# 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 It draws heavily on unpublished data from the Law and Justice Foundation of NSW *LAW Survey* (Coumarelos et al. 2012).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 ombudsman — 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]](#footnote-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)

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)
* 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)
* 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)
* 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.

## B.2 Characteristics associated with the unmet legal need of individuals

Table B.1 summarises the logistic regression analysis using unpublished *LAW Survey* datato 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**

|  |  |  |
| --- | --- | --- |
| Variable group and base categoryb | Categories within variable | Odds ratioc |
| 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** | | *Satisfied* | *Neither satisfied nor dissatisfied* | *Dissatisfied* | | **Whether respondent felt more mechanisms are needed** | *Yes* | 0.6% (fully met) | 0.4% (partly met) | 0.9% (unmet) | 0.6% (partly met) | 84.9% | | *No* | 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

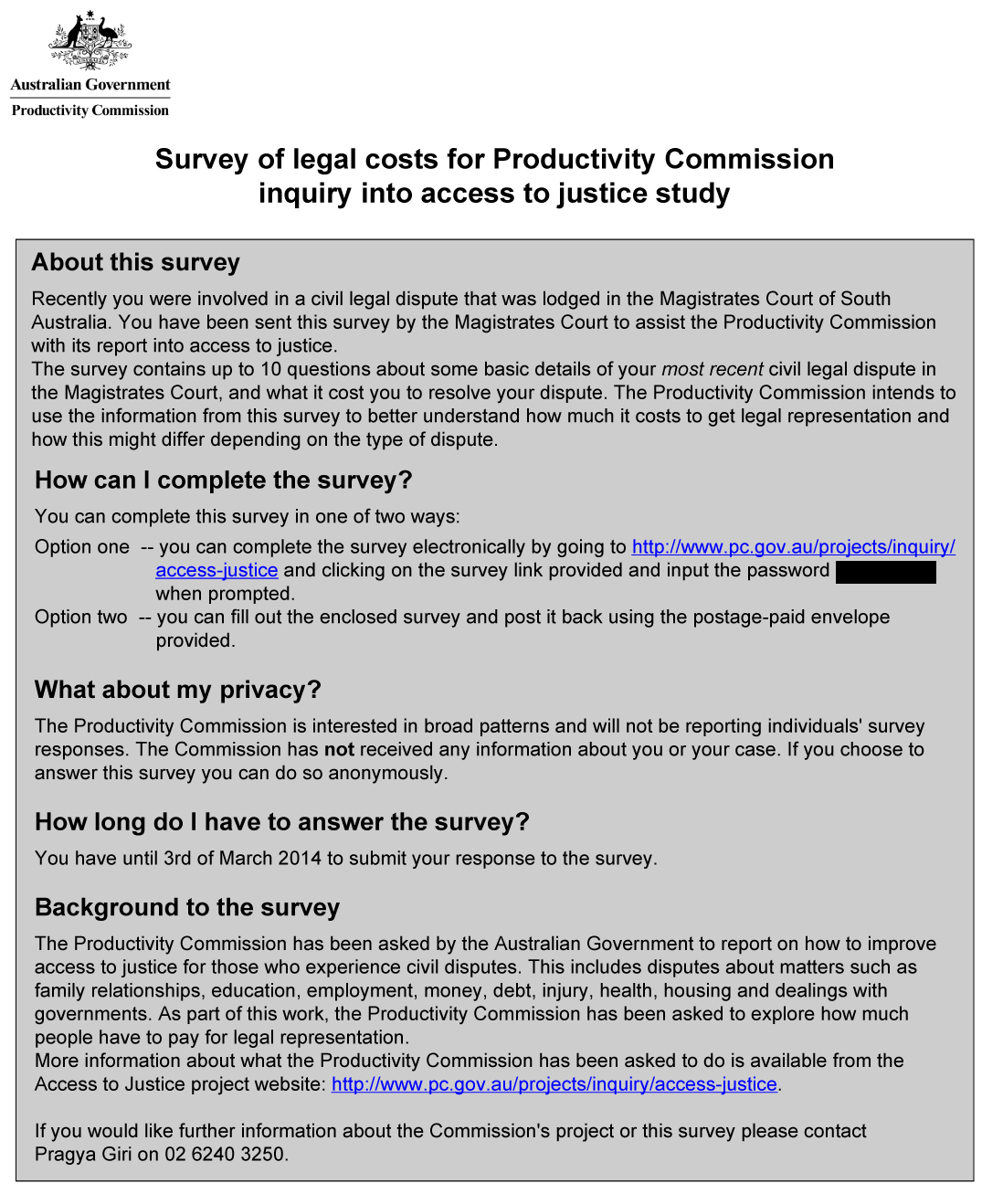
By South Australian court

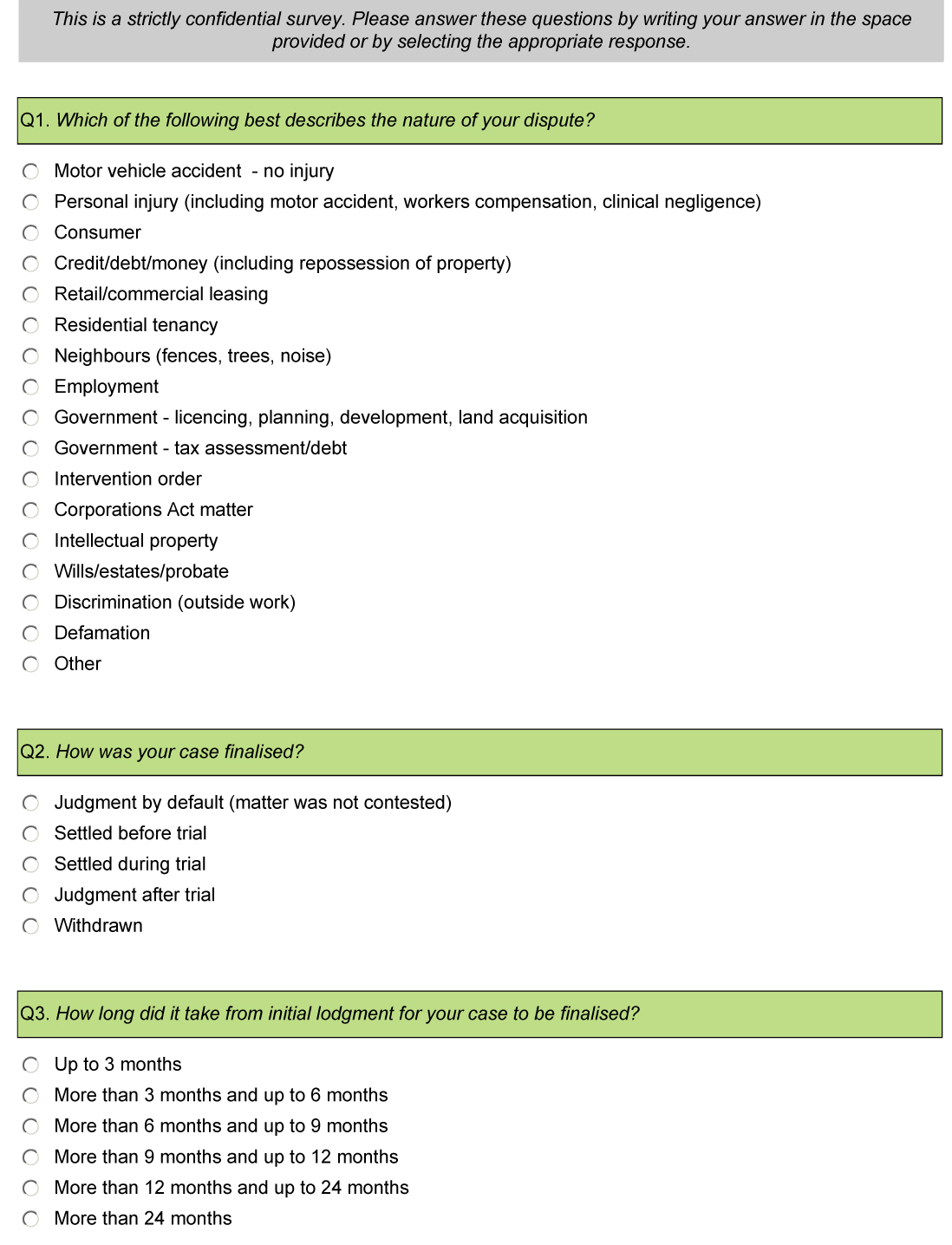
|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Surveys sent | Returned to sender | No. of response | Net response rate a |
| Magistrates Court | 430 | 32 | 55 | 14 per cent |
| District Court | 176 | 16 | 11 | 7 per cent |
| Supreme Court | 173 | 16 | 18 | 10 per cent |
| **Total** | **779** | **64** | **83** | **12 per cent** |

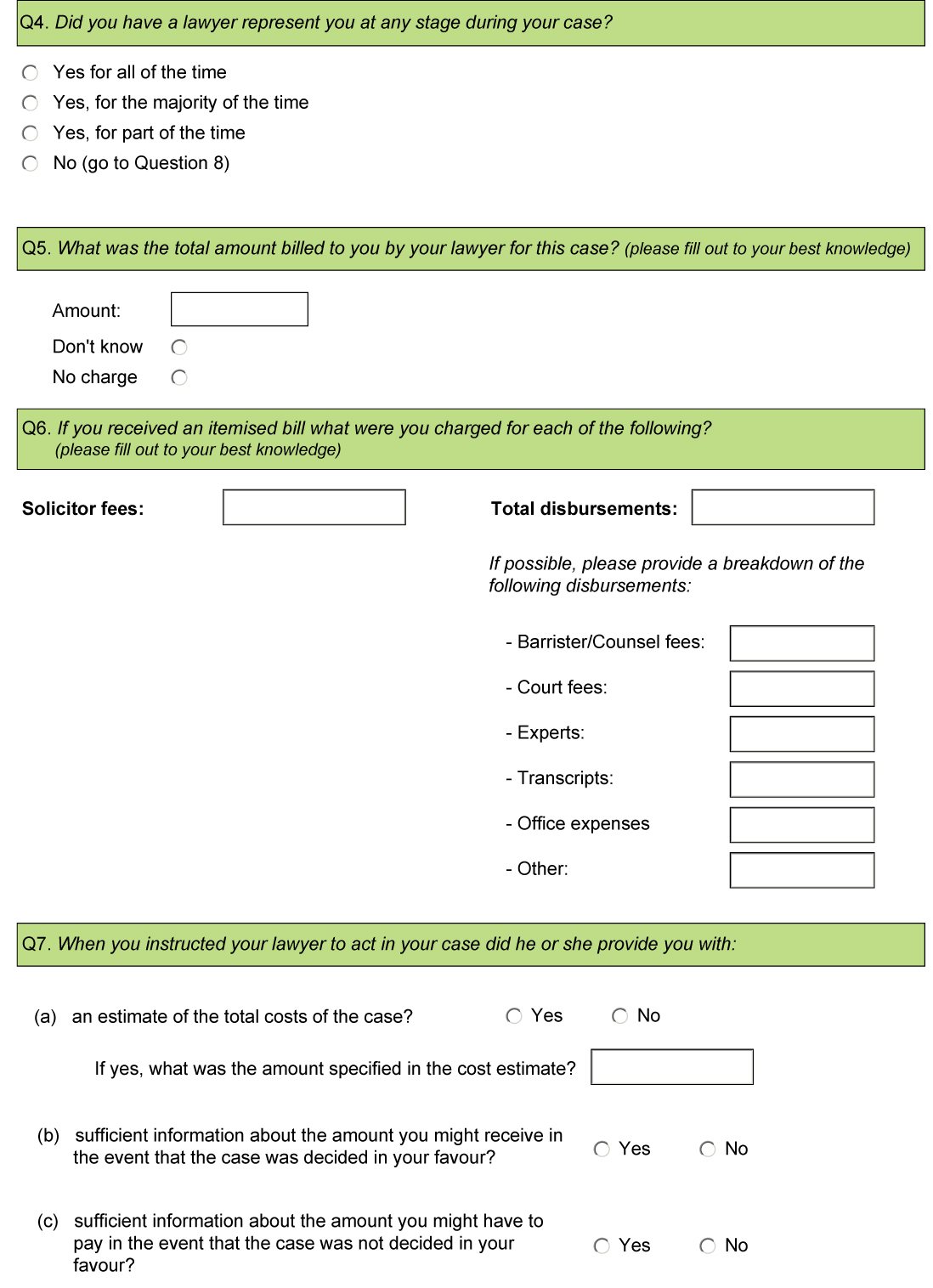
a The net response rate was calculated as the number of responses divided by the total number of surveys distributed minus the number of surveys ‘returned to sender’.

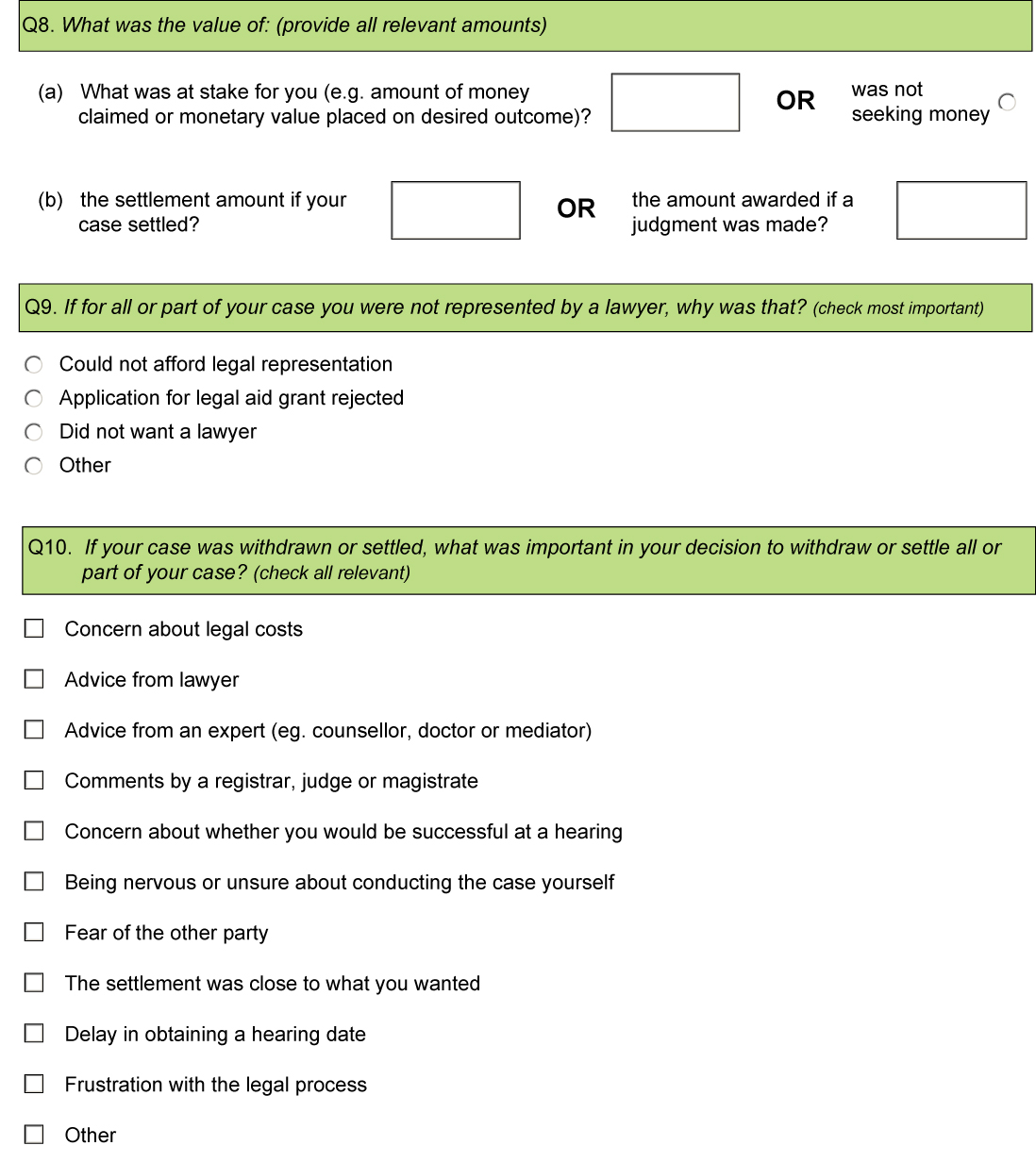
A copy of the questionnaire sent to users of the South Australian Magistrates Court is reproduced in this appendix. The questionnaires sent to users of the District and Supreme Courts were identical to the questionnaire below, with the exception of the name of the court identified in the ‘About this survey’ section.

### The survey of court users









# 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

|  |  |
| --- | --- |
| Jurisdiction | Tribunal |
| 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 Tribunala |
| NSW | Administrative Decisions Tribunala |
| NSW | Dust Diseases Tribunal of NSW |
| NSW | Guardianship Tribunala |
| NSW | Industrial Court of New South Walesb |
| NSW | Industrial Relations Commissionb |
| NSW | Mental Health Review Tribunal |
| NSW | NSW Civil and Administrative Tribunalc |
| NSW | Transport Appeal Boardsa |
| 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)

|  |  |
| --- | --- |
| Jurisdiction | Tribunal |
| SA | Administrative and Disciplinary Division of the District Court |
| SA | Dust Diseases list mattersd |
| SA | Equal Opportunity Tribunal |
| SA | Guardianship Board |
| SA | Licensing Courtd |
| 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 Tribunald |
| SA | South Australian Industrial Relations Commissiond |
| SA | South Australian Industrial Relations Courtd |
| SA | South Australian Workers Compensation Tribunald |
| 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

|  |  |
| --- | --- |
| Jurisdiction | Ombudsman or complaints bodya |
| National | Aged Care Commissioner |
| National | Aged Care Complaints Scheme |
| National | \*Airline Customer Advocateb |
| 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 Commissionerb |
| 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)

|  |  |
| --- | --- |
| Jurisdiction | Ombudsman or complaints body |
| 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.

Table E.1 Expert evidence reforms

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| Jurisdiction | Purpose clause | Requirement to seek directions of court | Express powers including limiting number of experts | Disclosure of contingency fee arrangements | Duties on experts — code of conduct | Provision for conferences and joint reports | Express power to direct parties to engage a single joint expert | Power for court to appoint own expertb | Direct how expert evidence is to be given |
| NSW | *r.31.17* | *r.31.19* | *r. 31.20* | *r. 31.22* | *r. 31.23 and Schedule 7* | *rr. 31.24 – 31.26 and Schedule 7* | *r. 31.37* | *r. 31.46* | *r. 31.35* |
| VIC | *s. 65F* | *s. 65G* | *s. 65H* | *s. 65P* | *ss. 16, 17, 20, 21, 23, 24, 25* | *ss. 65I and s65N* | *ss. 65H and s65L* | *ss. 65H and 65M.* | *s. 65K* |
| QLD | *r. 423* | *r. 427* | *r. 367(3)(e)* | *..* | *r. 426* | *r. 429B* | *r. 429G* | *r. 429G* | *PD 11 of 2012, para. 34* |
| SA | *..* | *..* | *r. 209(1)(d)* | *r. 160(5)* | *r. 160 and PD 5.4* | *r. 213* | *..* | *..* | *r. 213* |
| WAa | *..* | *O. 36A, r. 3* | *O. 36A, r. 5* | *..* | *..* | *O. 4A, r. 2(2)(k)* | *..* | *O. 40, r. 2* | *PD 4, para. 26* |
| TASa | *..* | *..* | *r. 460* | *..* | *..* | *r. 516* | *..* | *..* | *r. 516* |
| NTa | *..* | *..* |  | *..* | *PD 4 of 2009* | *r. 44.05 and PD 4 of 2009* | *..* | *..* | *r. 44.05* |
| ACT | *r. 1200* | *..* | *r. 1205* | *..* | *r. 1203* | *r. 1211* | *r. 1205* | *r. 1205* | *r. 1211* |
| Federal Court | *..* | *..* | *r. 5.04, item 16* | *..* | *PN CM 7* | *r. 5.04, item 16, r. 23.15* | *r. 5.04, item 17* | *r. 5.40, item 14, r. 23.01* | *r. 23.15* |
| Family Court | *r. 15.42* | *r. 15.51* | *r. 15.52* | *..* | *Division 15.5.5* | *r. 15.69* | *r. 15.44* | *r. 15.45* | *r. 15.70* |

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]](#footnote-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

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| This figure shows a line graph of the actions commenced by self-represented litigants as a share of total cases commenced, by year. In 2007 08, 35 per cent of total cases were commenced by self-represented litigants. In 2008 09, the share was 44 per cent. In the following years, the share declines year-on-year — 16 per cent in 2009-10, 7 per cent in 2010-11 and 6 per cent in 2011-12. |

*Data source*: Federal Court Annual Reports, various.

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

Proceedingsa and appealsb commenced by SRLs, by cause of action and year

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| This figure contains two bar graphs on self-represented litigants in the Federal Court of Australia. The first bar graph shows the types of matters in which SRLs commenced proceedings over the period 2009-10 to 2011-12. Ten to 15 per cent of proceedings commenced by SRLs were regarding administrative law cases, 60 per cent were concerned with appeals and related actions, and around 5 per cent were bankruptcy cases, another 5 per cent were corporations cases, and around 5 per cent were human rights cases. | The second bar graph shows the appeals commenced by SRLs over this same time period, by type of appeal. Around 70 per cent of SRL appeals are regarding migration matters, 10 to 15 per cent are bankruptcy matters, and around 5 per cent are administrative law matters. |

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

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| This figure contains two separate line graphs. The first shows the number of filings in which at least one party was self-represented in the Federal Court of Australia from 1998-99 to 2003-04. The number of filings in which at least one party was an SRL was around 2000 each year. The number of filings in which representation status was unknown fell from 4000 filings in 1998 99 to around 800 in 2001-02 and 2002-03, and slightly increased to around 1200 in 2003-04. | The second line graph shows these numbers as a percentage of total filings. Around 28 per cent of actions commenced in 1998-99 had at least one self-represented party. This increased to 40 per cent in 2001-02, and fell to around 33 per cent in 2003-04. |

*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

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| This figure contains two area graphs. One shows the proportion of litigants in the Family Court of Australia by representation status from 2003-04 to 2011-12, for finalised cases. The proportion of finalised cases involving no SRL increased from 57 per cent in 2003 04 to 73 per cent. The second area graph shows the representation status of litigants in trials. 46 per cent of trials had no SRL in 2003-04, which increased to 68 per cent in 2011-12. | The second area graph shows the representation status of litigants in trials. 46 per cent of trials had no SRL in 2003-04, which increased to 68 per cent in 2011-12. |

*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

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| This is a line graph showing the proportion of appellants in the Family Court of Australia who are self-represented, from 1996-97 to 2011-12. Twenty six per cent of appellants were self-represented in 1996-97. The proportion increased each year up to 2001-02 where 46 per cent of appellants were self-represented. The proportion was around 40 per cent since that year, with a spike in 2008-09 of 53 per cent. |

*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

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| This is a line graph showing self-represented applicants in the Family Court of WA by case type over the years 2007-08 to 2012-13. The three case types show are: divorce applications; final order parenting applications; and financial cases. Details of the movements over time are in the text above the figure. |

*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

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| This figure is a line graph showing the percentage of divorce applications in the Family Court of Australia who are self-represented. In 1981, around 25 per cent of divorce applicants were self-represented. In 1990-91, the proportion was around 46 per cent. The proportion grew and remained at around 70 per cent from 1995-96 to 1998-99. |

*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

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| This figure is a bar graph of family law final applications by party representation, from 2009-10 to 2012-13. Representation status did not vary much over these years. Around 65 per cent of parties both had legal representation in each of these years. Just under 10 per cent involved parties where neither had legal representation. Around 20 per cent had applicants only with legal representation, and around 5 per cent had the respondent only with legal representation. |

*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 2012‑13a

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| This figure is a bar graph showing the representation status of individuals in all cases finalised in the AAT in 2012-13, by jurisdiction. In the citizenship and immigration jurisdiction, around 50 per cent were self-represented, 22 per cent had a private lawyer and around 15 per cent were represented by a friend, relative or other person. In social security jurisdiction, around 75 per cent were self-represented. In taxation, 40 per cent were self-represented, around 25 per cent had a private lawyer and around 30 per cent were represented by an accountant or tax agent. Veterans’ affairs and workers’ compensation were the two jurisdictions with the lowest levels of self-representation (just under 20 per cent), and the highest levels of private lawyer involvement (around 55 per cent and nearly 80 per cent, respectively). |

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

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| This figure is a line graph showing the per cent of all matters in the civil appeal jurisdiction of the Victorian Court of Appeal commenced by SRLs, over the years 2001 to 2013. Further details are in the text above the figure. |

*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

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| This figure contains two line graphs regarding SRLs in Queensland’s Court of Appeal. The first graph shows the number of cases in which at least one party was self represented over 1995-96 to 2010-11. From under 20 cases in the first few years, the number of cases increased to 100 in 2002-03, fell to around 40 in 2005-06, and increased to 89 in 2010-11. | The second graph shows the per cent of civil cases in the Court of Appeal with at least one party self-represented, from 2000-01 to 2010-11. The proportion varied quite a lot over these years, and was in the range of about 25 to 40 per cent. |

*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).

# 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.

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| 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). |
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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 costsa

Using expenditure figures for the Family Court of Australia

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| --- | --- |
| Expense | Share of costs (%) |
| *Direct costs* |  |
| Client services | 25 |
| Family consultants | 8 |
| Registrars | 6 |
| Judges and support | 21 |
| **Total direct costs** | **60** |
| *Indirect costs* |  |
| 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]](#footnote-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.

# 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 exclusion[[4]](#footnote-4) 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).

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 arrangements[[5]](#footnote-5) were 1.5 times more likely to experience multiple legal problems than people in other types of housing (Coumarelos et al. 2012).

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 services[[6]](#footnote-6) 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 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 though the Community Legal Service Information System (CLSIS).[[7]](#footnote-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.

Table I.1 SEIFA deciles of CLCs and their clients

Per cent, 2011‑12

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| SEIFA decile | CLC clients |  | CLCsc | |
|  | 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 |
| naa | 0.8 |  | 6.3 | 5.0 |
| Otherb | 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

|  |  |
| --- | --- |
| This figure comprises two panels.The left panel shows where CLC clients live (that is the SEIFA decile of CLC clients). CLC clients with low or no income in lowest SEIFA decile make up about 76 per cent of CLCs’ clients in that decile. CLC clients with low or no income in the highest SEIFA decile make up nearly 60 per cent of CLCs’ clients in this decile. | Panel B shows where CLCs are located (that is the SEIFA decile of CLC locations). 76 per cent of clients serviced by CLCs located in the lowest SEIFA decile, have low or no income. 60 per cent of clients serviced by CLCs located in the third lowest SEIFA decile, have low or no income. Nearly 80 per cent of clients serviced by CLCs located in the fifth decile have low or no income. About 55 per cent of clients serviced by CLCs located in the highest SEIFA decile have low or no income. |
| *Legend for figure I1.* | |

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.

# 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

| Policy question | Data required | Available data and gaps | Data response |
| --- | --- | --- | --- |
| **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 *Legal Australia‑Wide* (*LAW) Survey* 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 through time. | * 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 *Business Characteristics Survey*. |
| **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. * *LAW Survey* 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. |
| * Are people using appropriate mechanisms to resolve disputes? | * Legal problems (nature, severity). * Demographic data. * Mapping of legal problem to appropriate dispute resolution mechanism. | * *LAW Survey* provided relevant information. | * Repeat *LAW Survey* 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. | * *LAW Survey* 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. * 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. | * 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 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 area of law. | * ABS definition of lawyers is not sufficiently descriptive. * NSW Law Society publishes information on number of lawyers. | * ABS definition of lawyers needs to be redefined to get better survey results. |
| **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 tribunal services be made? | * 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 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 expert evidence. | * 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 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? * How does self‑representation affect courts and tribunals? * Are measures aimed at assisting self‑represented litigants effective? | * 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 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. | * 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. * 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. | * 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 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 experienced by users. * Number and value of waivers given. * Methodology for setting waivers. | * 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 not report this information publicly. * Average size of waiver relative to court fee is not known. | * 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 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 billing arrangements? | * Publicly available billings data and information on billings models for consumers. * Median fees by legal matter. * A methodology for converting bill values into percentages of damages awards. | * 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. |
| **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, civil, family). | * 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. |
| * 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, LACs or referral body, and opportunity costs. | * 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 measures. | * 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. |

1. These are defined in the *LAW survey* as fines that lead to lead to court fines, loss of licence or registration, community service orders, property being seized or wage deductions (Coumarelos et al. 2012). [↑](#footnote-ref-1)
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/FlagPost/2013/November/Abolishing\_free\_legal\_advice\_to\_asylum\_seekers\_\_who\_really\_pays (accessed 12 March 2014). [↑](#footnote-ref-2)
3. Vic DoJ (Department of Justice Victoria) 2012, Regulatory impact statement: Supreme Court (Fees) Regulations 2012, County Court (Fees) Regulations 2012, October, Melbourne. [↑](#footnote-ref-3)
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). [↑](#footnote-ref-4)
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. [↑](#footnote-ref-5)
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. [↑](#footnote-ref-6)
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. [↑](#footnote-ref-7)