistance was provided to clients in over 45 per cent of the matters dealt with by the EIU duty service at Parramatta, most commonly in the form of drafting and amending documents. It was found that, particularly if provided at the point of filing, advice made a material difference to the efficient progress of these matters through the court. Representation was provided in 12 per cent of matters and included some complex and time-sensitive matters, such as child recovery and Airport Watch List matters.

Over a two month snap-shot period, for one-third of matters seen, clients had been seeking to commence an action that was not appropriate to progress their family law matter. The EIU successfully redirected these people to alternative pathways — de-escalating proceedings between parties and saving court time.

The introduction of the EIU Service at Parramatta Family Court resulted in a 160 per cent increase in the number of duty matters assisted by Legal Aid NSW. Where matters did progress to court, the EIU service assisted clients to progress their matters more efficiently, with 16 per cent of matters finalised by the court on the day or finalised by consent.

Sources: Legal Aid NSW (sub. 68); Forell and Cain (2012).

More intensive services

The LACs provide lawyer-assisted family law dispute resolution. Mediations conducted with the assistance of a family dispute resolution lawyer are said to provide a ‘user friendly’ mechanism to resolve complex family legal problems. For example, the use of ‘shuttle’ conferencing techniques or telephone attendance can assist victims of family violence to resolve their family issues in a safe environment. Having access to a lawyer to explain the implications of any agreements is said to assist the drafting of appropriate consent orders on the day of the mediation (Legal Aid NSW, sub. 68).

In the absence of lawyer assisted advice, family disputes can quickly escalate with adverse consequences for families (child custody and access arrangements and financial arrangements), which, in turn, can result in large costs to families, the justice system and society.

Litigation services cover legal representation in court and tribunal proceedings for which an application for legal representation has been granted. Representation services are ‘core business’ for the LACs (based on NPA reports, the average grant of legal aid provided by the LACs is around \$5000).

CLCs, on the other hand, focus on providing legal information, minor advice and community education. As Curran said:

Case work is not regarded as the sole driver of community legal centres but rather as an important way of informing work that addresses systemic issues and can actually prevent the revolving door of multiple problems. (2013a, p. 8)

Another factor contributing to CLCs’ low case load is the scale of CLCs. The ‘lumpy’ nature of case work and CLCs’ relatively small resource base means that they focus on relatively discrete provision of advice and planned information sessions.

Benefits of lawyer advice and representation

Just like access to information, lawyer advice and representation can reduce the number of unresolved disputes (and people giving up on defending their rights) and prevent the escalation of disputes. It can also increase the efficiency of the legal system (box 21.4). For example, a study by PricewaterhouseCoopers (2009) looking at the economic value of legal aid in the context of the family law system, estimated a cost benefit ratio of between 1.60 and 2.25 for every dollar invested in the legal aid system. Avoidance of future costs to the community (including avoidance of domestic violence, the continuation of care of children by parents, and the retention

of ownership of the family home in the matter which had been subject to legally aided intervention) was estimated to range from \$200 000 to \$750 000 (the range of avoided costs depended on the age of the children).

Box 21.4 Studies point to the benefits of legal aid

An Australian study, the *Economic value of legal aid*, undertaken by PricewaterhouseCooper (2009), estimated that the net efficiency benefits of providing legal aid for Family Court representation, duty lawyers and dispute resolution services ranged from \$15.9 million to \$32.9 million per annum, or a range of benefit-cost ratios of 1.60 to 2.25. The study found that the efficiency benefits were magnified by providing legal education, information and advice services as these services reached a broader group of clients. The study also found that the benefits accrued to both individuals and the community more broadly.

Another Australian study commissioned by the National Association of Community Legal Centres (NACLC) looking at the economic benefit of community legal centres found that benefits arose from:

- a more efficient legal system (for example, a reduction in court costs)
- the avoidance of domestic violence (the cost of domestic violence to the community was estimated at around \$37 000 per victim/survivor)
- the protection of legal rights, such as the reinstatement of an employee who was wrongly dismissed from their job (Judith Stubbs and Associates, 2012).

The study estimated a cost-benefit ratio of 1:18.

Other published studies also suggest that legal aid more than pays for itself:

- for every \$1 spend on legal aid in Louisiana, it was estimated that there was a return to the government of \$2.40
- for every \$1 spent on legal aid in Nebraska, the estimated saving to government was \$3.97
- for every \$1 spent on legal aid in Florida, the estimated saving was \$4.78
- for every \$1 spent on civil legal aid in New York State the estimated return was \$5
- for every \$1 spent on legal aid in Texas, the annual gains to the economy were estimated to be \$7.42.

Sources: PricewaterhouseCoopers (2009); Judith Stubbs and Associates (2012); Matthews (2011).

Access to lawyer advice and representation can also reduce the number of self-represented litigants who can take up more of the courts resources than represented litigants (chapter 14). As the report on the *Economic Value of Legal Aid* said:

There is a direct relationship between the efficiency of the court and the provision of legal aid. Efficiency is achieved through the provision of information, advice, legal assistance, dispute resolution, and representation for matters that would otherwise be

self-representing. Costs to the justice system are also avoided because cases are diverted from court rather than needing a hearing or decision by the court. (PricewaterhouseCoopers 2009, p. 25)

Access to legal advice and representation can also affect the behaviour of other parties (individuals, employers, businesses and government bodies). As Denniss, Fear and Millane said:

Knowing that the other side can fight as well as you can would have the direct effect of encouraging otherwise dominant litigants to engage in earlier negotiation, settlement and general preventative behaviour. (2012, p. 4)

Many in the community are also of the view that providing legal assistance to Australia's most disadvantaged people is the cornerstone to ensuring access to justice (box 21.5). As National Legal Aid put it:

... but for the presence of legal assistance service providers the capacity of society to provide access to justice — itself an essential feature of the rule of law and civil society — will be diminished. (sub. 123, p. 17)

As part of a recent survey, Australians were asked who should receive government funded legal aid. Just 4 per cent of respondents said that everyone should have to pay for their own lawyer if they needed one. Other results from the survey were that:

- around one-quarter of respondents (26 per cent) said only the very poor should receive government funded legal aid
- 44 per cent said everyone, except the rich
- 19 per cent said everyone, regardless of wealth (Denniss, Fear and Millane 2012).

The expression of community norms is a more contentious rationale for government intervention than other rationales, such as efficiency and effectiveness. On these latter rationales alone there are good reasons for governments to fund legal representation. Nevertheless, views on what is fair and equitable in a democratic society are also important rationales for government funding legal aid.

Box 21.5 **Community views about assisting Australians to have access to justice**

Slater & Gordon Lawyers:

'Equitable access' to justice means that anyone with a legal problem should be able to participate in the justice system on the same footing as the other party to a dispute, regardless of experience or resources. (sub. 56, p. 2)

Australian Lawyers Alliance:

Justice must be available to all. It cannot be exclusively accessible to some and not others. Any person who considers a wrong has occurred must be empowered to be able to seek a lawful solution. The access should not be dependent upon financial capacity, educational levels or other social factors. To have a justice system which operates on any other platform is an abhorrent idea which places the fabric of society at risk. (sub. 107, p. 5)

Denniss, Fear and Millane:

... a well-funded and more comprehensive legal aid scheme is critical to both the experience and the perception of justice. It would also offer a number of key opportunities for policy-makers, as well as substantial benefits for the many Australians who are currently unable to access legal assistance due to a lack of money or a lack of knowledge. (2012, p. 3)

Law Council of Australia:

When legal assistance is not available to anyone except the most economically and socially disadvantaged in our community, the integrity of the justice system is challenged. Regardless of means, all Australians should have access to legal services. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance sector is therefore critical in achieving social inclusion. (sub. 96, p. 113)

Strategic advocacy and law reform

The LACs and CLCs are also involved in policy and law reform. They play a key role in identifying and acting on systemic issues.

Strategic advocacy is an area where there are few incentives for private lawyers to act. Private lawyers are focused mainly on achieving outcomes for individual clients. They are less interested in achieving broad based reforms that could result in positive outcomes for the wider community. There are good reasons for this. Where individuals are the principal beneficiaries of services, lawyers can charge for the work that they undertake. But lawyers are unlikely to be able to charge for work that benefits the entire community. Victoria Legal Aid summed up the situation:

The private market alone has neither the infrastructure nor the incentive to prevent legal problems (reducing need for its own services) or undertake important preventative

work (such as providing free information or community legal education), despite these being inexpensive and cost effective ways to reduce demand on justice services. (sub. 102, pp. 5-6)

Legal assistance lawyers, on the other hand, are uniquely placed to identify systemic issues, particularly those affecting disadvantaged Australians. As Legal Aid NSW said:

... the daily experience of legal aid lawyers assisting high volumes of disadvantaged clients is harnessed to identify systemic issues and provide input into law reform processes. (sub. 68, p. 95)

Many CLCs are actively engaged in law reform activity to advocate for changes to laws, policies and procedures that are unfair or impede access to justice for their client groups. As Victoria Legal Aid said, CLCs can ‘add an important and different voice to the sector’ (sub. 102, p. 9).

Strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities).

Advocacy can also be an efficient use of limited resources. It can be an important part of a strategy for maximising the impact of LAC and CLC work — as one LAC pointed out, limited funds do not allow them to focus solely on legal representation for single cases.

Strategic advocacy is increasingly utilised by the sector as a necessary means to stretch the value of finite funds to maximise benefits to the community. ... the finite Legal Aid Fund will never meet all unmet legal need, requiring innovative approaches to expand our reach and impact. (Victoria Legal Aid, sub. 102, p. 5)

NACLC also said:

By engaging in education and systemic (law and policy reform) work, community legal centres are able to maximise their impact on the lives of disadvantaged people in their community. (sub. 91, p. 31)

Examples provided by the LACs (box 21.6) demonstrate that effective strategic advocacy can create valuable precedents which, in turn, can reduce demand for legal assistance services and the justice system more generally.

Box 21.6 Some strategic advocacy examples**Systemic issue identified relating to loan applications**

In late 2007, within a short period of time, 20 people approached the Penrith office of Legal Aid NSW seeking assistance in relation to home loan contracts with a major bank. Most were in default and were facing repossession proceedings. A systemic issue relating to the processing of loan applications at a number of branches of the bank was identified. Legal Aid NSW determined that the conduct in relation to these loans was misleading, deceptive, unjust and/or unconscionable.

Joint representations were made to the bank by Legal Aid NSW and the Australian Security Investments Commission. The bank subsequently advised that there were about 120 loans affected by this conduct. The bank agreed to send each of these borrowers a letter, asking them to contact the bank and suggesting that they seek advice from Legal Aid NSW. Legal Aid NSW was able to negotiate an appropriate resolution for most of these customers without needing to commence any proceedings in court.

The Keating case study

Victoria Legal Aid's (VLA) client, Ms Keating, was charged with welfare fraud under backdated Commonwealth legislation. Ms Keating had received an alleged overpayment of \$6942 from Centrelink, due to what Centrelink said was a failure to declare income. VLA initiated Ms Keating's case to determine whether the retrospective legislation was constitutional. It also sought clarity on the prosecution of offences on the basis of omissions. The High Court of Australia handed down its unanimous decision in *Director of Public Prosecutions (Cth) v Keating* [2013] HCA 20.

According to VLA, the decision has far reaching implications for the conduct of low level social security fraud prosecutions in Australia. The decision could affect around 15 000 previous prosecutions where people have been charged with welfare fraud because they omitted to tell Centrelink of a change in circumstances.

The Commonwealth Director of Public Prosecutions (in response to the High Court decision) has adopted a national policy that confirmed that they will not proceed to prosecute people on the basis of omissions and they will withdraw all prosecutions that are based solely on omissions.

The Taxi Driver Legal Service case

This case resulted from the reaction of a number of CLCs who were aware of taxi drivers being sued and their insurance claims not being paid. It was only after a number of these cases were pursued that it was revealed that the real problem lay with the operation of taxi clubs, the type of insurance they were providing and the failure of taxi clubs to indemnify their members and drivers (Curran 2013).

Sources: VLA (sub. 102); Legal Aid NSW (sub. 68); Curran (2013).

Victoria Legal Aid also noted that strategic advocacy can have significant consequential impacts on other government agencies:

When done effectively, strategic advocacy can create significant savings not simply for the legal assistance sector but also a cascading impact on other agencies. This includes improving primary decision making providing government with the advantages that flow from getting a decision right the first time and short-circuiting the duplication and delay caused by poorly made decisions. (sub. 102, p. 6)

While the smaller CLCs have a more limited capacity to undertake advocacy work than the LACs, there are examples of CLCs working with LACs on advocacy work. One such initiative is the National Bulk Debt Project. This joint project between Legal Aid NSW, Victoria Legal Aid and West Heidelberg Community Legal Service assisted disadvantaged clients in long term financial hardship by negotiating with creditors for waiver of their debts. Rather than negotiating for individual clients, lawyers negotiated for clients in bulk by convincing the creditors that there was no commercial value in pursuing the debts. To date, over \$15 million in debt has been waived and providers are working with banks, debt collectors and credit providers to develop a sustainable solution for people in long-term financial hardship who are unable to repay their debts (subs. 68, 102).

The Commission considers that advocacy should be a core activity of LACs and CLCs (particularly peak bodies and the larger CLCs).

The issue of how much funding to allocate to advocacy is less straightforward. As discussed in chapter 20, funding for advocacy was cut by \$43 million over four years as part of recent Commonwealth budget measures. Based on what legal assistance providers told the Commission about how much they spend on advocacy services, the cuts appear to be disproportionately borne by some legal assistance providers. This points to the need for a more systematic approach to funding advocacy services and ensuring that the benefits of advocacy services outweigh the costs of providing such services.

As a case in point, environmental disputes often have public interest elements in either clarifying the law or protecting local or community wide values which can provide justification for government funding. While the Environmental Defenders' Offices have been the subject of recent debate and change, given the public interest element of many environmental disputes, funding is warranted where the expected returns to the community exceed the opportunity cost to the community of the funding.

21.2 Is the ‘balance’ right in terms of areas of law?

Legal assistance is provided for criminal, family and civil law matters. But, civil matters are the poor cousin of the justice family in terms of legal assistance. Many submissions pointed to a lack of resourcing for civil matters (box 21.7). As one participant put it:

If you are not in a marital dispute or charged with a crime, legal aid is not available for you. (Steven Phillips, sub. 151, p. 2)

Box 21.7 Participants point to a lack of resources for civil matters

The New South Wales Bar Association said:

Presently there is very little legal aid available in civil proceedings. (sub. 34, p. 6)

New South Wales Society of Labor Lawyers:

Recent cutbacks to legal aid funding at the state level have led to LACs scaling back already sparse services in civil law. Eligibility for a grant of legal aid for casework has been restricted on both means and merit grounds. (sub. 130, p. 14)

Prue Vines:

Legal aid is almost non-existent for civil matters, but people can be pulled into a civil case as a defendant and have to fight it. (sub. 17, p. 1)

Australian Federation of Disability Organisations:

State based legal aid ... has limited resources which are often directed to criminal cases rather than civil cases such as disability discrimination complaints. It is rare for legal aid to fund disability discrimination cases. (sub. 24, p. 3)

Women's Legal Services NSW:

The obligation to provide representation in criminal matters results in less funding available for civil and family matters for which women have the greater need. (sub. 32, p. 4)

The Chief Justice of Western Australia recently said:

On the civil side of the court's business, apart from a portion of family law work, legal aid is virtually non-existent. Those who have suffered serious personal injury might be fortunate enough to obtain a lawyer who will take their case on a 'no win no fee' basis. Those who have suffered loss in company with many others may receive assistance from a private litigation funder to participate in a class action. However, for the many cases which fall outside these limited areas, legal assistance is largely unavailable and unaffordable for many. (Martin 2012a, p. 13)

The Northern Territory Legal Aid Commission (NTLAC) noted that they had cut their in-house civil law practice due to funding cuts to the LACs and any civil casework matters need to be referred to private practitioners under a grant of aid (sub. 128, p. 4).

In criminal matters, legal assistance is given priority where a person is accused of a crime and they cannot afford to pay for a lawyer because their liberty is at stake. As the Law Council of Australia said:

The importance of representation in criminal matters is paramount, given a person's liberty may be at stake and victims and their families are deserving of swift justice. This means that restrictions on legal aid grants generally fall most heavily on civil law matters. (sub. 96, p. 73)

Legal representation is also important in the area of family law, particularly where the consequences of a relationship breakdown include issues around child custody and access and child support. The case for legal aid is particularly compelling in situations where someone is trying to leave an abusive relationship and the safety of the person (and their children) is at risk. As Legal Aid NSW said, legal aid is generally available for care and protection proceedings (subject to a means and availability of funds test) and for child representation appointed by the court:

These types of proceeding are a priority because of the social and economic consequences on the child, parents and larger community of a child being removed from their parents. (sub. 68, p. 85)

The *LAW Survey* (Coumarelos et al. 2012) found that family legal problems had the potential to result in a range of negative consequences:

Some types of legal problems were much more severe than others. Family problems stood out as severe problems with a broad range of negative consequences on health, financial and social circumstances. In Australia as a whole, family problems comprised the highest proportion of substantial problems (78%) and had the highest mean number of adverse consequences. (p. xvi)

But the case for legal assistance in broader areas of civil justice is not as well understood. This is, in part, because civil justice problems relate to issues of everyday life — debt, fines, social security payments, housing — but also because, for many people, civil matters can be easily resolved. For disadvantaged Australians, however, unresolved civil law problems, such as a dispute about social security payments, can ultimately result in a person not having any money for food or not having somewhere to live. Civil legal needs for disadvantaged people involve essential human needs. Also, for many disadvantaged people legal problems rarely occur in isolation. It is not uncommon for one unresolved problem to trigger a number of other legal problems.

Civil law matters — the poor cousin in the family

As discussed in the previous chapter, the funding priorities mean that state funds for LACs are directed primarily to criminal matters (priority is given to criminal

matters where the accused is at risk of incarceration) and Commonwealth funds are predominately for family matters. As such, while criminal and family violence matters make up 15 per cent of all disputes, they capture the bulk of the legal assistance.

As noted in chapter 20, the LACs (who receive the majority of the legal assistance funding) dedicate around two thirds of their case work to criminal and family violence matters. The casework of ATSILS is almost entirely criminal in nature (around 90 per cent). FVPLS operate almost exclusively in the family violence space. CLCs are more focused on civil matters, with about 80 per cent of their casework dealing with civil and other family law matters. As the Attorney-General's Department said:

As a result of other service priorities for legal representation, Legal Aid Commissions (LACs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS) are more likely to offer advice and minor assistance in civil law matters. Community legal centres (CLCs) are often better placed to assist those with civil law matters who require more in-depth assistance. Given the number of Australians who face family breakdown, LAC funding has been focused here. For Indigenous Australians, high incarceration rates have meant that the focus of ATSILS funding is on state criminal law. (sub. 137, pp. 78).

Because of the nature of the competing demands on LACs' fixed budgets, civil matters will always be vulnerable to being 'squeezed out' or put down the priority list.

When thinking about the extent to which assistance should be available for civil law matters, it is important to understand the types of civil legal issues faced by people — particularly those faced by disadvantaged Australians — and the costs to individuals and the community of not providing assistance with civil matters.

As discussed, priority is given for criminal and family law issues because of the consequences on people's lives. But broader civil law problems, if left unresolved, can also have a big impact on lives of the most vulnerable Australians. The *LAW Survey* found that people with a disability, single parents, people in disadvantaged housing and the unemployed are particularly vulnerable to many civil law problems. A number of submissions also pointed to a link between the most disadvantaged members of the community (including the homeless) and high rates of civil legal matters (box 21.8).

Participants also provided many examples of problems spiralling when legal assistance was not provided.

- One case was a mother who was unable to afford a pay-day loan. Because she was being chased for loan payments she made the repayments but was unable to

pay her rent. The result was she was evicted from her home, and on becoming homeless, her children were put into care.

- The case of clients with multiple infringements (for example, for travelling on public transport without a ticket) was a common one. Infringements increase because added fees and penalties exacerbate the seriousness of the infringements. The result is extra distress for clients and increased time and cost to administer the infringements and resolve the matters legally. Allens said the stress from such situations frequently results in or exacerbates mental illness, jeopardises employment, leads to substance abuse, damages relationships and ‘ultimately cost society both in dollar terms and in quality of life’ (sub. 111, p. 1).

Box 21.8 Participants identify a link between disadvantage and civil matters that impact on everyday life

Public Interest Advocacy Centre:

The LAW Survey found that ‘[p]eople who had lived in disadvantaged housing had high prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems from seven problem groups’. Homeless people had the highest odds ratio of legal problems in the areas of consumer, credit/debt, crime, employment, government, housing, money and rights. In addition to their disadvantaged housing status, the homeless group had 2.2 types of disadvantage on average, compared to 1.9 for the basic/public housing group and 1.1 for the non-disadvantaged housing group. (sub. 45, p. 13)

Queensland Public Interest Law Clearing House (QPILCH):

... people with mental illness experience a high rate of civil law issues including debts, unfair contracts, problems with government agencies and housing. These issues are often a consequence of the person’s illness and behaviours during a mental health episode and are often compounded by the difficulties in accessing legal services. (sub. 58, p. 21)

Legal Aid NSW:

It is often the case that there is a strong connection between a legal problem and social problems, such as an uncontrolled mental health problem leading to multiple unpaid fines. (sub. 68, p. 15)

The evidence also shows that as disadvantage ‘concentrates’, vulnerability to multiple legal problems is heightened. Based on the *LAW Survey*, McDonald and Wei (2013) found that respondents with multiple disadvantage reported a greater number of legal problems and substantial legal problems (appendix H). Also, each additional indicator of disadvantage was found to have an ‘additive effect’ that increased the average number of legal problems and substantial legal problems reported.

In the context of civil justice problems relating to basic needs that impact on everyday life, Legal Aid NSW noted that regulation of aspects of everyday life (or some kind of interface with the law) has grown and this means that Australia's most disadvantaged people increasingly need assistance with civil matters.

As systems get more complex the disadvantaged and vulnerable need assistance to negotiate for them to ensure they are accessing appropriate services and entitlements. For example, there will be disadvantaged people potentially eligible to participate in the National Disability Insurance Scheme (NDIS) who will need assistance to access the scheme or to ensure they receive an appropriate entitlement. (sub. 68, p. 19)

The Civil Law Division of Legal Aid NSW has developed a problem-solving approach to civil law matters based around law for 'everyday life' (figure 21.2). The civil law program focuses on areas that have the most impact on people's lives, including tenancy and housing issues, debt and social security. Including legal services within social services allows an integrated response to the problems faced by Australians with multiple and complex needs. As Legal Aid NSW said, it is often the case that there is a strong connection between a legal problem and social problems and 'it is often ineffective in the long term to resolve one problem without resolution of the other' (sub. 68, p. 16).

Figure 21.2 Legal Aid NSW's 'Everyday life' problem solving approach



Source: Legal Aid NSW (sub 68, p. 15).

Unmet civil legal needs (family breakdown, fines and debt) can also lead to crime. Examples provided by National Legal Aid (sub. 123) include:

- the breach of a civil violence restraining order resulting in prosecution in the criminal jurisdiction with serious consequences, including a period of imprisonment
- children who have been or are involved in child protection proceedings, also involved in juvenile justice proceedings, and ultimately, adult criminal law proceedings (this cycle of disadvantage is commonly seen by LACs)
- unpaid traffic infringement notices that result in a licence suspension order, with the flow on effect of criminal penalties if the individual concerned is detected driving (the penalties for this offence can include imprisonment).

Commenting on the impact of unresolved fines, the NSW Attorney-General & Minister for Justice, the Hon. Greg Smith, said

The impact of fines on vulnerable people can be crippling. Almost two thirds of licence suspensions in NSW are for fine defaults. This can in turn lead to secondary offending and ultimately imprisonment. Aboriginal people are particularly vulnerable to this cycle. (Smith 2013, p. 15)

Not providing legal assistance for civil matters can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending such as health care, housing and child protection.

Areas of civil law identified by participants where legal assistance services are particularly thin include employment, housing, rights and consumer matters (Australian Federation of Disability Organisations, sub. 24; QPILCH, sub. 58; Law Council of Australia, sub. 96). Gaps in legal assistance for civil law matters means that Australia's most disadvantaged people may not get legal representation for these types of civil law matters. The Law Council of Australia said:

If a person suffers a civil wrong or is subject to government decisions affecting their rights, they are entitled to enforce their rights through litigation or a fair and transparent review process. If citizens cannot enforce their legal rights, those rights are effectively taken away, leading to wrongful transfer of assets, money and other property. (sub. 96, p. 30)

It was noted, however, that service offerings in the civil space vary across the jurisdictions, with Legal Aid NSW providing leading practice with its civil law division and services. NSW Society of Labor Lawyers said:

The services offered in the civil law space by different LACs are highly varied, with NSW the high water mark There is currently no benchmark for what civil law services should be offered by LACs and this variability means access to justice depends arbitrarily on state of residence. As a priority, the Commission should recommend

that federal government work towards making civil law services provided through LACs consistent among the states and territories. (sub. 130, p. 13)

The Commission considers that the Commonwealth and states and territories should seek to agree (as part of the next NPA) to national objectives and ‘core’ priorities for legal assistance services (rather than separate Commonwealth and state priorities). Determining ‘core’ priorities should be based on where the community-wide benefits are the greatest, taking into account the extent to which unresolved legal problems impact on a person’s life and the community more broadly. As discussed in more detail in section 21.8, the capacity of legal assistance providers to direct assistance dollars to where the greatest benefit is constrained by current separate Commonwealth and state priorities and funding arrangements.

The Commission is of the view that funding for civil law (including family law) assistance should be determined and managed separately to protect the funds from the pressures of criminal law work. Without earmarking funds for civil law matters there is a risk that civil matters will always be the poor cousin to criminal matters, with access to assistance for civil matters conditional on the availability of remnant funds.

DRAFT RECOMMENDATION 21.1

Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

INFORMATION REQUEST 21.1

The Commission seeks views on whether the above demarcation of funds would be sufficient to ensure that appropriate resources are directed towards non-criminal, non-family law matters.

A more efficient way to provide legal assistance for civil law matters?

Under current arrangements, government funding for civil law cases has effectively been earmarked in the form of funding for CLCs. The Commission, however, questions whether this is the most efficient and effective model.

While CLCs are able to assist people with early and minor advice on civil matters, many are small in scale and may not have the expertise (particularly those specialising in particular areas of law) to undertake complex civil matters. As the NSW Society of Labor Lawyers said:

It is of particular concern where Governments look to shift the burden of Legal Aid recipients to the community legal sector. Doing so ignores the fundamental differences in the services and philosophies of Legal Aid and community legal services. It also threatens to create injustices on the part of clients, because although CLCs are a good source of early advice and intervention, they lack the resources to properly assist individuals in adversarial proceedings. (sub. 130, pp. 19-20)

The Queensland Public Interest Law Clearing House (QPILCH) also pointed to the different strengths of CLCs and LACs:

CLCs are generally more flexible, and are well placed to get information out to target groups, provide preliminary advice, develop community relationships to facilitate multiagency approaches and conduct targeted research. Legal Aid and pro bono services are, on the other hand, better resourced for case work. The current funding model does not capitalise on these strengths, resulting in inefficient delivery of services. (sub. 58, p. 57)

An identified barrier to undertaking pro bono work (much of which is undertaken with CLCs) is the ‘mismatch’ between the skills and knowledge of pro bono lawyers and the services typically required for disadvantaged clients (chapter 23). Pro bono assistance for people experiencing disadvantage can also require specific communication and client management skills to be able to assist them effectively (The National Pro Bono Resource Centre, sub. 73).

The LAC’s and the larger CLCs, with dedicated funding for civil cases are better placed to employ lawyers to specialise in particular areas of civil law most relevant to disadvantaged Australians. Legal Aid NSW has already adopted this model with the civil division specialising in those areas of law most likely to impact on the lives of the most disadvantaged (sub. 68).

The LACs are also better able (than the CLCs) to achieve economies of scale through high volume service delivery (NLA, sub. 123). Evidence presented to the Commission suggests that the LACs are more efficient in terms of the number of cases held per civil law lawyers when compared with the CLCs.

As discussed in section 21.6, the Commission is seeking feedback on a model where LACs are able to compete (via competitive tendering) for civil law funding based on identified need. The proposed tendering of civil services offers the potential to better understand the costs of providing such services and ensures that scarce legal assistance dollars are used efficiently and effectively, delivering overall value for money. Proposals as to how the supplier would prioritise identified needs for services covered by the funding could form part of such a tender, as could innovative ways to meet identified needs.

21.3 Are legal assistance services in the right locations?

Ideally, legal assistance services will be located in those areas where there is the highest return to addressing legal need. As the Attorney-General's Department said:

Legal intervention programs ... need to be delivered to those areas where the services available are unable to meet the level of demand or legal need. Accurate data on legal need, drawn from Australian Bureau of Statistics' population research or from legal assistance services themselves, can help to target programs and services. The LAW Survey is also valuable here, as it looks at characteristics of high needs groups who access legal assistance to help address their problems. (sub. 137, p. 19)

LACs' locations are informed by an assessment of legal need ...

The LACs service models are informed by evidence on legal need and where service providers are located across the jurisdictions. For example, Legal Aid NSW reports having used the Law and Justice Foundation Access to Justice and Legal Need program to target service delivery since the program commenced in 2002. Examples of evidence-based mapping to target services are provided in box 21.9.

Legal Aid NSW provided a map showing the overlay of grants of legal aid and Socio-Economic Indexes for Areas (SEIFA) indicators of disadvantaged areas in NSW (sub. 68, p. 84).

... but there is no model to determine placement of CLCs

The placement of CLCs, however, is largely based on history — CLCs were traditionally established on the initiative of their communities in response to a lack of access to legal services.

CLC client data show that more clients are serviced by CLCs in Victoria than any other state or territory (table 21.1). But a comparison of the proportion of CLC clients in each jurisdiction with the distribution of Australia's population, shows that CLCs in SA, NSW and the NT service the highest number of clients (as a share of the population), while CLCs in WA and the ACT serve the lowest. There could be any number of reasons for these differences, such as geography and client mix relative to the median.

Around one fifth of CLCs are located in areas in the bottom three deciles of the SEIFA. Over two-thirds are located in the top three SEIFA deciles (appendix I).

Box 21.9 **Examples of evidence-based mapping of need to target services**

Deciding where to have 'Fines Days'

The Legal Aid NSW Work and Development Order (WDO) used State Debt Recovery Office data to target areas of high levels of fines debt and conduct 'Fines Days'. Lawyers assisted clients to engage with the State Debt Recovery office to apply for fine write-offs, time-to-pay arrangements and make referrals to the WDO Service.

The Outreach Fines Campaign included six road trips to regional and remote NSW (and covered Broken Hill, Wilcanna, Menindee, Bourke, Brearrina, Walget, Taree, Kempsey, Lightning Ridge, Taree, Purfleet, Nambucca and Bowraville). The 21 outreach clinics assisted 307 clients to resolve their unpaid fines and other legal problems. In 2012-13 over \$7.5 million in debt was cleared by the scheme with a cumulative total of \$29 million of outstanding fines being managed since the scheme commenced. WDO services are provided in over 1000 locations across NSW.

Targeting communities that are vulnerable to unscrupulous business

Legal Aid NSW also works closely with the Australian Securities and Investments Commission, the Office of Fair Trading and Aboriginal leaders to identify remote vulnerable communities which are being targeted by unscrupulous businesses or scams.

Cooperative Legal Service Delivery Program

NSW's Cooperative Legal Service Delivery Program (CLSD) is an example of a regionally based approach aimed at improving outcomes for disadvantage Australians by building cooperative and strategic networks of key government and non-government organisations at the regional level. Regional coalitions meet regularly and work together to:

- exchange information
- identify emerging and unmet legal needs for regions
- identify service delivery priorities for the region
- plan and deliver services in a more coordinated, collaborative and effective way, including outreach clinics, community legal education and training.

The CLSD program conducts planning sessions to ensure projects and initiatives target the highest areas of unmet legal need. This involves developing regional profiles. The profiles draw on information provided by: the Law and Justice Foundation's identified disadvantaged groups with high prevalence of legal need; regional priorities under the NSW 2021 Regional Action Plan; Australian Bureau of Statistics Census Data including Socio-Economic Indexes for Areas maps; Law and Justice Foundation Data Digest express legal need data; Legal Aid NSW and LawAccess data; data from the Bureau of Crime Statistics and Research and State Debt Recovery Office; and legal needs identified by local services.

Source: Legal Aid NSW (sub. 68).

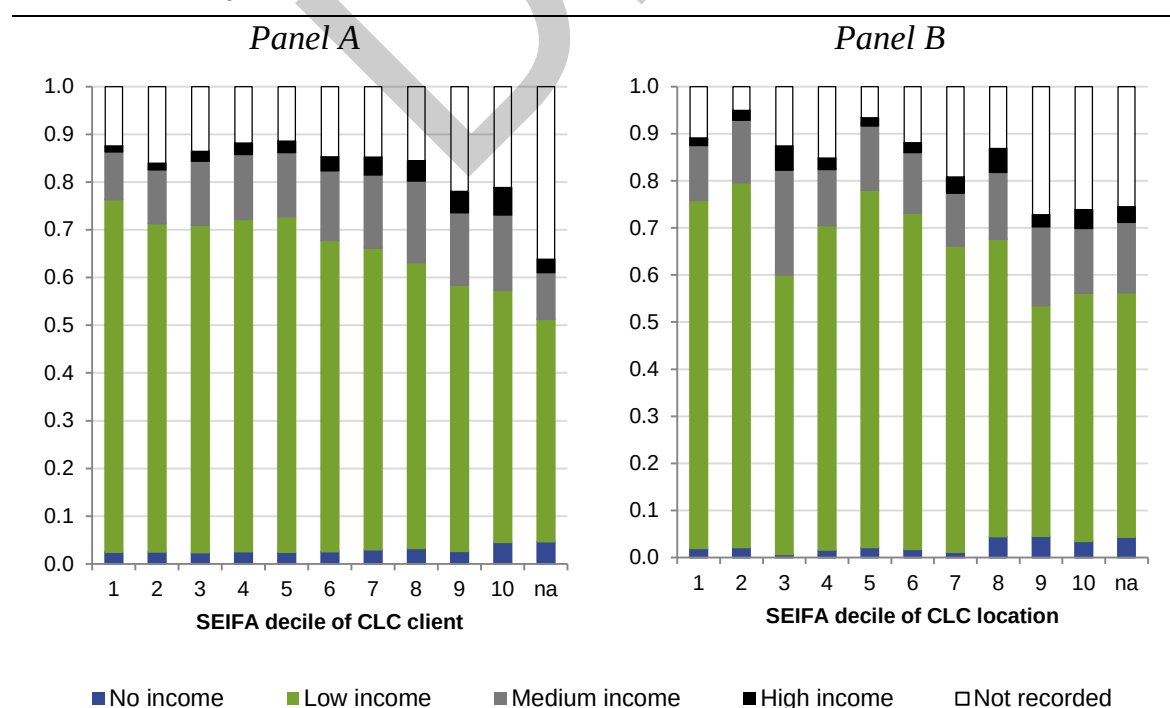
Table 21.1 Community legal centre clients by jurisdiction
2011-12

<i>State or territory</i>	<i>Number of clients no.</i>	<i>Proportion of total clients % (A)</i>	<i>Population distribution % (B)</i>	<i>Propensity to be a client % (A/B)</i>
Victoria	57 469	27.3	24.8	1.1
New South Wales	56 186	26.7	32.2	0.8
Queensland	43 245	20.5	20.1	1.0
Western Australia	30 495	14.5	10.7	1.4
South Australia	11 264	5.4	7.3	0.7
Tasmania	5 174	2.5	2.3	1.1
Australian Capital Territory	3 532	1.7	1.0	1.7
Northern Territory	3 116	1.5	1.7	0.9
Total	210 481	100.0	100.0	

Data sources: ABS Cat. No. 3201.0; unpublished CLSIS data.

Analysis undertaken by the Commission also found that the average income of CLC clients located in advantaged areas was higher than clients from disadvantaged areas (figure 21.3, panel A). Similarly, CLCs located in higher SEIFA deciles were found to serve a smaller proportion of low income clients than those in lower SEIFA deciles (figure 21.3, panel B).

Figure 21.3 Reported income by SEIFA decile of CLC client and CLC location
2011-12



Data sources: unpublished CLSIS data; ABS (2013d); Commission estimates.

For services to be targeted to those areas with the highest level of need, legal needs should be monitored and mapped against the supply or availability of legal assistance services (not just across CLCs but across all four legal assistance providers). Such mapping will highlight gaps and overlaps and help prioritise resources (the placement of legal assistance services) to those areas of greatest need.

Such mapping needs to be an on-going process so that the information on needs of the most disadvantaged and where services are located is up-to-date. This issue is discussed further in section 21.6.

There is no link between legal needs and funding amounts

A number of the LACs expressed frustration with the mismatch between need and government funding. The NTLAC said:

It is frustrating that even where there is strong evidence, funding decisions are made without reference to these. For example, the Indigenous Legal Needs Project of the NT found the predominant legal issue faced by indigenous people in the NT was housing and tenancy concerns. However, the resourcing of legal services in the NT still does not enable these needs to be met. (sub. 128, p. 17)

Legal Aid NSW also said:

The factors determining the volume of current funding for legal assistance are largely historical and based on a fixed pool of funding rather than assessed legal need. (sub. 68, p. 100)

As the Attorney-General's Department stated, the volume of Commonwealth funding for legal assistance services is set through the Budget process and there is no link between the volume of funding and the cost associated with providing specified services. Funding is indexed annually using 'Wage Cost Index 1', which is based on 75 per cent of a wage cost factor and 25 per cent of consumer price index (sub. 137).

The budgets for legal assistance are not set on the basis of identified legal need and/or who should be entitled to what assistance. Within this constraint, which services the LACs and the CLCs provide (and the ATSILS and FVPLS, chapter 22), and where they provide them, should be informed by 'justice gap' mapping exercises to identify gaps between legal need and available services. The quantum of money for legal assistance services is discussed further in section 21.7.

21.4 Are assistance services targeting the ‘right’ people?

The LACs and CLCs focus on providing legal assistance to Australians experiencing economic or other forms of disadvantage (chapter 20).

The LACs eligibility for a grant of legal assistance for legal representation is based on an applicant’s means (based on income and assets), merit of the matter, and competing priorities in an environment of limited funds. Any special circumstances that might be relevant to incapacity to self-help are also taken into account (National Legal Aid, sub. 123; chapter 20). The issue must also come within the relevant legal aid commission’s guidelines (which target particular areas of law on the basis of market failure and other factors).

CLCs largely determine their own eligibility criteria, but aim to target those people who do not qualify for a grant of legal aid but are among the most disadvantaged (box 21.10).

Some CLCs only provide services to particular groups (such as women or homeless people) while for others eligibility depends on the available resources of the centre (box 21.10). As Redfern Legal Centre said:

CLCs complement LACs as a more flexible option for receiving legal services for vulnerable clients. CLCs are not limited by the strict means and merits tests that restrict the provision of Legal Aid. (sub. 115, p. 33)

The LACs and CLCs eligibility tests only relate to case work services (information and minor assistance is not subject to a means test).

Efficient targeting?

In a world of limited resources there is a need for priorities and targeting.

As discussed in chapter 4, in a budget constrained environment, legal assistance service funds should be allocated to those unmet needs that deliver the greatest benefit relative to the cost of meeting the need.

Box 21.10 Some insights into how CLCs prioritise clients**Women's Legal Service (WLS) (Brisbane):**

WLS makes difficult daily choices about which women to assist and prioritise our casework and representation to women who:

- are declined legal aid (which can often be due to lack of evidence);
- experience significant safety issues due to domestic violence; and
- have urgent matters and urgent drafting of material is required; and
- are vulnerable due to their cultural background, physical or mental disability, or age. (sub. 117, p. 2)

Redfern Legal Centre (RLC):

Legal assistance is outside the price range of many people who need it. Within this group of people who are financially disadvantaged within the legal system, there are particularly vulnerable groups of people who are further disadvantaged in accessing justice by reason of a particular attribute. RLC prioritises this sub-category of clients in our service delivery: Aboriginal and Torres Strait Islander (ATSI) clients, people from culturally and linguistically diverse (CALD) backgrounds, people living with a disability, international students, victims of domestic violence, and homeless persons. RLC's most disadvantaged clients often fall in more than one of these categories, and often experience significant and multiple legal issues. (sub. 115, p. 11)

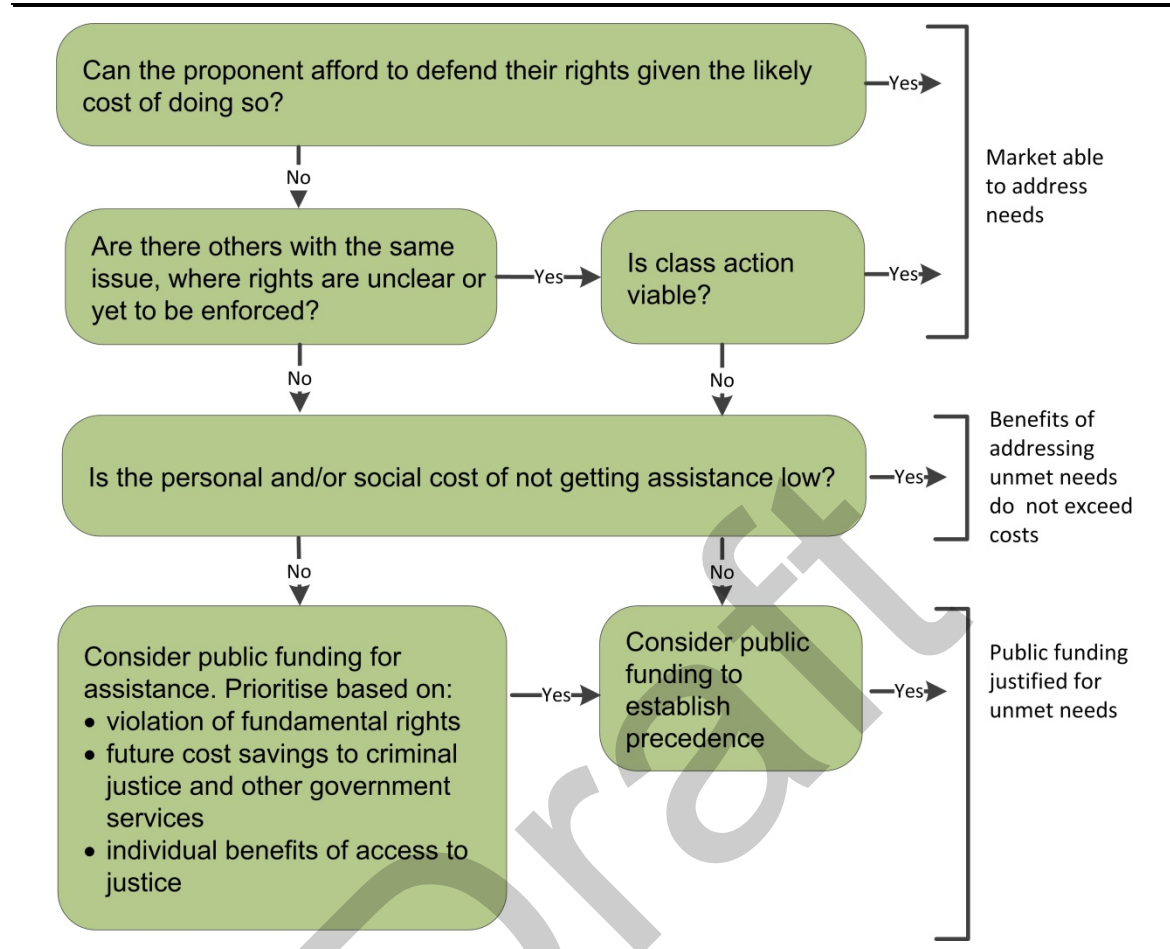
Hunter Community Legal Centre (HCLC):

The HCLC does not apply any strict criteria for providing legal advice and assistance to its clients. The level of advice and assistance provided will depend largely on the client's resources and capacity for self-help. The HCLC attempts to educate and empower its clients by providing them with the information they need to manage their legal problem independently. The HCLC will provide a greater level of ongoing assistance to those disadvantaged individuals who, for whatever reason, lack the resources or capacity to effectively self-represent. (sub. 26, p. 9)

As illustrated in figure 21.4, when deciding 'who' to spend taxpayers' money on in the civil legal system, eligibility for grants of legal aid should take into account:

- the client's circumstances, including whether they can afford to bring or defend the case given the likely cost of doing so (taking into account whether the person is able to fund their legal problem in other ways and whether there are alternative resolution routes) and whether they are capable of doing so
- whether there are others with the same issue (looking at the scope for class action)
- the full range of costs and benefits, including the value of establishing precedents, the impact of the legal problem on the client's life (including their personal safety, whether in Australia or in another country) and the flow-on effects to the justice system and on other publicly funded services.

Figure 21.4 Factors to consider when targeting grants of legal aid



A report of the Public Commission on Legal Aid in British Columbia recently recommended that there should be an entitlement to legal aid where:

... an individual has a legal problem that puts into jeopardy their or their family's security — be it their liberty, health, employment, housing, or ability to meet the basic necessities of life — and he or she has no meaningful ability to pay for legal services. (Doust 2011, p. 46)

Income and asset tests provide an indication of a person's capacity to pay for legal advice. They also help determine the extent to which clients have the capacity to repay some or all, of their legal aid grant. The NPA on Legal Assistance Services (Schedule B), sets out the principles for assessing eligibility for a grant of legal aid. The key principles relating to financial eligibility in assessing applications for grants of legal aid in Commonwealth matters are outlined below.

- Where a person receives the maximum rate of an income support payment or benefit administered by Centrelink as their total income, they will satisfy the income component of the means test.

-
- Where a person does not receive the maximum rate of an income support payment or benefit administered by Centrelink, the person's income is determined by making deductions from their total income in relation to objectively referenced costs of housing and providing support to dependents and measured against a nationally standardised income threshold.
 - A person who does not initially satisfy the income component of the means test but is still unable to afford private legal representation may be eligible for legal aid, on the condition that a contribution towards the person's legal costs is paid to the legal aid commission. The level of contribution is based on a sliding scale that takes into account the likely cost of the matter. Where the contribution imposed exceeds the estimated cost of the matter, assistance is refused on the basis that the applicant is able to pay for private legal representation.
 - The asset test includes allowable exemptions such as some equity in the applicant's principal place of residence, equity in a used motor vehicle and household furniture that are based on a nationally standardised asset threshold (box 21.11).

However, the circumstances of an applicant should extend beyond financial eligibility. As discussed in a paper on *Deep and Persistent Disadvantage in Australia*, financial eligibility is just one measure of disadvantage, the test for disadvantage is really about 'impoverished lives (including a lack of opportunities), not just low income' (McLachlan, Gilfillan, and Gordon, 2013, p. 2). Financial eligibility criteria can also be problematic in situations where there is financial dependency and domestic violence (since partners can have control over assets).

One of the outcomes for the LACs under the NPA is 'more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing social exclusion' (COAG 2010, p. 4). Social exclusion, while including income and financial poverty, extends to a wider range of life domains (covering employment, education and skills, health and disability, social connections, community and personal safety). This suggests that the eligibility tests applied by legal assistance providers should take into account the applicants personal capabilities, health (including mental health), and personal safety.

To some extent, the 'special circumstances' of the application priorities identified for Commonwealth law matters in the NPA (Schedule A) takes into account the circumstances of particularly vulnerable groups — including language or literacy problems, intellectual, psychiatric or physical disability, a person's remote locality or where a person would otherwise be at risk of social exclusion.

Box 21.11 National means test thresholds

In the mid 1990s, a working party comprised of representatives from all the LACs, developed a National Means Test (NMT) to ensure that eligibility for grants of legal aid were determined on the same factors and were referable to capacity to pay across the LACs.

The income test starts with the applicant's total gross income and then subtracts allowable deductions (including income tax, housing costs dependant allowances, child care costs and child support paid) up to thresholds allowed. The test then compares the balance with an amount considered reasonable for other living expenses. This amount is based on the Henderson Poverty Line (HPL). Any income above the HPL limit is regarded as 'discretionary' income, which is available to pay for legal costs.

The income test also sets a limit at which an applicant is eligible for aid with no contribution or with only a minimal contribution.

The asset test takes account of all assets other than 'excluded' assets. Assets such as home equity or motor vehicle equity are excluded up to a threshold. Ordinary household effects and tools of trade are totally excluded to a 'reasonable' level. Lump sum compensation payment may be excluded as assets, but assessed as deemed income.

The thresholds for allowable deductions and excluded assets are based on particular benchmarks, which are standardised nationally, while the actual dollar value varies across the LACs.

Source of national means test thresholds

<i>Threshold</i>	<i>Source</i>
Housing costs	Median rental of a two bedroom flat, from local real estate institute
Childcare costs	Rate of benefit payable for a child in care 50 hours per week, from Department of Human Services
Dependant allowance (first)	Difference between the Henderson Poverty Line (HPL) figures for 'Head in workforce, cost other than housing, single person,' and 'Head in workforce, cost other than housing, single person plus 1'
Dependant allowance (second and subsequent)	Difference between HPL figures for 'Head in workforce, cost other than housing, single person plus 1' and 'Head in workforce, cost other than housing, single person plus 2'
Child support allowance	As for dependant allowance
Home equity	Median price of established home in capital city, from local real estate institute
Motor vehicle equity	Average price of a five year old six cylinder car, from local automobile association
Farm or business equity	Current allowance applied by Centrelink
Non contributory income level	100 per cent of HPL, 'Head in workforce, cost other than housing, single person'

Source: Legal Aid NSW (pers. comm., 21 March 2014).

The Attorney-General's Department noted that it is currently considering a model for legal assistance eligibility that takes into account client capability when assessing the extent of their need for legal assistance (sub. 137). Legal Aid NSW is also currently piloting a new eligibility test in employment law matters looking at how social exclusion indicators can be used to target services. The social disadvantage test addresses the issue of linked problems such as under-employment, poor skills, low incomes, poor housing, high crime, bad health and family breakdown. Employment law was selected for the pilot because of the dramatic impact an employment problem can have on a person's level of disadvantage.

An eligibility criteria that involves taking into account personal capabilities and impacts on life requires judgments to be made. However, it is important to appreciate that an eligibility assessment for a grant of legal aid is quite different to an eligibility test for, say, a Centrelink payment. Legal assistance providers are working with clients over a period of time (for example, by providing them with information, initial advice and minor assistance) and are able to make assessments about personal capabilities and impact of the legal problem on the person's life. Legal Aid NSW, for example, said:

More intensive case work assistance is targeted to legal problems that have the biggest impact on peoples' lives. Priorities are based on: levels of capacity of the client; the consequences if no assistance is provided to individuals, families and the legal system; and the likely effectiveness of the service. For example, Legal Aid NSW does not provide legal aid for matters which can be conducted under conditional costs agreements by private lawyers, such as personal injury. These are matters for which there is a market solution. (sub. 68, p. 23)

Merit tests involve assessing whether the case is an appropriate use of taxpayers' money. Merit tests should include the prospect of success as well as the costs and benefits to the individuals, the legal system, other government services, and the broader community of funding the case (figure 21.4).

DRAFT RECOMMENDATION 21.2

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

A consistent eligibility criteria?

Different eligibility criteria across legal assistance providers was identified as creating problems. For example, the Aboriginal Legal Service of Western Australia (ALSWA) said:

... in WA there are significant discrepancies between Legal Aid WA and ALSWA with regard to the eligibility criteria for legal assistance. ALSWA's eligibility criteria are governed by the AGD Service Delivery Directions, which are much broader than Legal Aid's eligibility criteria. Generally speaking, a broader range of clients are eligible for assistance from ALSWA as opposed to Legal Aid WA. This presents a particular problem for ALSWA clients where ALSWA has a conflict of interest. (sub. 112, p. 8)

The CLCs' approach of determining their own eligibility criteria also lacks transparency and could encourage forum shopping (and inequitable outcomes).

That said, the majority of CLC clients are from disadvantaged groups (chapter 20). But, as discussed above, the evidence also suggests that where clients live can affect their access to assistance from a CLC. This suggests that there is scope to improve horizontal equity (that is, that people in equal circumstances are treated the same way).

While the LACs income and assets tests are based on the national means test thresholds (box 21.11) the reality of fixed budgets means that the LACs have not been able to keep updating the thresholds to keep pace with inflation. The cut off levels applied by the LACs therefore are set as a percentage of the national means test thresholds and these vary across jurisdictions.

The national means test for LACs attempts to achieve consistency across jurisdictions by linking the financial eligibility test to a measure of disadvantage. The Henderson Poverty Line, developed by the Commission of Inquiry into Poverty in the early 1970s, was the first widely used income poverty line in Australia (Australian Government 1975). No Australian government has officially endorsed the use of the Henderson Poverty Line, and it is no longer used by most poverty researchers in Australia. Poverty lines based on a proportion of median household incomes are now more common (McLachlan, Gilfillan and Gordon 2013).

Given the NPA's stated outcome of targeting services to those experiencing (or at risk of experiencing) social exclusion, a more appropriate measure of disadvantage would be the Social Exclusion Monitor. (The Monitor defines low incomes as less than 60 per cent of median household income and low net worth as less than 60 per cent of median household net worth (Scutella, Wilkins and Horn 2009).)

While, in principle, the Commission considers that financial eligibility criteria should be consistent across the LACs and CLCs, because of the current funding arrangements, in practice eligibility tests applied by LACs and CLCs are required to be flexible. As Legal Aid NSW said:

In times of financial constraint, Legal Aid NSW will apply its Availability of Funds test to types of legal matters that are of a lesser priority. The result is legal aid not being available for these types of matters until funds become available. (sub. 68, p. 24)

That said, seeking agreement on an eligibility test and linking the financial eligibility tests to an established measure makes transparent where the LACs and CLCs eligibility tests sit relative to the threshold, and thereby helps make any funding shortfalls far more transparent.

The Commission considers that there is scope to better target legal assistance services and for there to be greater consistency in targeting across legal assistance service providers. Better targeting would involve a more consistent approach to assessing eligibility across the LACs and CLCs and closer alignment of eligibility criteria between the LACs and the CLCs.

DRAFT RECOMMENDATION 21.3

The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.

Are the current eligibility criteria for LACs too mean?

Many submission said that funding constraints had resulted in the LACs and CLCs applying tighter eligibility criteria, which meant that many disadvantaged Australians are not eligible for grants of legal assistance (box 21.12). For example, the NSW Society of Labor Lawyers, said:

Eligibility for a grant of legal aid for casework has been restricted on both means and merit grounds. Stricter means tests mean that those eligible for legal aid are generally those earning \$26 000 or less a year. (sub. 130, p. 14)

Legal Aid NSW claimed that its current means test is ‘mean’ with the means test income limit being 52 per cent of the minimum weekly wage (sub. 68, p. 86). Other participants said that many Australians who are refused legal aid based on the means test are unable to afford to pay for legal representation (box 21.12). The Law Council of Australia said:

... restrictions on legal aid are now so severe that, in many jurisdictions, a substantial proportion of those living below the Henderson poverty line ... will not satisfy the means test for legal aid eligibility. (sub. 96, p. 38)

Box 21.12 Participants' views on the LACs eligibility criteria

National Legal Aid:

Funding constraints result in restrictions on the availability of legal aid services so that some people who need legal assistance but cannot afford to engage a private legal practitioner will not receive either a grant of legal aid for legal representation or the level of assistance that they need. (sub. 123, p. 3)

NTLAC said:

The means test is out of step with the economy of the NT and many people who are refused legal aid according to the means test are unable to afford their own legal representation. (sub. 128, p. 12)

Women's Legal Service (Brisbane):

WLS experiences great difficulty in obtaining grants of legal aid for family law and domestic violence matters. ... The means test is also strictly applied in a manner that does not reflect genuine living expenses of women. For example, a client of WLS was eligible for aid in every respect, but for equity in a car. The car was critical to this client in transporting her children, including facilitating contact of the children with their father. (sub. 117, p. 3)

Redfern Legal Centre:

Legal Aid is limited by strict means and merits tests. A client who has complex legal needs who has been dealing with a bureaucratic government department may be reluctant to engage with Legal Aid. Legal Aid service provision can be inflexible and unnecessarily complex, impeding access to justice for the most disadvantaged clients. (sub. 115, p. 33)

The working poor (low-income earners), were identified as a group that misses out on grants of legal aid but cannot afford to pay for legal services. Warner commented that:

Our current system also tends to put someone who just qualifies on financial grounds very far ahead of a person who just misses out on financial grounds and who has no prospect of paying for a service. ... That is, rationing takes place on the cusp and within the formal legal aid system. (2013, p. 4)

The client profile data for Victoria Legal Aid confirms that clients in that jurisdiction receiving casework under grants of legal assistance were either receiving government benefits or had no income. In 2012-13:

- 65 per cent of clients were receiving government benefits
- 31 per cent of clients had no income (VLA 2013a).

Legal Aid NSW also noted that grants had become increasingly ‘welfarised’ — over 88 per cent of people applying for aid in NSW in 2012-13 were on a Centrelink benefit (sub. 68).

Preliminary estimates based on Legal Aid NSW’s means test suggest that just over 8 per cent of households in that state would qualify for a grant of legal aid. Less than 5 per cent of NSW households would be eligible for legal aid without having to make a contribution, while the remainder would be eligible, but would be required to make a contribution. Box 21.13 provides some hypothetical means test scenarios based on Legal Aid NSW’s means test.

Box 21.13 Some hypothetical means test scenarios based on Legal Aid NSW’s means test

Sarah is a 43 year old women who has separated from her husband. She lives with her two children, James aged 13 and Emma aged 10. Sarah was a victim of domestic violence during her marriage and is subject to ongoing harassment by her estranged husband. Sarah is seeking family law orders to define the time the children spend with their father.

Sarah does not own a home and pays \$500 rent per week. She has a car worth \$10 000 and \$200 in cash. She has no other assets. She is employed full time and earns \$1050 per week and pays \$195 tax per week. She also receives the Family Tax Benefit and Rent Assistance, totalling \$306 per week (this is not included as income in the means test).

Sarah’s eligibility for legal aid is assessed on her income after tax of \$855 per week. She is allowed a deduction of \$200 per week for her dependent children and \$320 per week for rent. Her weekly assessable income for the Legal Aid NSW income test is \$355, which exceeds the upper limit of \$318 per week.

Angela is a 35 year old single mother to Jack, aged 11. She is currently studying and working part-time. She is seeking legal aid for a serious credit and debt matter.

Angela’s weekly income is \$400 per week and she pays \$75 per week in board as she lives with her parents. Angela has \$6000 in an incentive saver account (a small inheritance she received after the death of her grandmother a short time before her application for legal aid). Angela is not eligible for legal aid after not satisfying the assets component of the means test.

Source: Legal Aid NSW (pers. comm., 21 March 2014).

While priority must be given to ensuring that the most disadvantaged Australians have access to legal aid, the Commission considers that the LACs’ financial eligibility test is probably too tight (and the CLCs criteria is possibly too lax, although it is hard to know given the lack of transparency).

When setting financial eligibility criteria, consideration should be given to whether Australians who will miss out on grants of legal aid are able to fund resolution of their legal problems in some other way (for example, whether they have sufficient income to pay for legal insurance or payments on a legal expenses contribution scheme, chapter 19). A hard line for eligibility is problematic where the net benefits of assisting someone who just misses out are greater than someone who qualifies for assistance.

What about contributions from clients?

Contributions are required from clients who receive legal aid grants, but can afford to pay some component of their costs. As noted above, however, most LAC clients are either receiving government benefits or have no income. As a result they have limited ability to contribute.

The Commission considers that where clients can afford to contribute to their case they should do so. Getting clients to contribute to the costs of a case will reduce any perverse incentives there might be for unnecessary litigation. Client contributions can also off-set costs to taxpayers of providing legal aid within a set budget, which means that the funding dollar can be stretched so that more people can be assisted.

21.5 Is the service delivery model the right one?

There is strong support for the current mixed model

Both the LACs and the CLCs employ mixed service delivery models — the LACs utilise a mix of in-house and private practitioners, and the CLCs a mix of in-house and pro bono and volunteer services.

A distinguishing feature of CLCs is their ability to harness significant in-kind support. As NACLC stated:

[CLCs]' capacity to attract, train, utilise and retain large numbers of quality volunteers is a major feature that sets them apart from other legal service providers. (sub. 91, p. 48)

Volunteer and pro bono support significantly increases the capacity of CLCs to provide legal assistance services to disadvantaged Australians. Estimates of pro bono hours are provided in chapter 23.

The LACs commented favourably on their mixed service delivery model.

- Legal Aid NSW said the model has been ‘key to the success of the Australian legal aid model’. They also pointed to the United Kingdom model (where services are provided largely by private practitioners) as proving to be unsustainable (sub. 68, p. 94)
- Victoria Legal Aid described the mixed model of service delivery as ‘best practice’. Also, that ‘a strong staff practice provides leadership and specialisation, and a capacity to deliver services that the private sector is unable or unwilling to provide (for example, in rural and regional areas and matters that the private profession consider uneconomic)’ (sub. 102, pp. 8-9).
- The Northern Territory Legal Aid Commission (NTLAC) said the mixed model is ‘the ideal structure for NTLAC and is internationally regarded as the ideal’ (sub. 128, p. 23).

One of the benefits of the mixed service delivery model is that LACs are able to use general and specialist private expertise and specialise themselves in areas where the market is thin (such as welfare law and in rural and remote locations). Legal Aid NSW said the mixed model:

... leverages the spread of expertise of private practitioners across NSW, while the inhouse practice specialisation in welfare law and experience in assisting disadvantage people underpins the network of legal aid services’. (sub. 68, p. 15)

The Law Council of Australia also said the:

... mixed model offers greater efficiency, by harnessing the expertise of the private profession, particularly in matters requiring court representation. In this regard, the Law Council notes the Australian legal aid system is heavily reliant on the private profession for delivery of services. For example, the majority of legal aid grants to private practitioners relate to matters involving court representation. (sub. 96, p. 15)

The model allows those who qualify for legal aid to have choice of provider. It also creates competition between public and private lawyers. For example, if LACs consider that private lawyers are too expensive, they can cost the case using in-house lawyers and threaten to withdraw the case. National Legal Aid argued that quality and ‘affordability’ are important benefits of the mixed model:

Regardless of whether the client uses an LAC in-house lawyer or a lawyer in private practice, the LAC will ensure that the lawyer complies with appropriate standards. This is a highly evolved system which supports solicitor of choice on most occasions, quality, and also ensures that the value to the client is maximised and that scarce public resources are deployed in the most responsible and effective manner possible. (sub. 123, p. 18)

The Attorney-General’s Department also said the model allows cost control:

The department believes that the mixed model provides efficiencies in the delivery of legal assistance. It enables LACs to develop expertise in complex legal aid matters, and

helps strike a balance between publicly funded legal services and the private sector, which in turn promotes control of costs. (sub. 137, p. 39)

Conflict situations can also be facilitated. For example, in the case of a family law matter, one client can be assisted by an in-house LAC lawyer while the other client can be assisted by a private lawyer. The LACs also work with the CLCs, ATSILS and FVPLS to ensure that conflict issues are appropriately addressed (National Legal Aid, sub. 123).

A literature review (looking at evidence from the United Kingdom, Canada, United States, Australia and New Zealand), conducted as part of a United Kingdom Review of the Procurement of Legal Services found that public defender services are cheaper than private practice lawyers (Flood, Whyte and Bacquet 2005).

Similarly, a review of legal aid in New Zealand found that, where the volumes of work were sufficient, the Public Defence Service could provide services more efficiently than private lawyers, with no perceivable drop-off in quality (New Zealand Ministry of Justice 2009). The review also found that competition between public and private providers ensures quality of service and recommended the expansion of publicly provided services.

... but there are some recruiting and retention issues

While the mixed service delivery models were given wide approval by participants, a number of legal assistance service providers reported that they faced some recruiting and retention issues. For example, NACLC said that CLCs face particular challenges attracting and retaining staff and this directly impacts on their capacity to deliver effective legal services. Some of the factors that impacted on CLCs' ability to attract staff include:

- low remuneration compared with comparable positions in the public and private sector
- high levels of client demand
- inferior work premises and resources of community legal centres
- limited access to professional development opportunities particularly in regional, rural and remote areas
- the lack of a clear pathway from university into a legal career in a community legal centre (sub. 91).

Both CLCs and LACs said they had difficulty attracting staff to regional and more remote offices. They also reported a lack of private lawyers in regional, rural and

remote areas to undertake paid or pro bono work. The Attorney-General's Department said:

Staff recruitment is a key constraint on legal assistance service delivery in regional and remote areas. This problem is compounded by a lack of private practitioners to do outsourced or pro bono work. (sub. 137, p. 39)

Legal assistance providers spoke about declining average tenure for lawyers and social workers, particularly in regional and remote areas.

Lawyers and other professionals working in rural and remote areas face more limited opportunities for career development (and more limited education and employment opportunities for other family members). That said, the LACs are able to offer better career paths and development opportunities for their staff than the much smaller CLCs.

Difficulties attracting professional staff to rural and remote areas is not unique to the legal assistance services sector (it is also difficult to attract medical professionals and teachers to rural and remote areas). One approach is to focus on lawyer training opportunities for graduates from rural and remote areas. Greater use of technology can also assist with providing professional networks for lawyers working in rural and remote areas.

NACLC, with funding from the Commonwealth Attorney General's Department, is working to place graduate lawyers undertaking practical legal training with legal assistance services in regional, rural and remote areas. There are four regional coordinators to help with recruitment and retention of lawyers in legal assistance services (NACLC 2012).

The LACs also said that without an increase in fees paid to private practitioners, there is a risk that they will be unable to attract experienced private lawyers of sufficient skill and experience to do legal aid work, particularly in rural areas. The LACs spoke about a 'juniorisation' of private practitioners who are prepared to work for them. For example, Legal Aid WA said:

Over a number of years there has been a 'juniorisation' of a significant proportion of the private practitioners who are prepared to accept work from Legal Aid WA at the prevailing legal aid rate of remuneration currently \$140 per hour. Legal Aid WA considers that this arrangement is not sustainable into the medium term. (2012, p. 33)

NTLAC also raised concerns about the sustainability of the current mixed model:

Without the ability to appropriately remunerate suitably qualified professionals, there is a risk that the NTLAC panel will be reduced to inexperienced solicitors who are not able to provide the level of service which is required in the many complex matters

which receive grants of aid. This poses a threat to the sustainability of legal aid operations under the mixed model. (sub. 128, p. 14)

There is some evidence of private practitioners withdrawing from legal aid work in the Northern Territory (sub. 128). A letter from DS Family Law to NTLAC, for example, said:

... it has been decided that the Darwin Office of DS Family Law will no longer be taking on legal aid referrals given the volume of work that is currently coming through our office and the vast difference between the Legal Aid rate and the hourly rate of our solicitors. We have avoided making this decision for some time due to our social conscience though we cannot avoid the financial reality any longer. (sub. 128, attachment 3, p. 1)

Outsourcing of legal representation by LACs varies across jurisdictions (chapter 20). The jurisdiction with the lowest rates of outsourced legal work are the most sparsely population jurisdictions — Western Australia and the Northern Territory (they are also the LACs raising concerns in this area).

Private lawyers will not undertake legal aid work if they are not adequately compensated for it. Private lawyers may be prepared to take on cases at lower than market rates when there are a number of people they can represent at the same court on the same day (lower rates for higher volume). Lawyers with less experience (or those unable to find work elsewhere) may also be prepared to work for the LACs, but ultimately this inexperience can impact on justice outcomes for those eligible for legal aid grants. Also at issue is the complexity of many legal aid cases — clients with complex needs can mean that the cases are more challenging and time consuming than the average client. As Terrill Associates said:

Clients on legal aid are quite often very demanding; they will often ring the solicitor every other day and demand urgent attention, as it is not costing them anything. ... That is another reason that private solicitors are refusing to take matters on legal aid grants: not only do they get paid very little, they have the most demanding clients. (sub. 123, attachment 2, p. 2)

The base hourly rate for fees paid to private lawyers in Commonwealth Legal Aid matters was increased to \$150 (effective from 9 December 2013). Market rates are considerably higher (chapter 3). Terrill Associates said:

I am seriously considering not taking on any more ICL (Independent Children Lawyers) work (and I do not take on clients on grants of aid except in exceptional circumstances). For matters where I have billed NTLAC say \$600, I would have been able to charge a private client at least \$20 000 and that is on \$360 per hour plus GST. The fees paid simply do not cover my operating expenses, let alone provide any profit margin. (sub. 123, attachment 2, p. 3)

Legal Aid Commission ACT (sub. 27) suggested that legal fees paid to private law firms by a legal aid office could be exempt from income tax (either in part or full) and that the exemption could be targeted to certain types of legal services where a particular need for access to lawyers has been identified (such as in property matters under family law where the parties are on low incomes but do not qualify for legal aid). The Legal Aid Commission ACT pointed to current tax laws where exemptions for legal aid fees can be achieved, such as where the legal aid service provider is a charitable or otherwise not-for-profit tax entity. Salvos Legal is an example of this type of model.

The Commission's *Contribution of the Not-for-Profit Sector* report (PC 2010), argued that it is better for governments to fund services appropriately than to rely on tax exemptions or concessions as these are often inequitable (by benefiting higher income employees) and can distort the allocation of resources to tax exempt activities.

People who qualify for legal assistance grants should be represented by sufficiently skilled practitioners. Also, as argued by the Law Council of Australia, experienced legal representatives can increase the efficiency of the legal system:

Experienced representatives are able to deal with issues expeditiously and minimise legal errors which can lead to aborted trials, appeals or retrials. (sub. 96, p. 113)

Financial incentives are required to attract experienced private lawyers to continue to engage in legal aid work, but narrowing the gap between the legal aid rate and the market rate is a more straightforward way of attracting more private lawyers to this type of work. A graduated scale should also be considered based on the complexity of cases and the lawyer's experience. Increases in remuneration rates, however, have implications for funding. The adequacy of funding is discussed in section 21.7.

INFORMATION REQUEST 21.2

The Commission seeks views on the appropriate relationships between legal aid rates and market rates for the provision of legal services. What might be the cost of altering the relationship between the two rates?

21.6 Does the distribution of funds need changing?

The quantum of funding for both LACs and CLCs is determined via the budget process, but funds are distributed using different approaches. Commonwealth funding for LACs is distributed between the states and territories based on a model that attempts to reflect legal need and the costs of providing services in particular

jurisdictions/areas. However, as discussed in section 21.3, the distribution of CLC funding is largely based on history, with the added feature of ad-hoc grants.

A model approach for distributing LAC funding

Commonwealth funding to the LACs is allocated between the states and territories using a formula that takes into account differences in the need for legal aid services, together with differences in the cost of supplying services.

The approach broadly reflects that used by the Commonwealth Grants Commission (CGC) to distribute GST revenues between the states and territories. The distribution model seeks to ensure that each state and territory government has the resources to provide a similar level of service delivery.

The model takes into account state and territory characteristics identified as correlating with higher demand for family law legal services, including:

- divorces involving children per capita
- Single Parent Payment recipients per capita
- socio-economic composition (derived from the ABS SEIFA data).

The model assumes that demand for legal aid in civil law matters is uniform across states and territories (only weighted by CGC location factor). Supply factors include location-related costs and scale-related administrative costs.

Commonwealth funding of the LACs on a per person basis varies across the jurisdictions with Northern Territory receiving the highest per capita funding. Victoria and New South Wales receive the lowest per capita funding (chapter 20).

The distribution model is complex, but it provides a transparent way of attempting to allocate a fixed quantum of funds across the jurisdictions according to legal need and the cost of providing services. The model aims to ensure that each state and territory has the funds to provide a similar level of service delivery based on the funds provided. The specifics of the funding allocation model are set out in the NPA.

It is not clear how the states and territories determine their funding contributions and the quantum varies significantly by jurisdiction (chapter 20).

Distribution of CLC funding — historical rather than needs based

In contrast, Commonwealth funding for CLCs is allocated on a ‘historical basis’ under funding agreements through application-based grants under the Community Legal Services Programs (CSLP; chapter 20). Many of the CLCs are the same ones that were funded 10-20 years ago. Only under exceptional circumstances do CLCs not have their funding or contract renewed.

There are jurisdictional differences in CLC funding partly reflecting some more ‘savvy’ CLCs, the variety of sources of funding, as well as differences in the size and availability of public purpose trust fund accounts and one-off grants. As QPILCH put it:

... funding of CLCs in Australia is uncoordinated, fragmented and inequitable. Funding is provided from a variety of sources including the Community Legal Services Program (CLSP), one-off grants from both the Commonwealth and State governments, philanthropic sources and statutory and non-statutory financial assistance schemes. Funding by the States is not uniform with larger states such as Queensland and Western Australia facing greater demands to service far-flung clients but not receiving additional funding to do so. (sub. 58, p. 59)

A funding distribution model based on history does not link legal needs with services (there is no formula for linking the placement of CLCs with the areas of highest legal need or to reflect different costs between regions). History-based funding has meant that funders have not needed to consider whether the funding allocations are appropriate (except when there is ‘new’ money) — the Attorney-General’s Department stated that under the most recent allocation of new funding under the CLSP, SEIFA and CLSP service delivery data was used (sub. 137, p. 38).

But legal needs and the placement of services are not ‘static’ — demand for legal assistance services is influenced by demographic changes, changes in where disadvantaged groups are located, legislative reform, policy changes and where services are being supplied by other legal assistance providers. Where legal assistance dollars are spent (irrespective of service provider) should be in response to legal needs that are changing over time.

A historical approach to distributing funding for CLCs also does not align with funding for other legal assistance services. Without a consistent and coordinated approach to distributing legal assistance dollars, it is likely that there will be both duplication of services and gaps in services (a bit like a jigsaw puzzle with missing pieces in some parts of the puzzle and pieces of puzzle stacked up on top of each other in other areas).

A number of participants also spoke about the current ad hoc and uncoordinated manner in which funding decisions can lead to unnecessary duplication. One LAC spoke about considering pulling out of a long standing partnership and services because another service has been given temporary funding.

A new funding allocation model for CLSP funding is required to better reflect need. The Commission considers that it is better to approach this issue systematically rather than continue to rely on a ‘bottom up’ approach which depends on a motivated individual or group of individuals first identifying need and then applying for a grant to the CLSP.

Reform options

NACLC (sub. 91) put forward a new funding allocation option. Part of the proposed option included a new funding pool to address demonstrated unmet legal need. While the option shifts to an evidence-based approach for new funding proposals, it remains wedded to the historically-based funding model, characterised by duplication and gaps.

QPILCH (sub. 58, p. 59) also suggested a project fund with ‘guidelines that encourage partnership, strong project development and evaluation’ in addition to the existing CLSP fund. QPILCH submitted that the project fund be administered by various sectors of the community (government, legal aid commissions and PILCHs) and they would be responsible for:

- developing a formal structure, priorities and criteria for the application of funding
- coordinating and assessing funding applications
- establishing benchmarks by which funding levels and effectiveness could be assessed
- coordinating Commonwealth funding with state funding mechanisms.

Another option is to employ the same model as that used to allocate Commonwealth funds to LACs. Although the LAC funding model offers a more systematic approach than the existing historically-based ‘bottom up’ model, it is unlikely to be disaggregated enough to determine the allocation of CLC funding to particular areas of legal need within a jurisdiction. The model would also be unlikely to provide insights into the allocation of funds for specialist versus generalist CLCs.

That said, the LAC funding allocation model could be used to allocate CLSP funding across jurisdictions, and then the states and territories could take

responsibility for allocating the funds (such an approach is consistent with the subsidiarity principle which states that policy should be administered by the lowest level of government that can do so effectively). While the states and territories are in a better position than the Commonwealth government to understand and allocate resources within each jurisdiction, they could be required to transparently allocate the CLSP funds to identified areas of ‘highest need’ within their jurisdictions.

Under this option there are two possible approaches:

- the Commonwealth’s CLSP funding could be diverted into the NPA to allow the state and territory governments to directly manage the CLSP. State and territory governments would be responsible for needs based planning and the allocation of providers to relevant geographic locations and specialty areas of law. Commonwealth funding would be subject to the achievement of agreed outcome based performance indicators (as is currently the case)
- the Commonwealth’s CLSP funding could be diverted to the LACs and the LACs allowed to decide how the funding envelope is distributed based on the needs and priorities within individual jurisdictions. The LACs would need to work collaboratively with the CLCs in deciding on the allocation of funds. The Commonwealth’s funding would be subject to the achievement of agreed outcome-based performance indicators. (This model would involve the NT and ACT LACs managing CLCs rather than the Commonwealth Attorney-General’s Department. For South Australia, it would involve moving responsibility from the state’s Attorney-General’s Department to the LAC of SA.)

Both options involve moving towards a more holistic approach to distributing funds within each jurisdiction. One of the problems with the second approach is the LACs and CLCs could be in competition with each other for funding so there is potential for conflicts of interest in this model.

How do you decide ‘who’ represents the best value for limited dollars?

One approach to deciding which organisations should get access to the limited amount of funding available to provide public legal assistance services is to develop ‘collaborative partnerships’ between community-based providers and governments to enable them to take joint responsibility for successfully delivering services efficiently and effectively (Shergold 2013). This service sector reform canvassed by Shergold involves progressively consolidating (or linking) multiple funding streams to give service providers greater flexibility to pursue integrated outcomes. A ‘collaborative partnerships’ approach would be underpinned by an outcomes

framework that would establish benchmarks against which performance would be audited, monitored, measured and reported over time.

Another approach is to introduce competitive tendering (based on assessments of their local needs). This process would enable the market to resolve whether a community with identified needs is more cost effectively serviced by outreach from a larger regional centre or a small centre physically located in that community, perhaps as part of an auspiced or a regional model.

This model has been used by the Commonwealth when establishing new centres. For example, following a review in South Australia in the late 1990s, seven generalist metropolitan centres were reduced to four ‘super centres’ (Giddings and Noone 2004).

A competitive tender (of a fixed funding envelope) for areas of need would provide an opportunity for current and potential providers to indicate the level and type of service provision able to be provided within the funding envelope while at the same time being subject to set quality standards. Competitive tendering arrangements would also enhance incentives for efficiency and effectiveness of CLCs.

However, competitive tender processes may be difficult to operationalise where there are limited service options (such as where a market is ‘thin’) and where there are complex services with uncertain outcomes. While some services (such as information, minor advice and simple representations) are relatively well defined and amenable to a competitive tender process, others (such as more complex advice and case management work) may be better suited to a partnership or joint venture style arrangement. As the Commission’s *Contribution of the Not-for-Profit Sector* report (PC 2010) noted, joint ventures are best suited in situations where governments cannot easily specify the desired outputs, outcomes or processes prior to delivery.

The historic community support base, and the ongoing in-kind contributions via pro bono and volunteers that have been developed by many CLCs may also warrant the longer-term model of engagement, which is inherent in a joint venture approach. However, joint venture models can be resource-intensive, require a high degree of flexibility, funding certainty and agreed evaluation protocols (chapter 22).

To encourage allocation of taxpayer resources to the most efficient providers, the Commission’s view is that LACs should also be able to compete for CLSP funding alongside CLCs and other potential providers. Due to issues of conflict of interest, the LACs should be excluded from managing the CLSP program. As such, management of the CLSP would need to change to one where CLSP funds are managed by state or territory Attorney’s-General departments.

DRAFT RECOMMENDATION 21.4

The Commonwealth Government should:

- ***discontinue the current historically-based Community Legal Services Program (CLSP) funding model***
- ***employ the same model used to allocate legal aid commissions funds to allocate funding for the CLSP to state and territory jurisdictions***
- ***divert the Commonwealth's CLSP funding contribution into the National Partnership Agreement on Legal Assistance Services and require state and territory governments to transparently allocate CLSP funds to identified areas of 'highest need' within their jurisdictions. Measures of need should be based on regular and systematic analyses in conjunction with consultation at the local level.***

INFORMATION REQUEST 21.3

The Commission seeks feedback on how Community Legal Centre (CLC) funds should be distributed across providers while at the same time ensuring providers are of sufficient scale and the benefits of the historic community support of CLCs are not lost. Competitive tendering might be one possible method for allocating funds. The Commission seeks feedback on the costs and benefits of such a process and how they compare with the costs and benefits of alternative methods of allocating CLC funding.

21.7 Is the quantum of funding adequate?

While there is scope to improve the way that legal assistance funds are used, a common theme from submissions was that the quantum of funding for legal assistance services is inadequate to meet demand for services. For example, the Victorian Council of Social Services said:

... it remains clear that community legal services and legal aid commissions do not have the resources to provide sufficient response to meet the critical needs of the community. (sub. 132, p. 9)

The Law Council of Australia also argued that:

... the legal assistance sector is not meeting market demand. ... LACs have reached a point where further 'efficiencies and economies' cannot reasonably be expected to address the yawning gap in legal need. It is therefore a question of injecting appropriate funds into the system to enable the LACs to implement their charter, to provide appropriate legal assistance for disadvantaged members of the community.

... Currently, the vast majority of people that qualify for legal aid are receiving a government benefit. Implicit in this figure is that funding restrictions on LACs have resulted in the setting of a means test that eliminates all but the very poorest of society. Substantial funding increases are required in order to meet the definition of socio economic disadvantage as measured by the Henderson poverty index. (sub. 96, pp. 120-121)

A key point made by the LACs and CLCs was that there are challenges associated with demand for services being largely driven by external factors while funding is fixed (section 21.3; box 21.14). Policy and legislation changes can significantly impact on the demand for legal assistance services. As NTLAC said ‘service demands are difficult to predict and plan for’ (sub. 128, p. 11). Legal Aid Victoria also said:

Far from being static, the justice system is in fact dynamic and constantly changing. The demand for legal assistance is directly affected by the pace of legislative reform, policy change and resourcing commitments to other actors in the system. The legal landscape and associated legal need can look very different from one period to the next, making comparisons between years difficult. (sub. 102, p. 5)

Box 21.14 Some examples of policy and law changes and changes in demand for legal assistance services

Legal Aid NSW:

There are numerous examples of ‘legal inflation’, where new legislation and amendments to existing legislation impact on the level of unmet legal need and demand for legal assistance. For example, at its inception the Fines Act 1996 (NSW) contained 43 statutory provisions. It has since grown to 110 statutory provisions creating more than 7000 offences that can be enforced by way of penalty notices. Research by the LJF [Law and Justice Foundation] reveals that in NSW a median of 117 Acts were passed by Parliament each year between 1990 and 2009, approximately one Act every three calendar days. (sub 68, p. 21)

Northern Territory Legal Aid Commission (NTLAC):

The NT government passed the *Serious Sex Offenders Act* in 2013 which provides for the ongoing civil detention of certain prisoners after the completion of their term of imprisonment. The application must be made in the Supreme Court and will be determined following the hearing of evidence relevant to the issues in dispute. While the NTALC has raised concerns about meeting the additional costs of such matters, it has not received any additional funds to do so. Furthermore, NAAJA [North Australian Aboriginal Justice Agency] have advised that the cost of these matters is such that they are referring all future matters to NTLAC. (sub. 128, p. 11)

National Association of Community Legal Centres:

... deregulation of a number of industries over time has driven legal need among vulnerable and low income consumers and the gradual social and legal recognition of family violence has driven massive growth in legal need as victims access the much needed protection that is increasingly available through the justice system. (sub. 91, p. 10)

The *National Disability Insurance Scheme Act 2013* (NDIS Act) is a recent example of a policy change that is expected to result in increased demand for legal assistance services. Legal Aid NSW said:

The NDIS Act has over 200 sections and 16 associated statutory rules and operational guidelines, creating a new and complex legal framework around the provision of this support. The complexity is such that navigation of this legal framework will require legal advice and advocacy, particularly given the disadvantaged client group. (sub. 68, p. 21)

The combination of externally driven demand for legal assistance services and largely fixed budgets points to the importance of providing flexibility to the LACs and CLCs to manage their allocation of funds under guidelines for prioritising activities and clients to where the highest returns (broadly defined) will be.

Areas of unmet need highlighted

Participants pointed to a number of indicators of unmet legal aid needs:

- tighter eligibility criteria used by the LACs
- a lack of coverage in the civil law space (coverage is considered thin in areas such as employment, housing, rights and consumer matters), and a lack of services for some disadvantaged groups (for example, services for people living in rural and remote areas, those with disabilities, and the homeless)
- high turn away rates of legal assistance services
- an increase in self-represented litigants (chapter 14)
- an inability to remunerate suitably qualified professionals (resulting in concerns about the sustainability of the mixed model)
- the fact that Australia is one of the lower funding nations of legal assistance services (on a per capita basis).

Tighter eligibility, cutting of services

Participants noted that the reality of the current funding arrangements for LACs and CLCs is that each jurisdiction has its own budget limitations and, as such, funding is rationed by making adjustments to the:

- eligibility criteria (by offering legal aid to fewer people)
- coverage of services (by offering legal aid on fewer matters)

-
- conditions of service use (through partial assistance or contribution requirements).

A number of submissions spoke about tighter eligibility for legal aid and the cutting back of services. The Law Council, for example, said:

It is important to recognise that restrictions on legal aid are now so severe that, in many jurisdictions, a substantial proportion of those living below the Henderson poverty line ... will not satisfy the means test for legal aid eligibility. The restriction on legal aid comes in two ways:

- the means test, which effectively limits legal aid that is available to the most economically disadvantaged and excludes the working-poor and those on lower-middle incomes, who cannot afford legal representation. In most jurisdictions, the means test is set at 50-70 per cent of the Henderson poverty line; and
- the policy restrictions, under which legal aid is not available at all for certain matters, regardless of means (such as most employment law cases, workers compensation and personal injury). (sub. 96, p. 38)

Legal Aid NSW said that it had not been able to increase its means test income limits since 2008 and this had meant that the NSW income limit had fallen from around 60 per cent of the minimum weekly wage in 2007-08 to 52.4 per cent in 2012-13 (sub. 68).

Victoria Legal Aid also recently tighten its eligibility criteria. Legal assistance is no longer available for court-based family law disputes unless the other party is represented. Victoria Legal Aid said that the changes had to be made to the eligibility guidelines because Commonwealth funding had not kept up with demand (VLA 2013b).

National Legal Aid said that the constrained funding position of LACs is reflected in changes in output level including the number of grants of aid falling from 8.17 per 1000 Australians in 2006-07 to 5.97 in 2012-13 (sub. 123).

... and high 'turn away' rates and service gaps

Many participants pointed to the results of the Australian Council of Social Services (ACOSS) Community Sector Survey (2013) which found that community legal services had one of the highest 'turn away' rates of any of the community services surveyed as evidence of inadequate funding. The survey results showed that:

- 63 per cent of legal service providers were not able to meet demand for services (legal services ranked second highest among service providers in terms of inability to meet demand)

-
- 20 per cent of all clients in need of assistance from surveyed community legal services were turned away in 2011-12 (the highest turn away rate across all service types)
 - 85 per cent of legal services reported targeting their services more tightly or limiting service levels to meet demand
 - 67 per cent reported being underfunded and 59 per cent said they had increased waiting times for services
 - 76 per cent of services asked staff and volunteers to work additional hours in attempting to meet demand.

A number of service providers also told the Commission that they were regularly turning people away because of a lack of resources (box 21.15).

Many participants were of the view that legal assistance services were insufficient to support services in rural and remote areas, and there were gaps in services for a number of disadvantaged groups, including Australians with a mental illness or disability and those experiencing homelessness (box 21.15). Also, more assistance is needed to help Australians with multiple and complex needs.

Australia is a relatively low funding nation

Participants also noted that Australia is one of the lower funding nations of legal assistance services on a per capital basis (NLA, sub. 123). While England, Wales, Northern Ireland and Scotland have comparable legal systems to Australia, per capita funding for legal aid in those countries is considerably higher than Australian levels — for example, funding in England and Wales is around 3.6 times Australian levels, while in Scotland it around 2.9 times (UK Ministry of Justice 2011). The legal aid schemes in England and Wales, however, are currently being scaled back following a review that found the schemes were too generous.

Quantifying the legal assistance gap

As discussed throughout the chapter, underfunding of legal assistance services can lead to increased costs in other areas of government spending. The Law Council of Australia argued that providing adequate funding for legal aid may initially appear expensive but, as former Chief Justice Gleeson commented:

Box 21.15 What evidence is there that demand for legal assistance outstrips supply?

Women's Legal Service (Brisbane):

WLS provides services to over 3000 women every year, and we know that there are a further 16 000 requests for assistance that we are unable to meet In our experience, the last 12 months has seen a doubling of the number of women trying to access our evening advice service and on average turn 5-7 women away each night as we don't have capacity to see them. (sub. 117, pp. 1-2)

Northern Territory Legal Aid Commission (NTLAC) noted they had cut back or ceased services in a number of areas in recent years due to funding constraints:

NTLAC once had an in-house civil law practice; however this was cut some years ago due to national funding cuts to Legal Aid Commissions. NTLAC does not have an in-house civil casework practice. NTLAC is currently establishing a 2 year pilot Minor Assistance Civil Service to assist priority clients in civil law matters, primary employment law, consumer, credit and debt matters in order to arrest financial problems evolving into larger legal problems. (sub. 128, p. 4)

NTLAC previously conducted duty lawyer services in Child Protection proceedings and matters before the Mental Health Review Tribunal relating to involuntary detention and treatment. These services ceased in 2010 due to funding constraints. NTLAC will trial the reinstatement of duty lawyer service before the Mental Health Review Tribunal for a period of 6 months as of 1 January 2014. (sub. 128, p. 5)

Queensland Public Interest Clearing House (QPILCH):

The Law Survey has confirmed what many experienced practitioners already knew – that Indigenous legal need and the needs of people experiencing mental illness were not being adequately serviced. While QPILCH and other similar services have developed homeless services over the last decade, homelessness continues to be a high need, particularly outside metropolitan areas. QPILCH also identified the need to assist self-represented litigants, people from all groups who had fallen through the gaps in the available services. (sub. 58, pp. 19-20)

Legal Services Commission of SA:

One group in which the Legal Services Commission is particularly aware consists of persons of limited means who cannot qualify for legal aid but need assistance accessing the civil justice litigation system. This problem is acute in family law. (sub. 93, p. 12)

Allens:

Through our homeless legal clinics, we see hundreds of clients a year who have legal problems and few if any ways to address those problems themselves or with government funded legal services. Often, our clients' problems have been exacerbated by delay in addressing them. Examination reveals that the delay is due to their lack of access to the legal system, including inability to fund private representation and inability to gain access to legal aid or community legal centre help either because these services have guidelines that exclude them, or because these services are not understood by them, or otherwise hard or impossible to use. (sub. 111, p. 1)

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid. (sub. 96, p. 114, quoting State of Judicature, speech delivered at the Australian Legal Convention, 10 October 1999)

Also, while someone may not qualify for legal assistance when they first present to such services, they may still require support at a later date (possibly when the legal problem has escalated and become more complex and they have run down their assets trying to deal with the problem).

Quantifying the extent of underfunding in the legal assistance sector is not straightforward. There is limited information on the cost of individual services and the rates at which legal aid providers turn away clients offer little insight into the extent of existing service gaps — they capture clients who are denied assistance because they lack a meritorious claim, and fail to capture those who are discouraged from seeking any kind of assistance.

While participants to the inquiry have shed light on where there are ‘mismatches’ between the demand for legal assistance and services available, the additional dollars needed to fill these gaps, and the return on any additional funding, is less clear.

INFORMATION REQUEST 21.4

The Commission seeks feedback on the extent of, and the costs associated with, meeting the civil legal needs of disadvantaged Australians, and the benefits that would result.

21.8 How well do the governance arrangements work?

LACs are required to produce annual reports and financial statements and are subject to the budget estimates process and audit. In addition, the performance of LACs is evaluated against the National Partnership Agreement (NPA) objectives and benchmarks. LACs provide bi-annual reports to the Attorney-General’s Department with details of their outputs, performance benchmarks and timelines.

The governance arrangements for CLCs are complex with some CLCs reporting directly to the Commonwealth, others to LACs (as state program managers) and the NSW Attorney-General’s Department. CLCs submit a Community Legal Service

Program (CLSP) plan with service delivery targets at the beginning of each three year contract. While CLCs are not directly funded by or governed by the NPA, the CLSP forms part of the agreement.

The effectiveness of the NPA

The NPA was designed to consolidate agreements and disparate reporting requirements and form a single point of reference for LACs obligations in the delivery of Commonwealth funded services. The agreement sets out the relationship between the Commonwealth and state and territory governments to the extent that it specifies what the Commonwealth funding is to cover and the objectives and outcomes that are to be achieved (Warner 2013).

Participants said that the NPA had been useful in guiding service objectives and priorities and the additional funding provided under the agreement had allowed the expansion of services. The additional flexibility around meeting new priorities provided by the NPA was also considered to have worked well, particularly the flexibility around prevention and early intervention services regardless of whether the matter type related to Commonwealth or state/territory law (box 21.16).

Box 21.16 The NPA — participants' views on what has worked well

New South Wales Society of Labor Lawyers:

Additional Commonwealth funding for LACs provided under the NPA for Legal Assistance Services has helped achieve a number of its goals and the Commonwealth service priorities, particularly in providing more early intervention services and additional services in areas such as employment law. (sub. 130, pp. 13-14)

Legal Aid NSW:

... the NPA has been most effective in the expansion of intervention services, including advice, minor assistance and duty services. The inclusion of all preventative and early intervention services as a Commonwealth legal aid service priority, regardless of whether the matter is a Commonwealth or State or Territory law matter was a significant reform for the legal assistance sector. These reforms recognised that many of the legal problems which can lead to a cycle of disadvantage are State or Territory law matters.

... The NPA funding Legal Aid NSW receives has enabled the development of innovative service delivery models. The NPA funding has enabled Legal Aid NSW to further enhance the availability of legal advice and minor assistance through outreach services. There are now 164 locations with a regular outreach service, an increase of 67 per cent from 2009–2010. (sub. 68, pp. 98-99)

However, a number of factors were also identified as reducing the effectiveness of the NPA, including the:

- lack of a joint commitment between the Commonwealth and the states and territories
- continuation of the Commonwealth-State divide in grants
- temporary nature of the funding and inadequate indexation levels
- disconnect between the legal assistance providers' separate agreements (with the exception of the LACs) and the NPA objectives.

The NPA for legal assistance services, according to a number of participants, is not a 'true' National Partnership. In part, this is because there is no commitment by state and territory governments to maintain their level of funding, but also because the service priorities are Commonwealth priorities rather than priorities agreed to by both the Commonwealth and the states and territories.

Some participants argued that the quarantining of Commonwealth funds to issues of Commonwealth law matters (except for early intervention) comes at the expense of holistic or client-centred approach to assistance. The Legal Services Commission of SA, for example, said:

Many legal aid clients present with complex multi-jurisdictional legal issues. It is artificial to allocate assistance for only one aspect of the legal problem while refusing legal aid for other, related legal issues. (sub. 93, p. 37)

Warner (2013) also noted that the remaining distinction between Commonwealth and state and territory funded services does not recognise the co-occurrence of legal problems and the impact that changes in policy can have on demand for services:

... there still does remain a distinction between Commonwealth and state and territory funded services that fails to recognise the co-occurrence of legal problems and the impacts that policy initiatives at both levels of government can have in driving demand for services both in and beyond respective jurisdictions. It is also a distinction that is unique to the legal sector — there is no such thing as a Commonwealth disease compared to a state and territory disease; a person simply has a health problem. (p. 10)

The continuing distinction between Commonwealth and state and territory funded services was also considered to add to administrative costs and complexities. For example, different fees are paid to private practitioners depending on whether it is a Commonwealth or State matter.

It was also highlighted that there is a disconnect between the separate agreements (and reporting and funding arrangements) of the CLCs, ATSIL and FVPLS and the

NPA objectives. As Warner (2013) put it, the NPA does not reflect the entire legal assistance landscape:

While the NPA promotes ‘joined-up’ service delivery and collaboration across the legal assistance sector, it highlights that community legal centres, Aboriginal and Torres Strait Islander legal services and family violence intervention services will remain subject to separate agreements. The NPA as it stands does not reflect the entire legal assistance landscape. (p. 8)

One of the objectives of the NPA was to ‘realise opportunities for using resources more effectively and efficiently between service providers’. And, the LACS, CLCs, ATSILS and FVLPS all spoke about co-operative arrangements to ensure that legal assistance services are available to disadvantaged Australians. National Legal Aid, for example, said:

LACs ... work with the community sector including the CLCs, and the ATSILS to ensure services are stretched as far as possible and that issues such as conflict are appropriately addressed. Representatives of legal assistance providers meet as needed to discuss co-operative legal services delivery with a view to closing the justice gap as far as possible. (sub. 123, p. 15)

As part of the NPA, each LAC was required to set up a forum to look at opportunities for improved coordination and targeting of legal services. A number of submissions pointed to the Legal Assistance Forums as playing an important co-ordinating role in the legal assistance sector (NSW Bar Association, sub. 34; Legal Aid NSW, sub. 68; NLA, sub. 123). The Queensland Flood and Cyclone Legal Help, for example, was established as an initiative of the Queensland Legal Assistance Forum, incorporating Legal Aid Queensland, Queensland Association of Independent Legal Services, Queensland Public Interest Law Clearing House, Queensland Law Society, the Aboriginal and Torres Strait Islander Legal Service and the Bar Association of Queensland (NLA, sub. 123).

The legal assistance providers all have referral processes in place. Unpublished CLC data shows that in 2011-12 an average of 54 per cent of clients who presented at CLCs reported an inwards referral and 32 per cent of clients received a referral from a CLC to another service. The four main destinations of outward referrals were private legal practitioners, LACs, mediators and other CLCs.

But as discussed earlier, there appears to have been opportunities missed for the legal assistance providers to work together more cooperatively. For example, the Commission identified opportunities for the CLCs to leverage more off the LACs (in terms of information and helplines) to eliminate duplication and improve efficiencies (chapter 5).

The divide between Commonwealth and state or territory law matters also suggests that there is scope for legal assistance providers to adopt a more holistic or client-centred approach, particularly for those clients presenting with complex multi-jurisdictional legal issues.

The Commission's assessment is that the NPA is a national agreement on paper but is not necessarily working as such in practice. A 'true' agreement between the Commonwealth and the states and territories on issues such as national priority areas of law and legal problems, priority clients, and eligibility for assistance, would facilitate a more 'holistic' approach to client needs and reduce overlap.

With the NPA on legal assistance services expiring on 30 June 2014, there is an opportunity for a renegotiation of the agreement.

DRAFT RECOMMENDATION 21.5

The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

22 Assistance for Aboriginal and Torres Strait Islander people

Key points

- Aboriginal and Torres Strait Islander people often have complex legal needs and face substantial barriers in accessing legal assistance. The nature and complexity of their civil law needs means that specialist services are required alongside mainstream services.
- Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS) provide specialised, culturally tailored services for Indigenous Australians.
 - ATSILS focus on criminal law needs, and have few resources remaining to service civil and family needs. FVPLS specialise in helping victims of family violence.
- Unmet need is widespread. Some unmet civil needs may escalate to criminal behaviours and the line between civil and criminal needs is not always clear.
- While legal assistance services generally target people and areas of high need, some reallocation of resources appears warranted to fill service gaps. Additional funding may also be required. Remote areas appear to be most lacking in adequate resources. Funding alone will not resolve the complex problems besetting this area.
- Governance arrangements and reporting requirements have been previously identified as lacking, despite concerns about the extent of data and reporting and micromanagement of Indigenous-specific services. While some improvements have been made, deficiencies remain.
- The need to build trust between Indigenous communities and legal assistance providers warrants longer-term models of engagement.
- Indigenous interpreter services help some Indigenous people to communicate their needs and understand their legal rights and responsibilities. Longer-term investments are required to ensure the ongoing supply of these services.
- A range of culturally tailored alternative dispute resolution (including family dispute resolution) services are also needed to help Aboriginal and Torres Strait Islander Australians better resolve disputes before they escalate.
- Earlier and more pro-active engagement by government agencies might also help reduce disputes. Evidence on the cost-effectiveness of this strategy is required.

Aboriginal and Torres Strait Islander people comprise a small component of Australia's population — 3 per cent in 2011 (ABS 2013c). While their situations are diverse, on average their circumstances and characteristics increase the likelihood of needing, and reduce their ability to access, legal assistance.

This chapter focuses on strategies to address the unmet civil legal assistance needs of Aboriginal and Torres Strait Islander Australians. In doing so, it builds on the material presented earlier in this report (chapter 20). The chapter examines:

- the main barriers in accessing justice faced by Aboriginal and Torres Strait Islander Australians (section 22.1).
- the grounds for specialised legal assistance services for Indigenous Australians is discussed (section 22.2)
- gaps in the coverage in specialised services (section 22.3)
- how these gaps affect the wellbeing of Indigenous Australians (section 22.4)
- the responses needed to fill the gaps and ameliorate the consequences of unmet need (section 22.5).

22.1 Aboriginal and Torres Strait Islander people face significant barriers in accessing justice

Indigenous Australians' access to civil justice is made difficult not only by the multiplicity and complexity of legal problems that they experience (chapter 2), but also by the significant barriers they face in seeking to resolve their disputes. The two are often related. For example, with respect to consumer disputes, NSW Fair Trading observed:

Indigenous communities are at particular risk of unfair trade practices because of factors such as geographic isolation, lack of choice and competition, language barriers, a lack of financial literacy and restricted access to services. (2011, p. 1)

Many of these same factors make it more challenging for Indigenous people to resolve, or to seek assistance, to resolve their disputes.

Lack of awareness

Consultations with organisations representing Indigenous people and submissions to this inquiry indicated a persistent lack of awareness by Indigenous people about civil and family law (Cairns Institute, sub. 105; ALSWA, sub. 112; Redfern Legal Centre, sub. 115; ILNP & VALS, sub. 125; NTLAC, sub. 128). This is magnified

by the lack of familiarity among some staff in various support and referral agencies about what civil law covers or the options for redress available (Allison et al. 2012).

Lack of awareness of civil and family law has two dimensions. First, Indigenous people may not recognise some issues as having a legal dimension. For example, Indigenous Australians commonly view racial discrimination as just a ‘fact of life’, rather than something unlawful that gives rise to rights of redress (QIFVLS, sub. 46; NATSILS, sub. 78).

Second, Indigenous people may not be fully aware of the potential remedies available to resolve their disputes, which gives rise to an unrecognised need. For example, the Cairns Institute (sub. 105) suggested that the areas of victims’ compensation and wills were areas of unrecognised need due to a lack of knowledge of the potential benefits of legal solutions in these areas.

Communication barriers

While nearly 90 per cent of Aboriginal and Torres Strait Islander people speak English at home as a first or only language (SCRGSP 2011), in some very remote Indigenous communities, English is a second, third or fourth language (HRSCATSIA 2012). Further, many Indigenous people also speak Aboriginal English — a recognised separate dialect of English — which can be difficult for others to understand, as it incorporates Indigenous words, and some English words that have different meanings (NATSILS, sub. 78; Judicial Council on Cultural Diversity, sub. 120). The lack of a common language can compromise understanding between client and lawyer. Schwartz and Cunneen (2009b) reported that:

... 13% of ATSILS practitioners experience difficulty in understanding what their clients are saying ‘very often/often’; a further 50% ‘sometimes’ experience such difficulties. Practitioners also reported that their clients often struggle to understand what they are trying to convey, either because of the client’s shyness or discomfort (65%), a disability that hinders communication (51%), an inability to communicate adequately in English (40%), or because clients do not understand the legal process (77%) (p. 2)

The use of interpreters may not overcome communication barriers — not all communication is verbal. The use of body language, such as hand gestures and movement of the head and eyes, is an integral part of communication for many Aboriginal people. The presence of elders can also influence the effectiveness of communication with Indigenous people and the justice system (Kirke 2010). And many legal terms and concepts are not only culturally foreign, they may be

uninterpretable. As the Legal Services Commission of South Australia noted (in relation to criminal matters):

A very able court interpreter has given evidence on many occasions in South Australian courts that the words of the police caution are untranslatable into Pitjantjatjara, containing as they do propositions put in the alternative, and abstract concepts such as ‘rights’, which are divorced from immediate experience. (Legal Services Commission of South Australia 2012)

Some Indigenous people may also adopt a strategy of agreeing or saying what they think the person in authority wants them to say, regardless of the truth of the matter, when in a position of powerlessness, or when confronted by alien institutions and authority figures. Indirect approaches, such as allowing the person to ‘tell their story’, can be used to avoid such ‘gratuitous concurrence’ (Hunyor 2007; Legal Services Commission of South Australia 2012; Roberts 2007).

Finally, a number of characteristics related to socioeconomic disadvantage — such as low literacy and numeracy skills and hearing loss arising from ear disease — also create communication barriers. These issues exacerbate the challenges of communicating other than in person (Allens, sub. 111).

Socioeconomic disadvantage and geographic isolation

As is the case for a number of groups within the community, socioeconomic disadvantage directly impacts on the ability of Indigenous people to access justice. Socioeconomic disadvantage among Aboriginal and Torres Strait Islander Australians is widespread and multifaceted: various analyses show that, on average, Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health and housing. Often disadvantage is cumulative, with Indigenous Australians who experience one type of disadvantage also experiencing other kinds of disadvantage (SCRGSP 2011).

Socioeconomic disadvantage is linked to geographic isolation. Geographic isolation itself can represent a barrier in accessing justice. For example, in relation to remote communities, Billings stated:

Judicial review is, in every respect, a distant option for most Aboriginal people in remote communities. (Billings 2010, p. 173)

Other evidence indicated that remotely-located Indigenous respondents to the *LAW Survey* were less likely to take action, and to consult legal advisers when they did take action (relative to their metropolitan and regional counterparts) (Iriana, Pleasence and Coumarelos 2013). As the Law and Justice Foundation of NSW said:

Importantly, the problem of distance and poor service infrastructure in RRR [regional, rural and remote] areas is compounded by the fact that disadvantaged groups such as Indigenous Australians are more highly concentrated in RRR areas (Australian Bureau of Statistics (ABS) 2010, 2011). Thus, some RRR areas are microcosms of legal need, embodying the ‘double whammy’ of poor service infrastructure and populations with high vulnerability to legal problems. (Law and Justice Foundation NSW forthcoming)

Differences between traditional law and the Australian legal system

Some barriers faced by Indigenous Australians in accessing justice — such as the divergence between traditional law and the Australian legal system — are fundamental in nature.

Indigenous people were guided by a highly sophisticated system of justice based on principles of rights and responsibilities ... which formed the basis of traditional law (lore) [(Cunneen and Schwartz 2009)] ... Indigenous lore not only governs relationships with country, but also determines family and kinship ties, the resolution of disputes and numerous details of everyday life. (QIFVLS, sub. 46, pp. 6–7)

Indigenous traditional law continues as a real and controlling force in the lives of many Indigenous Australians. In contrast, the Australian legal system is relatively recent and, as indicated by a number of inquiry participants, has been externally imposed on Indigenous Australians (NCAFP 2013(2013); QIFVLS, sub. 46; Australian Inquest Alliance sub. 62; and ALRM, sub. 126).

Mistrust by Indigenous Australians of the justice system — and government agencies more generally — reinforces the divide between the two systems (AIJA nd). Conceptual differences between the two systems also mean that some Indigenous Australians tend not to distinguish between the criminal and civil arms of the justice system. The legal system as a whole is associated with incarceration, deaths in custody and the removal of children (NATSILS, sub. 78; and Cairns Institute, sub. 105). In the words of the Queensland Indigenous Family Violence Legal Service:

Studies have found that Indigenous people mistrust the justice system and more generally, government agencies. This mistrust acts as a major hurdle in building better relationships between the people in the justice system and Indigenous people ... The mistrust of the justice system, and the ‘government’ in general, affects all aspects of the interaction between Indigenous Australians and access to justice. (sub. 46, p. 7)

Similarly, the Judicial Council on Cultural Diversity (JCCD, sub. 120) put to the Commission:

Aboriginal and Torres Strait Islanders have a complex relationship with the law, regrettably grounded in a history of violence and dispossession. The imposition of colonial law and the dismantling of Indigenous ‘Lore’ has resulted in significant

mistrust of the legal system by many within Indigenous communities across the country. (p. 1)

The disjunct between the Australian legal system and traditional laws and customs plays out on many levels, including relationships with government agencies (QIFVLS, sub. 46). It also influences solicitor-client relationships, including the disclosure of information. As the Queensland Indigenous Family Violence Legal Service (QIFVLS) observed:

... there may be more than one clan represented within a single community meaning the relevant lores and customs which pertain to certain tribes will differ between clients. This may affect the ability of the client to disclose information to a lawyer of the opposite sex or affect the way in which a particular client views their relationships with others, including victims and third parties who are affected by domestic or family violence. (sub. 46, p. 7)

22.2 There are good grounds for specialised services

The barriers that many Aboriginal and Torres Strait Islander people face in engaging with the Australian legal system, and the lack of trust in the system, have led to the creation of Indigenous-specific legal assistance bodies — Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS).

ATSILS have a long history, having been active since 1971. They deliver legal assistance services to Indigenous people, usually in criminal matters. FVPLS (which commenced in 1998) are a more recent and specialised service, providing legal assistance and related support for victims of family violence (chapter 20).

The importance of culturally tailored services is widely recognised. NATSILS submitted:

The critical aspect of ATSILS service delivery that sets them apart from other legal assistance services is their focus on, and ability to, provide culturally competent services to Aboriginal and Torres Strait Islander peoples. ... Cultural competency is much more than awareness of cultural differences, as it focuses on the capacity to improve outcomes by integrating culture into the delivery of services, it requires commitment to a ‘whole of organisation’ approach. (sub. 78, pp. 13–14)

The National Pro Bono Resource Centre (NPBRC) (2009b) argued:

Indigenous legal services play a critical role in helping indigenous people access the legal system. Research indicates that Indigenous Australians rely on [Indigenous legal services] and are relatively less likely to seek help from mainstream providers to resolve their legal issues due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers. (p. 17)

While most legal services are provided to Indigenous Australians through these two government-funded bodies, Indigenous Australians are also significant users of legal assistance services provided by legal aid commissions (LACs) and community legal centres (CLCs). For example, in 2012-13, around 12 per cent of all approvals for legal aid were granted to Indigenous Australians. These services are particularly important in areas that are not serviced by ATSILS and FVPLS, or when an ATSILS or a FVPLS is unable to represent a client due to a conflict of interest.⁷⁶

While Indigenous legal service providers supported the ability of CLCs and LACs to provide services to disadvantaged people with complex needs, most indicated that they were better placed to meet the needs of Indigenous people. For example:

... all legal assistance services play an important role in the delivery of efficient and effective legal services to a range of people, particularly people who experience multiple disadvantage and who present with high and complex need. As an Aboriginal and Torres Strait Islander service, [Central Australian Aboriginal Legal Aid Service (CAALAS)] has particular expertise in delivering legal services in a culturally appropriate and effective manner ... (CAALAS, sub. 89, p. 20)

The Commission considers both ATSILS and FVPLS face a number of distinctive needs and service delivery challenges emanating from the cross-cultural issues, remoteness and language barriers of their clients. Together with Aboriginal and Torres Strait Islander peoples' well documented socioeconomic disadvantages and over-representation in the criminal justice system (SCRGSP 2011), these needs create a distinctive service delivery environment for ATSILS and FVPLS. These unique circumstances warrant the continuation of specialised Indigenous-specific legal assistance services.

That said, it would not be feasible, nor is it the case currently, that all Indigenous legal needs are met by Indigenous specific services. CLCs and LACs will remain important providers of legal services for Aboriginal and Torres Strait Islander Australians, particularly in regional and metropolitan areas.

DRAFT FINDING 22.1

Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

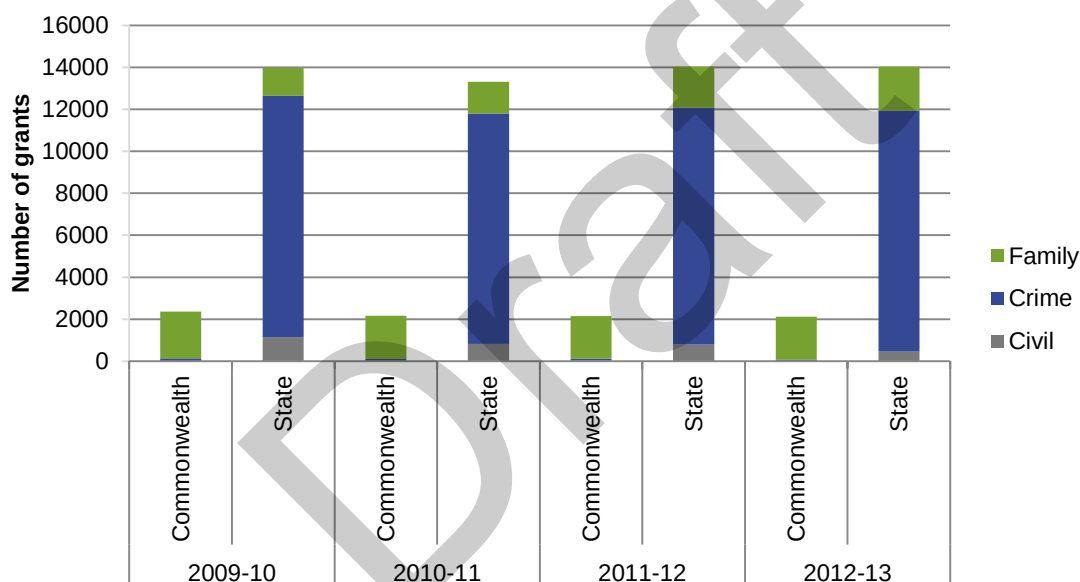
⁷⁶ Conflict of interest rules state that a lawyer acting for a party in a case must not act in the case for any other party who has a conflicting interest. In the context of ATSILS and FVPLS, the former can represent the alleged perpetrator(s) of family violence while the latter represents the victim(s).

22.3 There are gaps in coverage of specialised services

Gaps in coverage for family and civil law matters

Indigenous Australians are significant users of legal assistance services. For example, in 2012-13 over 16 000 grants of legal aid by LACs were to Aboriginal and Torres Strait Islander people, mostly in state-based criminal matters (figure 22.1).

Figure 22.1 Approved grants of legal aid for Indigenous Australians^a
By legal aid commissions by type of matter and funding category, 2009-10 to 2012-13



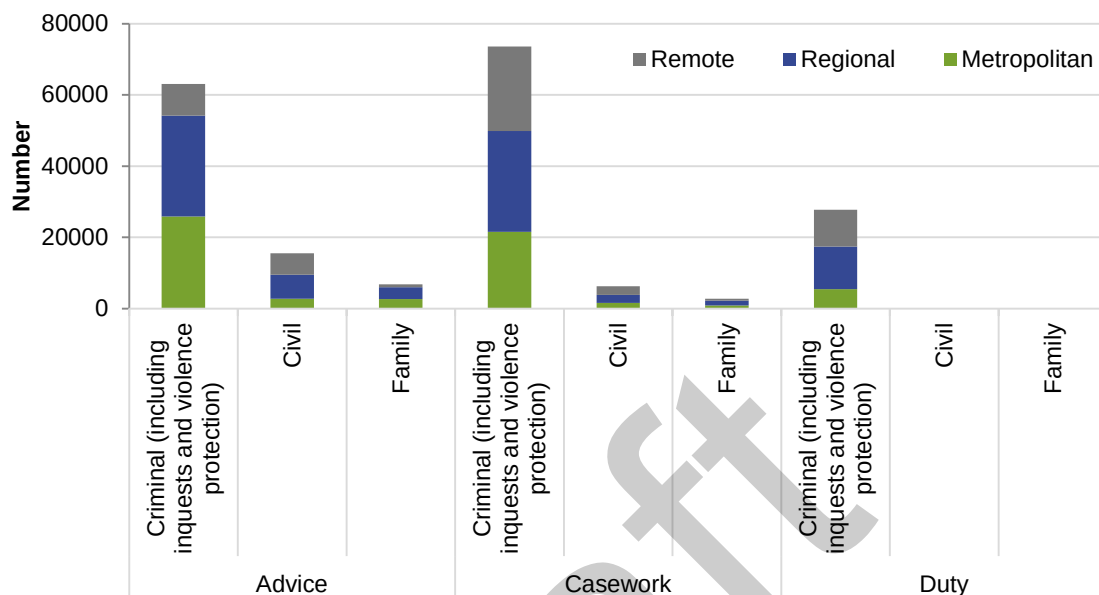
^a The data excludes where the Aboriginal and Torres Strait Islander status, type of matter and funding category is unknown. Combined state/Commonwealth matters are also excluded.

Data source: National Legal Aid website (nd).

Similarly, ATSILS' services are mainly provided in relation to criminal law matters, with family and other civil law matters receiving less attention (figure 22.2). Reflecting their specialist nature, FVPLS' casework focuses almost entirely on family violence matters (figure 22.3).

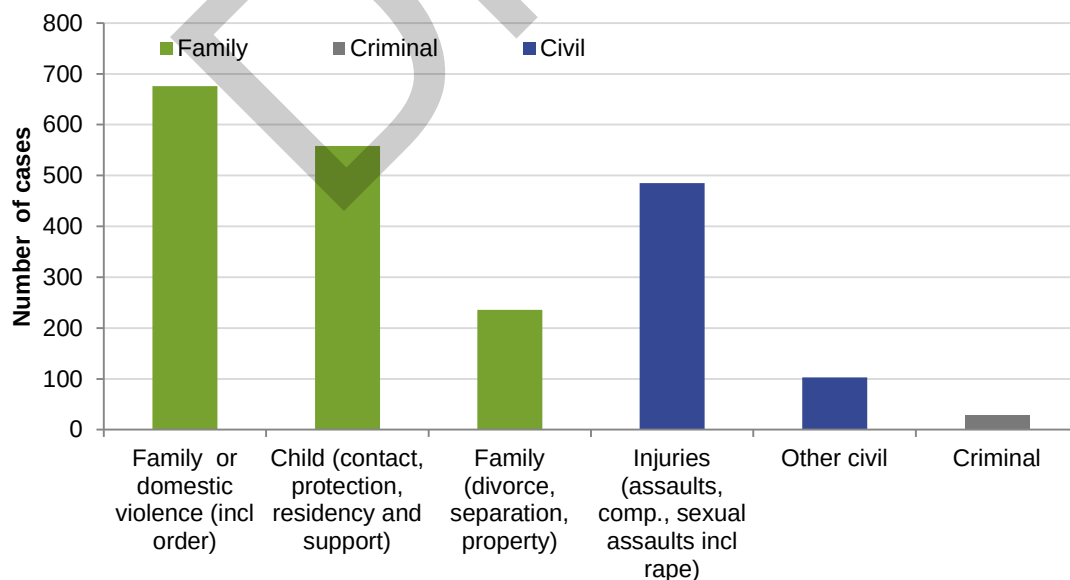
With the bulk of ATSILS' and FVPLS' resources is dedicated towards criminal and to a lesser extent family violence matters, some civil and family law needs go unmet. Estimating the extent of unmet need in these areas is frustrated by a lack of reliable data. Estimates of the extent of unmet need among disadvantaged individuals and those who reside in remote communities are particularly lacking.

Figure 22.2 Numbers of advice, casework and duty by law type and region, ATSILS
2012-13



Data source: Unpublished data provided by AGD (IRIS).

Figure 22.3 Casework by legal problem type, FVPLS
2012-13



Data source: Unpublished data provided by the Department of Prime Minister and Cabinet (CLSIS).

Qualitative studies, such as the Indigenous Legal Needs Project (ILNP), have attempted to bridge this information gap. The project was based on a series of interviews with key stakeholders and separate male- and female-based focus groups

held across a range of urban, rural and remote locations. It identified a number of areas of unmet legal need. Based on its assessment of the impact of the problem and whether the problem affected sizable numbers of people, the research (Cairns Institute, sub. 105) specified the following as priority areas:

- child protection (including the removal of children)
- tenancy (such as repair and maintenance, rent, overcrowding and eviction)
- discrimination
- social security (underpayments or overpayments)
- credit and debt
- consumer law (mostly mobile phone contracts and car purchases and repairs)
- neighbourhood disputes (mostly identified by Indigenous women and mostly in relation to noise, fences or boundaries and animals)
- victims' compensation and wills (within wills, the issues centred largely on superannuation, burial and child custody arrangements).

Many of these same areas were raised in submissions and during consultations. For example, in relation to child protection matters, the Aboriginal Legal Rights Movement (ALRM, sub. 126) argued:

By a process of de facto triage, ALRM is only able to represent parents, yet in the circumstance of extended Aboriginal kinship systems other family members may well be entitled to representation and may have a legitimate interest in the outcome; but they are not represented because ALRM only acts for parents. ... ALRM is concerned that these people, who should be represented parties in the litigation may be brought to court, be provided by the Crown Solicitor with a bundle of court documents, but whilst they may have access to an interpreter, they will have no access to legal representation. ALRM does not presume to say that their cases are or are not meritorious; it simply says it is unsatisfactory that potential parties who have locus standi in Child Protection litigation, do not receive representation due to inadequate resources and inability to brief them out at short notice. (p. 9)

In addition, the National Congress of Australia's First Peoples (NCAFP 2013) drew attention to the need for legal assistance to help with employment matters and stolen wages. And NATSILS (sub. 78) identified unmet legal need in family disputes over the custody of children.

Family violence matters — which were excluded from the ILNP study — were also identified by NCAFP (2013) and NATSILS (sub. 78) as a relatively complex area of legal need. These matters overlap legal systems covering family law, criminal justice proceedings, applications for personal protection orders, victims of crime

assistance applications and potentially child protection proceedings. They also co-exist with a cultural bias towards non-disclosure (QIFVLS, sub 46).

Finally, the Australian Inquest Alliance (sub. 62) identified a need for more legal help to assist family members to appear at coronial inquiries.

Geographic coverage is uneven

ATSILS service large geographic regions

There are eight ATSILS — two in the Northern Territory (NT) and one in every other state (with one for the Australian Capital Territory (ACT) and New South Wales (NSW)). Their focus, in terms of service types, varies considerably. Some ATSILS focus more on advice than casework and vice versa. For example, Queensland-based ATSILS would appear to focus more on advice and duty work while NT-based ATSILS would appear to focus more of their effort on casework than advice (table 22.1).⁷⁷

Table 22.1 **ATSILS share of advice, casework and duty relative to share of funding by jurisdiction**
2012-13

	Share of advice	Share of casework	Share of duty	Share of funding
	%	%	%	%
New South Wales & Australian Capital Territory	16.2	23.5	12.6	25.7
Queensland	45.9	22.8	44.9	24.0
Western Australia	5.0	16.8	21.1	18.3
Northern Territory	6.7	19.2	15.4	17.1
Victoria	9.9	5.4	0.2	5.6
South Australia	12.6	10.6	5.6	6.5
Tasmania	3.7	1.8	0.3	2.8
Total	100.0	100.0	100.0	100.0
Total matters	85 406	82 700	28 169	

Source: Commission estimates based on unpublished AGD data. These data include criminal matters.

Most ATSILS outlets are located in regional and remote areas and it is here where they focus their efforts. For example, examination of administrative data showed

⁷⁷ Grant of aid approvals by LACs for Indigenous clients also differ across states and territories. For example, of all legal aid grants approved for Indigenous clients in 2012-13, almost 60 per cent were granted in NSW and Queensland. That said, almost one quarter of all grants of legal aid approved by the LACs in the NT and in Western Australia were to Indigenous clients.

that the proportion of civil to criminal advice is higher in rural areas. Similarly, case work services in family and civil law matters were more likely in rural and remote areas than in metropolitan areas. Examination of administrative data also revealed that when duty lawyers were provided in civil matters they were much more likely to be present in regional and remote locations than in metropolitan areas. This pattern of service provision by ATSILS partly reflects the wider range of alternative service provider options (for example, LACs, CLCs and pro bono lawyers) available to metropolitan-based Indigenous Australians relative to those living in regional and remote areas.

Even so, qualitative evidence suggests that the level of unmet need appears to be highest in more remote locations.

Family violence services do not always reach high need areas

In contrast to ATSILS, FVPLS service narrowly defined geographic areas. In 2012-13, there were 14 FVPLS providers servicing 31 locations in regional and remote areas across all states and territories, except Tasmania and the ACT.

With catchment areas being more targeted, much rests on focusing services on the 'right' areas. But not all areas considered to be high need are being serviced by a FVPLS. An unpublished report by the Nous Group drew on a variety of ABS and other data in conjunction with mapping and statistical analyses to predict the demand for Indigenous family violence protection services in each local government area and ranked each according to need. They then examined how this ranking compared with service provision.

The analysis indicated that coverage in remote areas was very limited, often consisting of one to two days per month and that several locations of high need were serviced through long-distance outreach services. Examples include Ngaanyatjaraku (serviced from Alice Springs, around 1000 km away), Meekatharra (serviced from Geraldton, around 500 km away), and Kunbarllanjnja (serviced from Darwin, around 300 km away).

Further, six of the 30 local government areas predicted to have the highest incidence and proportion of Indigenous family violence were not nominated in funding agreements to be serviced by a FVPLS — Anmatjere and Yugul Mangi (NT), Yarrabah and Woorabinda (Queensland) and Central Darling and Dubbo (NSW). Although not nominated for servicing in funding agreements, some of the needs in these local government areas were being serviced from nearby existing FVPLS (namely in Queensland and the NT).

This is consistent with the findings of an unpublished evaluation of FVPLS by ACIL Allen Consulting (AAC) which suggested under-servicing in high demand areas (including areas outside of boundaries). The evaluation also found over-servicing by providers in some locations of limited demand:

One of the issues in the SFAs [Standard Funding Agreements] is that the AGD specifies towns to be serviced, rather than broad regions. This results in some over-servicing of locations where there is limited demand. (p. 40)

Local government areas do not necessarily align with Indigenous regions, so some local area knowledge is also required to assess community need. Some providers furnished the Attorney-General's Department (AGD) with additional data to illustrate need at a finer local level. However, as the department currently administering FVPLS stated:

... none of the data provided changed the general picture that the highest incidence of Indigenous family violence occurs in the north-western interior of Australia, coastal regions around the Gulf of Carpentaria, and Western NSW and Queensland. (PM&C, pers. comm., 21 January 2014).

The Commission notes that these are the same broad areas that the ATSILS funding model identifies as being 'at risk'.

The disconnect between need and service availability indicates that the current funding arrangements are deficient, and, irrespective of the size of the funding envelope, the Commission considers that there are grounds for revisiting the process by which funds are allocated to FVPLS. Any such allocation of funds should be based on a combination of need (based on the incidence of family violence) and service delivery costs, rather than fixed funding per provider as is currently the case (section 22.5).

Gaps in early intervention

Reflecting their focus on criminal and family violence matters, which tend to involve 'reactive' responses, ATSILS and FVPLS have a lesser focus than LACs and CLCs on early intervention services, including community legal education (CLE).

Most ATSILS considered that investing in information and CLE can help to reduce the demand for more costly services later on and, in some cases, stop civil problems evolving into criminal matters. For example, NATSILS said:

[CLE] plays a key role in prevention and early intervention as it provides people with the necessary information and skills to prevent the development of civil and family law issues and/or advice and information about ways to resolve such issues where they have

developed. It can also play a significant role in preventing relatively minor civil issues from escalating into criminal matters. Civil issues such as debt, driver's licenses and social security issues are increasing bases for Aboriginal and Torres Strait Islander peoples' contact with law enforcement, including arrest, detention and ultimately sentencing. (sub. 78, p. 16)

While many ATSILS agree on the value of early intervention only a few providers appear to dedicate resources to these services. For example, unpublished information provided by AGD showed that two providers dedicated approximately 5 and 8 per cent of their service delivery budget to CLE while three others devoted only around 1 per cent (AGD, pers. comm., 13 March 2014).

Similarly, there are few examples of early intervention being employed by FVPLS. That said, a recent initiative has seen the North Australian Aboriginal Family Violence Legal Service (NAAFVLS) partner with the Australian Football League in the NT to encourage and support non-violent behaviour:

AFLNT and NAAFVLS have entered into a mutually beneficial partnership whereby AFLNT will engage key talented remote indigenous footballers as part of the NT Thunder Talent Program to become Ambassadors against Family Violence. A rigorous check and selection process will take place to ensure all players who are ambassadors assist NAAFVLS in displaying a positive community image. (NAAJA nd)

A lack of resources was seen as constraining early intervention efforts by both ATSILS and FVPLS:

There is a dearth of funding and programs for a holistic approach to addressing family violence. There are examples of programs that could be used as a model or that could be funded to refer clients to, including red dust healing, and programs such as those used in Canada for first nations peoples, which provide a holistic approach to family violence could be developed in Australia by funding local Aboriginal and Torres Strait Islander community organisations. (NATSILS sub 78, p. 17)

... we cannot assist every client who seeks our help, nor can we meet the high demand for community legal education and legal outreach services. (CAALAS, sub. 89, p. 8)

Interventions such as CLE can be effective in preventing less complex disputes and/or minimising their impacts and there appears to be scope for these interventions to be used more widely by specialist Indigenous providers. However, strategies such as CLE have some limitations as standalone responses to complex problems or for those individuals with complex needs (chapter 5). Hence, greater use of early intervention strategies needs to be well-targeted and based on evidence about what works (chapter 24).

Gaps in alternative dispute resolution

Aboriginal and Torres Strait Islander people also face gaps in relation to alternative dispute resolution (ADR) (including family dispute resolution (FDR)) services (chapter 8). NATSILS (sub. 78) provided evidence on the lack of availability of legal assistance services, ADR services and family relationship services in regional, rural and remote areas. However, even if ADR services are known and available to Indigenous Australians, they are often reluctant to engage in them.

This reluctance can stem from differences between Indigenous and non-Indigenous customs and values (such as the neutrality of the mediator, confidentiality issues and voluntary attendance). As touched on earlier, Aboriginal and Torres Strait Islander Australians also face communication barriers, financial constraints, transport difficulties and ‘time and place’ issues. The complexity of some disputes (such as those involving multiple parties with overlapping issues which have evolved over a long period), and the absence of any ADR services in remote areas, can also affect their usage by Indigenous people (NADRAC 2006; NATSILS 2010 and sub. 78).

For example, family law disputes often require access to the Family Court of Australia and disputants must first obtain a certificate from a Family Relationship Centre (FRC) or another FDR practitioner stating that the disputants have genuinely attempted to resolve their dispute through mediation (unless they qualify for an exemption). However, NATSILS (2010) said that:

... such centres are often not culturally appropriate or accessible to people in remote and regional Australia, Aboriginal and Torres Strait Islander peoples can be discouraged from accessing them, and hence are obstructed from accessing the Family Court ... (p. 12)

22.4 Service gaps can have severe consequences

Unmet legal need can escalate into serious problems for Aboriginal and Torres Strait Islander people. The Shoalcoast Community Legal Centre (sub. 18) set out how something as commonplace as speeding tickets could, without legal assistance, snowball into ever more difficult circumstances for an Indigenous person (box 22.1).

As well as affecting the wellbeing of Indigenous people, unmet legal need can trigger larger and more complex legal problems and place unnecessary pressure on the civil justice system, particularly at the more formal (and costly) end of the system. In the words of the Cairns Institute (sub. 105):

... legal problems in civil, family and criminal law areas interact so as to intensify Indigenous legal need through a form of ‘snowballing’. Indigenous peoples may therefore be facing multiple legal issues, simultaneously, compounding need. (p. 3)

Box 22.1 The intensifying effects of unmet civil law needs: a stylised case study

The Shoalcoast Community Legal Centre (sub. 18) documented the escalating effect of unpaid traffic infringements:

An Aboriginal client in an isolated regional Aboriginal village receives a fine for a traffic offence in the mail but their cousin was actually driving at the time. Our client believes they do not have to pay the fine because they were not driving. However, as there are no free legal services in the area at the time, they simply do not pay and hope it just goes away. Roads and Maritime Services cancels their licence — however the client has not received this notification as the mail often goes astray in the village. The client is then fined for unlicensed driving when on their way to work. This not only adds to the now large fines debt but it is now virtually impossible for them to maintain their casual work without a licence as there is no suitable public transport in the area. The client becomes depressed with the lack of work and the inability to travel to look for work or even go to town to get groceries. They are no longer eating properly, have lost interest in outdoor activities with friends and as such are not exercising and have started drinking every day. It won't be long before they will be facing homelessness as they cannot afford to keep paying the rent and are in a state of mental health where they really do not seem to care anymore. The risk of suicide has become real. (pp. 5–6)

Source: Shoalcoast Community Legal Centre (sub. 18).

Inquiry participants nominated a number of specific areas of concern in these regards. NCAFP (2013) raised concerns in relation to child protection matters:

... where families are not represented, it may mean that the full range of relevant information about the family situation and, where the child is determined to be in need of protection, kinship placement options, may not be presented to the court. (p. 23)

In the area of domestic violence, the NT-based Domestic Violence Legal Service (DVLS) argued that a lack of legal advice can contribute to non-compliance with domestic violence orders:

Without legal advice or representation, defendants are frequently seen consenting to orders without understanding the consequences of breaching orders. Such orders may or may not be appropriate in the circumstances and may be made for extensive periods of time. Where breaches result, the entire purpose of orders being made to prevent the further commission of domestic violence by imposing severe penalties in the event the orders are breached is undermined. (DVLS, sub 140, attachment 2, p. 2)

Unmet needs may escalate to criminal behaviours

One of the more serious ramifications of unaddressed civil law needs is the potential for it to escalate into criminal behaviours, perpetuating the cycle of Indigenous over-representation in the criminal justice system. The Indigenous Legal Needs Project identified five areas in which civil and family law issues can escalate into criminal matters (box 22.2). As two participants in a study of Indigenous legal needs in NSW said:

[It's] sheer desperation, as far as family and civil matters go. They have nowhere to go for any legal advice ... [Family law matters] end up becoming criminal matters because they don't know how to deal with those family law matters, the only way they know how to deal with it is go out and have a big punch up ... They don't realise what their rights are in civil law; they don't even know what it is. (*Legal support worker Wagga*)

If the family and civil problems aren't addressed they turn into a criminal problem. They always do. Especially when it comes to the family stuff, about the kids, then it turns into someone is going to flog someone else. (*Legal Aid Commission Indigenous staff member*) (Cunneen and Schwartz 2009, p. 744)

The inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system (Schwartz and Cunneen 2009a).

22.5 Multi-faceted responses are required to help bridge the gaps

A number of participants in this inquiry highlighted the benefits from improving access in the civil and family law space. For example, ALRM said:

Much can be said of ... ensuring easier access to civil remedy, thereby enhancing and properly recognising civil law rights is likely to lead to increasing confidence in the legal system, and alleviate social disadvantage and perhaps thereby a decrease in criminal law matters overall. (sub. 126, p. 2)

Similarly, the ILNP at James Cook University suggested there were a range of social benefits to improving access to civil and family law assistance for Indigenous people, indicating that it:

... is likely to build resilience in individuals and communities, to reduce offending and to contribute to increased levels of Indigenous social inclusion. (sub. 105, p. 2)

Box 22.2 Escalation pathways in the Indigenous Legal Needs Project

Drawing on material from the Indigenous Legal Needs Project, Schwartz and Cunneen (2009a) identified several pathways in five distinct areas along which civil and family law issues can escalate into criminal matters.

1. *Care and protection orders.* Placing children in out-of-home care long distances from their families can make family visits difficult. The breakdown of family ties, in part caused by long distant placements, is one risk factor for juvenile offending. Family law disputes — particularly around children — can also lead to criminal behaviours. Hence, increases in child protection orders may ultimately lead to higher levels of juvenile detention, which is a well-documented stepping stone to the criminal justice system (NCAFP 2013). There is also a link between the incarceration of Aboriginal women — who can be both perpetrators and victims of violent crimes (Bartels 2012) — and child protection issues (McKail 2013).
2. *Tenancy matters.* The authors argued that feelings of power inequality between the landlord and tenants in public housing explained the low levels of advice sought to remedy disputes between them. In addition, over-crowded tenancies (as a result of inadequate supply of housing) are a risk factor for criminal matters such as sexual assault and domestic violence. Finally, there is a correlation between homelessness and criminal offending (and re-offending among recently released prisoners).
3. *Discrimination.* The authors contended that pent-up anger and resentment to ongoing discrimination may spark a reaction which is criminal in nature:
 ... without having recourse to challenge such incidents through the law, victims of discrimination are left vulnerable to responding in ways that leave them in danger of contact with the criminal justice system. In discussing some of the racist comments experienced by participants in Katherine, for instance, one male focus group participant stated that, 'If someone spoke to me like that, I'd punch 'em. Soon as I punch 'em, I'd be going to jail for it' (Allison, Schwartz and Cunneen 2013, p. 11)
4. *Credit and debt.* In some cases, Indigenous people were not aware, or did not understand, that they can be pursued for fines incurred many years ago. The accumulation of fines can reinforce low incomes, which increases the risk of contact with criminal justice. In particular, the non-payment of fines can lead to the suspension of a drivers' licence, which may result in serious criminal offences when the cancellation is not understood or not observed. The authors thus conclude 'the line between debt and crime can be quite direct' (Schwartz and Cunneen 2009a, p. 20). (See also Beranger, Weatherburn and Moffatt 2010; Law Reform Commission of Western Australia and LRC WA 2005.)
5. *Education.* The authors argued that this area was of concern because of the strong connection between schooling (or lack of it) and the rate of juvenile offending. Racism or discrimination by teaching and other staff was cited as a factor leading to suspensions and/or to some parent's 'giving up' sending their children to school — rather than seeking early intervention through mediation or administrative law avenues.

Sources: Allison et al. (2013); Bartels (2012); Beranger et al. (2010); Law Reform Commission of Western Australia (2005); McKail (2013); NCAFP (2013); and Schwartz and Cunneen (2009a).

The notion that improving access to justice is generally beneficial to the community is relatively uncontentious; the policy challenge is how this might best be done. While some submissions have called for greater funds (box 22.3), the complexity of the barriers faced by Indigenous Australians in resolving their civil disputes indicates that increased funding alone will not suffice.

Box 22.3 Views on the adequacy of funding for ATSILS and FVPLS

The National Congress of Australia's First Peoples (NCAFP) said:

... the total amount of funding provided to [Indigenous] legal assistance services is simply inadequate. This is further demonstrated by the fact that ATSILS have had to cut services in recent years in order to operate within current funding levels. The Aboriginal Legal Service (NSW/ACT) has had to cut almost all of its family and civil law services and the Aboriginal Legal Service of Western Australia has had to withdraw services from a number of regional and metropolitan courts and has closed a number of regional offices. The North Australian Aboriginal Justice Agency (NAAJA) has also reported they are no longer able to provide a family law service or assist defendants in relation to applications for Domestic Violence Orders that are brought against them. (NCAFP 2013, p. 27)

The Public Interest Advocacy Centre (PIAC) said:

ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements. (sub. 45, p. 41)

And NAAJA (sub. 95) said another major concern from inadequate funding was:

... the failure of our funding to keep up with increases in our workload, including those increases that have directly resulted from developments in law and policy. This not only limits our ability to provide a full range of services (and without NAAJA providing these services there is generally no alternative service provider in remote communities) but also limits our ability to implement best-practice strategies, including early intervention and prevention initiatives. (p. 28)

In relation to FVPLS, the NFVPLSF (sub. 97) argued that funding to FVPLS program should be increased to meet service gaps and to expand the delivery of services to a larger number of Aboriginal communities (including in metropolitan areas).

By contrast, from an individual provider perspective, NAAFVLS regarded their funding as adequate:

NAAFVLS is of the opinion that current funding provided by the Commonwealth is adequate to provide the return on investment and performance required by the Commonwealth in the delivery of the program in the Top End of the NT in its current form. (sub. 138, p. 1)

Sources: NAAFVLS (sub. 138); NAAJA (sub. 95); NCAFP (2013); NFVPLSF (sub. 97); and PIAC (sub. 45).

In the first instance, there needs to be a better understanding of who is receiving services, how many services are being provided, whether the same people receive similar services over time, whether services are being delivered in a cost-effective manner and achieve what is expected. Without such information it is extremely

challenging for governments to weigh up competing calls for additional funds and make assessments about where additional funds might make the biggest difference. It is equally challenging for providers to defend current funding arrangements or make a case against funding cuts in a tight fiscal environment.

Government and providers need to build a better understanding of their respective roles and performance. This requires changes to the nature of the relationship between government and providers and to governance and reporting requirements. Funding arrangements also matter — the allocation of limited taxpayer funds needs to be based on a combination of need and service delivery costs, and the incentives facing different levels of government can affect the ability of providers to meet need. A range of other areas impact on the demand for and effectiveness of Indigenous-specific legal assistance services, including interpreter services, culturally tailored alternative dispute resolution services and early interventions by government agencies in common areas for disputes.

Improving models of engagement between providers and government

ATSILS and FVPLS have many of the characteristics of a not-for-profit organisation. They are established for a community purpose, rely heavily on government funding, deliver services to their members, and offer participants opportunities to build a sense of self-worth, connection and influence.

There are three broad models of engagement for service delivery between such organisations and government: client directed, purchasing of service contracting, and joint ventures. Their features are depicted in figure 22.4.

Figure 22.4 **Three broad models for engagement between government and service providers**



Source: PC (2010, p. XXXVIII).

As the Commission set out in its *Contribution of the Not-for-Profit Sector* research report (PC 2010), determining the appropriate engagement model for such

organisations depends on the extent to which government is funding the service, the nature of the ‘market’ for the service, and the extent to which users of the service are able to exercise meaningful choice over either the services they require or the provider.

Which model?

In the case of Indigenous-specific legal assistance services:

- governments fully fund the service
- the market is ‘thin’, because there are limited service options outside of those offered by ATSILS and FVPLS (LACs and CLCs provide the main alternatives)
- most clients do not have real choice over the provider or the services required.

These points mean that a client directed model of engagement is not appropriate for ATSILS or FVPLS.

Some of the points suggest that the model that best suits these bodies’ circumstances and characteristics could be a hybrid between a purchase of services and a joint venture. This is because some services (such as information and representation) are relatively well defined and amenable to competition, while others (such as advice and case management) are less so. For most Aboriginal and Torres Strait Islander clients, however, these services cannot easily be unbundled.

Nonetheless, several other features suggest that a joint venture model is preferable relative to a purchase of services arrangement. For example, the thinness of the market and the complexity of services to achieve mostly uncertain outcomes favours a joint venture approach. The need to build trust between Indigenous people and communities, and legal assistance providers warrant longer-term models of engagement.

Challenges in operationalising the joint venture model

A ‘joint venture’ model of engagement involves greater collaboration between government and providers than occurs with the purchasing of services. Joint ventures require governments and providers to have complementary knowledge and expertise in the services to be delivered. Joint ventures are particularly applicable where governments cannot easily specify the desired outputs, outcomes or processes prior to delivery.

Such circumstances favour relational (as opposed to command and control) governance models. This is because a long-term relationship is needed to provide

appropriate (continuously improved) outcomes using both provider and government expertise.

To be most effective, relational governance models require a high level of flexibility and trust. Both parties need a good understanding of the other, open communication and a shared purpose. These models are relatively resource-intensive and hence tend to be better suited to ‘niche’ problems rather than large scale applications.

They also call for a degree of certainty about government funding, and an agreed evaluation process and protocols specifying the circumstances under which government can modify or terminate its involvement. Ideally, these specifications would be negotiated with providers at the outset, with formal points of review scheduled and a joint commitment to manage community expectations around the services to be provided. Risk management frameworks should also be developed in consultation with providers.

In its *Contribution of the Not-for-Profit Sector* report, the Commission (PC 2010) noted that specifications of tendering, contracting and reporting requirements for joint ventures need to walk a fine line between (a) ensuring accountability and probity in the use of public funds, and (b) providers having sufficient autonomy to design and deliver cost-effective services. This is easier when there is clarity about the outcomes that are being sought, implying that the contract and reporting obligations should be outcome-focused rather than process-driven.

That said, value for money remains an appropriate principle for developing and continuing joint ventures. And value for money may mean occasionally testing the market throughout the extended life of a venture.

These practical complications and requirements raise some questions about the merits and design of joint ventures, including vis-à-vis other models, for Indigenous-specific legal assistance services.

INFORMATION REQUEST 22.1

The Commission seeks views on the most appropriate model for engagement between governments and Indigenous-specific legal assistance services. Practical examples of successful models and the lessons from implementation are also sought.

Improving governance and reporting requirements

Governance⁷⁸ and reporting arrangements are used to ensure that legal assistance providers operate well and that taxpayer dollars are well spent. Ideally, arrangements should be tailored to reflect the model of engagement employed.

A key challenge is to reconcile Indigenous and non-Indigenous approaches to governance. Given their importance, governance arrangements for ATSILS and FVPLS have been subject to ongoing review and refinement.

Current governance arrangements

Drawing in part on a 2008 evaluation of ATSILS (OEA 2008), new governance arrangements were introduced in July 2011 to reduce complexity and red tape, enhance ATSILS' autonomy, improve quality assurance processes and improve contract payment arrangements to align with revised risk assessment processes (AGD, pers. comm., 13 March 2014). ATSILS providers now receive three year funding grants (rather than a contract for services), which allow them to develop their own service plans for approval by AGD. The agreements are considerably shorter than the previous contracts (approximately 30 rather than 140 pages).

As part of the new arrangements, AGD assesses the risk profile of service providers and tailors its accountability mechanisms accordingly. A 'high risk' provider is subject to greater reporting and monitoring than a 'low risk' provider. In addition, a 'high risk' provider receives a monthly upfront payment while a 'low risk' provider receives a six-monthly upfront payment. AGD monitors providers' progress against their service plans and meets with them biannually to review performance. The provider's risk profile is reviewed after each meeting.

An independent financial audit of the eight ATSILS in 2009-10 found that most were financially sound. However, the audit identified financial irregularities in two ATSILS, and a range of common areas for improvement across all ATSILS in the administration of assets registers, purchase orders, employee contracts and delegation of authority. The Commission was advised that these areas have since been improved and, as a result, a number of ATSILS received a lower risk rating than in previous risk assessments.

⁷⁸Governance refers to the way members of a group or community organise themselves to make decisions that affect them as a group, including how their resources are allocated to deliver services (SCRGSP 2011).

Scope to further improve governance

While much has been done to improve governance arrangements some inquiry participants suggested that governance arrangements could be improved further. The capacity and skills of some boards of ATSILS and FVPLS providers was identified as requiring ongoing attention. There can be a limited pool of suitably skilled individuals from which to draw board members, and not all board members may understand their roles and responsibilities. The Commission heard that AGD has addressed some of these concerns through training for board members of ATSILS. Measures to improve board capability would assist FVPLS in particular — two FVPLS providers were recently placed under special administration⁷⁹ (ORIC 2012b, 2012c). In one case, there were ‘allegations of improper payments and misappropriation of corporation funds’ (ORIC 2012a).

A more widespread concern raised during consultations related to the prescriptiveness of program guidelines and the associated regulatory burden, which ATSILS and FVPLS providers considered constrain them in tailoring services to meet client needs. While closer management by AGD of higher risk providers is appropriate, it is important that lower risk providers are not subject to overly prescriptive requirements.

Revamping performance reporting

The Commission considers that improved reporting would provide a more comprehensive picture of performance and help AGD to better match oversight and risk.

This is not to discount the intrinsic difficulties of measuring and benchmarking the performance of ATSILS and FVPLS providers. Users face different barriers, reside in different locations and their disputes arise in different areas of the law. This complicates comparisons across services and providers.

The biggest constraint in evaluating the performance of FVPLS and ATSILS (albeit to a lesser extent) is the lack of credible and consistent performance data. Indicators and data to measure performance against program guidelines are generally lacking, with many performance indicators based on outputs rather than outcomes. While ATSILS set service targets in their annual service plans, there are no service targets

⁷⁹Special administration is a special measure under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwlth) which helps corporations to fix their problems. It is different to an administration under the *Corporations Act 2001* (Cwlth). Only Aboriginal and Torres Strait Islander Corporations can be placed under special administration (ORIC 2010).

set for FVPLS. Instead, departmental officials use administrative data to monitor the work of each provider.

The quality of the indicators and data that is collected is questionable, particularly among FVPLS, although also among ATSILS in some areas. For example, some data required under agreements with the Commonwealth is either not collected or not reported. Data are not consistently reported across providers — with data collection requirements being interpreted in different ways by different providers. Among FVPLS, the high turnover among administrative staff can also cause inconsistent reporting over time.

Having reviewed existing performance indicators, the Commission found that, for FVPLS in particular, it was difficult to assess provider performance without explanations as to reporting differences. Further, in relation to FVPLS, only one or two departmental program managers were able to ‘make sense’ of existing data. Indeed, with staff turnover, the relevant administering department — now the Department of Prime Minister and Cabinet (PM&C) — may not be able to sensibly use the existing data. Some providers also questioned the value of the information collected:

The concept of benchmarking the FVPLS program remains problematic for all parties involved, including the Commonwealth Government, as data input into the Community Legal Service Information System (CLSIS) appears to be inconsistent across service providers. This makes it extremely difficult to assist the Commission with service delivery cost analysis methodologies. (NAAFVLS, sub. 138, p. 1)

Assessment of provider performance is also complicated by the use of two different administrative data collection systems, each with different variables and data collection protocols. ATSILS use the Indicator Reporting Information System (IRIS) while FVPLS use the Community Legal Service Information System (CLSIS), which is also used by CLCs.

Concerns about reporting arrangements are not new. In 2008, the Office of Evaluation and Audit (OEA) identified inadequate reporting arrangements as a key issue for ATSILS and AGD.

Lack of consistency in data reporting restricts AGD’s ability to undertake detailed analysis of program performance across service delivery types and locations and hence to fully assess program performance. (OEA 2008, p. 27)

The OEA made recommendations to strengthen strategic program management, enhance provider capacity (through benchmarking), strengthen IT support systems, streamline contract reporting arrangements and improve provider management (such as through data quality checking and client satisfaction surveys).

However, while AGD agreed (albeit sometimes with qualification) to all of the recommendations, progress in implementing them has been mixed. In particular, available data does not allow AGD to accurately gauge average cost per matter or to benchmark the cost of ATSILS service delivery against other providers, such as LACs (both of which were recommended by the OEA). Further, the OEA's recommendation for an independent (ATSILS) client satisfaction survey has instead been replaced with a stakeholder survey.⁸⁰

The Commission considers that significant changes to reporting frameworks are required. Measures of outputs need to be reshaped and outcome measures need to be crafted (chapter 24). While differences in program objectives, client needs and contextual factors complicate this task, akin to other types of human services, there are likely to be a number of measures of efficiency and effectiveness that could be applied across providers, with additional specific measures adopted depending on the circumstances.

The administrative data collection should be framed by suitable benchmarking for ATSILS and FVPLS. Ongoing training and comprehensive manuals are required to ensure that providers understand data requirements and report in a consistent fashion. The Commission was advised that the Australian Government has funded additional guidance and support to FVPLS over the last 12 months to encourage greater consistency in the collection and entering of information by providers on CLSIS.

DRAFT RECOMMENDATION 22.1

The Commonwealth Government should:

- ***establish service delivery targets (as currently apply to Aboriginal and Torres Strait Islander legal services (ATSILS)) within service plans for family violence prevention legal services (FVPLS)***
- ***develop and implement robust benchmarks with ATSILS and FVPLS to better measure performance. These agreed benchmarks should be a consideration in framing the administrative data collection for ATSILS and FVPLS.***

⁸⁰ Stakeholders are nominated by ATSILS and surveys occur once every three years.

Better directing funds

Better targeted services

While legal assistance services are generally targeted at high need communities and individuals, some reallocation appears warranted and could help fill some service gaps.

There are currently different approaches to determining the distribution of the fixed funding envelopes for ATSILS and for FVPLS. The dichotomy is not dissimilar to the two approaches used to fund LACs and CLCs.

The funding model for ATSILS attempts to take account of both the level of demand for services in a given geographic area and the costs of providing the services. Available funds are distributed across eight providers according to their assessed needs and costs. Funding is accompanied by service targets, which each ATSILS provider is expected to meet or exceed.

In contrast, the model employed to fund FVPLS is less formulaic. The reasons for targeting particular geographic areas over others, and the process for determining the quantum of funds allocated to providers is relatively opaque.

As outlined in chapter 20, the initial funding allocation approach for FVPLS was to allocate the same amount of funding to each of the 31 service areas, regardless of their circumstances, demands and relative needs (although as noted in the unpublished Nous Group report, over time there have been deviations from the fixed funding approach).

Even so, the Commission considers that the allocation of funding does not always align with need. As observed earlier (section 22.3), some higher need areas are not serviced at all, or only infrequently. At the same time, some FVPLS are located in areas with (relatively) lower levels of need. The Commission recommends that the FVPLS funding model be revamped to incorporate regular, systematic and transparent analyses of needs, as well as to take account of differences in the costs of providing services. The latter is particularly important given the focus on servicing client groups in rural and remote communities.

This could be done by aligning the two funding models. However, the risk factors employed in the ATSILS funding model should be adapted for FVPLS funding to capture the risk of experiencing family violence (rather than the risk of experiencing legal disputes more broadly).

Aligning the funding models would mean that, for any given geographic area, a clearly defined amount of funding would be on offer. This would enable current and potential providers to indicate the level and type of services they could provide within that funding envelope, while still being subject to set quality standards (and service delivery targets, see above). One mechanism for potential providers to identify their potential service offerings is through a comprehensive tender process — similar to that which occurred in 2005 (OEA 2008). However, as outlined earlier, the approach would make it feasible to have a tender calling for potential joint venture parties or parties prepared to engage in a negotiated contract.

Reducing administrative overheads

Reducing administrative overheads would allow for better use of funds. The ACIL Allen Consulting's (AAC 2014) survey revealed that ATSILS (like most LACs) tended to devote less than 20 per cent of their funding to administration (with larger jurisdictions reporting the lowest proportion of expenditure on administration). By contrast, FVPLS reported wide variations in the proportion of spending on administration (ranging from 17 to 46 per cent).

Those FVPLS which reported lower levels of expenditure on administration (relative to service delivery) tended to be those operating under the auspice service delivery model (under which administration costs may be shared with other parts of the organisation) (AAC 2014).

The scale of providers does not just affect administrative costs; it can also affect career progression opportunities and the support that providers can offer for staff training. These compound other difficulties providers face in recruiting and retaining legal practitioners including comparatively low salaries and high workloads, funding uncertainties and the demands of remote travel and work (NAAJA, sub. 95; AGD, sub. 137).

But as both the OEA and AAC reviews note, the effects of greater scale can be mixed. Greater regionalisation of service delivery often leads to measured cost efficiencies (for example, lower costs per unit of output), but it may be at the expense of service effectiveness, especially in the Indigenous context which requires organisations that are trusted and supported by communities (OEA 2008). Local-level organisations could perform better in this regard than regional (amalgamated) organisations.

DRAFT RECOMMENDATION 22.2

The Commonwealth Government should allocate funding for both Aboriginal and Torres Strait Islander legal services and family violence prevention legal services in accordance with differences in need and service costs across geographic areas.

INFORMATION REQUEST 22.2

The Commission seeks feedback on how the funds determined in draft recommendation 22.2 should be distributed across providers and how the relatively small scale of some providers affects the efficiency and effectiveness of services. Would there be benefits from further amalgamation of services and if so, how might this process be brought about?

Aligning incentives across governments

Although the supply of Indigenous-specific legal services are funded almost entirely by the Commonwealth, it is state and territory laws that most affect the demand for these services (especially in criminal matters). This disconnect means that the resource implications of state government policy changes on Indigenous-specific legal services are unlikely to be fully considered or addressed. This point was made by a number of stakeholders (box 22.4).

One way of addressing this problem could be for state and territory governments to have a stake in funding Indigenous-specific legal assistance services, as NCAFP have argued:

If State and Territory governments were engaged in the funding of legal services for Aboriginal and Torres Strait Islander people, this would also encourage a greater understanding of the ‘downstream’ impacts of changes to the law. This may help assist to reduce Aboriginal and Torres Strait Islander over-representation in the criminal justice system. (p. 27)

Box 22.4 Participants' comments on the effects of changes in state and territory laws on demand for Indigenous legal assistance

Several participants commented on the effects of changes in state and territory laws for the resource needs of Indigenous-specific legal assistance service providers.

The National Congress of Australia's First Peoples (NCAFP 2013) observed:

In the area of crime, for example, a change in policing practices, bail laws or public order offences can have a significant impact on the need for assistance from [ATSILS]. This has been demonstrated in the [NT], where the recent introduction of the offence of breach bail has led to significant increases in offences before the court and in demand for criminal representation. ... Mandatory sentencing laws also disproportionately impact Aboriginal and Torres Strait Islander people, and have placed a significant burden on ATSILS, particularly in [WA] and the [NT]. (pp. 26–27)

The North Australian Aboriginal Justice Agency (NAAJA, sub. 95) said:

Because we receive no funding from the NT Government, new policy and legislative initiatives introduced by the NT Government that impact upon our service are completely un-funded. Recent examples include the introduction of the Alcohol Mandatory Treatment Tribunal and the introduction of a regime of indefinite detention orders for serious sex offenders. (p. 28)

In some instances, changes have resulted in clients being unrepresented and without an interpreter (CAALAS et al. 2014). CAALAS submitted:

... the [NT] Government recently introduced an alcohol mandatory treatment scheme which confers power on a Tribunal to, among other things, detain a person in a residential alcohol treatment facility to receive mandatory treatment. The [NT] Government did not provide funding to any legal assistance service in the [NT] to advise and represent people appearing before the Tribunal, which has meant that none of the legal assistance services in Central Australia have been able to represent people brought before the Tribunal. (sub. 89, p. 25)

Reforms to government policy in other areas have also stretched resources, for example, CAALAS (sub. 89) said:

Recent changes in the [NT] Department of Housing's tenancy maintenance and eviction policies have also resulted in a sharp increase in demand for our service, which has effectively meant that we have had to reduce our intake of other matters. (pp. 25–26)

In some cases, disputes are between Indigenous Australians and a state or territory government. Here too, state and territory governments have little incentive to consider the representational needs of parties:

... there is a very substantial demand for legal assistance in tenancy law, especially with respect to representation in courts in relation to eviction matters involving the WA public housing authority, Homeswest. As far as ALSWA is aware, very few Aboriginal clients are provided with actual representation in court in relation to these sorts of disputes. ... ALSWA is aware of a very large number of instances where Aboriginal families have been evicted from Homeswest housing without having access to legal advice or representation and have become homeless. Homelessness increases the risk of criminal offending and, in turn, incarceration. (ALSWA, sub. 112, p. 3)

But state and territory governments tend to regard Indigenous legal services as a Commonwealth responsibility, despite many civil problems relating to state law. For example, the Queensland Public Interest Law Clearing House (QPILCH, sub. 58) stated:

For example, except for [Legal Aid Queensland] services for Indigenous Queenslanders as part of its overall services to the community or its Cape York targeted services, civil law services specifically for Indigenous Queenslanders were limited. The Commonwealth could not commit more funds beyond its funding program and the Queensland Government would not provide funding because it regards Indigenous legal services as a Commonwealth responsibility, despite many civil problems relating to state law. (p. 9)

DRAFT FINDING 22.2

The policies of state and territory governments can impact significantly on demand for services provided by Aboriginal and Torres Strait Islander legal services and family violence prevention legal services. Given these services are funded by the Commonwealth Government, there are poor incentives for state and territory governments to consider the ramifications of their policy changes on demand for these Commonwealth funded services.

INFORMATION REQUEST 22.3

The Commission seeks feedback on whether the National Partnership Agreement on Legal Assistance Services should include state and territory government funding for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services to provide a greater incentive for state and territory governments to consider the impact of changes in state or territory based policies on the demand for these services. Are there other ways this could be achieved? Where state and territory governments do not provide funding, or only provide limited funding, what role should they play in influencing service delivery and reporting requirements?

Bolstering interpreter services

While most Aboriginal and Torres Strait Islander people in non-remote areas speak English as their main or only language, interpreter services enable many Indigenous Australians in remote communities to communicate their needs and to understand the legal advice they receive and the law itself.

State and territory governments are primarily responsible for ensuring interpreters are available (as required) to assist people in dealing with government services, but

the Commonwealth Government also funds Indigenous-specific interpreter services (box 22.5). In 2012-13, the Commonwealth provided \$1.3 million for Aboriginal Interpreter Services (based in the NT).

Box 22.5 Indigenous-specific interpreting services

State and territory based services

There are two main Indigenous interpreting services in Australia.

- The NT Aboriginal Interpreter Service (NT AIS), which is established by the NT Government's Department of Housing, Local Government and Regional Services and is one of the largest employers of Aboriginal people in the NT. It provides interpreting services across the NT.
- The Kimberley Interpreting Service (KIS), which is a community-controlled Aboriginal organisation auspiced by the Mirima Council Aboriginal Corporation. It provides interpreting in the Kimberley and central desert languages.

Other jurisdictions are more reliant on ad hoc services and arrangements, such as:

- the South Australian Government's Interpreting and Translating Centre (which offers services in Pitjantjatjara and Yankunytjatjara)
- the privately run Queensland Interpreter Service (which offers services in a number of Indigenous languages)
- in Aurukan (Queensland), qualified interpreters are available in the Wik Mungkan language
- in the Barkly area (NT) the Papulu Appass-Kari Language Centre provides interpreting and translating services on a fee-for-service basis (HRSCATSIA 2012).

Commonwealth funded services

The Australian Government runs the (national) Translating and Interpreting Service, but their primary focus is on non-Indigenous, non-English speaking languages.

The Australian Government provides funding to the NT AIS to help train and accredit interpreters. AGD also has a memorandum of understanding with the NT AIS to support free access to interpreters for NT law, justice and health agencies and those NT-based legal assistance services which receive Commonwealth funding (HRSCATSIA 2012).

In addition, many Australian Government agencies purchase interpreter and translation services to meet their service delivery needs. For example, outside of the NT and the Kimberley, the Department of Human Services has its own panel of interpreters and bilingual staff to meet this need (DHS 2011).

Sources: DHS (2011); HRSCATSIA (2012).

Shortages in Indigenous interpreter services have been highlighted by a number of stakeholders (NATSILS, sub. 78; CAALAS et al. 2014; NCAFP 2013). Others have commented on the variable quality of interpreters (HRSCATSIA 2012).

The Judicial Council on Cultural Diversity (sub. 120) pointed to the deficiencies in interpreter services and said:

The Commonwealth Ombudsman noted it is March 2011 report *Talking Languages: Indigenous language interpreters and government communication* that there was often a lack of awareness of the significant barriers that language poses for communication between Indigenous and non-Indigenous Australians which can lead to gaps in service delivery by governments. The Ombudsman reported that there was a shortage of interpreters and a failure to use them when they are available. (p. 4)

One of the challenges to addressing these shortages is the limited pool of available individuals with the necessary skills. The vast majority of Indigenous language interpreters accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) are at the para-professional level (which is suitable for general conversation or non-specialist situations). However, professional level interpreters are recommended for legal and health assignments where the consequences of inadequate interpreting can be significant for the non-English speaker. As the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA 2012) stated:

In the justice and health areas, interpreters require extensive training on the use and understanding of specialist English terminology and finding equivalents in their Indigenous language. Jobs in these sectors are complex and continuous professional development is required beyond accreditation at the para-professional level. (p. 172)

Significant challenges in recruiting and retaining interpreters are also present. The Commonwealth Ombudsman (2011) drew attention to:

- poor literacy and numeracy skills among those with the requisite Indigenous language skills
- the presence of competing and conflicting cultural obligations
- more attractive employment options (when compared with the irregular nature of interpreting work) (see also Central Land Council (2011))
- the relatively high number of Indigenous languages and the decline in the number of fluent speakers of these languages
- the lack of accreditation at the professional level by NAATI.

In 2011, three (Indigenous language) speakers were accredited at the professional level for Djambarrpuyngu — a Yolnu Matha language (HRSCATSIA 2012) — and 262 interpreters were accredited at the para-professional level in 51 Indigenous

languages (National Accreditation Authority for Translators and Interpreters 2011). However, a significant shortfall remains.

In 2008, the Australian Government committed to the development of a national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of its National Partnership Agreement on Remote Service Delivery (COAG 2008).

In response to their perceived lack of progress in developing the framework, NATSILS sought to prompt action by outlining the need for interpreter services, the consequences of a lack of interpreters and the kinds of services that would meet these needs (NATSILS 2011 and sub. 78). Subsequently, NATSILS agreed to participate as part of the Australian Government's Stakeholder Reference Group to develop the proposed national framework. NATSILS report that while this process had been productive (with a draft national framework settled in 2013), some uncertainties remained:

Our understanding prior to [the 2013] federal election was that all relevant governments had endorsed the national framework aside from the Queensland Government. Post-election, it remains unclear what the new Commonwealth Government's position in relation to this project will be. (NATSILS, sub. 78, p. 19)

Aside from these challenges, NAATI indicated that it remained hampered by funding constraints in providing the same level of interpreting and translating service to Indigenous Australians as it does to other non-English speaking Australians (National Accreditation Authority for Translators and Interpreters 2013).

DRAFT RECOMMENDATION 22.3

While recognising there are significant challenges to addressing unmet need for Indigenous language interpreters, the Commonwealth and state and territory governments should agree and implement the proposed national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of the National Partnership Agreement on Remote Service Delivery.

INFORMATION REQUEST 22.4

The Commission seeks information on the level of funding required to expand interpreter services to meet some or all of the gap in Indigenous interpreter services.

Increasing culturally tailored alternative dispute resolution

Increasing culturally tailored ADR (including FDR) services is likely to enhance Aboriginal and Torres Strait Islander people's acceptance of, and compliance with, dispute resolution processes and outcomes. NATSILS (2010) stated that:

... evaluations have shown that the presence of Aboriginal and Torres Strait Islander mediators and staff has led to usage by Aboriginal and Torres Strait Islander peoples of services which they had previously avoided. (p. 10)

However, dispute management processes vary between cultures, including within different Indigenous cultures and communities. As the Federal Court of Australia's (FCA 2009) *Solid work you mob are doing* report observed:

There is no single, immutable Indigenous culture, nor are there pre-existing 'traditional' dispute resolution processes which can be used as a formula to manage all conflicts involving Indigenous peoples. ... effective dispute management practice is marked by an ability of practitioners to tailor and design processes, in collaboration with the disputants, to match the unique characteristics of each situation. (p. 99)

This report emphasised that culture regarding land and kin can differ markedly between and among Indigenous communities across Australia. For example, in some cases:

The prioritisation of relationships in Indigenous dispute management processes contrasts to many non-Indigenous processes, where the emphasis is often on the dispute itself and resolution outcomes. (p. 100)

To enable effective dispute management among diverse Indigenous communities the FCA (2009) developed a set of critical factors, that:

... highlight the importance of parties' ownership of processes, of careful preparation, and of working with the parties to design processes which can meet their procedural, substantive and emotional needs. Critical factors also relate to the implementation and sustainability of agreements, and the attributes and skills of effective practitioners in the Indigenous context. (p. xvi)

Several groups have called for Indigenous-specific ADR services. The Indigenous Facilitation and Mediation Project (Bauman 2006) recommended a nationally supported and accredited network of Indigenous mediators, facilitators and negotiators to support prompt ADR at the local level. The *Solid work you mob are doing* report concluded there was:

... need for a national Indigenous dispute management service, networked with regional panels and infrastructure, to provide consistent and specialised services to Indigenous peoples in a wide range of contexts. Such a service could ... [include] mechanisms to raise awareness of Indigenous dispute management services, ... identify and network practitioners with expertise in the Indigenous context and support their

professional recognition and development, provide appropriate training and accreditation procedures, and deliver effective and accessible services offering processes that are physically and culturally safe and ‘owned’ by the parties. (FCA 2009, p. 137)

Building on this work, the National Alternative Dispute Resolution Advisory Council (NADRAC 2009) recommended that the Australian Government establish and fund a National Indigenous Dispute Management Service to work in collaboration with state and territory governments to develop a nationally coordinated approach to Indigenous dispute resolution and conflict management.

Finally, NATSILS (2010, sub. 78) called for a culturally competent ADR service for Aboriginal and Torres Strait Islander people, with a national governing body and regional services overseen by regional advisory boards. It also suggested that the proposed service include FDR and that these services be given the same recognition as Family Relationship Centre’s by the Family Court of Australia. In this context, the AGD suggested that it is important to maintain nationally consistent standards in the delivery of FDR services:

... there is value in maintaining nationally consistent standards for the delivery of FDR, particularly as practitioners deal with complex family law matters involving vulnerable people, including where there may be family violence and child abuse. (sub. 137, p. 27)

Mainstream providers can also provide culturally appropriate ADR. During consultations the Commission heard that the NT’s Community Justice Centre (CJC) had successfully incorporated a range of relevant Aboriginal cultural norms in developing a culturally effective mediation strategy (see also CJC 2013). For example, it ensures that the correct kinship and blood lines are present at community meetings (as any meeting without one party is not regarded as a quorate meeting and any agreement reached at such a meeting is non-binding).

The NT Department of Attorney-General and Justice (2013) also reported that:

The [CJC] trained mediators located in Yuendumu, Lajamanu, Willowra and Alice Springs — in collaboration with NT Police, Courts, Central Desert Shire, Correctional services and FaCHSIA — played a leading role in successfully resolving a long-standing intra-family conflict in Yuendumu that had led to riots and a high number of incarcerations over two years. As a result of the continued peacemaking efforts, the community will return to holding its first sports weekend since 2011. (p. 58)

The Commission sees merit in a mixed approach for developing culturally tailored ADR services. Indigenous-specific ADR services could service areas of high unmet need while mainstream ADR services would be encouraged to facilitate greater access to, and use of, their services by Indigenous Australians through offering

culturally tailored ADR. Any approach should also include measures to raise awareness of these services, and professional support for practitioners.

The Commission recommended in chapter 8 that all government agencies — particularly those that deal regularly with disputes and do not already have dispute resolution management plans — should accelerate the development of such plans. These agencies should also consider the cultural appropriateness of their processes when engaging with Aboriginal and Torres Strait Islander clients and, where cost-effective to do so, modify their plans accordingly.

DRAFT RECOMMENDATION 22.4

The Commonwealth Government should:

- ***undertake a cost-benefit analysis to inform the development of culturally tailored alternative dispute resolution (including family dispute resolution) services for Aboriginal and Torres Strait Islander people, particularly in high need areas***
- ***subject to the relative size of the net benefit of such a service, fully fund these services***
- ***encourage government and non-government providers of mainstream alternative dispute resolution services to adapt their services so that they are culturally appropriate for Aboriginal and Torres Strait Islander people (where cost-effective to do so).***

INFORMATION REQUEST 22.5

The Commission seeks information on the cost of a culturally appropriate Indigenous-specific alternative dispute resolution (including family dispute resolution) service(s), particularly in 'high need' areas. Views on the appropriate engagement model and governance arrangements are also sought.

Earlier and more pro-active government intervention?

Aboriginal and Torres Strait Islander peoples often have disputes with government agencies, particularly in relation to child removal and protection, housing and tenancy, and social security payments. This raises the question of whether government agencies could intervene earlier and more pro-actively with at risk Indigenous clients in these areas.

Child protection and removal

In 2012, Aboriginal and Torres Strait Islander children were around ten times more likely than non-Indigenous children to be in out-of-home care (CFCA 2013). In most cases, children in out-of-home care will be subject to a care and protection order. A projection for South Australia indicates that around 80 per cent of young Aboriginal people will have been the subject of a notification to a child protection service by the time they are 16 (Arney, Chong and McGuinness 2013).

The Aboriginal Child Placement Principle (ACPP) aims to ensure the safety and welfare of Indigenous children and, where possible, gives priority to maintaining cultural ties by placing Indigenous children with family or other Indigenous people (SCRGSP 2011). However, as the safety of the child is paramount when applying this principle, placement with a non-Indigenous carer occurs on occasion. The incidence of such placements varies across jurisdictions (CFCA 2013).

Inadequate provision of culturally suited services in relation to the protection and removal of children has profound consequences for the wellbeing of Indigenous children, families and communities (Carmody 2013; Cummins, Scott and Scales 2012; HREOC 1997; Libesman 2011; Mulligan 2008).

The NT Government's (2010) Report of the Board of Inquiry into the Child Protection System in the NT acknowledged the current lack of trust in, and acceptance of, child protection systems stemmed from their people's previous experiences with child removal policies:

... when looking at risk factors impacting on Aboriginal children in child welfare the impacts of intergenerational experiences of dispossession, cultural erosion and policies of child removal must be considered. These issues not only impact on families, but also on the ability of families to seek or accept help from a system perceived to have caused or contributed to problems in the first place. (p. 116)

While Aboriginal families and communities are increasingly involved in general child protection systems (see, for example, Victorian DHS 2012), participants in this inquiry conveyed dissatisfaction with the handling of child removal in Indigenous communities by various governments. They also highlighted the substantial, adverse impacts on Aboriginal and Torres Strait Islander individuals, families and communities (NATSILS, sub. 78; ILNP and VALS, sub. 125; ALRM, sub. 126).

Culturally competent and appropriately trained mediators and family group conferencing facilitators can help reach agreement in these highly sensitive matters. For example, the Victorian Department of Human Services observed that a pilot program of Aboriginal Family Decision Making (AFDM) — a program which

incorporates culturally competent and trained mediators — had been very positive and highly regarded by Child Protection and Aboriginal family members (Victorian DHS 2012).

That said, as Arney et al. (2012) observed in their evaluation of another family group conferencing pilot:

To date, most of the research on family group conferencing has focused on the process of the conferences rather than on long term outcomes. ... What is less clear is how family group conferencing relates to longer term outcomes for children and young people and of the optimal models of conferencing for the families of Aboriginal children and young people. (p. 8)

There is scope for family group conferencing-style programs to reduce the need for the courts to resolve substantiated child protection matters, but the programs must ensure that safety of children and young people is not unduly compromised.

Housing and tenancy

Access to adequate housing is a key foundation of individual wellbeing. However, a sizeable proportion of Indigenous people identified housing and tenancy as an area where problems can arise due to unmet legal needs (Cairns Institute, sub. 105). For example, among participants interviewed in Victoria as part of the ILNP:

Most tenancy issues related to public or community-based housing. ... losing public housing tenancies, including by way of eviction for a range of reasons, may be particularly problematic for Indigenous tenants, given problems with accessing other types of tenancies and housing.

A major problem of secondary homelessness was also identified whereby other family and community members may be obligated to take in Indigenous homeless people. This can have negative impacts particularly on the elderly and vulnerable, and can lead to further problems such as eviction of the principal tenant and debt (where utility bills, for instance, are high due to overcrowding). (ILNP and VALS, sub. 125, p. 11)

The NT Legal Aid Commission — drawing on consultations with remote communities that are not located on or close to the court circuit — has also predicted continued need for legal assistance in housing and tenancy matters (sub. 128, attachment 1).

Indeed, most Aboriginal and Torres Strait Islander people do not tend to seek legal advice when housing problems occur. The ILNP and VALS (sub. 125) suggested Indigenous people delayed seeking assistance because of:

... shame, lack of knowledge of rights, and fear of repercussions from housing authorities or other agencies (such as child protection). (p. 12)

This is consistent with Indigenous people's low levels of appearance at tribunals, when tenancy disputes do go before them, which means that tribunals may make decisions without evidence from the tenant (ILNP and VALS, sub. 125). This suggests that there may be some benefit to more pro-active government measures to appraise Aboriginal and Torres Strait Islander Australians of their rights as tenants and create culturally-tailored avenues for settling disputes around tenancy.

Social security

Commonwealth agencies providing services and payments to individuals have programs that seek to ensure customer compliance with their obligations in order to minimise the risk of debts (see, for example, DHS 2013).

However, as QIFVLS (sub. 46) noted, arrangements which work well for most clients work less well in the circumstances facing many Indigenous people, especially those in remote areas:

It is the practice of some Government departments and agencies ... to require individuals to complete standard forms to authorise legal representatives to speak on their behalf. This can be difficult when clients are located in remote areas. Providing written authorisation forms should not be necessary; a simple notice in writing or a verbal instruction from the client, informing the department or agency of the lawyer-client relationship and the lawyer's authority to act, should suffice. Verbal authorisation will reduce difficulties associated with obtaining written correspondence from clients in remote communities, where scanning and internet facilities may not be available and mail may be interrupted by the wet season. (p. 20)

As with tenancy, there is also scope to improve Aboriginal and Torres Strait Islander people's awareness of their rights and entitlements around social security. The low rate of social security and related disputes by Indigenous Australians was also observed by AAC (2014). This may reflect 'the lack of awareness amongst Aboriginal and Torres Strait Islander communities in regards to civil law rights' (NATSILS, sub. 78, p. 4).

More effort could be given to evaluating the costs and benefits of initiatives government agencies can take, including engaging earlier with Indigenous clients, in order to avert disputes before they occur or escalate. Such initiatives would need to be in addition to the range of culturally tailored ADR mechanisms proposed earlier in this chapter.

INFORMATION REQUEST 22.6

The Commission seeks information on the cost-effectiveness of earlier and more pro-active engagements by government agencies with Aboriginal and Torres Strait Islander clients who are at risk of disputes with government.

Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

23 Pro bono services

Key points

- 'Pro bono' refers to services provided by lawyers, for free or at a reduced cost, to those in need.
- Data available on the provision of pro bono services are limited, and what is available is imperfect.
 - 'Headline' figures indicate that lawyers from large firms provided over 340 000 hours of pro bono in 2011-12, at an average of nearly 30 hours per lawyer. Extrapolating these figures to the wider profession would be an overestimate.
 - In terms of the number of full-time equivalent lawyers, pro bono provision from larger firms accounts for around three per cent of the capacity of the legal assistance sector, and 0.5 per cent of the entire legal market.
- Pro bono does not always (directly) assist individuals — over 60 per cent of pro bono services are undertaken for not-for-profit organisations. In line with this, pro bono is most commonly provided in areas of law relevant to these organisations.
- There are a range of delivery models for pro bono, from firms being approached directly, to case referral schemes and partnerships with community legal centres.
- Not all lawyers are equally effective in providing pro bono services that alleviate disadvantage, and some of those that may be better suited to pro bono face barriers to their participation.
- The capacity and culture of firms, the difficulty of matching expertise with needs, and conflicts of interest all limit the effectiveness of pro bono in improving access to justice.
- Not all of these limitations are insurmountable, and improvements can be made:
 - Free practising certificates for retired and other non-practising lawyers are not yet available in all jurisdictions.
 - To remove uncertainty for pro bono providers, the Australian and State and Territory governments should adopt the Victorian Government's use of a pro bono 'coordinator' (who coordinates requests from firms for clearance on conflicts of interest matters).
 - In principle, such 'pro bono coordinators' could also be used in certain industries. However, the relationship between industry associations and member companies complicates their specific role.
 - Increased pro bono involvement in legal education can benefit both students and recipients of pro bono.
- Evaluating past pro bono projects is critical to understanding the best ways to provide services to those in need.

From ‘pro bono publico’ (‘for the public good’), the concept of offering professional services free of charge (or at reduced prices) is well known in the legal profession. There are a range of definitions relating to the provision of ‘free’ work undertaken by lawyers. However, the term ‘pro bono’ is increasingly being used to describe work provided in response to disadvantage. This is also the most important aspect in terms of promoting access to justice, as it can assist Australians who would otherwise not have their needs met. As Hillard observed:

We act for disadvantaged people who cannot obtain legal aid and for the non-Governmental organisations which support disadvantaged people. There are other types of legal work which we might perform for free, but we do not call this our pro bono work. For example, we might choose to act for free for an arts organisation which is supported by one of our major commercial clients. It is work which we might decide to do without a fee, as part of strengthening our business relationship with a commercial client. However it is not about responding to disadvantage and therefore does not count as pro bono work. (2012)

The provision of pro bono is also cause for some tension between the legal profession and government. While both sides intend to assist disadvantaged Australians, government seeks to do so (partially) by ‘crowding in’ pro bono by offering incentives for its provision. The profession, on the other hand, is wary of ‘crowding out’ government legal assistance with pro bono services that are both limited, and may not be as suited to addressing disadvantage.

This chapter begins by examining the nature of pro bono services and models for their delivery (sections 23.1 and 23.2), as well as the overall amount of pro bono delivered (23.3). The effectiveness of pro bono in providing assistance to those in need is explored in section 23.4. Section 23.5 considers the appropriate role for pro bono and, in this context, section 23.6 goes on to suggest possible improvements to pro bono service delivery.

23.1 Who are the major providers and beneficiaries of pro bono services?

Large firms provide the bulk of pro bono lawyers

Pro bono services are provided by lawyers across the spectrum of the legal profession. The characteristics of providers impact on their capacity to, and the way that they, deliver pro bono services:

- *Large firms* are often considered to have a leadership role in the delivery of pro bono across the legal profession. Available information suggests that large firms

provide the majority of pro bono services — 95 per cent of all lawyers who are signatories to the National Pro Bono Aspirational Target (discussed below) are employed by a firm with 50 or more lawyers (NPBRC 2013f). Roughly half of these large firms also employ a pro bono coordinator who facilitates, supports and oversees the pro bono work of the firm (NPBRC 2013a). Larger firms are also the primary target for incentives to encourage pro bono services that are built into government tender arrangements (section 23.5).

- *Small firms* account for roughly 5 per cent of lawyers that are signatories to the Aspirational Target. The number of individual solicitors and barristers who are signatories to the target is low relative to their share of the legal services market (chapter 7), and may reflect that such practitioners are not the core audience for an instrument such as the Target (section 23.5). Pro bono work undertaken by small firms tends to be ad hoc and typically where disadvantaged clients approach the firm directly. The contribution by small firms and sole practitioners partly reflects their limited capacity to take on pro bono work, and the associated risks, such as increased insurance premiums after complaints from pro bono clients (NPBRC 2013d). Conflicts of interest are also a significant issue for small firms, who not only give up their time to volunteer, but could also lose paid work, effectively ‘burning the candle at both ends’ (NPBRC 2013d). Despite this, small firm lawyers are valuable pro bono providers, as their (paid) legal experience is more likely to be relevant to pro bono cases. And while their work is not part of a coordinated program, it nonetheless can have a substantial impact, particularly in smaller, more disadvantaged communities.
- *Barristers*, as sole practitioners, face many of the issues that small firms do. Nonetheless, they are active in pro bono provision, including through duty barrister and referral schemes (for examples of such schemes, see New South Wales Bar Association (sub. 34) and the Victorian Bar (sub. 127)).
- *In-house (corporate and government) lawyers* contribute a relatively small amount of pro bono. They are usually in smaller teams with less support and flexibility to take on pro bono work than those in law firms. They also have accentuated conflict of interest and organisational reputation issues that may preclude them from acting in certain areas of law. Some may not hold practising certificates or professional indemnity insurance, potentially limiting their provision of pro bono to working under the auspices of a Community Legal Centre (CLC).

Organisations rather than individuals are the main beneficiaries

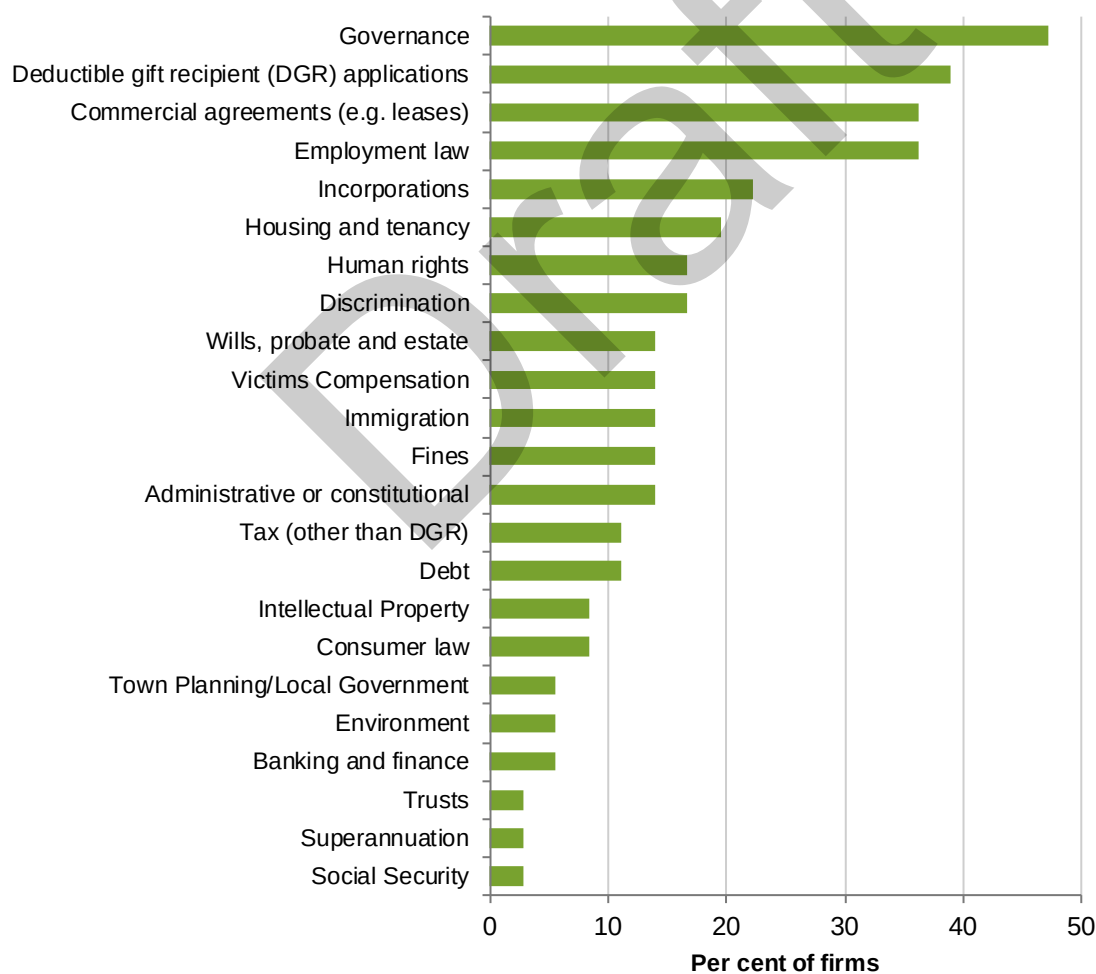
While pro bono is often thought of as improving access to justice to overcome disadvantage, it is not always provided directly to *people* in need. Indeed, the

National Pro Bono Resource Centre (NPBRC) survey of large law firms indicated that the majority (63 per cent) of pro bono work is undertaken for not-for-profit (NFP) organisations (who operate in areas such as health, social services, sports, arts and culture, the environment and animal welfare), rather than individuals. This may be a slight overestimate of the industry average, as the survey results may be skewed by seven of the smaller firms that reported over 90 per cent of their pro bono work was undertaken for organisations (NPBRC 2013a).

Areas of law affecting the operations of NFPs dominated the areas of pro bono practice in which firms provide the most assistance, such as matters involving deductible gift recipient (DGR) applications and incorporations (figure 23.1).

Figure 23.1 Top 5 areas of pro bono practice

2012, per cent of firms that identified these areas in the top 5 most accepted



Data source: NPBRC (2013a).

While pro bono services of this nature are valuable, particularly to the NFPs in receipt of services, they tend not to have direct benefits in terms of access to justice (as much of the work is of a transactional nature). For the purposes of this inquiry, the Commission's focus is on how pro bono services impact on access to civil justice and the resolution of civil disputes.

Of those areas that principally affect individuals, housing and tenancy, human rights and discrimination matters rank highly, while family law, domestic violence and social security matters feature far less (reasons for this are discussed in section 23.4).

23.2 How are pro bono services delivered?

Pro bono has evolved from being a patchwork of informal options to an increasingly organised and coordinated set of services. There are a range of pathways to deliver pro bono; two of note are through case referral services such as clearing houses, and partnerships between law firms and CLCs.

Services are delivered through referral schemes ...

Case referral is the traditional model for the provision (and coordination) of pro bono services. Parties seeking legal assistance approach an organisation who then refers them to a lawyer that is prepared to provide their service on a pro bono basis. The service providers choose the level of resources they are prepared to contribute, and even nominate particular areas of law that match the skills and interests of the staff they have available. Using a 'pool' of providers broadens the range of matters that pro bono providers can assist with and spreads the risk of demands for service provision across a wide range of practitioners.

In addition to providing a point of contact for the disadvantaged, schemes apply a filter to requests for assistance, and direct them to appropriate service providers:

[They] provide an important 'triaging' service for the many requests made for pro bono legal assistance. They only seek to place requests for assistance with their members, or the firms and barristers that have agreed to consider referrals, once they have made the assessment that the case meets pro bono guidelines. (NPBRC 2013d, p. 53)

This oversight and 'triage' role can also lead to the identification of trends at a higher level than individual law firms would be capable of (NPBRC 2013d).

New South Wales founded the first scheme in 1992 and other jurisdictions have gradually followed. Today, there is a referral scheme in every jurisdiction, each providing a range of services (table 23.1).

Table 23.1 Pro bono clearing houses and referral schemes

<i>Jurisdiction</i>	
NSW	Public Interest Law Clearing House (NSW) Inc, now part of Justice Connect Law Society of NSW Pro Bono Scheme NSW Bar Association Legal Assistance Referral Scheme Cancer Council Legal Referral Service
Vic	Public Interest Law Clearing House (VIC) Inc, now part of Justice Connect.
Qld	Queensland Public Interest Law Clearing House Incorporated (QPILCH) (manages both the Queensland Bar and Queensland Law Society schemes, along with its Public Interest Scheme)
WA	Law Access Pro Bono Referral Scheme (based at the Law Society of WA) WA Bar Association
SA	JusticeNet SA
Tas	Law Society of Tasmania Pro Bono Clearing House
NT	The NT Pro Bono Clearing House (based at the Law Society of the NT)
ACT	The ACT Pro Bono Clearing House (based at the Law Society of the ACT) The Centre for Asia-Pacific Pro Bono (based at the Law Council of Australia)

Source: NPBRC (2013d).

... and through partnerships, typically with community legal centres.

An alternative to referring out work is for a specific firm or firms to form an ongoing partnership with a CLC. Partnerships can involve direct referrals and co-counselling (where a firm and a CLC work together, such as on a particular piece of public interest litigation).

Another common approach involves firms partnering with CLCs (providing staff and resources) to deliver pro bono services through legal clinics. Typically, clinics target client groups or areas of unmet need.

There are also a host of other arrangements

Together, case referral and CLC partnerships are the source of around half of all reported pro bono work — referral schemes account for just over 30 per cent and CLCs for a little under 20 per cent (NPBRC 2013a). The remaining services are sourced through a combination of direct requests from existing pro bono clients, referrals from employees of the firm and ‘cold callers’ (potential new pro bono clients ringing the firms directly).

23.3 How much pro bono is provided in Australia?

Estimates of the amount of pro bono undertaken vary depending on how pro bono is defined

There are a range of measures of pro bono services — they employ different definitions and have been undertaken at different times.

The broadest measure is based on the last legal services survey conducted by the Australian Bureau of Statistics in 2008 (ABS 2009), which found that lawyers undertook 955 400 hours of pro bono legal work in the 2007-08 financial year, the equivalent of 531 full time lawyers, or just over 27 hours per ‘practising solicitor and barrister’ per annum.⁸¹ The ABS valued this work at \$238.2 million in 2007-08.

However, this number overstates the extent of true pro bono services. In addition to record keeping errors, the definition of ‘pro bono’ used by the ABS was broad, referring only to free or discounted services (other than paid legal aid work), and not limited to services provided to the disadvantaged (NPBRC, sub. 73). In addition to capturing volunteer work for the disadvantaged, this broader definition also captured discounted work provided to family and friends, as well as organisations such as the Australian Ballet.

More recent data on large firms (those with 50 or more lawyers) is available from surveys conducted by the NPBRC. The most recent survey of large firms concluded that:

... In the 2011-12 financial year, 11,460 FTE lawyers employed by firms with more than 50 lawyers undertook more than 343,058 hours of pro bono legal work, or an average of 29.9 hours per lawyer per annum. (NPBRC 2013d, p. 56)

... [these] survey results only cover the law firms with 50 or more FTE lawyers that responded to the survey. Lawyers in the 36 respondent firms in 2012 represent just under a fifth of lawyers in Australia (19% or 11,460 FTE lawyers). (sub. 73, p. 9)

The survey results shows a large variation in average pro bono hours between individual firms (ranging from 1.8 to 64.2 per lawyer in the year in question). The largest firms (those with between 450 and 1000 lawyers) reported the highest levels of pro bono services, providing on average around 38 hours per lawyer per year.

⁸¹ This represents a narrow definition of the profession and does not include patent attorneys, law graduates/clerks, paralegals or other staff of firms (ABS 2009). Inclusion of any or all of these sub-categories would result in a lower figure for average hours per lawyer per annum.

The National Pro Bono Aspirational Target is a voluntary target of 35 hours per lawyer per year that firms and individual practitioners can sign up to. It has been adopted as one means of meeting pro bono requirements for firms wishing to tender for Commonwealth Government legal work. Reporting on the performance of signatories to the National Pro Bono Aspirational Target provides a further source of pro bono data. The reporting showed that the Target had 104 signatories (79 firms and 25 individuals) and covered 8763 full-time equivalent (FTE) lawyers (approximately 15 per cent of the profession) who collectively undertook over 294 000 hours of pro bono work in 2012-13 (NPBRC, sub. 7).

Stricter definitions, along with more realistic assumptions, suggest that pro bono efforts are relatively modest

The above figures provide an incomplete and potentially biased picture, since those firms that are most active in providing pro bono services are also more likely to respond to the survey (and be signatories to the Aspirational Target). And, of the different types of service provider (discussed above), lawyers within large firms appear to be more likely (per lawyer) to provide pro bono compared to in-house lawyers or sole practitioners. Extrapolating survey results based (either solely or largely) on pro bono work undertaken by large firms to the wider legal market could result in a significant overestimate.

Even based on the survey of large firms, it appears that pro bono only adds a small percentage to other sources of free legal services for the disadvantaged:

... it appears that [large firms] add around 7% to 8% to the capacity of free legal services through their total pro bono legal work. Given that less than 40% of this reported work was done for individuals (the remainder being for not-for-profit organisations), their pro bono work for individuals makes up less than 3% of the capacity of legal assistance services. The percentage from that work actually performed for marginalised and disadvantaged clients is expected to be even lower. (Justice Connect, sub. 104, p. 6)

Expressed as a full-time equivalent number of lawyers, the work of lawyers surveyed at large firms equates to 191 lawyers, plus a further 134 lawyers volunteering in CLCs, or 325 lawyers in total. But this represents just over 0.5 per cent of the total legal market (that is, the total number of practising lawyers). As Hillard et al. (2012) observed:

More than 300 extra free lawyers is impressive, but to put that in context, there are about 60,000 lawyers in Australia. About 2000 lawyers work in community legal centres, legal aid commissions and indigenous legal services (some part-time).

In addition, private lawyers conduct more than two million hours of legal-aid-funded work, equivalent to an extra 1190 full-time legal aid lawyers a year.

One pro bono lawyer put the average number of hours per year into the broader context of other activities a lawyer may undertake in the course of a year:

Even where lawyers average 50 hours of pro bono work each per year, this translates to less than an hour a week worth of pro bono work. It is most likely that lawyers will spend more time drinking coffee at work each year than they will performing pro bono work. (Hillard 2012)

23.4 What impacts on lawyers' willingness and capacity to provide services?

The benefits afforded to individual lawyers and law firms motivate pro bono service provision

Pro bono service provision has been, and to a large extent still is, motivated by a lawyer's sense of professional responsibility. But, increasingly both individual practitioners and firms have come to appreciate that the provision of pro bono services affords a range of benefits. Active involvement in pro bono can provide training and development opportunities for staff, improve a firm's public image or its relationship with a large client, and bolster morale (box 23.1).

Box 23.1 Getting from giving: benefits of pro bono to providers

While social and professional responsibility are often cited as the main reasons for undertaking pro bono, there are other reasons for lawyers to offer pro bono, including benefits to themselves:

Many see it as a professional development opportunity, providing a chance to develop their skills by doing interesting work, as well as finding it satisfying to be able to work autonomously and take responsibility for a matter from beginning to end. Some pro bono work provides lawyers with much more direct client contact than their usual work and a feeling that they are making a real difference to a person's life. (NPBRC 2013d, p. 62)

In addition to benefits to the practitioner, pro bono can provide a range of other benefits to the firms providing it. An experienced practitioner from a large law firm summarised these as:

1. Morale. Most lawyers began their legal studies because they understand the need for a legal system to work properly. ... Embracing pro bono work as part of a law firm's ordinary practice allows lawyers to return to the very heart of what made them become lawyers in the first place. ...

2. Recruitment and retention. As a result of improved morale, it is easier for law firms to attract good lawyers to their firm and to have those lawyers stay at their firm. Our pro bono practice features heavily in the feedback which we receive from applicants for employment at Clayton Utz. In our most recent survey of the attitude of our lawyers to working at the firm, 93% of our people said that they felt proud of our pro bono practice. ...

(Continued next page)

Box 23.1 (continued)

3. Training and experience. Pro bono work often requires lawyers to think outside of their regular comfort zone. It improves their professional skills and makes them better lawyers.

4. Pro bono can help bind people more closely to the firm. Our pro bono practice is probably the only experience ... which is shared by all of our lawyers across six different offices in Australia and four diverse legal departments. In this way, it can operate as "firm glue", to make people feel more closely as part of a single team, even though their day-to-day legal practice experiences might be quite different.

5. Pro bono work can help to build a firm's reputation.

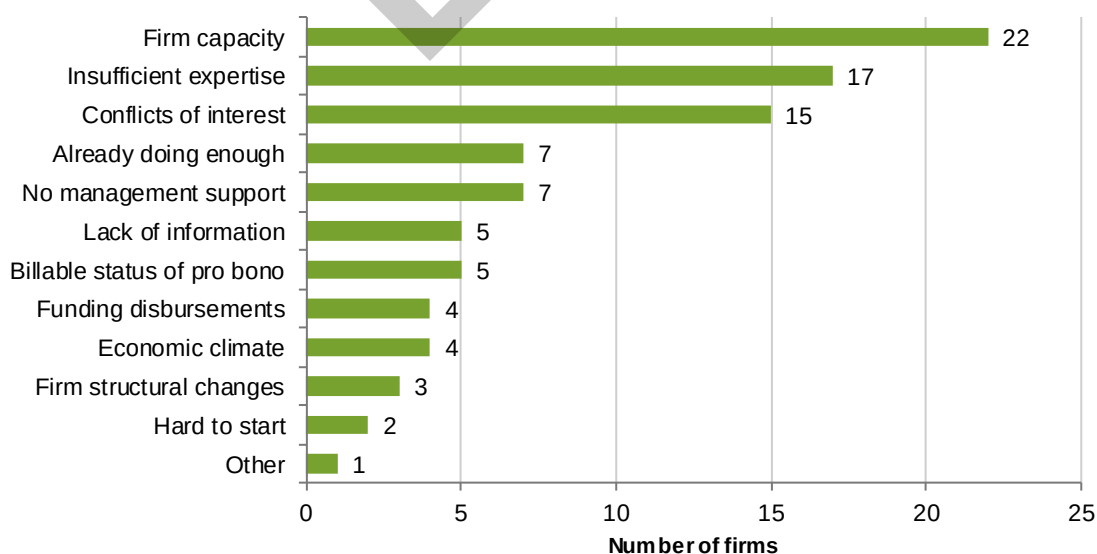
6. Pro bono practice [provides] a different way for us to relate to our commercial clients. There are a number of examples now of pro bono partnerships between law firms and the in-house legal teams at some of their major commercial clients. I think that it is a very useful way for us to entrench our relationship with major commercial clients by having our lawyers work with their lawyers on shared pro bono projects which benefit the wider community. (Hillard 2012)

But both law firms and individual lawyers face a number of barriers

The need for pro bono to 'fit' within firms' commercial work (both in terms of capacity and character of work) brings with it many inherent limitations on the effectiveness of pro bono work. Several of these were identified as part of the NPBRC's survey of 36 larger law firms (figure 23.2).

Figure 23.2 Constraints on further provision of pro bono

All constraints identified by firms with 50 or more lawyers, 2012



Data source: NPBRC (2013a).

The overall capacity of the firm to take on additional (unpaid) work features as the main constraint. But issues of expertise in the relevant areas of law, concerns about conflicts of interest and lack of management support are also significant barriers that impact on the capacity of lawyers to offer pro bono services.

Lawyers and firms are constrained by a lack of capacity and expertise

It is natural for commercial firms to have a limited capacity to provide free services in addition to their paid work. As noted above, this can be especially true of smaller firms, and by extension, to those jurisdictions where smaller firms dominate the local profession:

For example ... it is difficult to obtain a secondees in Queensland as the firms are smaller and have less capacity than the bigger offices in Sydney and Melbourne. JusticeNet in South Australia has similarly found it challenging to develop and staff services such as clinics ... (NPBRC 2013d, p. 37)

Further, the 'law' is a broad term covering many different practise areas, each with different demands and clients. As such, even where staff are available, 'a lawyer' is not automatically suited to work with every sort of client in every area of law. This can be especially true of providing pro bono services, particularly for some corporate lawyers who may be unused to dealing with disadvantaged clients:

Many clients may present with complex needs, for example mental illness, intellectual disability or a history of victimisation and abuse, which may affect their ability to understand legal advice or to give instructions. Lawyers may need specific communication and client management skills to be able to build a relationship of trust with their client in order to be able to assist them effectively. (NPBRC, sub. 73, pp. 31)

Often it is only after you have dealt with a client who is distressed and threatening to harm themselves that you realise you are entirely unprepared for that side of it. (A pro bono clearing house manager) (NPBRC 2013d, p. 74)

The (in)ability of some lawyers to communicate in lay language can also be a hindrance to the effectiveness of their work for pro bono clients:

Many CLCs have voiced concerns about corporate lawyers not meeting the needs of the clients ... explaining why something can/cannot be done, using plain English ... giving non-legal alternatives, referring to counselling services, spending time doing non-legal work eg, filling out forms, listening to the client's story and concerns ... (NPBRC 2013d, p. 73)

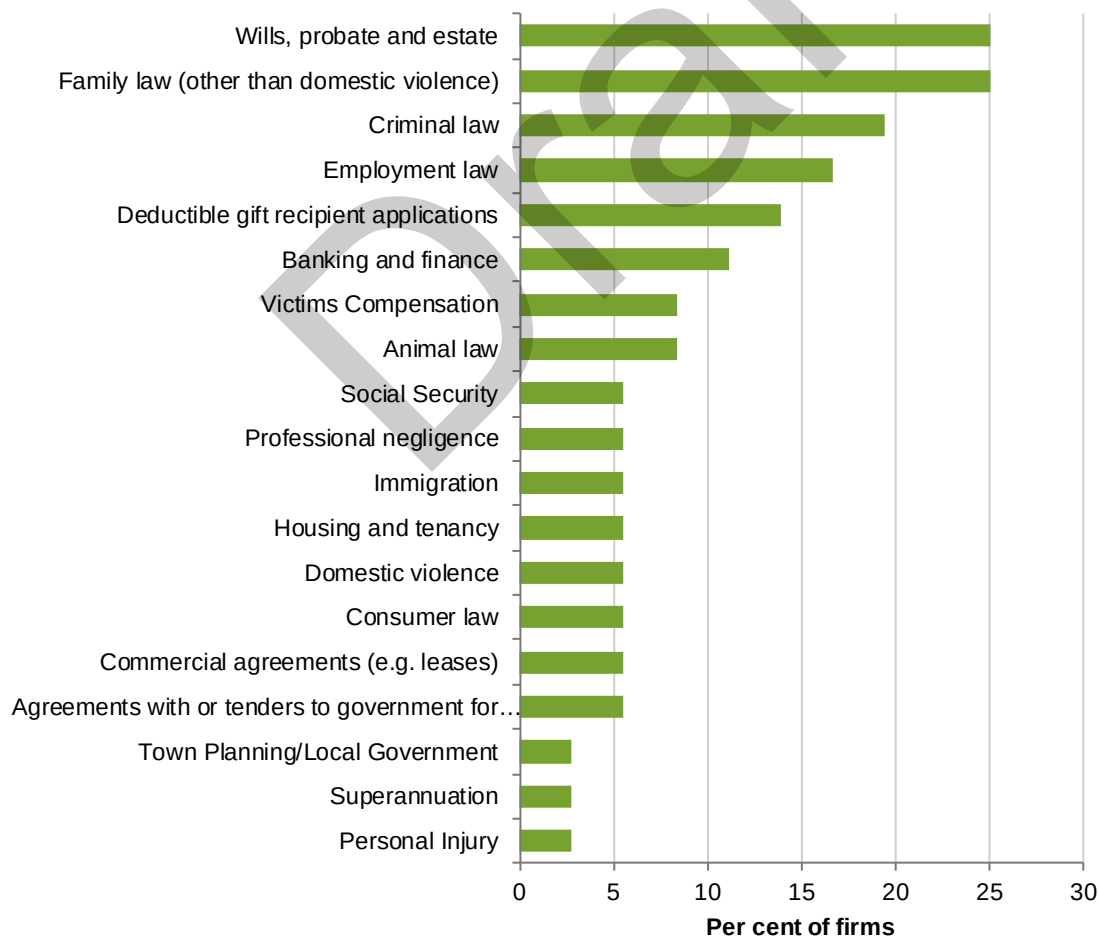
Beyond simply limiting the effectiveness of pro bono lawyers in client interactions (and potentially the outcome of matters), such mismatches between expertise and need can also reduce the trust between clients, referring or partner bodies and pro bono providers, affecting provider relationships.

Some areas of law do not lend themselves to pro bono provision

There are some areas of law where firms will reject requests for pro bono assistance simply due to the nature of the matter. This might be due to a lack of expertise within the firm in the area of law or the types of conflict of interest involved.

When asked as part of the NPBRC's survey to nominate the top five areas in their practice where requests were most turned down, larger firms indicated a range of areas (figure 23.3). Some of the rejected areas (employment law, deductible gift recipient applications, and to a lesser extent matters dealing with wills and estates) were also prominent in areas where firms provided most assistance (NPBRC 2013a). In these instances, the rate of rejection may simply reflect the volume of applications.

Figure 23.3 Top five rejected pro bono practice areas
2012, per cent of firms that identified these areas in the top 5 most rejected



Data source: NPBRC (2013a).

However, other areas (such as family law, criminal law and immigration) also feature in the rejected areas, but are not prominent areas of assistance, suggesting that these areas are more likely (per case) to be rejected than others. Family law (box 23.2) provides an example where the nature of the matter itself limits the provision of pro bono services.

Further, some pro bono work may not be favoured by providers due to the image it can create and its potential to damage their reputation. This can be a particular issue for in-house corporate lawyers:

There are some areas of pro bono work which ‘corporates’ may be less likely to actively pursue, due to perceived reputation issues, for example, work involving prisoners or refugees. (NPBRC 2013d, p. 87)

Box 23.2 Constraints to providing pro bono in family law matters

The National Pro Bono Resource Centre (2013c) identified a series of limitations that led to a low provision of pro bono assistance for family law.

First, family law is a highly specialised area, with its own legislation and body of case law. While targeted training can overcome a lack of expertise in some areas, pro bono providers argued that the complexity of family law made this impractical:

The Family Law Act is huge. Absolutely huge. And it has an equally large body of case law. And its own set of procedural rules. There’s no way that amount of information can be imparted in a few days of training. (Pro bono coordinator, large firm) (NPBRC 2013c, p. 11)

Second, the nature of family law *matters* makes finding discrete tasks (with predictable timelines) that are both separable from a larger matter, and have a meaningful impact on the client, difficult. Given the time constraints on pro bono providers, they will often prioritise their pro bono efforts to areas where the shortest intervention makes the most difference.

Third, the nature of family law *clients* is relationship-intensive, and may impact on the willingness of large firms and lawyers (who are typically more used to dealing with dispassionate commercial clients) to provide pro bono services:

Our lawyers aren’t used to dealing with highly emotional, sometimes irrational and traumatised clients. It can be very confronting and is a skill learned over time. You can’t just throw lawyers into those situations - they’d need to be supported in that regard as well. (Pro bono coordinator, mid-sized firm) (NPBRC 2013c, p. 11)

These factors, combined with a view from some firms that the ‘scope of a firm’s pro bono policy should not extend into areas that are considered to be government responsibility’ (NPBRC 2013c, p. 10) may weigh differently on different firms, but in their totality highlight some of the limitations of pro bono service provision.

Conflicts of interest restrict the cases that pro bono lawyers can take on

Local lawyers with expertise in the areas of law that affect disadvantaged clients would be ideal pro bono providers. Unfortunately, these lawyers are also more likely to have conflicts of interest issues. Indeed, part of what makes them valuable pro bono providers is the expertise they have gained from acting for the ‘other side’ (for example, acting for local employers, insurance companies or government bodies). Potential conflicts can result in some firms effectively ruling out pro bono service provision in entire areas of law, for example a pro bono coordinator at a mid-sized firm commented that:

We told PILCH not to send any matters involving major banks since they are likely to be clients. (NPBRC 2013d, p. 46)

The risk, or fear, of a conflict can be even greater in a smaller jurisdiction, or in smaller towns or communities, where the limited number of lawyers (and parties) may already have established clients in certain areas of law:

... Hobart Community Legal Service (HCLS) found it difficult to obtain pro bono assistance for their clients in certain areas of law. ... Industrial law is particularly difficult because there are only a couple of firms with the requisite level of expertise to enable them to provide mentoring/training assistance or advice/representation in complex cases, and they are usually acting for the few large employers in Tasmania so they always have a conflict (or fear having a future conflict). (NPBRC 2013d, p. 37)

Further, simply a fear or perception of a conflict of interest, and conservative behaviour in response to this, can have a real effect on the amount of pro bono provided. This problem is accentuated in areas of pro bono work that might involve ‘unsympathetic client groups or politically contentious subjects’ (NPBRC 2013d, p. 61).

Firm culture also impacts on the extent of pro bono provided

The culture within a firm, whether explicitly stated or implicit through observation of general attitudes, can impact on the willingness of lawyers to undertake pro bono services, and the perception of what impact that can have on their career. This can have a particular impact on staff through (a lack of) leadership from a firm’s partners:

Some secondees have been told by partners in firms that are not supportive of pro bono that doing a secondment will be a black mark in their career. We recently lost a secondee this way. (A pro bono clearing house manager)

Lawyers are more likely to put their hand up to do pro bono work if their supervising partner has been involved in pro bono work themselves. (Large law firm pro bono coordinator) (NPBRC 2013d, pp. 29, 63)

Another factor that can signal the importance of pro bono work compared to the firms' other work, is how the pro bono work is treated in terms of one of the law firms' key metrics — the billable hour. Some have commented on the impression this can give to the lawyers undertaking the work:

Pro bono hours do not count towards billable targets and are discounted by 25% in the timesheet system. It can be seen as one of the many non-billable demands on lawyers. We wouldn't do it unless we personally believed in it. (Mid-sized law firm pro bono coordinator) (NPBRC 2013d, p. 63)

Indeed this view appears to be validated by results from the NPBRC's survey of larger firms. These results (NPBRC 2013a) show that just over half of firms treat pro bono hours as billable, but this figure is down from almost two-thirds in 2010. Further, the proportion of firms that apply a lower value to pro bono for financial targets (and implicitly, a lower priority) has risen from 5 per cent in 2010 to 11 per cent in 2012. The proportion of firms that treat pro bono hours as non-billable, but recorded as a special category with lower value for financial targets, also increased from 18 to 20 per cent over the same period.

Others have also pointed to cultural issues that may hamper increased pro bono services from government lawyers, including an 'underdeveloped pro bono legal culture' in government organisations, and that government lawyers are 'less engaged with their professional bodies ... and therefore less immersed in the culture of pro bono as a professional obligation' (NPBRC 2013d, p. 92).

23.5 What role can pro bono play in improving access to justice?

Pro bono is not a panacea, nor is it costless

As noted above, though it constitutes a significant and valuable volunteer effort, pro bono provision in Australia remains a relatively minor component of overall legal assistance services. Further, limitations that are, to some extent, inherent in the nature of employing private parties in volunteer work (such as capacity, expertise, conflicts of interest and firm culture) also limit the extent and type of pro bono services that the legal profession can (and is willing to) provide.

One of the inherent tensions in a volunteer-dependent service is the mismatch between *clients'* legal needs and *lawyers'* volunteering desires. If this mismatch is not addressed, it can result in lopsided and 'patchwork' service provision that

reflects the attractiveness of certain areas of the work more than a systematic approach to addressing unmet legal need for disadvantaged people.

Given these limitations, no matter how well organised or resourced, pro bono service provision is unlikely to become the dominant means of assisting disadvantaged people with legal needs. Indeed, a consistent message the Commission heard during consultations was that pro bono was ‘no substitute’ for government funded legal aid, but rather a complement to it, as the Centre for Innovative Justice noted :

The limits of pro bono work, however, also need to be recognised. For example, just as governments should not assume that pro bono work should plug the gap in access to justice, nor should the profession assume that pro bono work justifies charging fees that are inherently unaffordable for ordinary fee paying clients. This is particularly the case when over 60% of pro bono services by large law firms are provided to organisations, not individuals; with many of these individuals nevertheless ineligible for assistance from the publicly funded sector. (2013, p. 32)

As such, it is unrealistic to rely on pro bono as a ‘silver bullet’ solution to the provision of systemic legal assistance. Even though pro bono is a volunteer-based service (and as such would not obviously appear as an ‘on budget’ cost to government), it is important to remember that pro bono service provision is not ‘free’.

Rather, the provision of pro bono services incurs a range of direct and indirect costs. The direct costs to government include the funding allocated to referral services (and some aspects of funding devoted to CLCs which focus on pro bono delivery). For example, in 2012-13, the Queensland Public Interest Law Clearing House (QPILCH) received nearly \$1 million dollars of funding from a range of sources, including Commonwealth and State governments, and recurrent and non-recurrent funding from the Queensland Legal Practitioner Interest on Trust Accounts Fund (QPILCH 2013). Similarly, the Public Interest Clearing House in Victoria (which has now merged into Justice Connect) received just under \$1 million in Commonwealth and State funding in 2012-13 (PILCH 2013a, 2013b).

In isolation, these may not appear to be large sums. But the important issue is whether these funds are devoted to their best possible use in improving access to justice for disadvantaged people. For example, could the funds better be devoted to CLCs or legal aid commissions directly delivering services, or are there genuine benefits from leveraging these funds into pro bono service provision? Such questions accentuate the need for careful evaluation of pro bono programs (section 23.6).

In addition to government funding, there are also the costs imposed on the providers of pro bono. Volunteer lawyers will, to varying degrees, forego paid work in order to deliver pro bono (but as noted above, receive benefits themselves). Referral centres and CLCs must also use money and resources (that could be devoted to alternative service delivery methods) in order to facilitate pro bono. As the Public Interest Advocacy Centre noted, the mismatch between the expertise of the volunteer lawyers and the areas of pro bono law (and skills needed to effectively interact with pro bono clients) means that the CLCs themselves must expend staffing resources to coordinate, supervise and assist the pro bono lawyers:

... all of the pro bono lawyers need training, and HPLS [Homeless Persons' Legal Service] staff supervise the information and advice given to every client who attends every HPLS clinic in a timely manner. During an average week, this involves the supervision of at least 20 solicitors providing advice to at least 35 clients face-to-face at an HPLS clinic, in addition to 200 ongoing casework files.

This example illustrates that pro bono does not equate to free. There are substantial costs associated with training and supervising lawyers to do pro bono work, and this coordination role needs to be properly funded so the benefits of pro bono work can be fully realised. (sub. 45, pp. 44–5)

But pro bono still has a role in improving access to justice

While it is important to acknowledge the limitations on the quantity and quality (in terms of the effectiveness of pro bono lawyers in undertaking pro bono tasks) of pro bono services, these limitations do not negate the value of pro bono itself.

In addition to the benefits to individual lawyers and firms (section 23.4), pro bono represents a resource that can be used to improve access to justice. To not make use of such a (willing) resource could unnecessarily result in some legal needs going unmet. Equally, a volunteer resource should not be taken for granted, nor used in a haphazard manner when improved approaches could make better use of the valuable time of providers and volunteers in order to further assist the disadvantaged. Therefore, the best use of this resource, and methods to alleviate any barriers to further provision, must be carefully considered.

23.6 How might pro bono service delivery be improved?

Many of the limitations to pro bono service provision discussed above can be overcome. There are several strategies that can be used by firms, providers and governments to alleviate the effects of some barriers to provision, and to ensure that pro bono efforts are directed towards their most effective uses.

Some of these strategies (including removing barriers such as conflicts of interest and utilising existing capacity within the profession) are relatively low cost and are discussed first in the sections below. Other approaches represent potential costs (such as aspirational targets and disbursement funds) or longer-term changes (such as culture change within the profession). Such new policy approaches require more careful evaluation. Indeed, evaluation of policies and programs has a broad role to play in improving pro bono service delivery.

Making the best use of capacity within the profession

While large law firms may not have a presence in every jurisdiction, other significant employers of lawyers such as large corporations (including utilities) and governments do. As noted in chapter 7, nearly one quarter of the roughly 60 000 practising solicitors in Australia work within corporations or government. Smaller jurisdictions may be able to increase pro bono service provision by drawing on these (relatively) untapped resources.

One important difference in utilising in-house (and government) lawyers is the training and support they require. Those working in law firms have access to colleagues and specialists in a range of areas to turn to when they need support. In-house lawyers on the other hand, are likely to be part of a smaller and more narrowly specialised team. Where possible, partnering existing law firms with a pro bono presence with government and in-house lawyers can alleviate this:

Lawyers in law firms have broader access to specialists who they can turn to when they have questions. This is where a partnership with a large law firm can make it easier for in-house lawyers to undertake pro bono as they have someone to ask when they have a question. (NPBRC 2013d, p. 90)

Where there are few (or no) large law firms to partner with in a jurisdiction, and technology cannot overcome distance barriers, this support role may fall more heavily on CLCs or a clearing house.

Drawing on a number of small firms, rather than a core of large firms, may require CLCs and referral bodies to improve their ability to coordinate (and provide support to) available pro bono resources.

Improving the coordination of pro bono efforts

To a large degree, efforts to coordinate pro bono provision have already been taking place over the last two decades. More recently, the consolidation of some clearing houses (as is the case with Justice Connect in New South Wales and Victoria)

shows that those within the sector are already examining opportunities to improve service delivery. The work and publications of the NPBRC also provide a valuable basis for providers to draw on when examining best practice approaches and benchmarks.

As large law firms gain more experience in the pro bono sector, they may change their level and type of involvement. Firms themselves are likely to seek out better methods of coordination and ways to improve the availability of pro bono services (box 23.3).

Box 23.3 Improving coordination through partnerships

As noted above, legal clinics are a well-known model of pro bono service provision. However, they are not without drawbacks (NPBRC 2013d). They are heavily reliant on the continued capacity and effectiveness of the partner CLC to deliver the service, particularly in terms of their organisational ability and quality of training for pro bono lawyers:

Law firms ... want to ensure that ... any firm resources that are invested in a partnership with a CLC are used to provide pro bono legal services to clients rather than on the administration of a pro bono project that is poorly managed. Also, the benefits to firms of increasing staff retention and skill development through [pro bono] can only be realised where the CLC is in a position to provide quality training and supervision to pro bono lawyers. (NPBRC 2013d, p. 59)

While pro bono providers may find the limited time commitments of clinics ('one afternoon a week') appealing, there is also a risk that, if poorly targeted and not integrated with other services, the clinic may do little to address the actual unmet need, especially for clients with complex needs that span several areas of law. This problem can be compounded if the pro bono lawyers are not appropriately trained or experienced to deliver appropriate services for the target group (including communication and interview skills).

The issue-specific nature of clinics can also limit their ability to deliver services in every area of law. The variety of CLCs in the community cover a range of issues, but their ability to attract pro bono partnerships may vary depending on the attractiveness (or profile) of a particular area of law. In such an environment, some CLCs may struggle to attract partnerships and must 'market' themselves to make their work seem appealing in order to attract firms to particular clinics or projects (NPBRC 2013d).

From a systemic perspective, partnerships (and clinics) may represent an issue-specific and relatively 'patchwork' approach to addressing broad legal need compared to a more centralised clearing house model. However, partnerships also offer the opportunity for experimentation, and a degree of competition, as particular causes or nonprofit groups may seek to make themselves more attractive as pro bono partners to firms (Cummings and Sandefur 2013). Over time, such experimentation could lead to improvements in both the amount, and effectiveness, of pro bono delivered.

Pro bono coordinators and referral organisations also face incentives to improve their approaches, as those CLCs that prove to be more effective in coordinating and delivering services will attract more partnerships from law firms.

Removing barriers to individuals

In other cases, government may need to intervene to prompt improvements, including by removing regulatory impediments to offering pro bono services.

As they may not be involved with ‘front-line’ legal service delivery, not all in-house lawyers hold practising certificates or professional indemnity insurance. This can present a barrier if they are prevented from providing a service, or discouraged from doing so due to concerns of claims against them that are not covered by insurance.

Professional indemnity insurance has been an issue for some time and there has already been reform in this area through a scheme operated by the NPBRC:

Previously in-house lawyers were limited to volunteering at CLCs where their work could be supervised by the CLC’s principal solicitor and covered by the professional indemnity insurance held by the Centre ...

Lawyers working in-house or in government roles can now obtain professional indemnity insurance for pro bono work free of charge through the insurance scheme of the National Pro Bono Resource Centre (NPBRC). The [Policy] is underwritten by LawCover and is held by the NPBRC. (2013d, p. 84)

In some jurisdictions, limitations remain on certain classes of practising certificates that hinder volunteering:

... Restricted (Corporate Lawyer) practicing certificates issues by the Law Society of the Northern Territory, entitle the holder to provide legal advice only to their employer. Similar restrictions exist in corporate and government practicing certificates in some other Australian jurisdictions (for example Tasmania). (NPBRC, sub. 73, p. 26)

There are moves to change practising certificates to facilitate volunteering, but as the NPBRC (2013d, p. 84) noted, ‘the position still varies from state to state’. Indeed, under section 47 of the recently passed *Legal Profession Uniform Law Application Bill 2013* (which will apply in both Victoria and New South Wales), holders of all classes of practising certificates (including in-house and government lawyers) will be authorised to volunteer on a pro bono basis.⁸² Even the current

⁸² The policy is currently approved under the relevant regulation in Queensland, New South Wales and Victoria as appropriate insurance cover to qualify for relevant practising certificates (following changes in 2009 and 2012 to remove restrictions on certain classes of practising certificates) (NPBRC 2013b).

scheme in New South Wales allows holders of any sort of certificate to volunteer, under certain conditions:

Any holder of a practising certificate granted by the Council of the Law Society of New South Wales is entitled to engage in legal practice in New South Wales as a volunteer providing pro bono legal services through a law practice or under an arrangement approved by the Council of the Law Society. (Law Society of NSW 2013, p. 1)

However, this only covers those lawyers with (any class of) current, paid, practising certificates, not those with legal training who do not hold a certificate. While fees for an unrestricted practising certificate may be commensurate with earnings for a practising lawyer, for those on career break or recently retired, obtaining such a certificate can be a real financial barrier:

... the cost of an unrestricted practicing certificate in several Australian jurisdictions exceeds \$1,000. For individual lawyers wanting to provide pro bono legal assistance, this cost may be prohibitive and can act as a disincentive to participation in pro bono service provision.⁸³ (NPBRC, sub. 73, p. 26)

The NSW Young Lawyers (sub. 79, p. 28) suggested that one way to increase pro bono services could be to make ‘free limited practising certificates available for retired or career break lawyers to provide exclusively pro bono services’.

Volunteer practising certificates already exist in some jurisdictions. For example, the Queensland Law Society already has a no cost volunteer practising certificate for retired and career break solicitors working through a CLC (QPILCH, sub. 58, p. 62), or if the pro bono service is approved by the NPBRC (who can also provide professional indemnity insurance).⁸⁴ The NPBRC will approve work if ‘the work falls within the definition of pro bono used by the Law Council of Australia and is to be undertaken without fee to the client’ (NPBRC 2013g).

Volunteer practising certificates are also available in Victoria (although retired or career break lawyers can only provide pro bono services through a CLC) and in Western Australia, although there are barriers to the NPBRC’s Professional Indemnity Insurance Scheme operating there, so volunteer lawyers must obtain discounted insurance from the local Professional Indemnity insurance provider, Law Mutual. In examining these schemes, the NPBRC remarked that the Queensland system was ‘the one that best facilitates [pro bono] ... and is the most administratively straightforward’ (NPBRC 2013g).

⁸³ The cost of an unrestricted practising certificate is \$1 498 in the Northern Territory, \$1000 in Western Australia, \$1176 in the Australian Capital Territory and \$1100 in Tasmania (NPBRC, sub. 73)

⁸⁴ *Queensland Law Society Administration Rule 2005*, Rules 15A and 15B.

To tap into those already working as in-house lawyers, the Commission considers that, at minimum, other jurisdictions should adopt the proposed approach in Victoria and New South Wales, and allow holders of all classes of practising certificates to work on a volunteer basis.

For those without any class of current practising certificate, a free volunteer practising certificate would tap into a section of the legal community that, while not large, could provide some additional pro bono services. As these practitioners are not certificate holders in other ways, such a change does not represent lost revenue from practising certificate fees to law societies (but may incur some administrative costs) and also allows a regulatory mechanism that ensures the quality of pro bono service provision.

Of the existing schemes, the Victorian scheme appears to facilitate pro bono provision only through CLCs, but the Queensland scheme extends this to include pro bono projects delivered without CLCs, provided they are approved by the NPBRC. Given that it further extends the opportunities for pro bono provision, while still maintaining a degree of oversight, the Commission considers that the Queensland system provides the best model for jurisdictions to adopt.

DRAFT RECOMMENDATION 23.1

Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.

Further, those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland.

- ***For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.***

INFORMATION REQUEST 23.1

Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents, that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?

Perceived and real conflicts of interest need to be better managed

Conflicts of interest, where they do arise, are not always intractable and various strategies can be implemented to manage them. Principle among these is clear policies in place to identify and manage conflicts:

While the risk of conflicts exists for all pro bono work and needs to be assessed on a case by case basis, setting up structures and having clear policies in place will make potential conflicts easier to identify and manage. ... [for example] When an appointment is taken by one of the pro bono volunteers they phone the firm from the outreach site to check for conflict. If there is a conflict they give the person a brochure on the issue and refer them to three other solicitors. (NPBRC 2013d, p. 46)

Upfront policies, explicitly agreed upon by both the CLC/referral body and the pro bono provider, are especially important for pro bono work involving in-house lawyers from companies that may be the subject of some of the pro bono actions:

The Telstra lawyers don't take on any matters that could potentially involve telecommunications companies (for example, a young person disputing their mobile phone bill) but they may give information or assistance to another lawyer ... eg about the process of complaining to the Telecommunications Industry Ombudsman. (NPBRC 2013d, p. 89)

It is therefore important that both pro bono providers and facilitators (referring agents or CLCs) have developed clear, upfront conflicts of interest policies. Although some conflicts may prove to be unavoidable, a clear policy (including examples of what is and is not a conflict for the relevant lawyers) can help to remove uncertainty about matters. Given many pro bono providers would prefer to err on the side of caution, minimising these 'grey areas' could increase the provision of pro bono services.

In addition to internal policies from firms and facilitators, another way to avoid or contain a conflict of interest is to obtain consent from the affected parties, as one pro bono lawyer remarked:

Banks and utility companies are often happy for representation to be provided to clients who would otherwise find it difficult to articulate the issues and provide their consent for our firm to act. (NPBRC 2013d, p. 46)

This may appear to be a simple solution. However, coordination issues would likely prevent every pro bono provider from checking with every government agency or company on every matter. Issues as simple as finding the right contact, knowing what their standpoint has been in the past, and identifying any other affected agencies, companies or parties also make the task significantly harder than it first appears.

Potential conflicts of interest can also arise for firms taking on pro bono work where governments are the counter-parties. While measures such as the Aspirational Target are intended to provide an incentive for increased pro bono work, there is a risk that governments can send ‘mixed signals’, particularly where the government is the counter party for a pro bono client. In contemplating such situations, s11.3 of the Commonwealth Legal Services Direction 2005 requires that, unless there is a conflict of interest:

The Chief Executive of an FMA [Financial Management and Accountability Act] agency is responsible for ensuring that the agency, when selecting and retaining legal services providers, does not adversely discriminate against legal services providers that have acted, or may act, pro bono for clients in legal proceedings against the Commonwealth or its agencies.

Despite this, the Commission has heard that a perception remains that firms will not be favoured if they take pro bono actions against government departments or agencies. This may not be true (and is difficult to substantiate), but nonetheless, perception matters. Indeed perceptions alone could discourage some firms or lawyers from making themselves available for certain classes of pro bono cases.

One way to alleviate these problems would be to provide a formal means of countering perceptions with actual approval (or, if the conflict is genuine and unavoidable, refusal) based on engagement with the affected (government) parties. As such, the Commission considers there is merit in exploring a concept of a pro bono ‘coordinator’.

Such a ‘coordinator’ model operates within the Victorian Government. As with the Australian Government, the Victorian Government incorporates a pro bono target into their process for tendering for government legal services. Unlike the Australian Government’s use of target pro bono hours, under the Victorian arrangements, contracting firms commit to provide pro bono legal services, equipment, or subject to approval, payments in kind, equal to a nominated percentage of the fees earned under the contract. Where there is a potential conflict of interest, firms contact a nominated officer within the Department of Justice (Vic DoJ 2010) who will relay the concern in a generalised form (so as not to unnecessarily expose the potential pro bono client) to the relevant agency or department. It is the relevant agency that will make the decision regarding whether conflicts would prevent pro bono delivery. The coordination role performed by the Department of Justice provides important ‘distance’ for the firms, allows the nature of the concern to be relayed to the relevant agency in an anonymous form (preventing any risk of the agency ‘retaliating’ against the potential pro bono client), and fit naturally with the centralised tender arrangements for government legal services.

Adopting, and publicly announcing, such a ‘coordinator’ would go at least some way to dispelling adverse perceptions, and potentially increase pro bono services. A central ‘coordinator’ with a record of actions allowed, or those not allowed due to direct conflicts, could also provide a repository for information for prospective pro bono providers to examine before considering a case.

DRAFT RECOMMENDATION 23.2

The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government’s use of a pro bono ‘coordinator’ to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.

The relationship between agencies as part of a single greater entity (a government) facilitates such coordination. Despite their membership, individual companies have a more ‘separate’ relationship with their industry associations — they are not part of a single entity, but remain individual legal actors. As such, industry associations do not have the same ability as government agencies to act on behalf of their members. Nonetheless, provided they do not exercise any decision making power over the contractual arrangements of third parties (companies), the Commission considers that there is scope to explore whether coordinators could be applicable in a corporate setting.

Coordinators could be housed in industry associations, and act as a contact point for their members, on an opt-in basis. While there would be some difficulties in implementing such a concept, in principle the benefits are similar to a government coordinator: providing a point of contact for the law firm that is removed from the actual relationship, and the ability to pass salient details onto the affected firm in an anonymous manner.

A clearly nominated central contact point may make firms more willing to ‘ask the question’ regarding conflicts of interest rather than act in a unilateral and risk averse manner and simply reject all pro bono work that could possibly lead to a conflict in any given area.

However, a potential difficulty lies in implementing a system that can provide these benefits without breaching confidentiality of contracts or otherwise interfere with the relationship between companies and their law firms. Further, not every industry would have the scale of disputes to justify such a function, though it could be trialled in those industries that are often the counter-party to a large volume of claims, such as telecommunications, insurance and banking.

INFORMATION REQUEST 23.2

The Commission seeks views on the potential for industry pro bono ‘coordinators’ to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the ‘coordinators’ be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?

Aspirational pro bono targets can help

The Australian and Victorian governments both include pro bono aspirational targets as part of a requirement for firms to tender for government legal work (under the Commonwealth’s Legal Services Multi-Use List (LSMUL) and the Victorian Government’s Legal Services Panel).

The nature and form of the targets differ with the Victorian scheme relying on a target based on the percentage of hours billed in the government contract (requiring at least 5 or up to 15 per cent), while the Commonwealth requires only that firms commit to pro bono work, either becoming a signatory to the National Pro Bono Aspirational Target (of 35 hours per lawyer per year), or by nominating a target value of their own. Parties must undertake to use their ‘best endeavours’ to meet their nominated targets, and report to the Australian Government within 30 days of the end of a financial year (which the Australian Government publishes as part of its Government Legal Services Expenditure Report (NPBRC 2013e)).

Australian Government arrangements are due to change. As of 1 July 2014, firms with more than 50 lawyers providing services to the Australian Government will be required to be signatories to the Target (and can no longer nominate their own target).

The Commonwealth Target is generally regarded as being effective in increasing the amount of pro bono services provided. Indeed, results from the NPBRC’s survey of firms with 50 or more lawyers show that Target signatories provided higher average hours, and had higher participation rates (numbers of lawyers within the firm who provided pro bono work) (table 23.2).

Table 23.2 Pro bono performance of signatories and non-signatories to the National Pro Bono Aspirational Target
2011-12

	<i>Aspirational target signatories</i>	<i>Non-signatories</i>	<i>All survey respondents</i>
Pro bono hours per lawyer	36.6 hours/lawyer (from 20 firms)	20.1 hours/lawyer (from 12 firms)	29.9 hours/lawyer (from 32 firms)
Average participation rates ^a	59.3% (from 19 firms)	43% (from 12 firms)	53% (from 31 firms)
Average % of gross billable hours	2.9% (from 11 firms)	1.4% (from 7 firms)	2.3% (from 18 firms)

^a 'Participation rate' refers to the percentage of lawyers at a firm undertaking at least one hour of pro bono legal work during the year.

Source: NPBRC (2013a).

Most larger firms (over 70 per cent of respondents) also indicated that the pro bono conditions in the Commonwealth and Victorian Government tender arrangements were 'useful in encouraging their firm to undertake pro bono legal work' (NPBRC 2013a, p. 6).

But these results do not provide evidence that the target is encouraging additional pro bono work. As signing up to the target is voluntary, an element of self-selection is to be expected. That is, those firms who already have a good pro bono culture are more likely to sign up to such targets, making it difficult to ascribe causation for increased pro bono hours to the target itself, rather than any underlying pro bono culture in the relevant firms. (Though signing up to the Target could affirm and publicise what might have previously been an unrecognised strength.)

The Attorney-General's Department felt that the target, combined with LSMUL had provided a positive incentive for pro bono:

The department considers that the target has been very effective in encouraging pro bono work. Since its introduction in 2007, the number of lawyers undertaking pro bono work has trebled to over 8,000 lawyers nationally. In 2011-12, these lawyers undertook over 340,000 hours of pro bono work. ...

It should be noted that the relationship between the Target and the Legal Services Multi Use List has also been very effective in encouraging pro bono. (sub. 137, p. 41)

However, there is some question regarding the effectiveness of the tender arrangements as an incentive, given the level of awareness among larger firms. Indeed, in 2012, 23 of the 36 respondents to the NPBRC's survey were on the Commonwealth LSMUL, but a further seven respondents did not know if they were. Similarly, in Victoria, 16 of 36 firms were on the Victorian Panel, and a further six respondents did not know if they were (NPBRC 2013a).

And while those firms that did comment on the tender arrangements were generally favourable, the extent of administrative compliance was an issue for some:

... the process requires a substantial amount of administrative time ... [and] appears to be designed to assist firms that have dedicated pro bono teams. ... [Victorian] reporting requirements are extremely onerous – more so than [the] Commonwealth. (NPBRC 2013a, pp. 51–2)

While the incentive of increased access to government work may be effective in larger jurisdictions (or those jurisdictions where government is a larger ‘player’ in the market), it is not necessarily effective in smaller jurisdictions:

South Australia is another example of a small jurisdiction with very few national firms. When JusticeNet conducted a review of its members two years ago, the motivation for firms to join seemed to be primarily about doing the right thing, followed by Corporate Social Responsibility and, to a smaller extent, keeping up with what other firms were doing in a smaller jurisdiction. ... [The] Target and publicity for firms are not as significant for Adelaide firms. (NPBRC 2013d, p. 38)

There remain some larger jurisdictions in Australia who do not have jurisdiction-specific pro bono targets and related tender arrangements. Given that compliance costs for firms may be duplicated in the presence of multiple targets, the Commission considers that there is value in exploring if a single target (with centralised, shared reporting) could be adopted, but applied to tender arrangements in multiple jurisdictions.

INFORMATION REQUEST 23.3

The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?

Should targets be aspirational or mandatory?

The current Commonwealth Target is aspirational only. Even the Commonwealth’s tender obligations only require signing up to the Target, not actually delivering a certain level of pro bono services. The use of a target as an aspirational goal (rather than obligation) exists in other international jurisdictions — for example in the United States, the American Bar Association’s Model Rules of Professional Conduct (rule 6.1) state that a lawyer ‘should aspire to render at least 50 hours of pro bono public services per year’.

The Victorian target differs from the Australian Government one. In force since 2002, the Victorian target requires firms that wish to contract for government work to commit to pro bono work of between 5 and 15 per cent of the value of total hours billed under the relevant contract, hence this target is ultimately expressed in dollars, rather than hours per lawyer per year. Also, the ability to nominate this target allows firms to tailor their pro bono delivery to suit their own capacity. So far, this target does not appear to be onerous, as the NPBRC noted ‘[m]ost firms nominate 15 per cent and many exceed it each year’ (2013e).

The commitment under the Victorian target is enforceable, and in some circumstances firms can make a payment (to a pro bono service provider or to the Victorian Government) in lieu of the obligation. Firms can also deliver the obligation to pro bono providers in kind (for example, through the provision of equipment, information technology services, or use of premises), and in practice firms have also been allowed to ‘make up’ the commitment in a subsequent year (NPBRC 2013e). Allowing flexibility in how firms meet the target (through lawyers’ time, in kind donations or payments) may improve the efficiency of pro bono delivery as firms are able to determine the methods that suit them best.

Some consider that a further option to increase pro bono services would be to make such requirements (and their delivery) strictly mandatory. However, mandatory pro bono has several drawbacks:

- Given the unpaid nature of the work, those with a genuine desire and interest are likely to be more involved and effective than those fulfilling an externally imposed obligation (Taylor 2013).
- Requiring mandatory pro bono efforts may not assist those that need it most, as lawyers may instead focus on where it is easiest to ‘clock up the hours’ or on pro bono efforts that could be parlayed into paid work.
- It is also possible that with greater weight placed on them, the administration and compliance costs of reporting requirements would increase.

The Commission notes that the flexibility allowed in the methods of meeting the Victorian target means that it largely avoids the first two drawbacks. However the reporting and audit requirements needed to enforce the commitments do give rise to compliance costs. Given these factors, and the role that the voluntary culture plays in the legal profession, the Commission considers that it is appropriate that targets remains flexible — that is, that firms can either elect a particular target, or the means to meet it. Where the targets are externally set, and can only be met by one method (lawyer’s time), the Commission considers targets should remain aspirational to avoid any incentive for firms simply ‘ticking a box’ and providing multiple hours of ‘easy’ but low value pro bono. These targets should remain

voluntary in the sense that they are not levied on all firms in the market, but only on those who understand it is a condition of engaging in government work, and are willing and prepared to do so.

DRAFT RECOMMENDATION 23.3

Any pro bono targets used by governments as incentives in tender arrangements should remain flexible. Reporting required for pro bono targets should be clear and simple.

INFORMATION REQUEST 23.4

The Commission is seeking views on the most efficient form of pro bono targets. How should they be expressed (in hours, dollars or some other means)? How do the reporting requirements of the two current targets (one for the Commonwealth and the other for Victoria) compare in terms of limiting compliance costs?

Limited disbursement funds are not a significant barrier to pro bono

Disbursements relate to costs incurred in the course of a legal action other than the fee for the lawyer themselves. For the purposes of pro bono matters, there are two categories of disbursements: *internal disbursements* (non-legal costs incurred within a law firm, such as photocopying) and *external disbursements* (incurred where the law firm engages third parties such as experts or barristers).

For pro bono matters, of the firms that took part in the NPBRC's survey of larger firms, most (83 per cent) met the cost of all internal disbursement themselves, with only 6 per cent applying to disbursement assistance schemes to cover internal costs.

External disbursements were less likely to be covered by the firm, and there was a higher rate (31 per cent) of applying to disbursement assistance schemes (NPBRC 2013a).

Of the barriers to pro bono represented by disbursements, expert witnesses (both medical and non-medical), and filing fees were regarded by the surveyed firms as the greatest, while internal disbursements and government fees were relatively minor (NPBRC 2013a). However, as noted above (section 23.3), disbursements did not feature as an important barrier to the provision of pro bono.

There are several government assistance schemes that providers can apply to offset the cost of disbursements in pro bono actions:

There are currently nine different disbursement assistance schemes ... at least one in each state and territory with the exception of the ACT, and a separate scheme for Commonwealth law matters. ... only the NSW and Commonwealth disbursement assistance schemes ... have been established specifically to fund disbursements in pro bono matters ... (NPBRC, sub. 73, p. 28)

Responses to the NPBRC's survey of larger firms indicates that the schemes are neither widely used, nor universally praised:

... the responses to the 2010 Survey indicated that many respondents were dissatisfied with the operation of some of these schemes.

In the 2012 Survey, nine of the 36 firms (25%) had applied to a disbursement assistance scheme in the last two years. In 2010 seven firms (24%) had applied. (NPBRC 2013a, p. 47)

Further, those that did use the schemes complained that funding was limited and required some administration on behalf of applicants, including:

... an application fee, or a condition that an application can only be made once the disbursement has been incurred. Other limitations include caps on the amount that can be recovered, means and merits tests, and conditions that limit assistance to cases where damages are likely to be recovered. This means that from the perspective of a pro bono provider, there can be no [certainty] ... that any disbursement costs will be met [and] ... obtaining funding for reimbursements of disbursements, if available at all, can be difficult and time consuming. (NPBRC, sub. 73, pp. 28–9)

The Commission understands the frustration on the part of service providers regarding the certainty of funding. However, in the context of limited funding for the assistance sector as a whole, a range of factors suggest that simply increasing funding for disbursement schemes is a relatively poor use of funds. These factors include the low importance of disbursements as a barrier, the ability for some firms to cover them (or for the expert witnesses to provide their services on a pro bono basis), and the apparently limited use of the existing schemes.

Instead the Commission considers that certainty for pro bono lawyers can be best improved by ensuring that conditions for application to the funds are as objective and transparent as possible (so applicants can reasonably predict the outcome), and that the application process is not unnecessarily time consuming.

Promoting a pro bono culture would be beneficial

In the short term, pro bono culture rests with the attitudes of firms and individuals (particularly the leadership within firms). In this context, existing advocates such as coordinators at large firms, the NPBRC, law societies and bar associations, all have

a continued role to play in identifying, evaluating and publicising ways to improve pro bono culture.

CLCs and clearing houses can also assist the culture change by providing information and training to volunteers, explaining the philosophy of the service they provide and improving the chances of the volunteers returning to their firms with a good experience (and becoming advocates for pro bono themselves).

In the long term, further ingraining pro bono into the legal profession begins with legal education and the involvement of students. Students are already an important part of the resources available (in terms of hours available) for pro bono services — a 2012 survey reported that 55 per cent of all individual volunteering hours came from students (NPBRC 2013d). Some argue that increased student involvement has ongoing benefits:

Law graduates who are actively involved in *pro bono* work at university are more likely to enter legal practice with a personal commitment to undertake *pro bono* work as part of their professional obligations as a solicitor or barrister. Although these cultural practices are difficult to quantify in economic terms, it is clearly a phenomenon which, in the Centre's view, is likely to generate costs savings across the board as it leads to greater numbers of legal professionals actively engaged in *pro bono* work. (University of Queensland Pro Bono Centre, sub. 74, p. 5)

Current pro bono opportunities for students include clinics initiated through universities, for example the University of Queensland Pro Bono Centre (sub. 74, pp. 2–3). Students can also gain experience through CLCs and clearing houses.

In addition to long-term cultural change and the promotion of a social justice ethos, pro bono involvement during their education can provide students with additional skills that could benefit both practitioners and clients, including 'legal and work environment skills, particularly interpersonal skills required to deal with colleagues and clients in a legal professional environment' (NPBRC 2013d, p. 99).

While students gain valuable experience from the training provided during the pro bono work, this comes with a cost for the CLC, in the form of additional training and supervision:

Given that students have limited professional experience, they are likely to require more training and supervision than qualified lawyers, and are limited in the type of work they can do. The host organisation needs to have the resources to appropriately train, adequately supervise, administer and physically seat the students, and prepare tasks that are suitable for the participating students. (NPBRC 2013d, p. 99)

As such, it is important that the programs and roles offered for student involvement are carefully structured to ensure that both CLCs and students benefit, and that any

long-term benefits are preserved by offering (at least some component of) meaningful and interesting work. This, and other, changes to the content of legal education are discussed in chapter 7.

Governments and pro bono providers need to understand what works

Both pro bono and government funded legal assistance providers share a common aim — to provide a good outcome for (generally) disadvantaged clients. Despite these good intentions, there appears to be little analysis of programs to highlight the best way to use limited pro bono resources for the benefit of those in need:

No matter what drives the provision of pro bono legal assistance, having more information about the impact of pro bono projects and programs would help to inform decisions about where pro bono resources should be allocated. However there is currently little evaluation of the impact of pro bono programs/projects on addressing unmet legal need. (NPBRC 2013d, p. 36)

As noted above, government funds are devoted to both CLCs and clearing houses. Given their common goal of assisting the legal needs of the disadvantaged, and their overlapping role in doing so, it is important to understand the relative costs (and, where possible, benefits) of using various forms of legal assistance or pro bono to achieve the goal and whether they could be more efficiently provided. At an extreme, this could mean that the important social aims of pro bono work could be achieved in other ways:

If expanding sources of legal aid is the goal, researchers should focus on gathering evidence about whether pro bono is, in fact, an effective way to achieve this. ... there is little evidence on the questions of whether pro bono services are effective, whether lawyer charity is a cheaper way to provide them (because it does cost money to do pro bono), or whether it would in fact be more efficient and effective if firms and attorneys stopped giving their time and instead donated money to the organizations already specializing in these clients and causes. (Cummings and Sandefur 2013, p. 91)

In addition to finding the best way to help the disadvantaged, clarifying how a project will be evaluated up front can also provide benefits through the course of the project itself (as well as lessons for other projects):

... early planning for how a project will be evaluated later can also help to crystallise the shared mission and objectives of the project partners. ... Evaluation also allows providers to reflect on their work and identify what can be improved in the future to better address unmet legal need. (NPBRC 2013d, p. 48)

Despite the benefits that can be gained from identifying best (and worst) practices, some in the sector have argued that pro bono services may not be suited to

‘statistical’ analysis as ‘providing legal services to vulnerable and disadvantaged people has value in itself’ (NPBRC 2013d, p. 48).

Measurement difficulties exist in a range of other areas, but these difficulties do not exempt them from careful evaluation. While it may be difficult to apply a numerical value to a range of outcomes, they can at least be categorised. Where like outcomes exist, the costs of different methods of achieving them can then be compared, allowing an evaluation of their cost-effectiveness. Indeed, efforts to measure the impact and effectiveness of pro bono are already underway — for example, Justice Connect (in New South Wales and Victoria) highlighted its current evaluation framework:

Justice Connect’s work also contributes to broad social goals of access to justice and a fairer society. These goals are evaluated using a ‘Theory of Change’ model of evaluation and assessment. By setting measures to monitor the programs, Justice Connect is better able to understand how its programs work and where improvements can be made. The Theory of Change also enables meaningful reporting on program outcomes. (sub. 104, p. 11)

Justice Connect’s Victorian predecessor, PILCH, has also attempted to evaluate the economic contribution of its ‘PilchConnect’ program (which assisted NFP organisations) by examining the value of the pro bono services rendered, the impact they had on the capacity of the NFP and broader social impacts such as savings to the justice system and reduced social services costs (Deloitte Access Economics 2011). Commentators in the United States have also considered means to obtain better data on pro bono, summarised in box 23.4.

As others in the sector have acknowledged, in the presence of limited funding, evaluation is an important means of prioritising services, meaning that ‘legal assistance providers will increasingly be required to demonstrate the impact of their projects to justify a continuation of support ...’ (NPBRC 2013d, p. 48)

Obtaining a better understanding of how funding can be most effectively devoted to gain the best outcome for disadvantaged individuals (be it through Legal Aid Commissions, direct services from CLCs, or other means to facilitate pro bono) is vital to improving overall outcomes in the long term. As such, the Commission considers that, where government funding is provided, there should be a requirement that program evaluations are conducted.

DRAFT RECOMMENDATION 23.4

The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers should be contingent upon regular, robust and independent evaluation of the services provided.

Box 23.4 Potential ways to improve pro bono data

Cummings and Sandefur (2013) considered several methods for improving pro bono data, including:

Standardised data collection about the work pro bono lawyers do

This involves tracking cases by area of law (such as housing or immigration), type of service provided (advice, completing transactions, representation) and categorised outcomes (settlement, success at court, avoided penalties). While much of this information is already collected for some pro bono services in the NPBRC's surveys of large firms, a broader application would provide a broader understanding. These categories would be of most benefit if they were aligned with those used by legal aid commissions and CLCs more broadly.

Standardised client and lawyer satisfaction evaluations

Pro bono clients could complete standardised surveys relating to their satisfaction with their pro bono lawyer. This would include aspects such as the quality and frequency of lawyer communication, the lawyer's responsiveness to client concerns and input and satisfaction with outcomes. While such surveys may be inherently subjective, they would not be used to identify individual lawyers. Instead the aggregate results may point to systemic issues where support and training could usefully be targeted.

Enhanced cost tracking

The cost of undertaking pro bono cases could be collected in a uniform fashion. This could include the time spent on a case by the pro bono lawyers and support staff, internal organisational costs assigned to each matter and referral or partner agency time and costs (in training, organising and supporting).

Social impact metrics

Defining objectives, outcomes, and the contribution made by pro bono towards them, is a complex issue. However, there are established metrics such as the 'social return on investment' which examines additional revenues or avoided costs to government. Broader measures require clearly identified and prioritised objectives, as well as ways of measuring whether they are met. The metrics used to evaluate PilchConnect (see text) offer another example of ways to assess social impact.

Source: Cummings and Sandefur (2013).

A further consideration is that recording, collating, reporting and using data is not a costless activity. In other areas there are examples of onerous reporting requirements for data that is of either limited use, or difficult to use (that is, difficult to compare with other sources). Indeed excessive reporting requirements could themselves displace work done directly to assist the disadvantaged. As such, in implementing improvements to data collection, careful consideration needs to be given to ways that minimise the cost of data (such as ‘piggybacking’ off existing collections or methods) while maximising its usefulness.

INFORMATION REQUEST 23.5

The Commission is seeking views on methods to implement data collection on pro bono services without increasing unnecessary reporting burdens. Are there ways to better utilise existing sources? Can reporting be standardised? Are there existing social impact metrics (or categories of outcome) that should be adopted? How would data collection best be done in a systemic manner? Who should collect the data?

24 Data and evaluation

Key points

- It is widely acknowledged that data on the civil legal system are seriously deficient. Previous reviews have called for this situation to be remedied and identified the need to build an evidence base to monitor the system and guide policy reform.
- Factors contributing to the present state of the data landscape include:
 - inconsistencies in definitions and measures between providers and institutions, and across jurisdictions
 - data collected at a level that is less useful to inform policy
 - a lack of information around outcomes
 - incomplete and patchy data collection
 - inadequate management systems especially with regard to the use of technology for data collection and storage
 - ‘fatigue’ amongst those who currently report data and a lack of awareness of how data will be used
 - a lack of incentives to report policy-relevant, commercially-sensitive information.
- Poor data hinders efforts to evaluate how the civil justice system is performing and frustrates the already difficult task of measuring quality and comparing legal services.
- Greater effort should be taken to gather data and evidence to support civil justice policy development. Governments should work together to develop and implement reforms to collect and report data that have common definitions, measures and collection protocols. Outcomes based standards to measure service effectiveness and the capacity to link de-identified records should be a priority given their value in policy evaluation.
- The Commission has identified a range of specific policy questions and associated data gaps that should be considered by the relevant stakeholders.

This chapter emphasises the need for high quality data and better evaluation in the civil justice system. It begins by accentuating the importance of data and evaluation (section 24.1). The chapter then examines some of the general problems identified in the present data landscape (section 24.2) and explores reasons why evaluation has been difficult (section 24.3). The chapter concludes by presenting a range of possible improvements to data and evaluation (section 24.4).

24.1 Data and evaluation are important but underutilised

Data and information form the foundation of the evidence base that assists in the development of effective policy. In addressing issues related to access to justice, evidence-based policy requires information that can:

... reveal gaps in current legal provision, or weakness in the ways in which current laws work. It can help identify new strategies for dispute resolution and more generally for increasing the impact of law on society. (Partington 2010, p. 1003)

Evidence is also needed to evaluate the effectiveness of policies and programs designed to improve access to justice. In order to perform an economic evaluation, evidence is needed to establish baseline conditions, to infer what would have happened in the absence of policy or program changes (the counterfactual), and to determine what happened following a policy intervention. Evidence also needs to reflect the social costs and benefits (in addition to the private costs and benefits), as discussed in chapter 4. Making policy without evidence, however, can ultimately lead to poor policy and unexpected outcomes:

Without evidence, policy makers must fall back on intuition, ideology, or conventional wisdom — or, at best, theory alone. And many policy decisions have indeed been made in those ways. But the resulting policies can go seriously astray, given the complexities and interdependencies in our society and economy, and the unpredictability of people's reactions to change. ... Among other things, policies that haven't been informed by good evidence and analysis fall more easily prey to the 'Law of Unintended Consequences' — in popular parlance, Murphy's Law — which can lead to costly mistakes. (Banks 2009, pp. 4–5)

Stakeholders recognise that the evidence base is poor

The Commission has received a number of submissions from stakeholders — including providers, government, and community organisations — which acknowledge the need for consistent, policy-relevant data. For example the Law Council of Australia stated:

... a key priority in this area should be the development of nationally consistent data collection policies, to be applied across legal assistance providers (including LACs [legal aid commissions], ATSILS [Aboriginal and Torres Strait Islander legal services], CLCs [community legal centres] and FVPLS [family violence prevention legal services]) and Federal, State and Territory courts. Currently (for example) there is no consistently applied definition of what amounts to a 'legal inquiry'. There is also no central body collecting and publishing data coming out of Australian legal service providers and courts. (sub. 96, p. 140)

The Commonwealth Attorney-General's Department (AGD) asserted:

Access to justice related inquiries over several years have frequently commented on the lack of comprehensive and consistent data available to inform civil justice policy and program reforms. In particular, there has been a lack of information about the actual costs of different dispute resolution pathways and the economic and social impact of these costs.

In response to these concerns, the department is developing the architecture necessary to develop a strong, consistent evidence base across the civil justice system. This evidence base will enable us to answer important questions about the function and operation of the civil justice system in Australia and information about those who [encounter] it. (sub. 137, p. 44)

Women's Legal Services Australia argued:

Better data and analysis can assist better policy development and supports the drafting of better laws. (sub. 29, p. 18)

Rigorous evaluation of programs is also lacking

While providers (such as legal assistance providers, and the legal profession) and institutions (including courts, tribunals, and ombudsmen) often have an anecdotal understanding of 'what works'; an understanding of the counterfactual, indirect effects, uncertainties and issues around self-selection may be lacking. Anecdotal evidence is insufficient to determine if programs are having their desired impact or even if they are cost-effective. As Genn noted:

The discourse is anti-empirical. It does not need information, although it does incorporate atrocity stories that support any particular matter under discussion. What is discussed becomes what is known. The mythology is developed and elaborated on the basis of war stories told and repeated. (1997, p. 169)

Even worse, programs that may be effective and represent a 'best practice' response to a problem cannot be defended without sound evaluation, and may be at risk of being terminated.

Even where evaluations occur, they may not be made public or are only released some time after their finalisation. Two prominent examples include 'The review of the National Partnership Agreement on Legal Assistance Services (NPA)' and the 'Family Violence Prevention Legal Services — Research and Needs Analysis Report'.

24.2 What are the data limitations?

Throughout this inquiry, the Commission has encountered many data limitations including:

- definitions and measures that are inconsistent
- data that are reported at a level which is too general to prove valuable
- outcomes that are poorly captured
- some cases of incomplete data
- management systems that inadequately collect and store data
- data collection ‘fatigue’ amongst providers and institutions
- incentives and frameworks to report policy-relevant, commercially-sensitive and/or privileged information are lacking.

Greater detail around the identified data limitations is provided below.

Inconsistency in definitions and measures

‘Like’ needs to be compared with ‘like’ in order to evaluate the efficiency and effectiveness of services provided across jurisdictions and over time. For the purposes of benchmarking, the types of services provided and the classification of users and providers need to be clearly defined and used consistently across the justice system. Standardised terminology is a necessary precursor to consistent data. Without standard terminology, the ways in which types of services are counted and measured, and how service users are classified, differ across providers and institutions.

In many areas of the civil justice system the types of services provided are not consistently defined. For example, what constitutes mediation is not consistently defined and applied across providers and institutions using alternative dispute resolution (ADR). As a result, it is not possible to determine the relative frequency with which mediation is used across types of providers and institutions, and jurisdictions (chapter 8). Similarly, the Commission heard the way in which delivery of community legal education is measured differs, with some providers counting the number of sessions and others counting the number of attendees. When costs are ascribed to activities that are not consistently defined, an inaccurate picture of the relative efficiencies of providers emerges.

A related issue is that performance is reported and measured differently by providers of similar services. Using government ombudsmen as an example,

table 24.1 illustrates that there is little consistency in the periods used to measure timeliness and in the ways complaints are defined. In some cases, the timeframes employed do not reveal the speed with which complaints are resolved. For example, reporting timeliness over a 12 month period provides little detail if almost all complaints are resolved within one month or within 10 months.

Table 24.1 Reported timeliness of government ombudsmen

<i>Ombudsman</i>	<i>Reported measure of timeliness of finalising complaints (2011-12)</i>
ACT Ombudsman	• 88 per cent of complaints finalised within three months
Commonwealth Ombudsman	• 80 per cent of complaints and approaches finalised within one month
Ombudsman New South Wales	• 99 per cent of complaints finalised within 12 months
Ombudsman NT	• 99 per cent of inquiries and complaints resolved within three months (excluding police) • 89 per cent of police inquiries and complaints resolved within three months
Queensland Ombudsman	• 85 per cent of complaints finalised within 10 days • 90 per cent of complaints finalised in three month • 99 per cent of complaints finalised within 12 months
Victorian Ombudsman	• 97 per cent of complaints finalised within required timelines
Ombudsman SA	• Average age of complaints and Freedom of Information reviews was 87 days
Ombudsman Tasmania	• 85 per cent of complaints finalised within three months (excluding Freedom of Information and Right to Information) • 88 per cent of complaints within six months (excluding Freedom of Information and Right to Information) • 98 per cent of complaints within 12 months (excluding Freedom of Information and Right to Information)

Sources: ACT Ombudsman (2012); Commonwealth Ombudsman (2012); Ombudsman NSW (2012); Ombudsman NT (2012); Queensland Ombudsman (2012); Victorian Ombudsman (2012); Ombudsman SA (2012); and Ombudsman Tasmania (2012).

Collections of demographic data are also affected by inconsistent classifications. For example, the definition of homelessness, risk of homelessness and disability differs across a range of surveys and administrative data sets that record this information.

Separability of data

Much of the administrative data collected by service providers and institutions is very high level. The effectiveness and efficiency of types of services cannot be judged when data are not sufficiently disaggregated.

While this is a policy concern, it also has ramifications for providers. Providers may not be aware of how successful or costly the provision of specific services are if they only collect data at a high level. For example, total costs of early intervention are reported by legal assistance providers, but the costs of the constituents of preventative services, including law information and community legal education, are often unknown.

A lack of cost data disaggregation is also an issue with respect to ombudsmen, tribunals and courts. This can frustrate comparisons of costs. For example, in the case of some ombudsmen, reported costs capture both the costs of executing regulatory functions and complaint functions (chapter 9). This means that costs are not comparable with other ombudsmen who predominately service complaints. Ideally, the complaints function would be separately costed and the number of complaints recorded, to get a clearer picture of the average costs of servicing complaints, and to enable benchmarking.

A lack of data disaggregation also reduces the value of data that are available on those who use the civil justice system. For example, while courts and tribunals record tallies of self-represented litigants, they tend not to report information about their demography or income. As a result, the information reported is too general to answer policy questions such as what types of individuals self-represent, and whether they are disadvantaged (chapter 14).

Outcomes are poorly captured

The key to assessing the effectiveness of services is measuring the outcomes they achieve. The first step in this process is crafting outcomes that reflect policy objectives. This requires consultation with providers and institutions to gain an understanding of the context and opportunities to develop outcome measures.

Measuring outcomes involves more than recording counts of activity and relying solely on the latter can distort effort. As Curran observed:

There is also a problem with activity reporting, where the focus can become the number of tasks completed, which may have little bearing on the actual effect of the intervention. To reduce things to tasks or activities can, lead to significant inefficiencies or over-servicing as services become obsessed with the number of the activities they are doing so that they can report positively and not lose their funding, rather than strategically approaching client problems to achieve real results. (2013a, p. 22)

Outside of timeliness measures (such as those provided by ombudsmen, tribunals and courts), outcome measures are generally lacking across the civil justice system.

Legal assistance and ADR services tend to rely more on service counts than outcome data.

Occasionally, user satisfaction surveys are used to measure the ‘desirability’ of outcomes. While these surveys may provide a record of users’ experiences and perceptions, they do not completely encapsulate the ‘desirability’ of the outcomes achieved and the complexity of the legal landscape. Curran notes the problem with relying on user satisfaction surveys to measure desirability of results in the legal assistance sector.

Studies that involve ‘Client Satisfaction Surveys’ are problematic if applied to the legal assistance sector, in view of the overriding obligations of the legal profession under the various legal professional legislation and conduct rules which impose duties and obligations which can conflict with what a client might want or expect (for example, the paramount duty to the court). (2012, p. 6)

A further issue relating to interpretation of user surveys is the correlation between satisfaction rates and the direction of the settlement. For example, individuals tend to be more satisfied with the services they received if they were successful. This may not have much to do with the quality of the service received, but rather the outcome of the case.

Incomplete data collection

Incomplete record-keeping is mainly a problem in the legal assistance landscape. Since these providers service predominately disadvantaged clients and are government funded, it is particularly important that data are reliable and transparent.

In some cases, data are ‘missing’ on particular groups within the community. For example, the National Aboriginal and Torres Strait Islander Legal Service noted:

There is not a large amount of comprehensive nationwide data available in regards to Aboriginal and Torres Strait Islander peoples’ civil law needs. (sub. 78, p. 3)

In other cases, data are only partially collected. Legal assistance commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS) are required to report to various government agencies on services provided, costs, and characteristics of users. In theory, the data provided should indicate the level of activity and the types of clients being serviced. However, in practice records are incomplete.

Even data that are relevant to an organisation's stated goal — such as ensuring that advice is reaching marginalised or disadvantaged users — can be incomplete, and sometimes not retained (box 24.1).

Box 24.1 CLCs and data collection

One example where data are not being properly collected occurs in CLCs. The goal of CLCs is stated in the National Association of Community Legal Centres (NACLC) submission:

Community legal centres are independent community organisations providing equitable and accessible legal services. Community legal centres work for the public interest, particularly for disadvantaged and marginalised people and communities. (sub. 91, p. 6)

However, the data collected by CLCs is patchy, even when that data may be directly relevant to their stated goal. For example, data that relates to indicators of disadvantage is not collected regularly. For civil matters in the 2011-12 financial year:

- Disability information was not recorded for 39 per cent of CLC clients
- Homelessness risk was not recorded for 71 per cent of CLC clients
- English ability (an indicator of culturally and linguistically diverse status) was not recorded for 21 per cent of CLC clients
- Self-reported income was not recorded for 16 per cent of CLC clients (unpublished Community Legal Service Information System (CLSIS) data).

Source: Commission estimates based on unpublished CLSIS data from AGD.

As a result, administrative data sets in their existing form, can be of limited use in assessing the effectiveness and efficiency of legal assistance services.

Inadequate data management processes and systems

Data collection across the civil justice system is limited by the administrative data collection and storage protocols of some providers and institutions. Some current management systems do not allow for cost effective record keeping and data collection, and as a result the data collected is not complete.

Curran noted that the biggest obstacle when conducting her research in 2007 was that most CLCs had thrown out many of their campaign files ... The State peak body for CLCs the Federation of Community Legal Centres (FCLC) had retained some materials but it relied on CLCs providing these to them regularly which had not occurred over the two decade period under examination. The FCLC had also had to cull material that would have been relevant due to its own space issues. (Curran 2012, p. 60)

Similarly, some tribunals do not use electronic case management systems (chapter 10), and as a result these tribunals do not have easy access to data on their

case loads and costs. This information is valuable to the individual institution, as well as assisting in benchmarking. Chapter 17 discusses the improvements to efficiency and effectiveness that have resulted from the implementation of electronic management systems in the courts.

Further, the use of different management systems by providers of similar services makes data coordination and consistency more difficult to achieve. In the case of publicly-funded legal assistance, differences in collection methodology across the four types of legal assistance providers degrade the quality and comparability of information collected. This complicates the task of measuring the use of legal services by disadvantaged and marginalised groups. For example, ATSILS and FVPLS use two different administration data collection systems, which have different variables and data collection protocols. As a result, data are inconsistent even though services are targeted at the same community.

‘Fatigue’ amongst those collecting and reporting data

A number of stakeholders (including the Law Council of Australia, sub. 96 and Curran, sub. 88) have suggested that reporting requirements act as a burden to many providers and institutions and there is a perception that data are collected for data’s sake.

There is evidence that the data currently being collected are not being fully exploited. As an example, some data provided to the Commission required significant work to permit statistical analyses, raising questions about whether the relevant data had been previously employed for analytical purposes. Where data are not used, incentives for providers and institutions to report accurate and complete information are reduced, contributing to patchy and incomplete data sets.

It is important that requests for data are carefully targeted so that benefits of its use are apparent to those that provide and collect information. Before imposing additional data requirements, existing data need to be fully assessed and used so that data collection fatigue is not compounded. Efforts need to be made to identify and reduce ‘redundant data’ requirements. This process should be undertaken in consultation with providers and institutions. This should help allay concerns raised by some participants about imposing additional costs on providers and institutions that are already data weary and resource constrained:

The Law Council’s key concerns with respect to the gathering of data are that ... it creates an additional cost burden for the courts and legal assistance providers, which are often required by Federal and State Attorney-General’s Departments to collect new information, without any or sufficient allocation of funding to support the additional work (which can be substantial). (Law Council of Australia, sub. 96, p. 139)

Researchers and policy evaluators should also be transparent with the organisations responsible for collecting data, in terms of explaining how such information might be used in evaluation and research. Greater engagement between policy evaluators, providers and institutions can lead to mutually beneficial outcomes in building a greater understanding of the context of data collection in the civil justice system. In turn, providers and institutions can realise the benefits of data, which includes garnering a clearer understanding of their clients and operations.

A lack of incentive to report policy-relevant, commercially-sensitive information

Private providers of legal services can be diverse (chapter 7), ranging from the sole trader who might specialise in simple legal services to large firms that deal in complex, and sometimes rare, matters. The information that they collect about their clients and operations will be tailored to their clients' concerns. These firms lack an incentive to publicly reveal commercially-sensitive information that may put competitors at an advantage, such as data on litigation costs, even where this information has direct policy relevance (chapter 6). There may also be ethical or lawyer-client privilege issues.

While the dissemination of commercially-sensitive administrative data are not feasible (or warranted), survey data may play a role in forming the evidence base, though this will inevitably be less valuable than getting access to the data directly. For example, given the sensitive nature of litigation costs, there may be reluctance for litigants or their lawyers to participate in surveys. If particular types of litigants and lawyers refuse to participate, survey results may be unrepresentative. Inaccurate survey results can emphasise (or play down) the importance of particular issues, which can lead to policy interventions that do not meet the needs of the community.

Surveys have been used in the past to glean useful information from private lawyers and firms while preserving confidentiality. For example, the Law Council of Australia (2009) coordinated a national survey of legal practitioners in rural, regional and remote areas that involved collection of sensitive information such as the incomes of legal professionals. The presentation of this information retained the privacy of the lawyers and firms and allowed for analysis across Australia.

24.3 Why have evaluations been limited?

The lack of appropriate data has frustrated evaluations of the civil justice system, a task already made difficult by the need to take account of contextual factors and

reliable measures of quality. While these factors complicate evaluations they do not, and indeed should not, rule them out.

The context of the civil justice system complicates measurement

The civil justice system is very diverse, with a number of different types of legal service providers and dispute resolution bodies offering different types of services targeted at different users who are located in different jurisdictions. The interplay of these factors means that the outcomes are contextually-dependent. The contextually-dependent nature of the civil justice system has been noted as a barrier to policy-making (Law Council of Australia, sub. 96) because there is a concern that evaluations, and the data used to underpin them, will ignore important details of the civil justice system.

While it is important to acknowledge context, it does not preclude data collection or evaluation that can meaningfully inform policy. First, there are ways to control for context in evaluations. Second, similarities exist across some types of matters and services, which allows for the collection of comparable data. For example, mediation occurs in many different settings including in the courts, tribunals, and informally. While the data collected may not be able to describe every legal matter in detail, it may be more than sufficient to use for evaluation purposes.

Measuring the quality of legal services is difficult

As discussed in chapter 6, quality is difficult to measure from a consumer perspective. Equally, it is difficult to measure from a data perspective since doing so can involve imputing the value or suitability of advice or services given by legal providers, or how ‘fair’ an experience was in the legal system. Where the data are collected by providers or institutions, it is normally in the form of feedback. Feedback provided is often at one of two extremes — respondents are either very satisfied or very unsatisfied. Self-reported survey data are also prone to framing effects and survey responses are highly correlated with the outcome of the dispute, which indicates that users of the legal system are not able to assess the quality of the advice or service provided outside of the context of the result.

While the civil justice system does face challenges around measuring quality in the context of the service provided, it is not a challenge that is unique to the sector. Similar problems are faced in equally complex policy areas, such as health care, where data are collected effectively to account for the scale of problems and the quality of care provided. Follow-up on a random sample of users can be used to understand what aspects of the services consumers valued and what aspects they did

not. This can indicate to providers and institutions those aspects of services that are working well, and hence help improve service delivery and understanding for providers and institutions.

24.4 Improving data collection and evaluation

There is a range of issues that need to be addressed so that the quality of data collected and evaluations undertaken can improve.

Data collection needs to be better coordinated and more accessible

Policy-relevant data can be best utilised when it is consistent within and across different types of providers and institutions. One of the recurring challenges faced by the Commission in this inquiry has been the disparate nature of the data collected, and the effort required to identify what is available and bring it together into a usable form. There is potentially valuable privately-held data and, provided privacy issues are dealt with, there appears to be little rationale as to why it should not be in the public domain — particularly in the case of information relating to the client base of publicly-funded legal assistance providers.

A common framework around definitions, objectives and use of the data would substantially improve the quality of data collected.

DRAFT RECOMMENDATION 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

- ***adopting common definitions, measures and collection protocols***
- ***linking databases and investing in de-identification of new data sets***
- ***developing, where practicable, outcomes based data standards as a better measure of service effectiveness.***

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

Better information also needs to be collected on the placement and outcomes of those individuals that are frequent (and disproportionate) users of legal assistance services — commonly referred to as ‘intensive users’. Collecting relevant and timely information is critical to making judgments about the effectiveness of placements in order to assist more disadvantaged individuals. However, the detail collected on the placement and outcomes of intensive users is not tracked over time and varies between jurisdiction, hampering the formulation of policies targeting disadvantage.

DRAFT RECOMMENDATION 24.2

As part of draft recommendation 24.1, existing data systems should be overhauled so that providers can track outcomes for intensive users of legal assistance services over time.

The establishment of a data clearinghouse would also improve data and evaluation. A clearinghouse which coordinates, gathers and disseminates data from a wide range of stakeholders, would enable researchers, and policy makers and evaluators to access and analyse comparable data across the sector.

A balance between data collection and dissemination for policy purposes and privacy needs to be carefully articulated. This is well recognised by stakeholders:

The Law Council also supports collection of data in relation to the legal profession. However, the capacity of law practices to collect data and provide information will be limited by a number of factors, including cost, obligations of confidentiality to clients and concerns about the way in which the data may be used or compared. (Law Council of Australia, sub. 96, p. 10)

There are, however, precautions that can be taken to de-identify data so that it can be used without the possibility of personal or business information being revealed. These are relatively common practices amongst statistical agencies (including the ABS) and government organisations that collect data (such as the Department of Social Services). Indeed, there are already examples where this has successfully occurred including the WA data linkage service which links ‘registers of birth defects, of cancer ... of autism and mental health problems’ (Stanley 2010, quoted in PC 2013a, p. 10) by setting up unique identifiers that preserve the anonymity of individuals.

INFORMATION REQUEST 24.1

The Commission seeks feedback on where a data clearinghouse for data on legal services should be located. Such a clearinghouse needs to be able to coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. It should also have some expertise in linking, using and presenting data, especially administrative data. Ideally, the clearinghouse should also have experience in liaising with legal service providers and different levels of government, have an understanding of the operation of the civil justice system and understand the principles behind benchmarking.

The *Legal Australia-Wide (LAW) Survey* (Coumarelos et al. 2012) has helped to provide evidence on the civil justice system on a wide range of topics, including unmet legal need, intensive users of the legal system and more general data around the disputes experienced by individuals. The Commission has drawn heavily on this survey in research for this report, and a range of stakeholders commended the *LAW Survey* in their submissions to the Commission (including the Law Council of Australia, sub. 96 and National Association of Community Legal Centres, sub. 91), and it is clear that other research using the survey has provided a better evidence base for civil justice policy.

DRAFT RECOMMENDATION 24.3

The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.

Evaluations need to be conducted regularly

Evaluation of programs should be undertaken at regular intervals using a common and transparent methodology. This ensures that the organisations responsible for service delivery are aware of ‘the rules of the game’ and adjust their output to meet the goals that are determined. In a similar way, those on the front-line of legal services should provide input in helping to develop what goals and measures should be in place. By engaging stakeholders to both develop and work to a sound evaluation policy, the quality and collection of the data can often be improved.

The importance and benefits of data and evaluation have been stressed throughout this chapter. One of the primary benefits of collecting good quality data and performing evaluations is that it leads to continuous improvement of policy. The Commission considers that the suite of data outlined in appendix J should form the basis for future data collection.

A Conduct of the inquiry

The Commission received the terms of reference for this inquiry on 21 June 2013. It subsequently released an issues paper on 16 September 2012 inviting public submissions and highlighting particular matters on which it sought information.

In total, 152 public submissions were received and placed on the inquiry website. A list of all public submissions is contained in table A.1.

During the course of the inquiry, the Commission held informal consultations and roundtable discussions with governments, regulatory bodies, peak industry groups in the legal sector, as well as a number of legal organisations and individuals with a legal background. Tables A.2 and A.3 lists these participants.

The Commission would like to thank all those who contributed to this inquiry.

Table A.1 Public submissions received

<i>Participants</i>	<i>Submission No</i>
Aboriginal Family Violence Prevention & Legal Service Victoria	99
Aboriginal Legal Rights Movement	126
Aboriginal Legal Service of Western Australia (Inc)	112
Adelaide Law School, The University of Adelaide	16
Administrative Appeals Tribunal	65
Adrian Evans	114
Allens	111
Andrew Smart	147
Annette Marfording	19
Attorney-General's Department	137
Australian and New Zealand Ombudsman Association Inc	133
Australian Bankers' Association Inc	121
Australian Bar Association	149
Australian Centre for Disability Law	67
Australian Federation of Disability Organisations	24
Australian Inquest Alliance	62
Australian Institute of Company Directors	40
Australian Institute of Family Studies	101
Australian Lawyers Alliance	107
Australian Network of Environmental Defenders Offices	94
Australian Taxation Office	150
Brett Dawson	8
Central Australian Aboriginal Legal Aid Service Inc (CAALAS)	89
Central Coast Community Legal Centre	39
Central Highlands Community Legal Centre Inc	13
Centre for Rural Regional Law and Justice & National Rural Law and Justice Alliance	20
Christopher Enright	10
City of Sydney Law Society	110
Commonwealth Ombudsman	129
Communication Rights Australia	71
Community Legal Centres NSW and others	4
Consumer Action Law Centre	49
Consumer Credit Legal Centre (NSW) Inc	87
Council of Australasian Tribunals	98
David Caruso & Dr Suzanne Le Mire (Adelaide Law School, University of Adelaide)	106
Disability Advocacy Network Australia (DANA) Ltd	35
Disability Discrimination Legal Service Inc	116
Domestic Violence Legal Service	140
Dr Liz Curran	88,92
Dr Gabrielle Appleby & Dr Suzanne Le Mire (Adelaide Law School, University of Adelaide)	63
East End Mine Action Group (Inc)	37

(Continued next page)

Table A.1 (continued)

<i>Participant</i>	<i>Submission No.</i>
Energy and Water Ombudsman (Victoria) Limited	119
Energy & Water Ombudsman NSW	141
Eqalex Underwriting Pty Ltd	108
Evan Whitton	7,42
Family & Relationship Services Australia	90
Family Court of Australia	70
Federation of Community Legal Centres (Victoria)	77
Financial Ombudsman Service	136
Funds in Court of the Supreme Court of Victoria	152
Grays Institute	38
Hunter Community Legal Centre	26
IMF (Australia) Ltd (now known as Bentham IMF Limited)	103
Indigenous Legal Needs Project & Victorian Aboriginal Legal Service	125
Intellectual Disability Rights Service Inc	75
John Joseph	113
Jonathan B. Horrocks	148
Jones Day Lawyers	54
Judicial Council on Cultural Diversity	120
Julie Grainger	66
Justice Action	43
Justice Connect	104
Kevin Rothery	22
Kingsford Legal Centre	53
Law Council of Australia	11, 96
Law Society of South Australia	61,131,139
Legal Aid (ACT)	27
Legal Aid NSW	68
Legal Services Commission of South Australia	93
Lynton Freeman	9,12
Maurice Blackburn Pty Ltd	59
Medical Consumers Association Inc	41
Mental Health Carers Arafmi (WA) Inc	5
Michael O'Keeffe	69
Mid North Coast Community Legal Centre	85
Migration Review Tribunal - Refugee Review Tribunal	14
National Aboriginal and Torres Strait Islander Legal Services (NATSILS)	3,78
National Aboriginal Family Violence Prevention Legal Services	97
National Alternative Dispute Resolution Advisory Council	109
National Association of Community Legal Centres	91
National Children's and Youth Law Centre	50
National Legal Aid	6,123
National Native Title Tribunal	55
National Pro Bono Resource Centre	73
National Public Lobby	143

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Table A.1 (continued)

<i>Participant</i>	<i>Submission No</i>
Nature Conservation Council of NSW on behalf of the Conservation Councils of Australia	124
Negocio Resolutions	52,144
New South Wales Aboriginal Land Council	80
New South Wales Bar Association	34
North Australian Aboriginal Family Violence Legal Service	138
North Australian Aboriginal Justice Agency	95
Northern Territory Legal Aid Commission	128
NSW Society of Labor Lawyers	130
NSW Young Lawyers Committees	79
Office of the Australian Small Business Commissioner	23
Office of the Legal Services Commissioner (NSW)	36
Patrick Cavanagh	1
Paul Evans	15
Peninsula Community Legal Centre Inc	28
People with Disability Australia Incorporated	30
Peta Spender	135
Peter Mair	2
Peter White	142
Prisoners' Legal Service	82
Prue Vines	17
Public Interest Advocacy Centre Ltd	45
Public Transport Ombudsman Limited	118
Queensland Advocacy Incorporated	64
Queensland Indigenous Family Violence Legal Service	46
Queensland Law Society	57
Queensland Public Interest Law Clearing House Incorporated	58
Redfern Legal Centre	115
Rich Krasnoff	100
Richard Whitwell	81
Salvos Legal (Humanitarian) Limited	122
Shearer Doyle Pty Ltd	21
Shoalcoast Community Legal Centre	18
Slater & Gordon Lawyers	56
Small Business Development Corporation	76
Social Security Appeals Tribunal	86
Springvale Monash Legal Service (Inc)	84
St Kilda Legal Service Submission Co-Op Ltd	51
Steve Phillips	151
Stuart Bruce VENN	60
Tasmanian Government	72
Telecommunications Industry Ombudsman	134
The Aged-care Rights Service Incorporated	31
The Indigenous Legal Needs Project, James Cook University	105

(Continued next page)

Table A.1 (continued)

<i>Participant</i>	<i>Submission No</i>
The Refugee Advice and Casework Service (RACS)	47
Tom Benjamin (Vice-President Medical Consumers Association Inc)	44
U.S. Chamber Institute for Legal Reform	25
Pro Bono Centre, University of Queensland	74
Veterinary Surgeons' Board of WA	145
Victoria Legal Aid	102
Victorian Bar	127
Victorian Council of Social Service (VCOSS)	132
Western Australian Dispute Resolution Association Incorporated	146
Women's Health In the North	83
Women's Legal Service Inc (Brisbane)	117
Women's Legal Service Tasmania	48
Women's Legal Services Australia	29
Women's Legal Services NSW	32
Women's Legal Service Victoria	33

Table A.2 **Meetings***Participant***ACT**

ACT Justice and Community Safety Directorate
 ACT Magistrates Court
 ACT Ombudsman
 Administrative Appeals Tribunal
 Attorney-General's Department
 Federal Court of Australia

New South Wales

Department of the Attorney General and Justice
 Australian Law Reform Commission
 Community Legal Centres NSW
 Federal Court of Australia
 Law Society of NSW
 Legal Aid NSW
 National Legal Aid Grants and National Statistics Working Group
 District Court of NSW
 Judicial Commission of NSW
 NSW Land and Environment Court
 NSW Law and Justice Foundation
 NSW Local Court
 Energy & Water Ombudsman NSW
 Supreme Court of NSW

Northern Territory

Aboriginal Interpreter Service
 Community Justice Centre
 Darwin Community Legal Centre
 Department of Attorney-General and Justice
 Northern Territory Magistrates Court
 National Alternative Dispute Resolution Advisory Council
 Northern Australian Aboriginal Family Violence Legal Service
 Law Society Northern Territory
 NT Legal Aid Commission
 Ombudsman NT
 Top End Women's Legal Service Inc

Queensland

Department of Justice and Attorney General
 Federal Circuit Court of Australia
 Family Court of Australia
 Indigenous Legal Needs Project
 Law Council of Australia
 Law Council of Australia-Family Law Section

(Continued next page)

Table A.2 (continued)

Participant

Legal Aid Queensland
 Legal Services Commission
 Queensland Law Reform Commission
 Queensland Law Society
 Women's Legal Services Australia

South Australia

Attorney-General's Department
 Chief Justice of SA & Procedure Executive Committee
 Chief Justice of SA & representatives of the Judiciary
 Law Society of South Australia
 Legal Practitioners Conduct Board
 Legal Services Commission
 National Aboriginal and Torres Strait Islander Legal Services
 South Australian Bar Association

Tasmania

Department of Justice
 Law Society of Tasmania
 Legal Aid Commission of Tasmania
 Legal Profession Board of Tasmania
 Magistrates Court of Tasmania
 Supreme Court of Tasmania
 Tasmanian Aboriginal Centre Inc
 Greg Barns

Victoria

Telecommunications Industry Ombudsman
 Australian Bar Association
 Australian Centre for Justice Innovation
 Dispute Settlement Centre of Victoria
 Family Law Council
 Federal Circuit Court/Family Court
 Bentham IMF Limited (formerly IMF (Australia) Ltd)
 Magistrates' Court of Victoria
 Supreme Court of Victoria
 Victorian Bar
 Victorian Civil and Administrative Tribunal
 Federation of Community Legal Centres (Victoria)
 Victorian Legal Aid

Western Australia

Department of the Attorney General
 Law Reform Commission of Western Australia

(Continued next page)

Table A.2 (continued)

Participants

Law Society of Western Australia

Legal Aid Western Australia

Western Australia Ombudsman

Draft

Table A.3 **Roundtables***Organisation***Sydney — 22 November 2013**

Aboriginal Family Violence Prevention Legal Service Forum
 Access to Justice Division, Attorney-General's Department
 ACIL Allen Consulting
 Ashurt
 Commercial Disputes Management Centre
 Law Council of Australia
 Deakin University, Centre for Rural Regional Law and Justice
 Deputy Commonwealth Ombudsman
 Dispute Resolution Unit, NSW Small Business Commissioner
 Energy & Water Ombudsman NSW
 Family Law, Legal Aid NSW
 Family Law Council
 Federation of Community Legal Centres (Victoria)
 Foundation Chair and Director of Australian Centre for Justice Innovation at Monash University
 Representatives from NADRAC (before disbanded)
 Indigenous Country and Governance, AIATSIS
 Institute of Arbitrators & Mediators Australia (NSW chapter)
 Judith Stubbs & Associates
 Justice Connect (previously PILCH NSW and PILCH Vic)
 Law and Justice Foundation of NSW
 Law Council of Australia
 Legal Aid NSW
 Legal Services Commission of South Australia
 National Aboriginal and Torres Strait Islander Legal Services (NATSILS)
 National Aboriginal Family Violence Prevention Legal Services Forum
 National Association of Community Legal Centres
 North Australian Aboriginal Family Violence Legal Service
 Pro Bono, Clayton Utz
 Relationships Australia Victoria
 Salvos Legal
 Senior Executive Officer responsible for ADR at ATO
 Social Inclusion Division, Attorney-General's Department
 UNSW Faculty of Law
 Victoria Legal Aid

(Continued next page)

Table A.3 (continued)

*Organisation***Melbourne – 25 and 26 November 2013**

Access to Justice Committee, Law Institute of Victoria
 Administrative Appeals Tribunal (AAT)
 Australian Centre for Justice Innovation, Monash University
 Consumer Action Law Centre
 Department of Attorney General and Justice (NSW)
 Family Court of Australia
 Family, Legal Aid NSW
 Federal Circuit Court of Australia
 Federal Court of Australia
 Independent Children's Lawyer, Victoria Legal Aid
 Law Council of Australia and Australian Bar Association
 Law Society Northern Territory
 Law Society of NSW
 Law Society of South Australia
 Legal Aid NSW
 Legal Practitioners Conduct Board (South Australia)
 Legal Services Commissioner of Victoria and CEO Legal Services Board
 Legal Strategy and Development, Victorian Bar
 Long Tail Claims, QBE Australia (on behalf of the Insurance Council of Australia)
 Policy and Research, Centre for Innovative Justice, RMIT University
 Pro Bono Relationships, Justice Connect (formerly PILCH NSW and PILCH Vic)
 Queensland Public Interest Law Clearing House (QPILCH)
 Risk and Investigation, Australian Skills Quality Authority
 Social Security Appeals Tribunal
 South Australian Bar Association
 Supreme Court of Victoria
 Supreme, District and Land Courts Service (QLD)
 University of Melbourne Law School
 Victorian Civil and Administrative Tribunal (VCAT)

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Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

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B Unmet legal need

This appendix provides some greater detail around the informal dispute resolution mechanisms that could be used to satisfy unmet legal need. It also provides detail around the characteristics of those with unmet legal need, and the incidence of unmet legal need of small businesses. It draws heavily on unpublished data from the Law and Justice Foundation of NSW *LAW Survey* (Coumarelos et al. 2012).

B.1 Identifying informal dispute resolution mechanisms appropriate for particular problems.

Consumer problems

The largest number of instances of unmet legal need occurred in relation to consumer problems and disputes. These made up 28 per cent of instances of unmet legal need despite consumer problems accounting for only 21 per cent of problems.

Around 40 per cent of instances of unmet legal need in the consumer category related to telecommunications and TV providers. There is an industry-specific ombudsman for telecommunications complaints — the Telecommunications Industry Ombudsman (TIO) — but there are few instances of respondents seeking redress through an ombudsman service.

Problems relating to insurance and banking services accounted for 17 per cent of instances of unmet legal need in the consumer category. Two industry ombudsmen — the Financial Ombudsman Service (FOS) and the Credit Ombudsman Service (COS) — provide avenues to address these disputes. However, as with the TIO above, there are relatively few instances of ombudsmen being used to resolve such problems.

Problems relating to buying faulty goods accounted for 15 per cent of cases of unmet legal need in the consumer category. These problems, based on the limited information from the *LAW survey*, may have a solution through complaints mechanisms such as the office of fair trading in the relevant jurisdiction. Failing

that, action through the relevant state or territory tribunal may also be a viable option.

Another area of unmet legal need related to problems and disputes with utilities providers, which made up 9 per cent of instances of unmet legal need within the consumer category. These, too, can be resolved through the relevant ombudsman.

The remaining instances of unmet legal need in the consumer category (18 per cent) related to problems or disputes involving lawyers, professionals and tradespersons, or some ‘other provider’. In the case of disputes with lawyers, there may be an avenue to address problems via the relevant legal services commission, but it is unclear that there is a clear pathway to address the remaining disputes. Depending on their nature, a more informal mechanism (relative to courts) could be to make a complaint to the relevant professional association or regulator (where available), use a tribunal, or approach an office of fair trading.

Government problems

The next largest group of problems with unmet legal need relate to ‘government problems’, which comprise 13 per cent of instances of unmet legal need. Within this category of problems there are a range of disputes.

The most common problem associated within the government category were those associated with local government (29 per cent of instances of unmet legal need relating to government problems). These included problems relating to the services and amenities provided by local government, as well as objections to or problems with planning approvals. Generally, there is a state-based ombudsman to address complaints about local government, but some matters are exempt from their consideration. For these matters, redress may be available from a (relatively more costly) tribunal.

For example, planning matters are exempt by the local government ombudsman in New South Wales, but in Queensland there is an informal dispute resolution mechanism in the form of the *Building and Development Dispute Resolution Committees* (PC 2011). In the case of business regulation, disputes are often resolved in lower courts or tribunals (PC 2012), but this will generally involve a cost.

The next most common problem associated within the government category were those associated with receiving government payments (25 per cent of instances). A complaint around Commonwealth payments can be reviewed by the Commonwealth Department of Human Services, which in turn can be appealed to

the Social Security Appeals Tribunal (SSAT) — both of which do not charge users and where self-representation is the norm. The Commonwealth Ombudsman also provides another avenue to appeal, which also does not charge users as fee. (There are further avenues of appeal — such as to the Administrative Appeals Tribunal (AAT) and the Federal Court — but these can involve significant costs.)

The third most common problem associated with unmet legal need in the government category related to tax assessments and tax debts (11 per cent of instances). The Australian Taxation Office (ATO) offers the opportunity to review complaints about taxation assessments and decisions. The ATO also utilises ADR once it exhausts direct negotiation opportunities, and considers the use of ADR, where appropriate, to resolve disputes earlier (sub 150, p. 13). Failing that, the Commonwealth Ombudsman can also hear some tax-related disputes. Further appeals — through the AAT — involve some cost to parties, depending on the individual's circumstances and nature of the dispute.

The next most common categories include fines — separated by those that have no further penalty (8 per cent of unmet legal need relating to government problems) and those that do lead to further penalty (7 per cent).¹ The former are often imposed by local government, while the latter are often imposed by the police. However, it is difficult to suggest an appropriate remedy without more information on the details of the fines.

The remaining instances of unmet legal need related to a wide range of problems including disputes around citizenship, residency or immigration (6 per cent), building works by home owners (6 per cent), freedom of information requests (3 per cent), building works by investors (3 per cent) and other issues not further defined (the remaining 2 per cent). Many of these problems could be addressed in the Migration Tribunal, Refugee Review Tribunal, Commonwealth Ombudsman or Information Commissioner as appropriate.

Housing problems

Housing problems accounted for 8 per cent of instances of unmet legal need. Most of the unmet legal need in housing problems (56 per cent) related to disputes with neighbours. Specifically, the survey questionnaire asked:

‘Have you had any problems or disputes with your neighbours over things like fences, trees, noise, litter or pets?’ (Coumarelos et al. 2012, p. 272)

¹ These are defined in the *LAW survey* as fines that lead to court fines, loss of licence or registration, community service orders, property being seized or wage deductions (Coumarelos et al. 2012).

Given the broad nature of this question, it is difficult to assess the nature of unmet legal need associated with those facing problems with their neighbours. For example, there are different dispute resolution mechanisms for matters involving boundary disputes and disputes over barking dogs. The appropriate dispute resolution mechanism will vary depending on the problem and jurisdiction. For example, the Dispute Settlement Centre of Victoria, NSW Community Justice Centres, the Dispute Resolution Branch of the Queensland Department of Justice and Community Mediation Service of South Australia are all low or no-fee ways to resolve many, but not all, neighbourhood disputes in each of those jurisdictions. The alternative is a tribunal, which may be costly for some disputes.

The next most common category of unmet legal need occurred with respect to ‘rented housing’ (26 per cent of instances of unmet need in the housing category). In turn, this mostly comprised of problems relating to renting privately (82 per cent), as opposed to renting public housing (12 per cent) and strata title issues (6 per cent). In some jurisdictions, there are government agencies that offer mediation in response to disputes around rented housing, but often these require all parties to voluntarily agree to engage in mediation. Beyond this, the relevant state- or territory-based tribunal is an option to resolve disputes around private renting, albeit at a cost. Disputes relating to public housing can be appealed to the relevant state or territory government department or ombudsman. Depending on the nature of the strata dispute, a resolution may be found through the appropriate office of fair trading.

There were also a number of instances of unmet legal need in the housing category that were associated with ‘owned housing’ (17 per cent of problems). Of these problems, 41 per cent were associated with mortgage payments or other mortgage issues; 29 per cent were some ‘other issue’, 27 per cent were about disputes over strata titles, while 3 per cent were to do with retirement villages. Disputes around mortgages are most likely addressable through the FOS and issues of strata title with the appropriate office of fair trading. Problems with retirement villages could be addressed through the Aged Care Complaints Scheme (ACCS).

(The ‘other issues’ were more difficult to describe, but there is information about the other party to the dispute. Common responses included disputes with tradesmen, neighbours, local government and private lawyers — the processes for which have been discussed, above.)

Employment problems

Problems relating to employment comprised 8 per cent of all instances of unmet legal need. These included disputes around conditions (43 per cent), harassment or victimisation at work (24 per cent), work-related discrimination (including discrimination when seeking work) (19 per cent), and being dismissed or made redundant (13 per cent). The remaining 1 per cent of unmet need related to reviews of work performance and conduct.

In the case of employment conditions, most workers covered by enterprise agreements have a dispute resolution mechanism included in their agreement. Once this avenue has been exhausted, employees can then use the Fair Work Ombudsman. Alternatively, the problem could be resolved by approaching Fair Work Australia or the relevant state or territory industrial relations commission, but they can involve greater costs to users. Also, depending on the nature of the discrimination or harassment, there may also be some recourse available through the human rights or anti-discrimination commission in the relevant jurisdiction.

Family problems

Family problems and disputes accounted for 8 per cent of instances of unmet legal need. Within the category of family problems, 40 per cent of instances of unmet need related to child support, 25 per cent related to divorce or separation, and the remaining problems related to guardianship (including fostering and adoption), care and protection, custody and contact, and division of assets following a break-up.

In the case of child support, the services provided by the child-support agency (part of the Commonwealth Department of Human Services) can help by providing advice and determining the responsibilities of each party, with an avenue of appeal to the Commonwealth Ombudsman. In the case of separation, there are also family dispute resolution (FDR) practitioners that can accommodate many of these other problem types. There are also tribunals that can be used in the area of guardianship matters.

Rights problems

The majority of problems with unmet legal need in the ‘rights’ category occur with respect to matters of education (65 per cent). These included:

- student bullying or harassment of the respondent’s child (30 per cent of unmet need in the rights category)

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- student bullying or harassment of the respondent (12 per cent)
 - unfair exclusion from education of the respondent's child (10 per cent)
 - unfair exclusion from education of the respondent (6 per cent)
 - student fees and results (the remaining 7 per cent).

Without further information, it is difficult to understand the nature of these cases and whether they can be solved using informal avenues. For example, it may make sense for those that are victims (or parents of victims) of bullying to contact the educational institution or state education department to make a formal complaint or seek a resolution through the education system. It may be that some disputes involve parties that are reluctant to make a complaint, or that parties are unaware that many educational institutions have policies to deal with bullying. The data are insufficient to make suggestions with respect to bullying or unfair exclusion.

The other rights problems with unmet need included matters relating to unfair treatment by police (21 per cent), and discrimination outside of work (13 per cent). Other civil cases, which included matters of privacy, intellectual property, court processes and costs and complaints against independent bodies accounted for the remaining 2 per cent of instances of unmet legal need.

As with disputes around education, it is difficult to make suggestions around unmet need relating to unfair treatment by police without further information. There are mechanisms to make complaints about the actions of police, with the avenue of further referrals to the relevant ombudsman. Matters of discrimination, however, can be brought to the relevant human rights or anti-discrimination commission in a particular jurisdiction.

Credit/debt problems.

The problems associated with unmet legal need in the 'credit/debt' category were relatively diverse. These included problems or disputes related to:

- creditors taking or threatening to take action to recover unpaid bills or debts (33 per cent of credit/debt problems)
- the repayment of money owed to the respondent (27 per cent)
- credit ratings or refusals of credit (21 per cent)
- paying a loan or hire purchase agreement or guaranteeing someone else's loan (15 per cent)

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- other issues including repayment of money owed to the respondent and bankruptcy (the remaining 4 per cent of credit/debt problems).

The *LAW Survey* data indicated that, for some of these problems, the type of unmet legal need can vary. For example, in the case of creditors threatening to take action to recover unpaid bills, most instances of unmet need occurred where respondents consulted the wrong adviser to try and resolve the problem (85 per cent of instances of unmet need). In cases relating to credit ratings and bankruptcies, however, the proportion of unmet need where respondents took no action at all was around 30 per cent. This indicates that for some credit/debt problems, a relatively high proportion of unmet need occurred because respondents may not have known who to contact to resolve the problem.

In many of the cases outlined above, the COS may be an appropriate organisation to help resolve these problems.

Other selected issues

There were relatively few instances of problems in the remaining categories — ‘money’, ‘accidents’, ‘health’ and ‘personal injury’ — which collectively comprised 11 per cent of instances of unmet need. One third of these problems occurred in the money category, around a quarter in each of the accidents and health categories, with the remainder in personal injury. At this level of disaggregation, it is difficult to form inferences around these types of problems because there were few observations (collectively 529 problems out of the 19 469 problems documented in the *LAW Survey*).

Nevertheless, there are mechanisms to deal with some of these categories of unmet need:

- those with money problems often have a state-based tribunal to approach
- those with nursing home or group home care problems can approach the ACCS
- those with problems relating to health can consult the state- or territory-based health complaints commission, and those with mental health problems can seek redress through state-based mental health tribunals.

For some problems, however, the Commission was unable to identify an informal avenue to seek a resolution. These disputes included:

- those involving disability care, aid and equipment (although there may be some recourse through the disabilities commissioner, or the AAT, in the case of National Disability Insurance Scheme decisions)

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- access to health services and disputes around health care costs and entitlements
 - there are few avenues, besides courts, through which to dispute matters around wills and powers of attorney
 - there is no informal avenue to pursue matters around accidents — which mainly comprise motor vehicle accidents without injuries — especially in cases where the other party is unknown. Nor are there formal avenues to pursue matters relating to personal injury outside the courts.

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B.2 Characteristics associated with the unmet legal need of individuals

Table B.1 summarises the logistic regression analysis using unpublished *LAW Survey* data to determine the relative importance of various characteristics that may be associated with incidence of unmet legal need (discussed in section 2.5).

Table B.1 Logistic regression results for unmet need ^a

<i>Variable group and base category^b</i>	<i>Categories within variable</i>	<i>Odds ratio^c</i>
Age (relative to 15-17)	18 to 24	0.8
	25 to 34	1.06
	35 to 44	1.24
	45 to 54	0.97
	55 to 64	0.81
	65 and over	0.70*
Gender (relative to female)	Male	0.90*
Income (relative to means tested government payments)	Up to \$249 per week	0.62**
	Between \$250 and \$599 per week	0.72**
	Between \$600 and \$999 per week	0.87
	Between \$1000 and \$1299 per week	0.83*
	More than \$1300 per week	0.65**
Remoteness (relative to rural)	Regional	0.85
	Major city	0.79
ATSI (relative to ATSI status)	Not ATSI	0.58**
Disability type (relative to no disability)	Mental only	1.44**
	Physical only	1.44**
	Mental & physical	1.92**
Unemployed (relative to unemployed)	Not unemployed	0.63**
Jurisdiction (relative to New South Wales)	Victoria	0.9
	Queensland	1.18*
	South Australia	0.83**
	Western Australia	0.94
	Tasmania	0.66**
	Northern Territory	0.86
	The ACT	0.93
Language of interview (relative to English interview with non-English speaking background)	Non-English interview	1.42
	English only	0.82**

^a This table shows the odds ratio implied by the logistic regression for individuals having unmet legal need, based on the sample of individuals with any civil legal problem. 8538 observations, log pseudolikelihood = -5427.3228. ^b Defines the categories of dependent variables and the base category against which they are compared. ^c Odds ratio relative to the base category. For example, males are 0.9 times as likely, relative to females, to suffer from unmet legal need. Asterisks denote levels of significance: ** denotes 5 per cent level of significance; * star denotes 10 per cent level of significance.

Data source: Commission estimates based on unpublished *LAW Survey* data.

B.3 Incidence of unmet legal need for small business

Figure B.1 shows the combinations of responses from the Department of Industry, Innovation, Science and Research-commissioned survey into unmet legal need amongst businesses. Unmet need is based on satisfaction and whether firms felt more dispute resolution mechanisms were needed.

Figure B.1 **Analysis of unmet demand for dispute resolution mechanisms for small business**

		Satisfied with available mechanisms			Avoided dispute escalation	No serious disputes
		<i>Satisfied</i>	<i>Neither satisfied nor dissatisfied</i>	<i>Dissatisfied</i>		
Whether respondent felt more mechanisms are needed	<i>Yes</i>	0.6% (fully met)	0.4% (partly met)	0.9% (unmet)	0.6% (partly met)	84.9%
	<i>No</i>	2.8% (fully met)	1.9% (fully met)	1.8% (partly met)	6.0% (fully met)	

Data source: Table 2 of (DIISR 2010). Shaded cells indicate the combinations that represent partially or fully unmet need. Number of respondents: 2007.

C Survey of court users

C.1 Survey design and distribution

With the assistance of the South Australian courts, the Commission conducted a survey of parties who used the Magistrates, District and Supreme Courts of South Australia. Information elicited from survey respondents included the costs of obtaining legal representation, the amounts at stake for parties, the time taken to resolve disputes, reasons for a lack of representation, and important factors in parties' decisions to settle or withdraw their cases.

The survey was sent to parties via post on 18 February 2014. Postal addresses for potential respondents were supplied by the courts from samples of cases finalised in the 12 months prior to February 2014. Parties who responded to the survey had the option of submitting their response via reply-paid post or online.

A total of 779 surveys were distributed (table C.1). The Commission received a total of 84 responses. Another 64 survey forms were returned to the Commission without completion, due to the intended recipients no longer residing at the street addresses listed in the courts' records. Overall, this represented a net response rate of 12 per cent. Given the low response rate, the results of the survey should be treated with some caution. Nonetheless, they provide some insights into the experiences of some parties in using the formal justice system in South Australia.

Table C.1 Summary of surveys sent, received and response rate
By South Australian court

	<i>Surveys sent</i>	<i>Returned to sender</i>	<i>No. of response</i>	<i>Net response rate ^a</i>
Magistrates Court	430	32	55	14 per cent
District Court	176	16	11	7 per cent
Supreme Court	173	16	18	10 per cent
Total	779	64	83	12 per cent

^a The net response rate was calculated as the number of responses divided by the total number of surveys distributed minus the number of surveys 'returned to sender'.

A copy of the questionnaire sent to users of the South Australian Magistrates Court is reproduced in this appendix. The questionnaires sent to users of the District and Supreme Courts were identical to the questionnaire below, with the exception of the name of the court identified in the 'About this survey' section.

The survey of court users



Australian Government
Productivity Commission

Survey of legal costs for Productivity Commission inquiry into access to justice study

About this survey

Recently you were involved in a civil legal dispute that was lodged in the Magistrates Court of South Australia. You have been sent this survey by the Magistrates Court to assist the Productivity Commission with its report into access to justice.

The survey contains up to 10 questions about some basic details of your *most recent* civil legal dispute in the Magistrates Court, and what it cost you to resolve your dispute. The Productivity Commission intends to use the information from this survey to better understand how much it costs to get legal representation and how this might differ depending on the type of dispute.

How can I complete the survey?

You can complete this survey in one of two ways:

- Option one -- you can complete the survey electronically by going to <http://www.pc.gov.au/projects/inquiry/access-justice> and clicking on the survey link provided and input the password [REDACTED] when prompted.
- Option two -- you can fill out the enclosed survey and post it back using the postage-paid envelope provided.

What about my privacy?

The Productivity Commission is interested in broad patterns and will not be reporting individuals' survey responses. The Commission has **not** received any information about you or your case. If you choose to answer this survey you can do so anonymously.

How long do I have to answer the survey?

You have until 3rd of March 2014 to submit your response to the survey.

Background to the survey

The Productivity Commission has been asked by the Australian Government to report on how to improve access to justice for those who experience civil disputes. This includes disputes about matters such as family relationships, education, employment, money, debt, injury, health, housing and dealings with governments. As part of this work, the Productivity Commission has been asked to explore how much people have to pay for legal representation.

More information about what the Productivity Commission has been asked to do is available from the Access to Justice project website: <http://www.pc.gov.au/projects/inquiry/access-justice>.

If you would like further information about the Commission's project or this survey please contact Pragma Giri on 02 6240 3250.

This is a strictly confidential survey. Please answer these questions by writing your answer in the space provided or by selecting the appropriate response.

Q1. Which of the following best describes the nature of your dispute?

- ☐ Motor vehicle accident - no injury
- ☐ Personal injury (including motor accident, workers compensation, clinical negligence)
- ☐ Consumer
- ☐ Credit/debt/money (including repossession of property)
- ☐ Retail/commercial leasing
- ☐ Residential tenancy
- ☐ Neighbours (fences, trees, noise)
- ☐ Employment
- ☐ Government - licencing, planning, development, land acquisition
- ☐ Government - tax assessment/debt
- ☐ Intervention order
- ☐ Corporations Act matter
- ☐ Intellectual property
- ☐ Wills/estates/probate
- ☐ Discrimination (outside work)
- ☐ Defamation
- ☐ Other

Q2. How was your case finalised?

- ☐ Judgment by default (matter was not contested)
- ☐ Settled before trial
- ☐ Settled during trial
- ☐ Judgment after trial
- ☐ Withdrawn

Q3. How long did it take from initial lodgment for your case to be finalised?

- ☐ Up to 3 months
- ☐ More than 3 months and up to 6 months
- ☐ More than 6 months and up to 9 months
- ☐ More than 9 months and up to 12 months
- ☐ More than 12 months and up to 24 months
- ☐ More than 24 months

Q4. Did you have a lawyer represent you at any stage during your case?

- ☐ Yes for all of the time
☐ Yes, for the majority of the time
☐ Yes, for part of the time
☐ No (go to Question 8)

Q5. What was the total amount billed to you by your lawyer for this case? (please fill out to your best knowledge)

Amount:

Don't know ☐

No charge ☐

Q6. If you received an itemised bill what were you charged for each of the following?
(please fill out to your best knowledge)

Solicitor fees:

Total disbursements:

If possible, please provide a breakdown of the following disbursements:

- Barrister/Counsel fees:

- Court fees:

- Experts:

- Transcripts:

- Office expenses

- Other:

Q7. When you instructed your lawyer to act in your case did he or she provide you with:

- (a) an estimate of the total costs of the case? ☐ Yes ☐ No

If yes, what was the amount specified in the cost estimate?

- (b) sufficient information about the amount you might receive in the event that the case was decided in your favour? ☐ Yes ☐ No

- (c) sufficient information about the amount you might have to pay in the event that the case was not decided in your favour? ☐ Yes ☐ No

Q8. What was the value of: (provide all relevant amounts)

(a) What was at stake for you (e.g. amount of money claimed or monetary value placed on desired outcome)?

OR

was not seeking money ☐

(b) the settlement amount if your case settled?

OR

the amount awarded if a judgment was made?

Q9. If for all or part of your case you were not represented by a lawyer, why was that? (check most important)

- ☐ Could not afford legal representation
- ☐ Application for legal aid grant rejected
- ☐ Did not want a lawyer
- ☐ Other

Q10. If your case was withdrawn or settled, what was important in your decision to withdraw or settle all or part of your case? (check all relevant)

- ☐ Concern about legal costs
- ☐ Advice from lawyer
- ☐ Advice from an expert (eg. counsellor, doctor or mediator)
- ☐ Comments by a registrar, judge or magistrate
- ☐ Concern about whether you would be successful at a hearing
- ☐ Being nervous or unsure about conducting the case yourself
- ☐ Fear of the other party
- ☐ The settlement was close to what you wanted
- ☐ Delay in obtaining a hearing date
- ☐ Frustration with the legal process
- ☐ Other

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

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D List of tribunals and ombudsmen

This appendix contains a list of tribunals (table D.1) and a list of ombudsmen (including complaints bodies, table D.2) that were identified for this report.

Table D.1 Tribunals

<i>Jurisdiction</i>	<i>Tribunal</i>
Cth	Administrative Appeals Tribunal
Cth	Australian Competition Tribunal
Cth	Copyright Tribunal of Australia
Cth	Defence Force Discipline Appeal Tribunal
Cth	Fair Work Commission
Cth	Migration Review Tribunal
Cth	National Native Title Tribunal
Cth	Refugee Review Tribunal
Cth	Social Security Appeals Tribunal
Cth	Superannuation Complaints Tribunal
Cth	Veterans' Review Board
NSW	Consumer, Trader and Tenancy Tribunal ^a
NSW	Administrative Decisions Tribunal ^a
NSW	Dust Diseases Tribunal of NSW
NSW	Guardianship Tribunal ^a
NSW	Industrial Court of New South Wales ^b
NSW	Industrial Relations Commission ^b
NSW	Mental Health Review Tribunal
NSW	NSW Civil and Administrative Tribunal ^c
NSW	Transport Appeal Boards ^a
NSW	Workers Compensation Commission
Vic	Accident Compensation Conciliation Service
Vic	Mental Health Review Board
Vic	Victorian Civil and Administrative Tribunal
Vic	Victorian Mining Warden
Qld	Mental Health Review Tribunal
Qld	Queensland Civil and Administrative Tribunal
WA	Mental Health Review Board
WA	State Administrative Tribunal
WA	Warden's Court

(Continued next page)

Table D.1 (continued)

<i>Jurisdiction</i>	<i>Tribunal</i>
SA	Administrative and Disciplinary Division of the District Court
SA	Dust Diseases list matters ^d
SA	Equal Opportunity Tribunal
SA	Guardianship Board
SA	Licensing Court ^d
SA	Pastoral Land Appeal Tribunal
SA	Police Disciplinary Tribunal
SA	Protective Security Officers Disciplinary Tribunal
SA	Residential Tenancies Tribunal
SA	Skills and Training Commission
SA	South Australian Health Practitioners Tribunal ^d
SA	South Australian Industrial Relations Commission ^d
SA	South Australian Industrial Relations Court ^d
SA	South Australian Workers Compensation Tribunal ^d
SA	Wardens Court
Tas	Administrative Appeals Division, Magistrates Court of Tasmania
Tas	Anti-Discrimination Tribunal, Magistrates Court of Tasmania
Tas	Asbestos Compensation Tribunal
Tas	Guardianship and Administration Board
Tas	Health Practitioners Tribunal
Tas	Mental Health Tribunal
Tas	Mining Tribunal, Magistrates Court of Tasmania
Tas	Motor Accidents Compensation Tribunal, Magistrates Court of Tasmania
Tas	Resource Management and Planning Appeal Tribunal
Tas	Workers Rehabilitation and Compensation Tribunal
ACT	ACT Civil and Administrative Tribunal
NT	Lands, Planning and Mining Tribunal
NT	Mental Health Review Tribunal

^a This tribunal existed in 2011-12 and has been included in caseload data. ^b The Industrial Court of New South Wales is administratively run with the Industrial Relations Commission and has therefore been included in this list. ^c This tribunal did not exist in 2011-12 and is not included in caseload data. ^d These bodies are administratively run together, therefore the Licensing Court and South Australian Industrial Relations Court have been included here.

Table D.2 Ombudsmen and complaints bodies

<i>Jurisdiction</i>	<i>Ombudsman or complaints body^a</i>
National	Aged Care Commissioner
National	Aged Care Complaints Scheme
National	*Airline Customer Advocate ^b
National	Australian Communications and Media Authority
National	Australian Competition and Consumer Commission
National	Australian Health Practitioner Regulation Agency
National	Australian Human Rights Commission
National	Australian Information Commissioner
National	Australian Securities and Investments Commission
National	Commonwealth Ombudsman
National	*Credit Ombudsman Service
National	Fair Work Ombudsman
National	*Financial Ombudsman Service
National	Franchising Mediation Adviser
National	Horticulture Mediation Adviser
National	Immigration Ombudsman
National	Inspector-General of Intelligence and Security
National	Law Enforcement Ombudsman
National	National Health Practitioner Ombudsman; National Health Practitioner Privacy Commissioner
National	Oilcode Dispute Resolution Adviser
National	Overseas Students Ombudsman
National	Postal Industry Ombudsman
National	Private Health Insurance Ombudsman
National	Produce and Grocery Industry Ombudsman
National	Taxation Ombudsman
National	*Telecommunications Industry Ombudsman
NSW	Anti-Discrimination Board of New South Wales
NSW	*Energy & Water Ombudsman NSW
NSW	Health Care Complaints Commission
NSW	Information and Privacy Commission
NSW	Judicial Commission of New South Wales
NSW	NSW Fair Trading
NSW	NSW Ombudsman
Vic	Consumer Affairs Victoria
Vic	*Energy & Water Ombudsman Victoria
Vic	Freedom of Information Commissioner ^b
Vic	Health Services Commissioner
Vic	*Public Transport Ombudsman
Vic	Victorian Equal Opportunity and Human Rights Commission
Vic	Victorian Ombudsman

(Continued next page)

Table D.2 (continued)

<i>Jurisdiction</i>	<i>Ombudsman or complaints body</i>
Qld	Anti-Discrimination Commission Queensland
Qld	*Energy and Water Ombudsman Queensland
Qld	Health Quality and Complaints Commission
Qld	Office of Fair Trading
Qld	Office of the Information Commissioner
Qld	Queensland Ombudsman
WA	Consumer Protection
WA	*Energy and Water Ombudsman Western Australia
WA	Equal Opportunity Commission of Western Australia
WA	Health and Disability Services Complaints Office
WA	Information Commissioner
WA	Ombudsman Western Australia
SA	Consumer and Business Services
SA	Employee Ombudsman
SA	*Energy & Water Ombudsman SA
SA	Equal Opportunity Commission
SA	Ombudsman South Australia
SA	Health and Community Services Complaints Commissioner
SA	WorkCover Ombudsman
Tas	Anti-Discrimination Commissioner
Tas	Consumer Affairs and Fair Trading
Tas	*Energy Ombudsman of Tasmania
Tas	Health Complaints Commissioner
Tas	Ombudsman Tasmania
ACT	ACT Human Rights Commission
ACT	Australian Capital Territory Ombudsman
ACT	Office of Regulatory Services
NT	Consumer Affairs
NT	Health and Community Services Complaints Commission
NT	Information Commissioner; Commissioner for Public Interest Disclosures
NT	Northern Territory Anti-Discrimination Commission
NT	Northern Territory Children's Commissioner
NT	Ombudsman NT

^a (*) denotes industry funded ombudsman. ^b This body did not exist in 2011-12.

E Expert evidence reforms

This appendix contains a table setting out the sources for the expert evidence reforms summarised in table 11.3 of the report.

Draft

Table E.1 Expert evidence reforms

<i>Jurisdiction</i>	<i>Purpose clause</i>	<i>Requirement to seek directions of court</i>	<i>Express powers including limiting number of experts</i>	<i>Disclosure of contingency fee arrangements</i>	<i>Duties on experts — code of conduct</i>	<i>Provision for conferences and joint reports</i>	<i>Express power to direct parties to engage a single joint expert</i>	<i>Power for court to appoint own expert^b</i>	<i>Direct how expert evidence is to be given</i>
NSW	<i>r.31.17</i>	<i>r.31.19</i>	<i>r. 31.20</i>	<i>r. 31.22</i>	<i>r. 31.23 and Schedule 7</i>	<i>rr. 31.24 – 31.26 and Schedule 7</i>	<i>r. 31.37</i>	<i>r. 31.46</i>	<i>r. 31.35</i>
VIC	<i>s. 65F</i>	<i>s. 65G</i>	<i>s. 65H</i>	<i>s. 65P</i>	<i>ss. 16, 17, 20, 21, 23, 24, 25</i>	<i>ss. 65I and s65N</i>	<i>ss. 65H and s65L</i>	<i>ss. 65H and 65M.</i>	<i>s. 65K</i>
QLD	<i>r. 423</i>	<i>r. 427</i>	<i>r. 367(3)(e)</i>	..	<i>r. 426</i>	<i>r. 429B</i>	<i>r. 429G</i>	<i>r. 429G</i>	<i>PD 11 of 2012, para. 34</i>
SA	..	..	<i>r. 209(1)(d)</i>	<i>r. 160(5)</i>	<i>r. 160 and PD 5.4</i>	<i>r. 213</i>	..	..	<i>r. 213</i>
WA ^a	..	<i>O. 36A, r. 3</i>	<i>O. 36A, r. 5</i>	..	..	<i>O. 4A, r. 2(2)(k)</i>	..	<i>O. 40, r. 2</i>	<i>PD 4, para. 26</i>
TAS ^a	..	..	<i>r. 460</i>	..	..	<i>r. 516</i>	..	..	<i>r. 516</i>
NT ^a	..	..	..	..	<i>PD 4 of 2009</i>	<i>r. 44.05 and PD 4 of 2009</i>	..	..	<i>r. 44.05</i>
ACT	<i>r. 1200</i>	..	<i>r. 1205</i>	..	<i>r. 1203</i>	<i>r. 1211</i>	<i>r. 1205</i>	<i>r. 1205</i>	<i>r. 1211</i>
Federal Court	..	..	<i>r. 5.04, item 16</i>	..	<i>PN CM 7</i>	<i>r. 5.04, item 16, r. 23.15</i>	<i>r. 5.04, item 17</i>	<i>r. 5.40, item 14, r. 23.01</i>	<i>r. 23.15</i>
Family Court	<i>r. 15.42</i>	<i>r. 15.51</i>	<i>r. 15.52</i>	..	<i>Division 15.5.5</i>	<i>r. 15.69</i>	<i>r. 15.44</i>	<i>r. 15.45</i>	<i>r. 15.70</i>

^a Refers to superior courts only. ^b Does not cover use of referees.

Sources: Uniform Civil Procedure Rules 2005 (NSW); *Civil Procedure Act 2010* (Vic); Uniform Civil Procedure Rules 1999 (Qld); Practice Direction Number 11 of 2012 (Supreme Court of Queensland); Supreme Court Civil Rules 2006 (SA); Supreme Court Practice Directions 2006; Rules of the Supreme Court 1971 (WA); Supreme Court Rules 2000 (Tas); Supreme Court Rules (NT); Practice Direction No 4 of 2009 (Supreme Court of the Northern Territory); Court Procedures Rules 2006 (ACT); Federal Court Rules 2011 (Cth); Practice Note CM 7 (Federal Court); Family Law Rules 2004 (Cth).

F Data on self-represented litigants

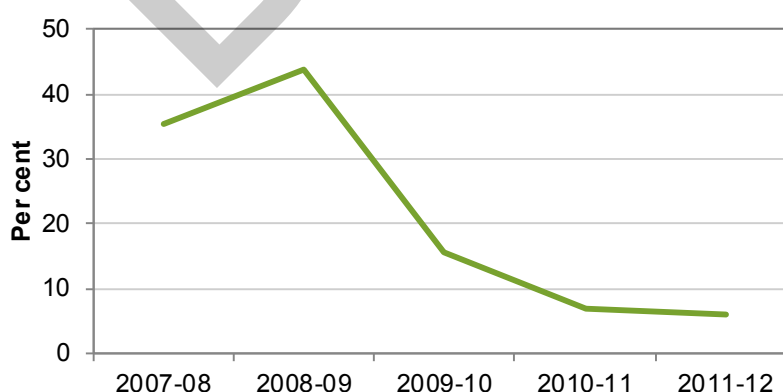
This appendix outlines the data on self-represented litigants (SRLs) in Australia.

Information about SRLs is collected inconsistently across (and sometimes within) different courts and tribunals. This makes it difficult to assess the nature and extent of self-representation. Section F.1 outlines data from the federal jurisdiction (for comparability this section also includes information on the Family Court of Western Australia), and section F.2 covers the states and territories.

F.1 Federal jurisdiction

The number and share of cases commenced by SRLs in the Federal Court of Australia has declined significantly in recent years. The share fell from 44 per cent of all cases in 2008-09 to only 6 per cent in 2011-12 (figure F.1), primarily due to a fall in self-represented applicants in migration matters. This fall coincided with an increase in government-funded legal advice for asylum seekers.²

Figure F.1 Declining proportion of SRLs in the Federal Court of Australia
Actions commenced by SRLs as a share of total cases commenced, by year



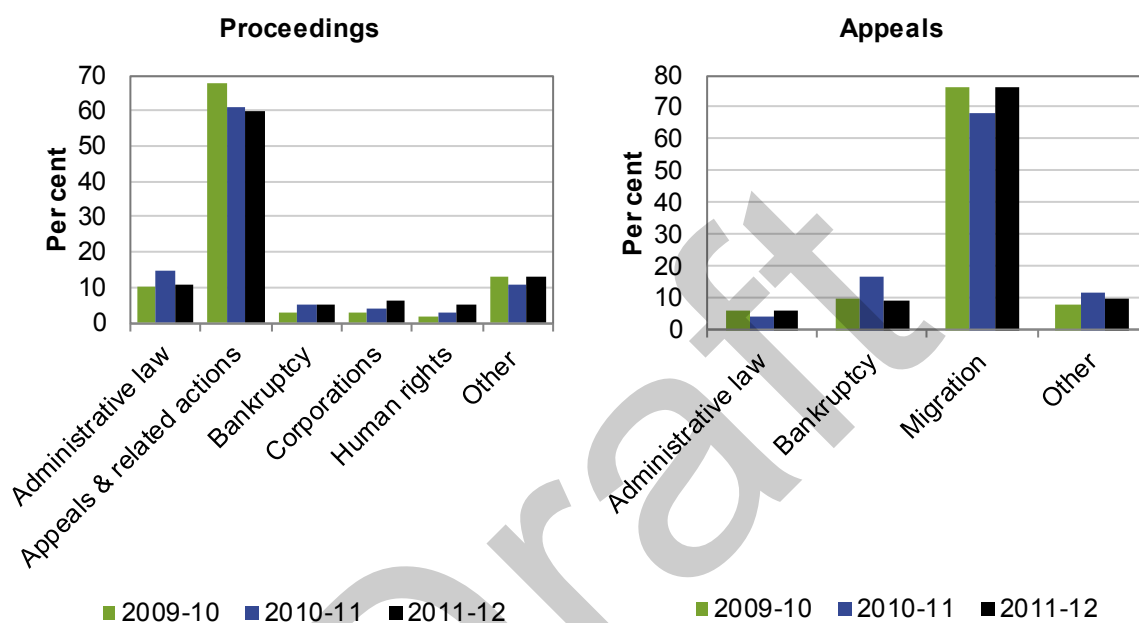
Data source: Federal Court Annual Reports, various.

² Parliamentary Library 2013, Abolishing free legal advice to asylum seekers – who really pays? http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FragPost/2013/November/Abolishing_free_legal_advice_to_asylum_seekers_who_really_pays (accessed 12 March 2014).

Migration disputes continue to comprise a large share of self-represented cases appearing in the Federal Court. Over 60 per cent of proceedings commenced by SRLs concerned appeals and related actions, and of the appeals commenced by SRLs around 70 per cent related to migration matters (figure F.2).

Figure F.2 SRLs in the Federal Court mostly appeal migration decisions

Proceedings^a and appeals^b commenced by SRLs, by cause of action and year

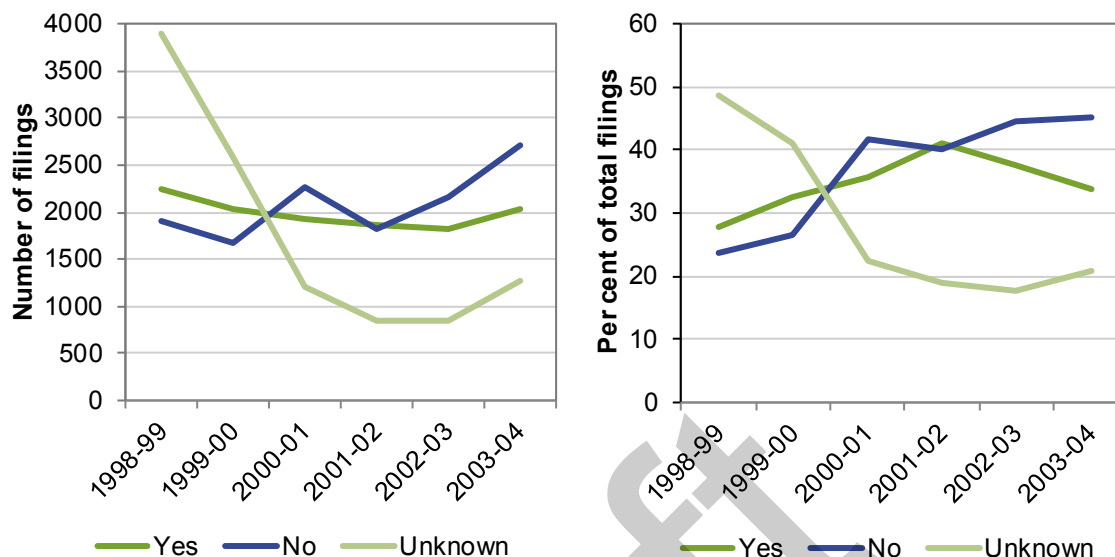


^a 'Other' includes admiralty, assisted dispute resolution, bills of costs, competition law, consumer protection, cross claim, fair work, industrial, intellectual property, migration, miscellaneous, native title, and taxation. ^b 'Other' includes admiralty, competition law, consumer protection, corporations, fair work, human rights, industrial, intellectual property, miscellaneous, and taxation.

Data source: Federal Court of Australia Annual Reports, various.

Changes in data reporting make comparisons over a longer period of time difficult. Earlier Federal Court annual reports included the number and proportion of actions commenced in which either the applicant or respondent was self-represented. According to this measure, some variation was detected in the share of total cases with SRLs — at least one party was an SRL in 28 per cent of filings in 1998-99, increasing to 40 per cent in 2001-02, and falling to 34 per cent in 2003-04 (figure F.3).

Figure F.3 Federal Court — self-represented applicants and respondents
Actions commenced in which at least one party was an SRL, by year



Data source: Federal Court of Australia annual reports, various.

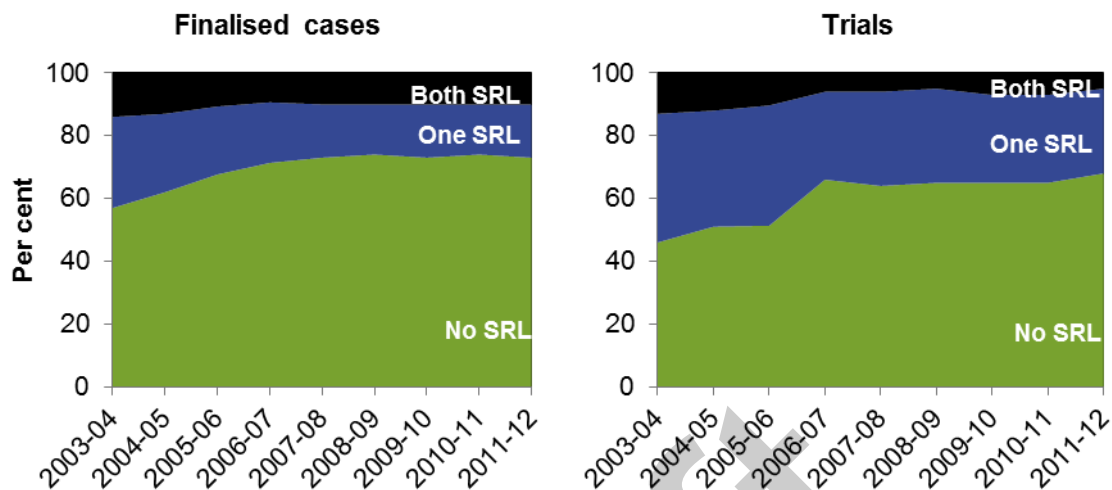
Self-representation is also common in the Family Court of Australia. Between 30-40 per cent of matters involve litigants who are self-represented at some point (FCA 2003). The proportion of SRLs for both finalised cases and trials has fallen in recent years (figure F.4). The proportion of self-represented appellants has remained steady over the last decade, at around 40 to 50 per cent (figure F.5).

Cases involving an SRL in the Family Court (at both first instance and on appeal) are much more likely to:

- involve only children's matters (rather than property matters)
- be of shorter duration
- finalise earlier in the process (Hunter, Giddings and Chrzanowski 2003; FCA 2003).

Figure F.4 Proportion of SRLs in the Family Court is decreasing

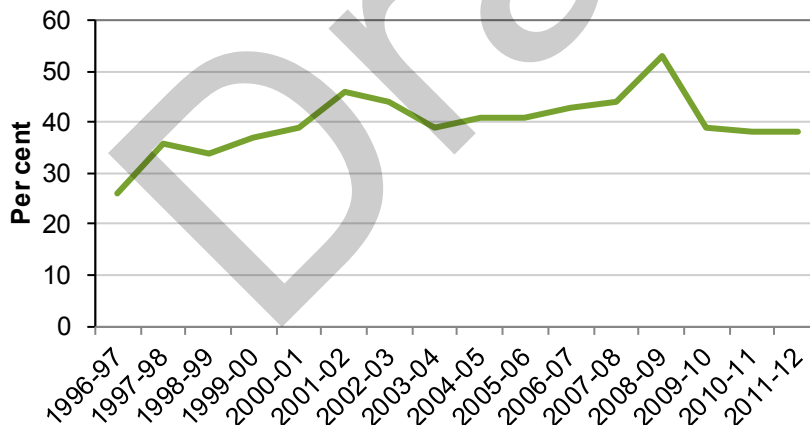
Proportion of litigants by representation status, by year



Data source: Family Court of Australia annual reports, various.

Figure F.5 Self-represented appellants in the Family Court

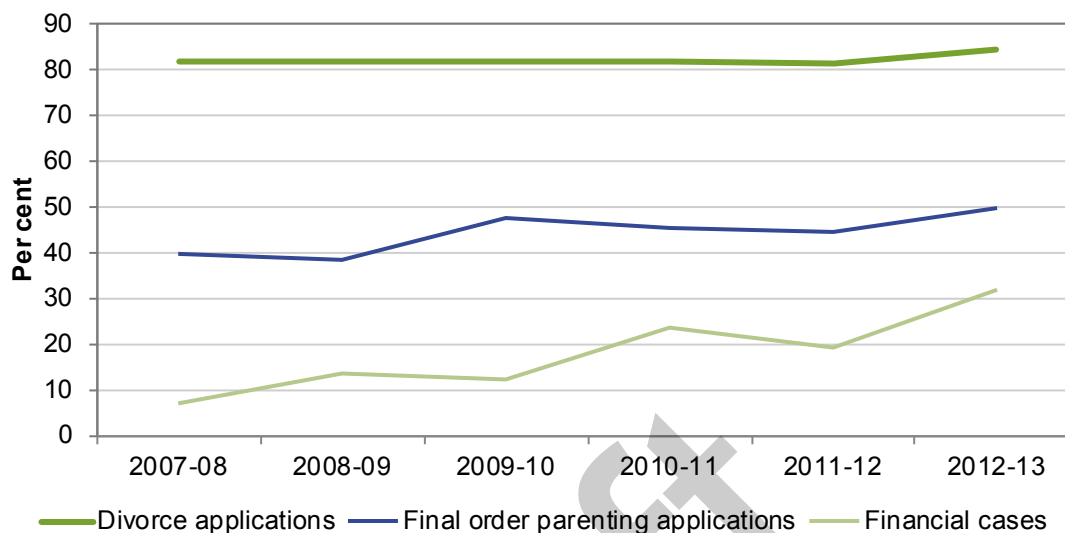
Proportion of appellants who are self-represented, 1996-97 to 2011-12



Data source: Family Court of Australia annual reports, various.

In the Family Court of Western Australia between 2007-08 and 2012-13, the share of cases involving self-represented applicants increased in financial cases (7 per cent to 32 per cent) and final order parenting applications (40 to 50 per cent), while the proportion of self-represented applicants for divorce matters was steady at around 80 per cent (figure F.6).

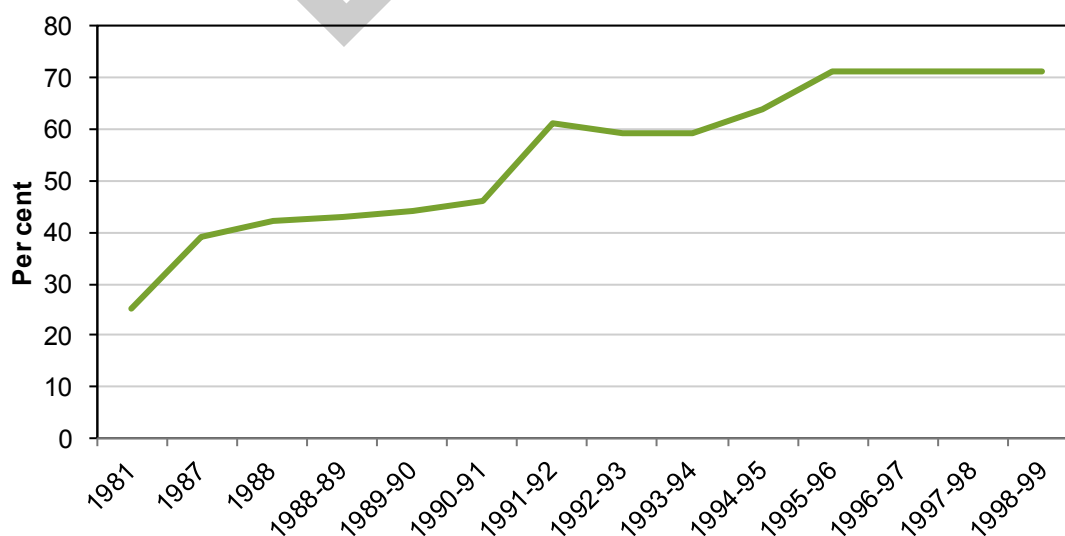
Figure F.6 Self-representation in the Family Court of Western Australia
Self-represented applicants by case type, by year



Data source: Family Court of Western Australia annual reviews, various.

A high proportion of divorce applicants in the Family Court of Australia are also self-represented. Data from the late 1990s suggest that around 70 per cent of applicants self-represent — more than twice the level of the early 1980s (figure F.7). The Federal Circuit Court does not publish data on self-representation in relation to divorce.

Figure F.7 Most divorce applicants in the Family Court self-represent
Per cent of divorce applicants who are self-represented

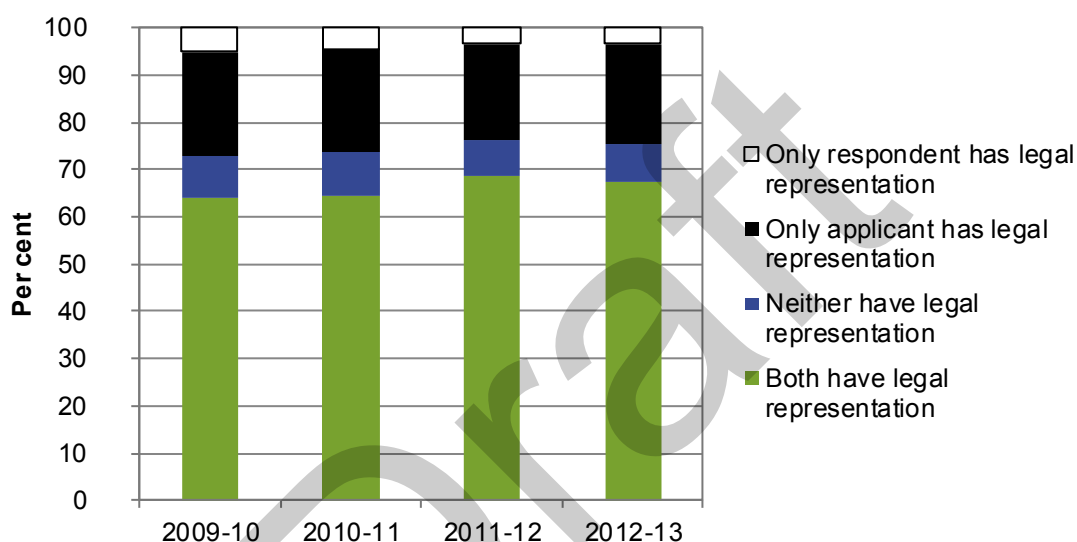


Data source: Family Court of Australia, 1998-99 Annual Report.

According to the Federal Circuit Court (FCC) a significant number of parties self-represent, particularly in the areas of family law, child support, bankruptcy and migration. Note that the Court's database only captures SRLs in finalised applications for final orders in family law (FCC 2013). Over the past four years, over 30 per cent of family law final applications had at least one SRL (figure F.8). The divorce jurisdiction is also said to attract a significant number of SRLs (FCC 2013).

Figure F.8 Representation in the Federal Circuit Court

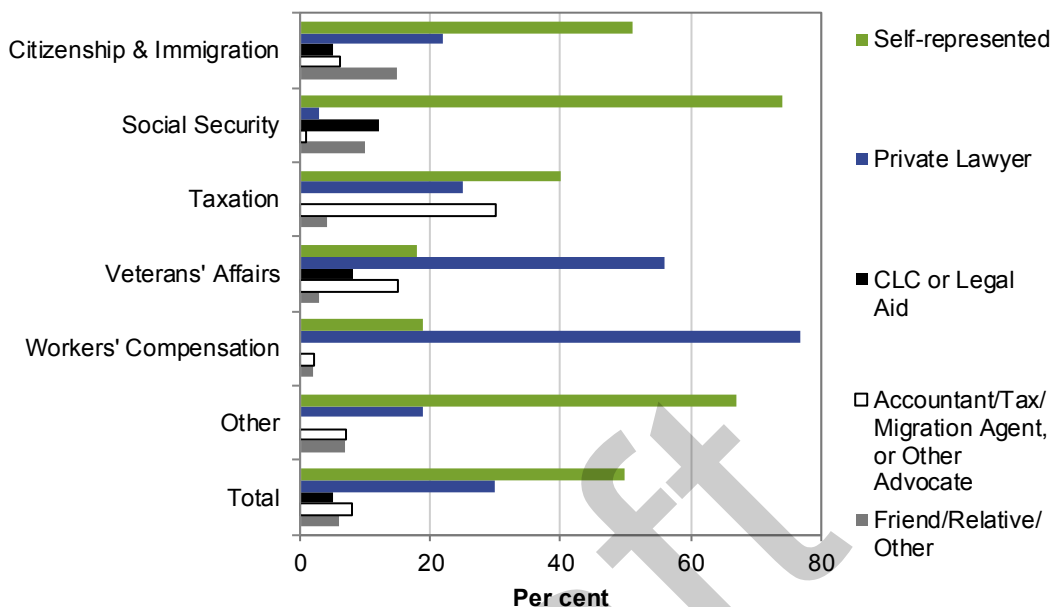
Family law final applications by party representation, finalised in year



Data source: Federal Circuit Court of Australia annual reports, various.

Rates of self-representation are typically much higher in tribunals given that most actively encourage and accommodate self-represented parties (chapter 10). In the Administrative Appeals Tribunal (AAT), almost half of all individuals with cases finalised in 2012-13 were self-represented (sub. 65). The rate of self-representation varied across matter types — with the highest rates being recorded for social security, and citizenship and immigration cases (figure F.9). According to the AAT, greater access to legal aid for veterans' affairs cases, and the fact that costs awards can be made in workers' compensation cases, reflects the lower proportion of SRLs appearing for those matters.

Figure F.9 Representation of individuals in the AAT
By jurisdiction, per cent of all cases finalised in 2012-13^a



^a The data reflects representation status when the application was finalised. It does not include information about the representation of parties who were not individuals (that is, companies, associations or other organisations).

Data source: AAT case management system (sub. 65).

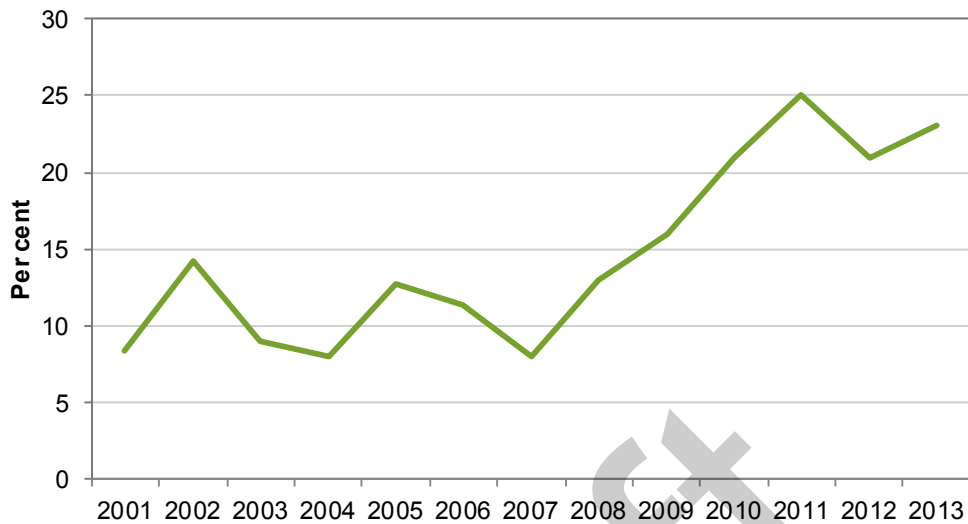
F.2 States and territories

State and territory-level data on SRLs are less comprehensive relative to federal jurisdictions.

The Supreme Court of Victoria publishes the number of contacts made with its SRL Coordinator (without separating criminal and civil matters). Data supplied to the Commission by the Court show that the proportion of applications filed in the Court of Appeal by SRLs has increased over time — from 8 per cent in 2001 to 13 per cent in 2008. The proportion of SRLs appearing has been above 20 per cent over the last four years (figure F.10). While the Court also collects information on the types of matters involving SRLs, this information is not published.

Figure F.10 Court of Appeal, Supreme Court of Victoria

Per cent of matters in civil appeal jurisdiction commenced by SRLs, by year

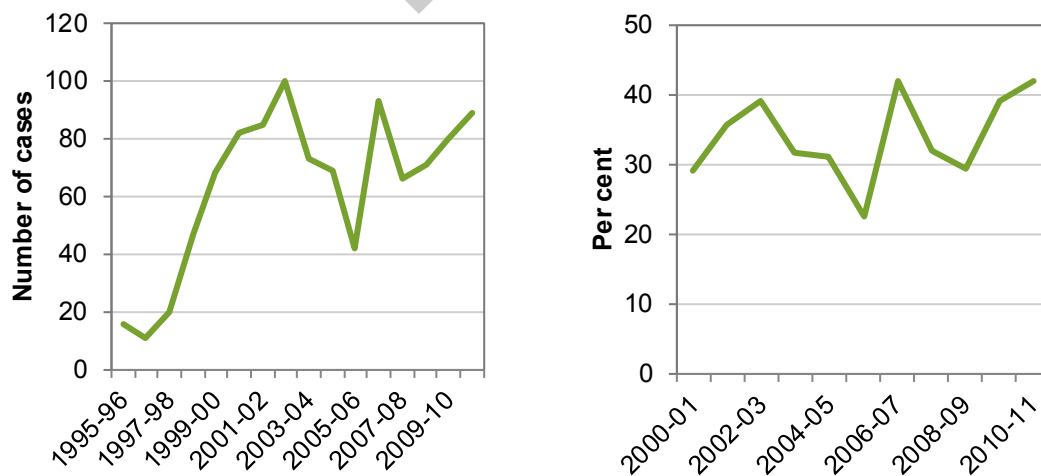


Data source: Unpublished data provided by the Supreme Court of Victoria.

In Queensland, only the Supreme Court publishes numbers of SRLs, and only for its Court of Appeal. QPILCH noted that all documents filed in Queensland courts contain information about self-representation, but this information is not published (sub. 58). The share of civil cases heard in the Court of Appeal in which one or both parties are self-represented is relatively variable, but on average around 34 per cent of matters have had at least one SRL since 2000-01 (figure F.11).

Figure F.11 SRLs in the Supreme Court of Queensland

Court of Appeal, civil cases with at least one party self-represented, by year



Data source: Supreme Court of Queensland annual reports, various.

While there are no firm figures across all Western Australian courts, of the 41 048 matters lodged in the Civil Registry of the Magistrates Court in 2008-09, one or more parties were self-represented in 98 per cent of matters at lodgment and in 53 per cent of hearings (excluding residential tenancy matters) (Department of the Attorney General WA 2009).

Draft

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

G Approaches to cost allocation in court fees

It is not always straightforward to calculate the cost to the courts of resources used in determining a matter. For instance, what share of the court's corporate services expenses should be attributed to a particular dispute?

There are a number of possible approaches to measuring a court's operating costs, which can have substantially different implications on the charging of costs to users through court fees. As noted in chapter 16, the Commission has suggested that a fully distributed cost (FDC) method, using differential pricing of indirect costs, may be the most appropriate approach to charging court fees in most matters (in combination with fee relief measures to safeguard access for disadvantaged parties).

This appendix draws on the Commission's previous research on cost recovery to provide background information on approaches to cost recovery (PC 2002). It first outlines a number of terms and concepts used to define and measure the costs to be charged (section G.1), before discussing various approaches to allocating costs under the FDC method (section G.2).

G.1 Defining and measuring costs

The full cost of a unit of product or service is the value of all resources used or consumed in its provision. Definitions of the various types of costs which can comprise this full cost are outlined in box G.1. These costs may include:

- direct labour costs (for example, salaries and associated costs, such as allowances, long service leave and superannuation)
- direct materials and services (for example, paper and photocopying services)
- an appropriate share of indirect labour (for example, executives, office services, personnel, library, audit services, and information technology staff)
- an appropriate share of indirect materials and services (for example, office machinery and insurance). Some materials classified as indirect costs could be direct costs, but attributing them to a particular product may be impractical or too costly (for example, office stationery)

- property charges, which could be both direct and indirect (for example, rent, repairs and maintenance, cleaning and utility charges)
- capital costs (for example, depreciation or interest on working capital). Some could be direct costs dedicated to the provision of particular services; others could be indirect costs, such as assets used by corporate services.

Box G.1 Cost definitions

Direct costs are costs that can be directly and unequivocally attributed to an activity or product. They include labour and materials used to deliver products.

Indirect costs are costs that are not directly attributable to an activity or product and are often referred to as overheads. They can include ‘corporate services’ costs, such as those of the chief executive officer’s salary, financial services, human resources, records management and information technology.

Capital costs comprise the user cost of capital and depreciation. The user cost of capital represents the opportunity cost of funds tied up in the capital used to deliver activities or products. It is the rate of return that must be earned to justify retaining the assets in the medium to long term. Depreciation reflects the portions of assets consumed each period.

Fixed costs are costs that do not vary with the amount of activity or product. Rent and capital are usually fixed costs in the short run.

Variable costs vary with the volume of activity or product and typically include direct labour and materials.

Source: Productivity Commission (2002, p. H.3).

Defining the various components of a court’s operating costs into these categories may be challenging, and a number of approaches could be used. To demonstrate a simplified approach to categorising costs, the Commission has separated the operating costs listed in the Family Court’s annual report into direct and indirect costs (though some of the broad descriptions of costs listed in this example as indirect may contain some direct components) (table G.1). The information set out in this example is intended to be illustrative — implementation of the Commission’s recommendations would require more detailed analysis to separate direct and non-direct components. For example, distinguishing between information technology services used to directly deliver services to clients (such as video-conferencing) and information technology services used to support corporate services functions.

Table G.1 Illustrative example of categorising court operating costs^a
Using expenditure figures for the Family Court of Australia

<i>Expense</i>	<i>Share of costs (%)</i>
<i>Direct costs</i>	
Client services	25
Family consultants	8
Registrars	6
Judges and support	21
Total direct costs	60
<i>Indirect costs</i>	
Depreciation	8
Property	15
Corporate support	7
Corporate overheads	2
Information technology services	8
Total indirect costs	40

^a Assuming that judicial salaries can be entirely attributed as direct costs. As discussed further below, this may not be the case and thus the proportion of direct costs may be smaller.

Data source: Family Court of Australia (2013a).

Treatment of judicial salaries

Judicial salaries can comprise a significant share of operating costs for Australian courts. In order to ensure judicial independence, the salaries of judges in the federal courts are subject to specific provisions set out in section 72 of the Australian Constitution:

The Justices of the High Court and of the other courts created by the Parliament:

- shall be appointed by the Governor-General in Council;
- shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
- shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The result is that, unlike most labour costs, the cost to courts of paying judicial salaries cannot be reduced in the short run, even where it may be operationally efficient to do so (for example, in the event of a sudden and substantial decrease in workload). This has significant implications for defining and allocating the cost of judicial salaries through court fees.

Some courts, for example the Family Court of Australia and Federal Court of Australia, characterise judicial officers and their support as a fixed cost in their

annual reports. However, it is important to recognise that this inflexibility only applies to reductions in cost. In the event that additional judges are appointed in response to an increase in workload, the cost of judicial salaries would rise accordingly. Thus it is not appropriate to characterise judicial salaries purely as fixed costs.

The fact that judicial salaries are fixed at a minimum level in the short run does not mean that their cost cannot be directly attributed to a particular service offered by the courts. Indeed, the Commission believes that the time spent by judges dealing with cases should be included in the direct costs charged through fees for various court activities. For example, the value of a judge's time spent in hearing a case in court could be reflected in hearing fees. The value of time not spent dealing directly with cases can then be treated in the same way as other indirect costs.

G.2 Allocating costs to users using the fully distributed cost method

Many businesses and government agencies use the FDC method as a simple way to distribute joint and indirect costs. The Commission believes that the FDC method may be an appropriate means by which courts can allocate their operating costs to be charged through court fees.

Under an FDC approach, direct costs are allocated to their respective output, while indirect costs are distributed across all outputs. Thus, the cost base for each service will include the direct costs, and those costs incurred indirectly to produce the service. The amount of indirect costs to be reflected in court fees will depend on the specific approach to FDC that is adopted. The Commission has suggested in chapter 16 that a differential pricing approach may be the most appropriate method. The various approaches to allocating these indirect costs, including on a differential basis, are discussed below.

Pro-rata basis

The most simple form of FDC allocates indirect costs on a pro-rata basis. They may, for instance, be allocated as a proportion of:

- staff involved in the activity as a percentage of total staff
- the direct resource use of the activity as a percentage of total resource use, or
- the budget for the activity as a percentage of the total business budget.

Simple pro-rata methods are relatively easy to implement and many courts may have the financial data available to attribute direct costs to services and to identify indirect costs separately.

However, allocating the indirect costs of operating courts on a pro-rata basis is unlikely to satisfy the policy objectives of accessibility and affordability in the justice system, since a pro-rata system distributes costs evenly across users without any regard to their willingness or capacity to pay.

Activity-based costing

Activity-based costing (ABC) links an agency's products to the activities undertaken to produce them. Activities are, in turn, linked to the agency's costs. While the form of an ABC system can vary between various bodies, it typically comprises:

- identifying full costs
- identifying products and services, and the agency's user groups
- identifying all activities that the agency performs to produce products and services
- tracing full costs to the activities
- identifying cost drivers that link activities to products to give a cost per unit of product or service.

ABC is a more accurate and sophisticated method of allocating the indirect cost pool. Under the ABC approach, categories of indirect cost are identified, and these costs are allocated to products using criteria (often called 'drivers') which most closely reflect usage by each product. ABC is not only useful from a cost recovery perspective — it can also help a business or agency understand which of their activities are high cost, and help evaluate whether those activities are worthwhile or if there are more efficient alternatives available.

ABC requires more detailed data than needed for the simple pro-rata system. For example, data would be required to determine which activities contribute to certain court services and how these activities consume resources. These requirements may often be in addition to data already held by courts. Typically, agencies that use ABC collect these data via surveys undertaken at regular intervals. They may also use rosters or timesheets.

As a result, new systems may be needed to record items such as staff time spent on activities and services, numbers of users and indicators of complexity for each

service. The increased complexity of ABC, and the greater need for data mean that the costs of implementing and using the system are higher than under simpler approaches to FDC.

A number of courts have explored the use of ABC. The Family Court of Australia and the Federal Circuit Court have updated their resource planning model in recent years to incorporate ABC (Family Court of Australia 2011; FMC 2011). The Commission understands that this has been largely for management purposes to identify savings, rather than for use in determining fees. More recently, the use of ABC to determine court fees has been explored in a regulatory impact study of fees in the Supreme and County Courts of Victoria.³

Differential basis

A third (and the Commission's preferred) approach for allocating indirect costs through court fees is on a differential basis (chapter 16). Rather than averaging indirect and joint costs across all fee amounts, differential pricing allocates a share of indirect costs to users through fees based on the characteristics of the party or the dispute in which they are involved.

While not as simple as a pro-rata approach, differential pricing has the advantage of better fulfilling the broader objective of safeguarding the accessibility of the courts. Allocating indirect costs towards cases with greater private economic value and parties with higher capacity to pay can help balance cost recovery and accessibility objectives, while avoiding the equity and efficiency impacts of cross-subsidisation.

Allocating indirect costs on a differential basis is also likely to require less data and complexity than an ABC approach, and thus may be easier to implement and use. However, for those courts with sufficient resources and access to data to undertake ABC, there may be merit in using ABC as a reference point from which differential amounts can then be set.

³ Vic DoJ (Department of Justice Victoria) 2012, Regulatory impact statement: Supreme Court (Fees) Regulations 2012, County Court (Fees) Regulations 2012, October, Melbourne.

H Complex legal needs

As noted in the draft report, some people experience multiple and substantial legal needs. While the characteristics of this group vary, several themes have emerged from the literature, including links between disadvantage and the clustering and compounding of issues that require a legal resolution. This appendix provides an overview of this literature and is organised around the following questions:

- what types of legal problems tend to occur as multiple or clustered problems (section H.1)?
- what factors are associated with multiple legal needs (section H.2)?
- what are the characteristics of intensive users of legal assistance services (section H.3)?

H.1 Clustering of legal problems

Studies of legal need reveal a clustering of issues that can contribute to legal problems or disputes. For example, analysis of results of the Civil and Social Justice Survey (CSJS) conducted in the United Kingdom showed evidence of clustering within the domains of family, economic and homelessness issues. The family issues cluster comprised divorce, domestic violence and relationship breakdown problems. The economic issues cluster included consumer, employment, money/debt, neighbour, owned housing, personal injury and rented housing problems. Legal problems most commonly arising from homelessness or temporary accommodation included problems with rental housing, welfare payments, and employment (Pleasence 2006).

A survey of the legal needs of people living in disadvantaged regions of New South Wales undertaken in 2006 provided similar findings, with evidence of a family cluster, an economic cluster and a broader cluster of legal need. The family cluster included legal issues related to domestic violence, education, family law and human rights. The economic cluster comprised business and credit/debt issues and the broad cluster consisted of accident/injury, consumer, employment, general crime, government, housing and wills/estates issues (Coumarelos, Wei and Zhou 2006).

More recently, the results of the *Legal Australia-Wide Survey (LAW Survey)* undertaken in 2008 showed patterns in the combinations of legal problems across Australia. For example, consumer, crime, housing and government problems tended to cluster with money problems. Similarly family problems tended to cluster with credit/debt problems (Coumarelos et al. 2012).

In some cases, clustering of legal problems occurs due to spiralling. For example, the experience of relationship breakdown, injury or employment problems can trigger other legal problems. In Canada, survey results showed divorce, domestic violence and relationship breakdown predated problems related to money/debt problems, consumer issues and rental accommodation (Currie 2007).

Similarly, in the United Kingdom, divorce, domestic violence and separation were found to be initial triggers that preceded problems such as financial hardship, less suitable housing accommodation, difficulties in maintaining steady employment and dependence on income support payments (Pleasence 2006). The same international studies also found that personal injury that had an impact on employment, led to other problems related to welfare, consumer issues and debt.

In Australia, Coumarelos et al. (2013) found that the loss of employment and its impact on reduced income contributed to the non-payment of debts and difficulties in paying rent. In more extreme circumstances, these events may precipitate eviction from a rental property and possibly homelessness.

H.2 Factors associated with multiple legal need

The Commission's analysis of unpublished *LAW Survey* data revealed that people who reported multiple legal problems were a heterogeneous group. For example, the data showed that people who experienced multiple legal problems were fairly evenly spread across the personal income distribution.

People on low, moderate and higher incomes who experienced multiple legal problems faced different types of legal problems. Individuals earning \$67 600 or more per annum were more likely to experience a combination of consumer, money and criminal legal problems, while individuals near the bottom of the income distribution were more likely to experience a combination of consumer, government, housing and criminal problems.

Multiple legal problems and disadvantage

While not all individuals who experience multiple legal problems are disadvantaged, the literature indicates that as disadvantage increases, so too does the likelihood of experiencing multiple and substantial legal problems (McDonald and Wei 2013). For example, people who are disadvantaged are less likely to be able to raise sufficient finances to cover housing and utility costs or meet larger debts at short notice (Saunders 2011; Scutella, Wilkins and Kostenko 2009). In particular, more disadvantaged individuals:

- are more likely to experience problems related to repaying debts or fines as a result of income deprivation
- may face issues related to public or private rented housing
- are more likely to experience a problem with agencies responsible for administering income support payments (Coumarelos et al. 2012).

A number of studies showed social exclusion (one measure of disadvantage) can be both a consequence and cause of legal problems. As Buck et al. noted:

Some justiciable problems may be a consequence, others a precursor to social exclusion. For example, a divorce problem might be the trigger to a spiral of problems which lead people into social exclusion. On the other hand, people who already experience a host of different circumstances associated with social exclusion, such as unemployment, poor skills and bad health, might experience justiciable problems due to their very circumstance of being excluded. (2005, pp. 318–319)

Disadvantage is also associated with the clustering and compounding of a range of non-legal problems. More persistent and deeper social exclusion can result from the compounding of a number of factors, which can include:

- income deprivation
- low capabilities (resulting from low levels of educational attainment)
- tenuous attachment to the labour market (which contributes to income deprivation)
- lack of social connections
- concerns about personal safety (McLachlan, Gilfillan and Gordon 2013).

Lack of capabilities among disadvantaged individuals can contribute to a lack of awareness that some of the problems they are experiencing have a legal dimension. This can lead to legal issues becoming well established and more difficult to resolve when they are finally detected. The discovery of multiple legal problems for some disadvantaged individuals may result from the need to solve a single problem such as a health issue, a tenancy problem, suspension of an income support payment or

the need to pay outstanding fines. This highlights the need for better links between legal and non-legal organisations to detect the presence of multiple legal problems of clients (chapters 5 and 21).

Factors associated with the experience of multiple legal problems

The results of international research confirm some groups are both more likely to experience multiple legal problems and more vulnerable to disadvantage than others.

For example, while lone parents accounted for only six per cent of those experiencing at least one legal problem in England and Wales in the 18 months prior to 2009, they accounted for over a fifth of those experiencing multiple legal problems. Further, two fifths of those experiencing six legal problems or more had a disability, 60 per cent suffered a mental illness and one half received income support (Pleasence et al. 2010).

People who are homeless and ex-prisoners are also vulnerable to multiple and substantial legal problems (Forell, McCarron and Schetzer 2005b; Grunseit, Forell and McCarron 2008).

Australian studies of legal need also revealed that the characteristics of many of those who experienced multiple legal problems were similar to those of people who were disadvantaged. According to the *LAW Survey*, the characteristics that were most likely to be associated with experiencing multiple legal problems included: having a disability or long-term health condition, being a lone parent, being unemployed, and living in disadvantaged housing (Coumarelos et al. 2012).

Having a disability

Having a long-term illness or disability is the strongest predictor of justiciable problems — stronger than family type (including being a lone parent), age and economic circumstances (Pleasence 2006).

People with a disability are vulnerable to a broad range of legal problems. Studies of legal need in the United Kingdom reveal that people with a disability have a higher prevalence rate than other respondents for legal problems related to discrimination, employment, neighbours, housing, homelessness, money/debt, welfare benefits, domestic violence, personal injury, medical negligence, mental health and unfair treatment by police (O’Grady et al. 2004).

As well as having a higher likelihood of experiencing a range of legal problems, people with a disability also have an increased likelihood of clustering of problems. For example, the results of the *LAW Survey* showed people with a disability had a high probability of experiencing multiple legal problems (1.6 times higher than respondents who did not have a disability) (Coumarelos et al. 2012).

People with a disability are also more likely to be deeply socially excluded. For example, Household, Income and Labour Dynamics in Australia (HILDA) survey data showed that over 13 per cent of Australians aged 15 years or more, with a long term health condition or disability, experienced deep social exclusion⁴ compared to the Australian average of just under 5 per cent in 2010 (McLachlan, Gilfillan and Gordon 2013).

However, the direction of causality between legal problems, long term illness or disability, and social exclusion is not always clear. As the results of the Periodic Survey of Legal Needs in the United Kingdom showed:

... it is not always the case that a respondent reporting certain demographic characteristics at the time of the survey had those characteristics at the time they experienced a justiciable problem. It may therefore be the case that the problem itself led to the respondent becoming, for example, long-term ill or disabled. For instance, personal injury, clinical negligence and domestic violence problems might often be causes, rather than consequences of a long-term illness or disability. Notwithstanding this, however, it remains clear that long-term ill or disabled respondents are still more vulnerable than others to experiencing a wide range of justiciable problems, many of which have clear and defined links to issues of social exclusion. (O'Grady et al. 2004, pp. 264–265)

Lone parenthood

Lone parents are more vulnerable to multiple legal problems than other family types. According to the *LAW Survey*, single parents were 1.4 times more likely to experience multiple legal needs in 2008 than people in other living arrangements (Coumarelos et al. 2012).

Lone parents were more likely to experience legal problems related to their children, domestic violence, mental health, money/debt, neighbours and rental accommodation (Buck et al. 2004; Pleasence et al. 2010).

⁴ Deep social exclusion was calculated by aggregating responses of individuals participating in the HILDA survey to indicators related to seven life domains including: material resources, employment, education and skills, health and disability, social connection, community and personal safety (McLachlan, Gilfillan and Gordon 2013).

International studies suggest that many lone parents — particularly females — experience domestic violence. In many cases this situation has precipitated the disintegration of their relationship. Around 35 per cent of lone parents in the United Kingdom experienced domestic violence in their last relationship, with three quarters of this group sustaining physical injuries (Marsh et al. 2001).

Being unemployed

Unemployed Australians are a vulnerable group who have a higher likelihood of experiencing legal problems. Around 11 per cent of the *LAW Survey* sample had experienced unemployment at some time in the 12 months prior to the survey. The *LAW Survey* results revealed unemployed Australians had a greater prevalence rate (than the average for all Australians) of legal problems related to consumer issues, credit/debt, crime, family, government, health, housing and rights (Coumarelos et al. 2012). Unemployed people were 1.4 times more likely to experience multiple legal needs than people who were employed or not in the labour force (Coumarelos et al. 2012).

As with other vulnerable groups that face multiple legal problems, unemployed Australians are much more likely to be disadvantaged. Unemployed Australians have among the highest relative income poverty rate (63 per cent in 2010) and rate of deep social exclusion (31 per cent). The poverty rate for unemployed Australians is more than five times the national average and their rate of deep social exclusion is more than six times the rate for all Australians aged 15 years plus (McLachlan, Gilfillan and Gordon 2013).

Living in disadvantaged housing

A series of legal needs surveys have established that homeless people and people living in basic housing conditions face a much higher probability of experiencing multiple legal problems than the general population. In Australia, the results of the *LAW Survey* showed people living in disadvantaged housing arrangements⁵ were 1.5 times more likely to experience multiple legal problems than people in other types of housing (Coumarelos et al. 2012).

⁵ Disadvantaged housing is defined in the *LAW Survey* as any of the following situations being experienced at any time in the previous 12 months: being homeless; living in emergency or basic accommodation (e.g. refuge, shelter, boarding house, caravan park, tent, motor vehicle, shed or barn); living with relatives or friends due to not having anywhere else to live; or living in public housing.

A qualitative study conducted in New South Wales also found evidence of different clustering of legal problems associated with different phases of homelessness. When people became homeless they were more likely to face family, domestic violence, debt and housing issues whereas people who experienced entrenched homelessness were more likely to face legal issues related to criminal activity and fines. More than three quarters of respondents (to the qualitative study) who were homeless experienced three or more legal issues (Forell, McCarron and Schetzer 2005a).

H.3 Intensive users of legal aid assistance are highly disadvantaged

While people with multiple legal problems are a diverse group, those eligible to receive legal aid assistance are more likely to have low capabilities, low financial resources and are more likely to experience multiple disadvantage.

Legal Aid NSW undertook a profile of the 50 highest users of their legal assistance services⁶ over a five year period between 1 July 2005 and 30 June 2010. Legal issues were found to be just one of a number of issues that became interrelated and presented challenges to both legal assistance providers and providers of other social services.

The results of the study showed that the 50 most intensive users of legal aid services in New South Wales tend to be relatively young. Around 80 per cent were aged 19 years and under and 82 per cent had their first contact with Legal Aid NSW by the time they were 14 years of age (van de Zandt and Webb 2013).

Intensive users shared similar characteristics including a history of mental health issues, exposure to domestic violence, time spent in correctional facilities, low levels of educational attainment, and poor behaviour while attending school. The issues faced by high use clients were compounded by factors such as long-term unemployment, dependence on income support, relative income poverty and exposure to community dysfunction (van de Zandt and Webb 2013).

As all participants in this study had used criminal law services provided by Legal Aid NSW, a large proportion of their contact would have related to assistance with criminal offences. Of the high use client group, just over one quarter also used

⁶ The types of services (or ‘dealings’) provided to these clients included a 20 minute legal advice session, a Local Court mention to determine bail, a short Children’s Court hearing to determine care arrangements and/or a complex higher court trial.

family law services and one fifth used civil law services. These results highlight that involvement in criminal activity is one of the first issues to require legal aid for members of this group and crime is inextricably linked to a range of other legal problems they face.

Men account for a high proportion of all high use legal aid clients in New South Wales — with three quarters of the 50 highest users of legal aid services being men. However, the gender split is more evenly balanced amongst the 10 highest users of legal aid services, with half being women.

High service users often had a history of health disorders. Just under half had received a mental health diagnosis, two fifths had experienced a behavioural disorder (such as Oppositional Defiant Disorder, Conduct Disorder or Attention Deficit Disorder) and one third were diagnosed as having developmental issues (including low IQs and mild to moderate intellectual disabilities).

The prevalence of mental illness among high service users is consistent with surveys of legal need which show that people with a disability or chronic illness, when compared with the general population, have increased rates of vulnerability to legal problems and reduced rates of resolution of their legal problems. (van de Zandt and Webb 2013, p. 12)

There is also some evidence of inter-generational transmission of disadvantage from primary care givers to high service users. Data records showed that just under a half of primary care givers of high services users had a history of drug and/or alcohol addiction, just under a half had been the victim of domestic violence and a fifth had previous contact with the criminal justice system (van de Zandt and Webb 2013).

I Location of community legal centres and disadvantage

The locations of community legal centres (CLCs) largely reflect the fact that CLCs were traditionally established on the initiative of their communities in response to a lack of access to legal services (discussed in chapter 21). But the areas with legal need in the past may not be the same areas with legal need today. This appendix looks at information about the location of CLC clients, the location of the CLCs they use, and measures of disadvantage and income to examine whether CLCs are located in areas where they are likely to be most needed.

Administrative data about the clients that use CLCs are collected through the Community Legal Service Information System (CLSIS).⁷ The data items collected include the locality of clients, which the Commission has matched to postcodes (where possible). These postcodes were then matched to the Australian Bureau of Statistics' *Socio-Economic Information for Areas* (SEIFA) Index of Relative Socio-economic Advantage and Disadvantage (ABS 2013). Information on the location of CLCs was also provided to the Commission, which was also matched to postcode and SEIFA. Each CLC client and CLC was mapped to a SEIFA decile (with a higher decile indicating a lower level of disadvantage).

If CLCs only provided services to relatively disadvantaged clients, then, all else being equal, the greatest proportion of CLC clients would be in locations associated with lower SEIFA deciles. However, this is not the case, with CLC clients being (roughly) evenly distributed across each SEIFA decile (table I.1). Another indicator of serving disadvantaged communities would be for the CLCs themselves to be located in relatively disadvantaged areas. But the data indicate that around one fifth of CLCs are located in postcodes that correspond to the bottom three SEIFA deciles, while over two thirds of CLCs are located in postcodes associated with the top three SEIFA deciles.

⁷ These localities are usually recorded as a suburb, which allows for easy linking to a postcode. More cryptic responses are not always mappable, and in some cases data are not recorded for a small number of clients.

Table I.1 **SEIFA deciles of CLCs and their clients**

Per cent, 2011-12

SEIFA decile	CLC clients	CLCs ^c	
	Total	Total (unweighted)	Total (weighted)
1	10.0	9.4	9.5
2	9.1	5.5	5.3
3	7.4	5.5	4.6
4	10.4	2.2	3.4
5	10.2	4.1	4.2
6	11.5	4.1	4.1
7	10.0	4.1	3.6
8	10.0	30.1	29.8
9	12.5	22.6	22.4
10	8.0	6.2	8.2
na ^a	0.8	6.3	5.0
Other ^b	0.2		
Total	100.0	100.0	100.0

^a 'na' refers either to clients or CLCs whose locality maps to a postcode exclusively for post office box use. Accordingly, these special postcodes have no population or SEIFA index. ^b Includes those where location could not be identified, or the locality of the individual was an overseas location. ^c CLC location is weighted by the number of clients it serves.

Source: Commission estimates based on unpublished CLSIS data and ABS (*Census of Population and Housing: Socio-Economic Indexes for Areas (SEIFA), Australia, 2011*, Cat. no. 2033.0.55.001).

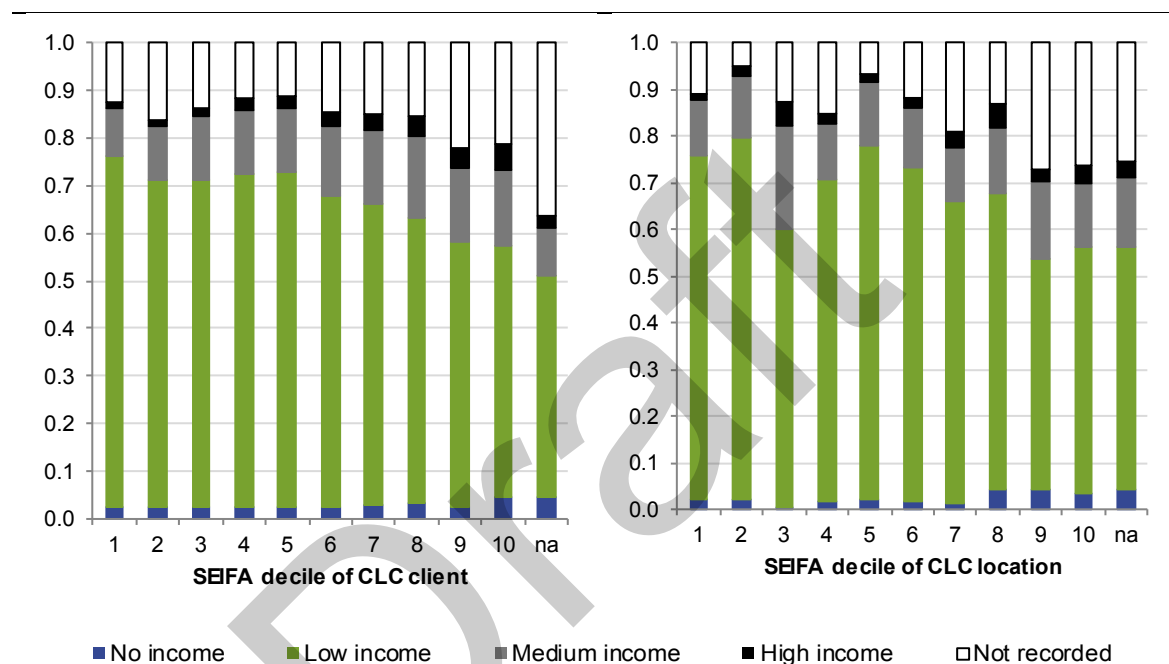
However, there are some reasons why using SEIFA postcodes may not be appropriate to measure legal need.

1. The SEIFA scores associated with postcodes reflect the *average* level of disadvantage. There can be relatively disadvantaged individuals in postcodes associated with high SEIFA scores.
2. Many CLCs offer outreach services, and so travel to more disadvantaged locations relative to their main office.
3. Some specialised CLCs provide a particular service that is not aimed at disadvantaged clients. For example, offices of the environmental defender provide assistance to all members of the community irrespective of their socioeconomic status.
4. Some CLCs focus on particular matters rather than servicing a particular geographical area. In doing so, it may make sense for them to be centrally located (in high SEIFA decile areas) to try and provide services to as many people as possible.

These concerns can be addressed by comparing administrative data on the income of individuals that use CLCs against the SEIFA decile of their postcode (figure I.1). The left hand panel presents this distribution, and indicates that while most CLC

clients report low incomes irrespective of their SEIFA decile, the average income of CLC clients from advantaged postcodes is higher than those from disadvantaged postcodes. The right hand panel in figure I.1 is also consistent with this finding, suggesting that CLCs located in high SEIFA deciles serve smaller proportions of low-income clients than their counterparts located in low SEIFA deciles.

Figure I.1 Reported income by SEIFA decile of CLC client and CLC location^a
2011-12



^a 'na' of SEIFA decile refers to those localities linked to postcodes for post-office box purposes only. Income is defined in CLSIS as no income, low income ('under \$500 per week or \$26 000 per year'), medium income ('between \$500 and \$1000 per week or \$26 000 to \$52 000 per year'), high income ('\$1000 per week or over or \$52 000 per year or over'), not applicable or not stated.

Data source: Commission estimates based on unpublished CLSIS data and ABS (*Census of Population and Housing: Socio-Economic Indexes for Areas (SEIFA), Australia, 2011*, Cat. no. 2033.0.55.001).

The issue of placement of CLCs is discussed in further detail in chapter 21.

DRAFT REPORT

This draft report is no longer open for consultation. For final outcomes of this project refer to the inquiry report.

Draft

J Building the evidence base

The rationale for establishing an evidence base in the civil justice system is presented in chapter 24. This appendix details some of the data required to help build the evidence base.

Collecting data is not costless and some participants in this inquiry have raised concerns that data are sometimes collected with little apparent purpose. To ensure the relevance of data collected, the Commission has identified a number of policy questions that can be used to frame an ongoing assessment of the civil justice system, and identified the data that would help answer those questions.

These questions form the basis of table J.1. The table also takes stock of available data and suggests possible responses to identified data gaps. Greater detail on data requirements is contained in the relevant chapters.

Table B.1 Policy relevant data

<i>Policy question</i>	<i>Data required</i>	<i>Available data and gaps</i>	<i>Data response</i>
Understanding and measuring legal need			
• How many people have legal need? • What are the factors that contribute to legal need? • How are people resolving their legal needs? What works and what does not work? • How many people have unmet legal need? • What are the consequences of unmet legal need? • What are the characteristics of people who experience multiple legal problems?	• Information about the legal problems that people face, as well as the demography of those with legal need. • Information about steps taken (or not taken) to resolve legal problems — ideally through time.	• No regular survey around legal need. Demographic data are usually limited to those that have a dispute in the formal system. • No consistent definition of legal problems — infrequent surveys use inconsistent definitions that make comparisons difficult, especially across time. • No longitudinal information to track individuals through time.	• The <i>Legal Australia-Wide (LAW) Survey</i> undertaken in 2008 is a world-class examination of legal need and responses to legal need. It should be repeated on a regular basis. • Better collaboration between researchers in this field to ensure methodology and definitions become more consistent. • A longitudinal component to legal needs surveys should be added where possible.
• How many businesses have legal needs? How do they resolve their problems? How many have unmet need?	• Information about the legal problems that businesses face and the characteristics of those businesses. • Information about steps taken (or not taken) to resolve legal problems — ideally	• There is no regular survey to address the legal need of businesses. Only one survey of small businesses has been undertaken recently in Australia.	• A survey of businesses should be undertaken to provide data in this area. The Australian Bureau of Statistics (ABS) should consider adding questions around legal disputes to the <i>Business Characteristics Survey</i>.

<i>Policy question</i>	<i>Data required</i>	<i>Available data and gaps</i>	<i>Data response</i>
	through time.		
How accessible is the civil justice system?			
• Do legal costs, delays and complexity reduce access to the civil justice system? • How is accessibility changing over time? • Does accessibility vary according to the nature of users?	• Costs to consumers. • Timeliness by case type. • Survey data on the ease of using the system.	• Adequate data at an aggregate level (for example, on average time to finalisation by each court) but less data on cost and time for each type of case. • Timeliness data reported by ombudsmen and some tribunals, and Report on Government Services (RoGS) measures the timeliness of courts. However, timeliness measures are not consistent across these institutions. • Private costs including legal costs to users of courts are unclear and comparable data across different time periods are lacking. • <i>LAW Survey</i> provided information on characteristics of users, and asked whether action was not taken because it was too stressful or the respondent did not know what to do. • Australia Institute survey asked respondents how long it took to resolve, and whether they thought the system was too complicated to understand properly. • Some courts measure user satisfaction by asking court users how easy and clear to understand they found the processes and forms. • Surveys provide a 'snapshot'. • Demographic data are collected but may not assist in answering accessibility questions because not linked to barriers.	• There is a need for consistent terminology across institutions. • Information from claims lists can form the basis of a measure of average costs/time by case type. For example some jurisdictions, such as South Australia, prepare claims lists (such as small claims, motor vehicle claims, disputes) that can be used to form such a basis. • Comparable sources of legal cost data to allow for study of legal costs over time. • Surveys to be repeated periodically to understand longitudinal effects and changes to accessibility.

<i>Policy question</i>	<i>Data required</i>	<i>Available data and gaps</i>	<i>Data response</i>
Are people using appropriate mechanisms to resolve disputes?	- Legal problems (nature, severity). - Demographic data. - Mapping of legal problem to appropriate dispute resolution mechanism.	<i>LAW Survey</i> provided relevant information.	Repeat <i>LAW Survey</i> every five years to understand longitudinal effects.
Understanding and navigating the system			
- How many people lack legal knowledge including knowledge of their rights under the law? - Do disadvantaged people have lower levels of legal knowledge and does this affect their access the civil justice system?	- Unprompted and prompted recall of legal services and rights. - Demographic and income data on survey respondents.	<i>LAW Survey</i> provided information on the educational levels of respondents and whether respondents took no action because they did not know what to do. - Australia Institute survey asked respondents whether they know their rights under the law and whether they know how to get help if they had a legal problem. - Surveys provide 'snapshots'. 'Disadvantage' is not defined consistently across survey instruments, providers and institutions. - Better understanding of why some groups are more likely to have problems is needed.	- Surveys should seek to incorporate measures of legal knowledge. 'Disadvantage' needs to be consistently defined so that it is easier to measure the legal knowledge of disadvantaged people.
How effective and efficient are legal health checks, community legal education (CLE), legal information and referrals?	- Cost and activity count of each type of service. - Client satisfaction data. - Impact of interventions on outcomes	- Activity-based performance targets are a requirement of the National Partnership Agreement on Legal Assistance Services (NPA). - NPA reports track the number of services delivered included website traffic, number of education sessions, publications printed, responses to requests for information and referrals.	- Clear, consistent definitions of each type of service are needed. - Client satisfaction and whether services led to satisfactory outcomes could be revealed through surveys of users. - Disaggregated expenditure data on each type of service should be recorded. - The correlation between spending on services and outcomes in other areas of

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		- Aggregate expenditure is recorded but not disaggregated by types of services. - Outcomes not measured. - Reported data are inconsistent and incomplete across jurisdictions. - Effectiveness is generally not based on empirical evidence or evaluations. - Little evidence of efficiency by way of cost benefit analysis.	- legal assistance should be measured. - Benchmark average costs across jurisdictions over time for each method.
Information and redress for consumers			
How can consumers be better informed about the costs of taking legal action?	- Publicly available billings data and information on billings models for consumers. - Average, median or range of fees by legal matter.	Information is not public.	Aggregated information on average legal costs, by type of matter, could be published in each jurisdiction.
How can more consistency be introduced to how cost assessors determine 'fair and reasonable' costs?	Breakdown of costs by legal matter.	Cost assessors do not publish their determinations of 'fair and reasonable' costs.	The results of cost assessors' decisions should be published by type of legal matter. Where necessary, these should be de-identified.
Are complaints bodies effective?	Data on use and nature of sanctions, timeliness and user satisfaction.	- Sanctions and timeliness data not consistently collected. - While complaints bodies seek feedback, more rigorous and systematic follow-up is not undertaken. This means that there is not a complete picture of what works.	- Collection of data should be consistent across jurisdictions. - Surveys to be conducted periodically.
A responsive legal profession			
How responsive is the legal profession?	Number of lawyers in total and practicing by	ABS definition of lawyers is not sufficiently descriptive.	ABS definition of lawyers needs to be redefined to get better survey results.

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	area of law.	NSW Law Society publishes information on number of lawyers.	
Alternative dispute resolution (ADR)			
- How effective is ADR and does effectiveness vary depending on the nature of the dispute; the parties; or the ADR techniques employed? - How often is ADR used?	- Cost of ADR. - Count of individual ADR processes. - Demography of users. - Settlement rates and determinants of settlement, for example referral stage.	- Unclear whether demographic data are collected. - Costs of provision unknown. - Anecdotal evidence suggests that ADR less expensive than going to trial. - Terminology is inconsistent and data are reported in an ad hoc way and cannot be easily collated and compared. - ADR carried out in the informal sector is not recorded, so extent of use and settlement rates are unknown.	- Terminology needs to be agreed on and standardised. - Settlement rates and stage of settlement need to be collected. - At a minimum, how settlement was achieved should be recorded. - Legal assistance providers should be required to report on use of ADR services. - Courts and tribunals to report on how disputes have been settled and whether ADR was used. - Surveys or studies to ascertain ADR use among general population, including for what kind of legal problem, how it was initiated, and whether it was successful.
Ombudsmen			
- How efficient are ombudsmen? Where could improvements be made? - Are generalist or specialised ombudsmen more efficient and effective?	- Full list of ombudsmen and data on type, cost, caseload and timeliness. - Breakdown of resources devoted to complaints.	- Timeliness, costs and caseload are reported by most ombudsmen, however definitions are sometimes inconsistent. - Complaints functions of most ombudsmen are not separately costed. - Data are not coordinated across ombudsmen, making comparisons difficult.	- Measures relating to types of disputes and timeliness should be standardised and used consistently for data collection and reporting in order to assist benchmarking. - Benchmarking of similar entities - Complaints functions need to be separately costed to aid benchmarking of government ombudsmen so that average costs are not overestimated.
Tribunals			
- How efficient are tribunals? - Where could improvements in	Data on the number of tribunals and their caseload, costs, fees and timeliness.	- Consistent and complete data not reported in Annual Reports. - Not all amalgamated tribunals collect cost data separated by case type.	- Consistent terminology needed for benchmarking. - Caseload, fees, cost and timeliness data required; separated by case type for

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tribunal services be made?			amalgamated tribunals.
• Are tribunals easy to use, including for self-represented litigants?	• Rate of legal representation. • Referral rate of ADR. • Settlement rates through ADR.	• Data not reported for all tribunals; reporting measures are inconsistent.	• Data on the rate of legal and other types of representation, by type of case. • Data on how disputes were settled and whether ADR was used.
Court processes			
• What is the relative effectiveness and efficiency of different case management approaches? • What is the scope of disproportionate discovery? • Have reforms to discovery rules been effective? • Have reforms to expert evidence rules been effective?	• Cost and timeliness data by case type by case management method. • Costs of discovery relative to total costs of litigation, the value of what is at stake for the parties in the litigation, number of discovered documents, survey data collecting judges' and practitioners' views on the extent to which discovered documents assist in the resolution of the dispute. • Costs of expert evidence to litigants, court time utilised for expert evidence, survey data on the quality/utility of different forms of	• Limited data overall. • Limited data on the cost-effectiveness of different case management approaches for resolving different case types. • It is unclear the extent to which different courts measure the impacts of different case management approaches on timeliness, court resources and litigant costs. Little information is publicly available. • Very limited data on prevalence of disproportionate discovery and the impact of discovery reforms. • Cost of expert evidence not publicly available.	• Courts' case management systems should collect statistics which allow courts to evaluate the impact of case management and procedural reforms on timeliness and court resources. • An appropriate body for coordinating analysis and evaluation of different case management approaches should be determined. • Stakeholders to consider cost effective ways to collect data on the impact of procedural and case management reforms on litigant costs. • Data could be collected at infrequent intervals on total litigation costs and amount of costs associated with discovery, the value of what is at stake for the parties in the litigation, the number of discovered documents that are relied upon at trial, whether settlement was achieved after discovery, lawyers impressions of the extent to which discovered documents were crucial in resolving the dispute or narrowing the issues in dispute. A closed case survey instrument could be used for this purpose. Surveys developed by the Federal Judicial

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	expert evidence.		Centre in the United States could be drawn upon for this purpose.
- How often is ADR used in the resolution of disputes lodged in courts? - How efficient and effective is ADR in assisting in the resolution of these types of disputes?	- Referral rate of ADR by legal matter. - Type of ADR process used. - Timing of ADR referral. - Cost of ADR. - Settlement rates. - User satisfaction with the process.	- Some data for ADR referral rates and settlement rates are reported in court annual reports but these data are not consistently reported and not broken down by legal matter. - Limited evaluations assessing user satisfaction with different ADR processes.	- Courts to report on how different legal case types have been resolved, if ADR was used and settlement rates. - Terminology for legal case types and ADR processes would need to be agreed.
Costs awards			
How can costs awards better encourage parties to only incur proportionate costs?	- Periodic calculations of representative costs. - Average costs award by case type or length, relative to legal expense.	- Lack of transparency around how costs awards are determined. Costs awards based on scaled costs, but method of scaling is unclear. - Most recent legal costs for state courts came from studies released in 1993 and 1994. Legal costs of Federal Court and Family Court from 1999.	Data on costs and costs awards should be collected periodically.
Self-represented litigants			
- What proportion of court and tribunal users are self-represented? - What are their characteristics? - Why do people self-represent? - What is the nature of the experience of self-representation?	- Number of self-represented litigants relative to total users, by legal matter. - Demographic data on self-represented litigants. - Data on reasons why people self-represent. - Outcomes of	- Most Federal Courts publish tallies of self-represented litigants. The Family Court and the Federal Court publish the most extensive information. - Few state and territory courts and tribunals publish data on self-representation; and it is unclear whether they collect this information. - Published data too high-level. Courts and tribunals do not hold demographic data on users.	- Greater and consistent reporting of proportion of self-represented litigants in courts and tribunals in each jurisdiction. - Family Court or Federal Court are possible models for other courts in this area. - Collection of number and type of legal matter should be a minimum to inform policy. - Ongoing collection of demographic data on court users may be too onerous. Instead, annual surveys of court users could be

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- How does self-representation affect courts and tribunals? - Are measures aimed at assisting self-represented litigants effective?	- self-represented litigants compared with other users, and how assistance measures affect outcomes. - Court/tribunal time and resources used to support self-represented litigants compared with other users, and how assistance measures affect this.	- Queensland Public Interest Law Clearinghouse (QPILCH) undertakes an annual survey of self-represented litigants who have used QPILCH services. - It is unclear whether courts and tribunals collect data to assess the effectiveness of initiatives aimed at assisting self-represented litigants.	- undertaken to study differences of self-represented litigants and represented users. - Smarter use of case management technology including software could capture information on case outcomes and use of court/tribunal resources so that effectiveness of measures could be assessed.
Court and tribunal fees			
Do court and tribunal fees appropriately recover costs?	- Operational costs of courts and tribunals. - Court and tribunal fees. - Count and proportion of users paying full fees. - Methodology for fee setting. - Demographic and income data on court users (those who are and are not paying full fees).	- Methodology for setting court and tribunal fees is unclear - Basis of different levels of cost recovery across courts and tribunals is unclear. - Fixed and ongoing costs are unclear. - RoGS reports average court fees but acknowledges that distribution of court fees is unclear.	- Cost breakdown by type of case and overheads. - Court and tribunal fees. - Demographic data on court users. - Income data on those who apply for fee relief and whether a waiver was granted.
- Who is deterred by court and tribunal costs? - How should fee waivers be targeted?	Income and demographic data including on the nature of disadvantage	- More accurate picture of average court fees can be gleaned once number of waivers are reported. - Federal Courts report number of waivers given in a financial year. State courts do	- Surveys to be conducted periodically. - Count and value of waivers to be collected by all courts and methodology to be made public. - Courts to collect data on the size of the

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	- experienced by users. - Number and value of waivers given. - Methodology for setting waivers.	- not report this information publicly. - Average size of waiver relative to court fee is not known.	waiver given, relative to court fee.
Courts — technology, funding, specialisation			
What impact do different court technologies have on accessibility, efficiency and effectiveness?	- Data on uptake of different technologies. - Data to support cost benefit analysis of technological take-up.	- Limited data on uptake of different technologies reported. - Data on cost-effectiveness of court technological solutions not publicly available.	- Courts to report on uptake of different technologies. - Courts to consider how case management systems can be used to collect data to measure the cost-effectiveness of different technologies. - Courts could periodically conduct user surveys to collect data on levels of satisfaction with the availability of different technologies.
Are current levels of court funding and judicial resourcing appropriate to ensure accessible, efficient and effective court services?	- Measures of court workload. - Number of judicial officers and court staff. - Data that indicates how courts are performing against agreed outputs and performance measures.	- Current RoGS performance indicators include fees paid by applicants, judicial officers, backlog, attendance, clearance rate, judicial officers per finalisation, FTE staff per finalisation and cost per finalisation. - Courts report against different outputs and time standards in annual reports.	- Courts to consider the potential for case management systems to provide more sophisticated measures of workload. - Courts and governments could investigate the value of a wider range of performance measures drawing from a range of international tools for measuring court performance.
Private funding for litigation			
- What are the impacts of caps on conditional and damages-based billing? - What are the impacts of different types of	- Publicly available billings data and information on billings models for consumers. - Median fees by legal	Data are not generally publicly available but the Queensland Legal Services Commission conducts periodic surveys on billing practices in Queensland. However, surveys have a low response rate.	Periodic surveys to be undertaken in each jurisdiction by legal profession regulators to ascertain the prevalence of different billing agreements.

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billing arrangements?	matter. • A methodology for converting bill values into percentages of damages awards.		
Legal assistance landscape			
• Are legal assistance providers (LACs), Aboriginal and Torres Strait Islander legal services (ATSILS), family violence prevention legal services (FVPLS) and community legal centres (CLCs) providing services effectively and efficiently? • Is the allocation of legal assistance funding amongst LACs, ATSILS, FVPLS and CLCs appropriate?	• Demographic data on users. Information on costs to provide different sorts of services (for example advice, casework, CLE). • Client satisfaction data.	• Demographic data are collected, but can be of poor quality. • Information on costs of different services by provider is lacking. • Apparent divergence between required data and what is actually reported (some missing fields, definitions not always adhered to). • National Legal Aid (NLA) does not publish cost data. Some LACs, including Legal Aid WA and Legal Aid QLD publish average costs of services. • Comparing the outcomes between different LACs can be difficult. • ATSILS no longer collect client satisfaction data. Have moved selected stakeholder assessment instead.	• Demographic data should be collected more efficiently by examining what data items are needed and reducing load by removing those that are not. • Types of services (e.g. minor assistance) should be consistently defined and reported to allow for benchmarking. • Reporting requirements should be consistent within and across legal assistance providers. This will allow for comparisons across the legal assistance landscape and will reduce reporting burden.
• What are the incomes and assets of people receiving legal aid grants relative to those being rejected? • How restrictive is the means test?	• Income and assets of legal aid users and grant applicants.	• Some LACs publish the proportion of users on income support. • Users' income (including those not earning an income and not receiving income support) not published. • Aggregate data on applicants' incomes not published. • NLA publishes application statistics by jurisdiction and by law type (criminal,	• NLA should report information on the sources and amounts of people applying for grants, receiving grants and being rejected and whether applications have been rejected due to means, merit or the nature of the matter.

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		civil, family).	
How effective are legal assistance providers over time?	Follow-up data on, or tracking of, users.	- Reported data only allows for 'snapshots'. - Understanding the longitudinal effects of legal assistance provision requires users to be tracked across time.	Providers should track outcomes through time.
- What are the characteristics of intensive users of legal assistance? What factors contribute to the multiplicity of their legal problems? - What share of legal assistance resources are allocated to assisting intensive users? - How effective and efficient are legal assistance services targeted at intensive users?	- Extensive demographic data (see results of Legal Aid NSW study on intensive users). - Longitudinal data on intensive users including frequency of use, nature of legal problems, and actions sought. - Financial and time costs of providing services to identified intensive users.	- Demographic data reported by some legal assistance providers is incomplete and inconsistent — particularly in relation to Indigenous and disability status. NSW and Vic have detailed data on web. It is unclear whether other jurisdictions collect similar information but do not report it publicly. - There is a lack of information on whether interventions have been successful in achieving resolution of legal problems and whether intensive users return to seek legal assistance with related legal problems. - Spending on intensive users, relative to total cost of legal assistance is not collected. - No agreed definition of intensive users.	- Adopt a common definition of intensive users, identify the characteristics of this group and measure the share of services they use. - Track outcomes for these users over the medium (as well as short) term. - Identify risk factors for poor outcomes over the medium term.
Pro bono			
What are the most cost-effective pro bono programs?	Value of pro-bono activities undertaken measured on a cost per hour, matter or client basis. Costs should be defined broadly to include costs to pro-bono volunteers, CLCs,	- Main sources of data are ABS (2009) and National Pro-Bono Resource Centre (NPBRC) surveys, which define pro-bono services differently. - Surveys detail the number of pro bono hours per lawyer and sometimes by law firm size and legal matter. - Pro-bono services used by individuals are poorly captured by existing	- Consistent definition of pro-bono activities to be established. - The NPBRC and the ABS should coordinate in undertaking surveys on the value of pro-bono services.

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	LACs or referral body, and opportunity costs.	measures.	

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