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Productivity Commission

Access to Justice Arrangements

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Appendices B to K

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The Productivity Commission

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

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

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

Contents

Appendices B to K for the *Access to Justice Arrangements* inquiry report are referred to in the chapters but are not included in the two volume report. They are available online from the Commission's website (www.pc.gov.au).

B Legal need

As noted in chapter 2, 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 the clustering and compounding of issues that require a legal resolution and disadvantage. This appendix provides an overview of this literature and is organised around the following questions:

- what type of legal problems tend to occur as multiple or clustered problems? (section B.1)
- what factors are associated with multiple legal needs? (section B.2)

This appendix also provides some greater detail around the informal dispute resolution mechanisms that could be used to satisfy unmet legal need (section B.3). It also provides detail around the characteristics of those with unmet legal need, and the incidence of unmet legal need of small businesses (sections B.4 and B.5). It draws heavily on unpublished data from the Law and Justice Foundation of NSW's *Legal Australia-Wide Survey* (*LAW Survey)* (Coumarelos et al. 2012).

B.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 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 legal needs of people living in disadvantaged regions of NSW 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 *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 upon income support payments (Pleasence 2006). The same international studies also found personal injury which, in turn, impacted upon employment led to other problems related to welfare, consumer issues and debt.

In Australia, Coumarelos et al. (2013) found an interrelationship between 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.

B.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 people who experienced multiple legal problems were fairly evenly spread across the personal income distribution.

Commission estimates based on unpublished *LAW Survey* data suggest that those on low, moderate and higher incomes who experience multiple legal problems face different types of legal problems. Individuals earning $67 600 or more per annum were more likely to experience the combination of consumer, money and criminal legal problems while individuals near the bottom of the income distribution were more likely to experience the 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 (chapter 5).

Factors associated with 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 one legal problem or more 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 a half were in receipt of 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 2005; 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 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 have revealed that people with a disability have a higher prevalence rate than other respondents for legal problems related to discrimination, employment, neighbours, owned housing, rented 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 Survey data showed that over 13 per cent of Australians aged 15 years plus with a long term health condition or disability experienced deep social exclusion[1] compared to the Australian average of just under 5 per cent in 2010 (McLachlan, Gilfillan and Gordon 2013).

[1] Deep social exclusion was calculated by aggregating responses of individuals participating in the Household, Income Labour Dynamics in Australia 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).

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 — and in particular female lone parents — 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) for 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 rates (63 per cent in 2010) and rates 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 and older (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[2] 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. According to this study, more than three quarters of respondents who were homeless experienced three or more legal issues (Forell, McCarron and Schetzer 2005).

B.3 Identifying informal dispute resolution mechanisms appropriate for particular problems.

Section 2.5 of chapter 2 used a definition of unmet legal need and data from the *LAW Survey* to identify where there may be such unmet need for different types of problems. This section describes the incidence of unmet need in greater detail, as well as identifying some of the informal resolution mechanisms — which often incur a low or no cost to the user — that could be used to resolve them.

Consumer problems

The largest number of instances of unmet legal need occurred in relation to consumer problems and disputes. These made up 29 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 (including TV) services providers. There is an industry-specific ombudsman for telecommunications complaints — the Telecommunications Industry

[2] 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.

Ombudsman — but there are relatively 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 and the Credit Ombudsman Service — provide avenues to address these disputes. However, as with the Telecommunications Industry Ombudsman 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 offices 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 offices 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 problems 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 from consideration by the local government ombudsman in New South Wales while 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 Australian Government payments can be reviewed by the Commonwealth Department of Human Services, which in turn can be appealed to the Social Security Appeals Tribunal — 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 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 offers the opportunity to review complaints about taxation assessments and decisions. The Australian Taxation Office also utilises alternative dispute resolution (ADR) once it exhausts direct negotiation opportunities. It also considers the use of ADR, where appropriate, during the earlier stages of disputes (sub 150, p. 13). Failing that, the Commonwealth Ombudsman can also hear some tax-related disputes. Further appeals — through the Administrative Appeals Tribunal — 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).[3] 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.

Another recourse for government problems is to contact the relevant elected representative, who may advocate on behalf of their constituent or direct them to the appropriate agency for review and assistance.

[3] These are defined in the *LAW Survey* as fines that lead to court fines, loss of licence or registration, community service orders, property being seized or wage deductions (Coumarelos et al. 2012).

Housing problems

Housing problems accounted for 9 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 the 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 relating to '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, and 3 per cent were to do with retirement villages. Disputes around mortgages are most likely addressable through the Financial Ombudsman Service 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.

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 9 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. Workers and small business operators can seek advice from unions and industry associations respectively and both can obtain information from various government agencies.

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, although these may 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 6 per cent of instances of unmet legal need. Within the category of family problems, 33 per cent of instances of unmet need related to child support, 32 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 Australian Government's 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 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 and debt problems

The problems associated with unmet legal need in the 'credit and 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 and 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 and debt problems).

Commission estimates based on *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 Credit Ombudsman Service 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 470 problems out of the 19 388 weighted problems detailed 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 Aged Care Complaints Scheme
- 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.

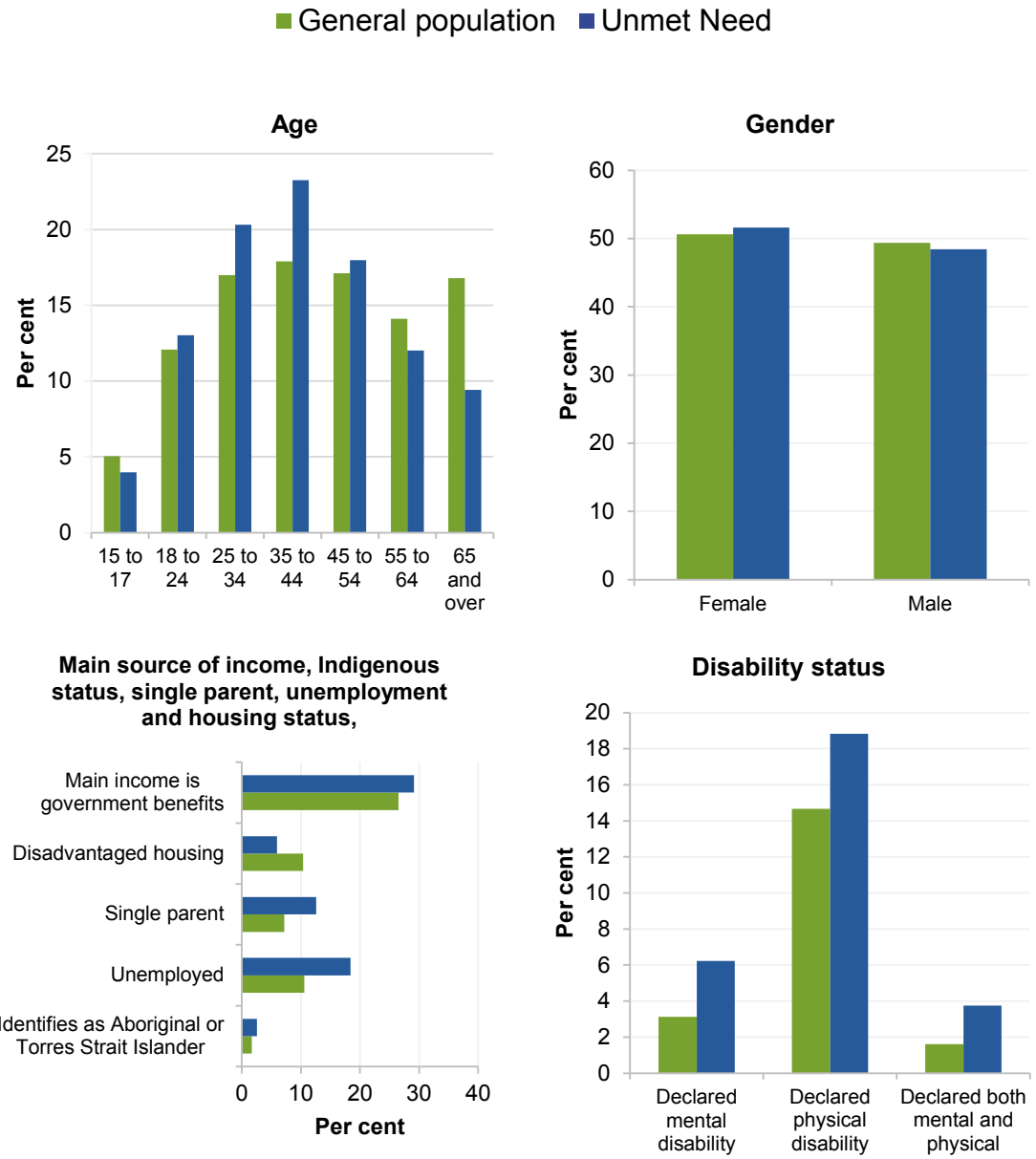
For some problems, however, the Commission was unable to identify an informal avenue to seek a resolution. These disputes included:

- those involving disability care, aid and equipment (although there may be some recourse through the disabilities commissioner, or the Administrative Appeals Tribunal 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 comprised 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.4 Distribution and characteristics associated with unmet legal need

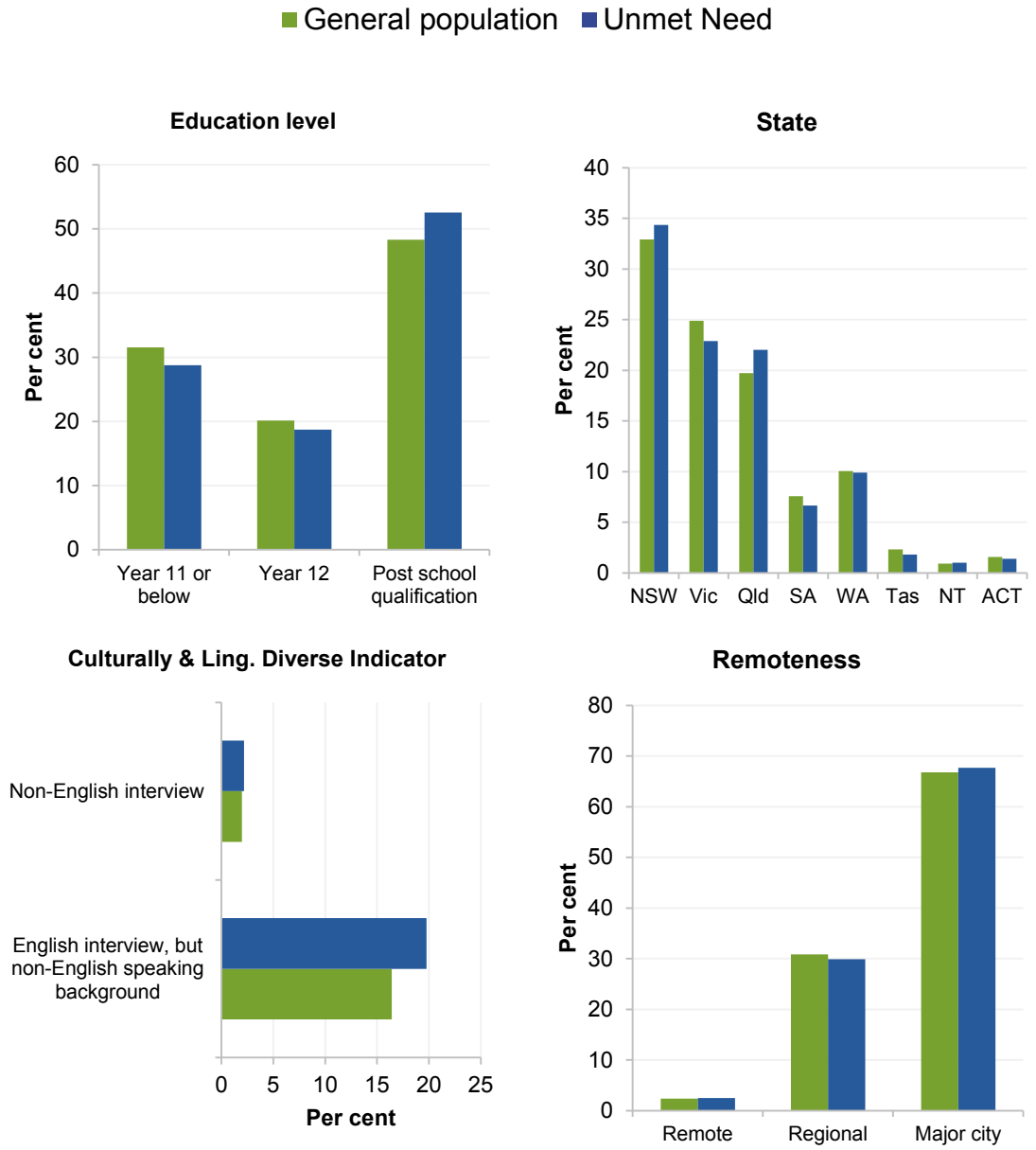
Figure B.1 compares Commission estimates of the distributions of various indicators based on *LAW Survey* data for the general population and those identified with unmet legal need.

Figure B.1 **Distribution of indicators[a]**
Per cent



(continued)

Figure B.1 **(continued)**[a]



[a] Disadvantaged housing is defined as being homeless, living in emergency or basic accommodation (such as a refuge, shelter, boarding house, caravan park, tent, motor vehicle, shed or barn), living with relatives or friends due to having nowhere else to live, or living in public housing.

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

Table B.1 summarises the Commission's logistic regression analysis (discussed in section 2.5) using unpublished *LAW Survey* data to determine the relative importance of various characteristics that may be associated with incidence of unmet legal need.

Table B.1 **Logistic regression results for unmet need**[a]

Variable group and base category[b]	*Categories within variable*	*Odds ratio*[c]
Age (relative to 15-17)	18 to 24	1.07
	25 to 34	1.30*
	35 to 44	1.51**
	45 to 54	1.26
	55 to 64	1.15
	65 and over	1.04
Gender (relative to female)	Male	0.88*
Income (relative to means tested government payments being main source of income)	Not means tested government payment	0.81**
Remoteness (relative to rural)	Regional	0.90
	Major city	0.86
Identifies as Aboriginal or Torres Strait Islander (relative to not identifying)	Does not identify Aboriginal or Torres Strait Islander	0.73*
Disability type (relative to no disability)	Mental only	1.27*
	Physical only	1.29**
	Mental & physical	1.66**
Unemployed (relative to unemployed)	Not unemployed	0.64**
Jurisdiction (relative to New South Wales)	Victoria	0.84
	Queensland	1.17*
	South Australia	0.80*
	Western Australia	0.88
	Tasmania	0.69**
	Northern Territory	0.89
	The ACT	0.90
Language of interview (relative to English interview with non-English speaking background)	Non-English interview	1.35
	English only	0.76**
Both criminal and civil problems (relative to those with civil problems only)	Both criminal and civil problems	1.91**
Family status (relative to single parent family)	Not a single parent family	0.89
Education (relative to less than completing year 12)	Year 12	0.94
	Post-school qualification	0.97
Housing type (relative to disadvantaged housing)[d]	Other than disadvantaged housing	0.68**

[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. There were 9296 observations.[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; * denotes 10 per cent level of significance. [d] Defined as being homeless, living in emergency or basic accommodation (such as a refuge, shelter, boarding house, caravan park, tent, motor vehicle, shed or barn), living with relatives or friends due to having nowhere else to live, or living in public housing.

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

B.5 Incidence of unmet legal need for small business

Figure B.3 shows the combinations of responses from a survey commissioned by the Department of Industry, Innovation, Science and Research (DIISR 2010) into unmet legal need amongst businesses. Unmet need is based on satisfaction and whether firms felt more dispute resolution mechanisms were needed.

Figure B.2 **Analysis of unmet demand for dispute resolution mechanisms for small business[a]**

		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)	

a Shaded cells indicate the combinations that represent partially or fully unmet need. Number of respondents: 2007.

Source: Table 2 of DIISR (2010).

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 86 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

Court	*Surveys sent*	*Returned to sender*	*No. of responses*	*Net response rate*[a]
Magistrates Court	430	32	57	14 per cent
District Court	176	16	11	7 per cent
Supreme Court	173	16	18	10 per cent
Total	**779**	**64**	**86**	**12 per cent**

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

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

The survey of court users

Australian Government
Productivity Commission

Survey of legal costs for Productivity Commission inquiry into access to justice study

About this survey

Recently you were involved in a civil legal dispute that was lodged in the Magistrates Court of South Australia. You have been sent this survey by the Magistrates Court to assist the Productivity Commission with its report into access to justice.
The survey contains up to 10 questions about some basic details of your *most recent* civil legal dispute in the Magistrates Court, and what it cost you to resolve your dispute. The Productivity Commission intends to use the information from this survey to better understand how much it costs to get legal representation and how this might differ depending on the type of dispute.

How can I complete the survey?

You can complete this survey in one of two ways:

Option one -- you can complete the survey electronically by going to http://www.pc.gov.au/projects/inquiry/access-justice and clicking on the survey link provided and input the password [redacted] when prompted.

Option two -- you can fill out the enclosed survey and post it back using the postage-paid envelope provided.

What about my privacy?

The Productivity Commission is interested in broad patterns and will not be reporting individuals' survey responses. The Commission has **not** received any information about you or your case. If you choose to answer this survey you can do so anonymously.

How long do I have to answer the survey?

You have until 3rd of March 2014 to submit your response to the survey.

Background to the survey

The Productivity Commission has been asked by the Australian Government to report on how to improve access to justice for those who experience civil disputes. This includes disputes about matters such as family relationships, education, employment, money, debt, injury, health, housing and dealings with governments. As part of this work, the Productivity Commission has been asked to explore how much people have to pay for legal representation.
More information about what the Productivity Commission has been asked to do is available from the Access to Justice project website: http://www.pc.gov.au/projects/inquiry/access-justice.

If you would like further information about the Commission's project or this survey please contact Pragya Giri on 02 6240 3250.

This is a strictly confidential survey. Please answer these questions by writing your answer in the space provided or by selecting the appropriate response.

Q1. *Which of the following best describes the nature of your dispute?*

- ○ Motor vehicle accident - no injury
- ○ Personal injury (including motor accident, workers compensation, clinical negligence)
- ○ Consumer
- ○ Credit/debt/money (including repossession of property)
- ○ Retail/commercial leasing
- ○ Residential tenancy
- ○ Neighbours (fences, trees, noise)
- ○ Employment
- ○ Government - licencing, planning, development, land acquisition
- ○ Government - tax assessment/debt
- ○ Intervention order
- ○ Corporations Act matter
- ○ Intellectual property
- ○ Wills/estates/probate
- ○ Discrimination (outside work)
- ○ Defamation
- ○ Other

Q2. *How was your case finalised?*

- ○ Judgment by default (matter was not contested)
- ○ Settled before trial
- ○ Settled during trial
- ○ Judgment after trial
- ○ Withdrawn

Q3. *How long did it take from initial lodgment for your case to be finalised?*

- ○ Up to 3 months
- ○ More than 3 months and up to 6 months
- ○ More than 6 months and up to 9 months
- ○ More than 9 months and up to 12 months
- ○ More than 12 months and up to 24 months
- ○ More than 24 months

Q4. *Did you have a lawyer represent you at any stage during your case?*

- ○ Yes for all of the time
- ○ Yes, for the majority of the time
- ○ Yes, for part of the time
- ○ No (go to Question 8)

Q5. *What was the total amount billed to you by your lawyer for this case? (please fill out to your best knowledge)*

Amount: ☐

Don't know ○

No charge ○

Q6. *If you received an itemised bill what were you charged for each of the following? (please fill out to your best knowledge)*

Solicitor fees: ☐ **Total disbursements:** ☐

If possible, please provide a breakdown of the following disbursements:

- Barrister/Counsel fees: ☐
- Court fees: ☐
- Experts: ☐
- Transcripts: ☐
- Office expenses ☐
- Other: ☐

Q7. *When you instructed your lawyer to act in your case did he or she provide you with:*

(a) an estimate of the total costs of the case? ○ Yes ○ No

If yes, what was the amount specified in the cost estimate? ☐

(b) sufficient information about the amount you might receive in the event that the case was decided in your favour? ○ Yes ○ No

(c) sufficient information about the amount you might have to pay in the event that the case was not decided in your favour? ○ Yes ○ No

Q8. *What was the value of: (provide all relevant amounts)*

(a) What was at stake for you (e.g. amount of money claimed or monetary value placed on desired outcome)? [ ] **OR** was not seeking money ○

(b) the settlement amount if your case settled? [ ] **OR** the amount awarded if a judgment was made? [ ]

Q9. *If for all or part of your case you were not represented by a lawyer, why was that?* *(check most important)*

- ○ Could not afford legal representation
- ○ Application for legal aid grant rejected
- ○ Did not want a lawyer
- ○ Other

Q10. *If your case was withdrawn or settled, what was important in your decision to withdraw or settle all or part of your case?* *(check all relevant)*

- ☐ Concern about legal costs
- ☐ Advice from lawyer
- ☐ Advice from an expert (eg. counsellor, doctor or mediator)
- ☐ Comments by a registrar, judge or magistrate
- ☐ Concern about whether you would be successful at a hearing
- ☐ Being nervous or unsure about conducting the case yourself
- ☐ Fear of the other party
- ☐ The settlement was close to what you wanted
- ☐ Delay in obtaining a hearing date
- ☐ Frustration with the legal process
- ☐ Other

D List of tribunals and ombudsmen

This appendix contains a list of tribunals (table D.1) and a list of ombudsmen and complaint bodies (table D.2) that were identified for this report.

Table D.1 **Tribunals**

Cth	Administrative Appeals Tribunal
Cth	Australian Competition Tribunal
Cth	Copyright Tribunal of Australia
Cth	Defence Force Discipline Appeal Tribunal
Cth	Fair Work Commission
Cth	Migration Review Tribunal
Cth	National Native Title Tribunal
Cth	Refugee Review Tribunal
Cth	Social Security Appeals Tribunal
Cth	Superannuation Complaints Tribunal
Cth	Veterans' Review Board
NSW	Consumer, Trader and Tenancy Tribunal[a]
NSW	Administrative Decisions Tribunal[a]
NSW	Dust Diseases Tribunal of New South Wales
NSW	Guardianship Tribunal[a]
NSW	Industrial Court of New South Wales[b]
NSW	Industrial Relations Commission[b]
NSW	Mental Health Review Tribunal
NSW	NSW Civil and Administrative Tribunal[c]
NSW	Transport Appeal Boards[a]
NSW	Workers Compensation Commission
Vic	Accident Compensation Conciliation Service
Vic	Mental Health Review Board
Vic	Victorian Civil and Administrative Tribunal
Vic	Victorian Mining Warden
Qld	Mental Health Review Tribunal
Qld	Queensland Civil and Administrative Tribunal
Qld	Residential Tenancies Authority
WA	Mental Health Review Board
WA	State Administrative Tribunal
WA	Warden's Court

(Continued next page)

Table D.1 (continued)

SA	Administrative and Disciplinary Division of the District Court
SA	Dust Diseases list matters[d]
SA	Equal Opportunity Tribunal
SA	Guardianship Board
SA	Licensing Court[d]
SA	Pastoral Land Appeal Tribunal
SA	Police Disciplinary Tribunal
SA	Protective Security Officers Disciplinary Tribunal
SA	Residential Tenancies Tribunal
SA	Skills and Training Commission
SA	Health Practitioners Tribunal[d]
SA	Industrial Relations Commission[d]
SA	Industrial Relations Court[d]
SA	Workers Compensation Tribunal[d]
SA	Wardens Court
Tas	Administrative Appeals Division, Magistrates Court of Tasmania
Tas	Anti-Discrimination Tribunal, Magistrates Court of Tasmania
Tas	Asbestos Compensation Tribunal
Tas	Guardianship and Administration Board
Tas	Health Practitioners Tribunal
Tas	Mental Health Tribunal
Tas	Mining Tribunal, Magistrates Court of Tasmania
Tas	Motor Accidents Compensation Tribunal, Magistrates Court of Tasmania
Tas	Resource Management and Planning Appeal Tribunal
Tas	Workers Rehabilitation and Compensation Tribunal
ACT	ACT Civil and Administrative Tribunal
NT	Lands, Planning and Mining Tribunal
NT	Mental Health Review Tribunal

[a] This tribunal existed in 2011-12 and has been included in caseload estimates, but has since ceased operation. [b] The Industrial Court of New South Wales is collectively administered with the Industrial Relations Commission and has therefore been included in this list. [c] This tribunal did not exist in 2011-12 and has been excluded from caseload estimates. [d] These bodies are collectively administered, therefore the Licensing Court and South Australian Industrial Relations Court have been included here.

Source: Commission research.

Table D.2 **Ombudsmen and complaints bodies**

National	Aged Care Commissioner
National	Aged Care Complaints Scheme
National	Airline Customer Advocate[ab]
National	Aircraft Noise Ombudsman
National	Australian Human Rights Commission
National	Australian Information Commissioner
National	Commonwealth Ombudsman
National	Credit Ombudsman Service[a]
National	Fair Work Ombudsman
National	Financial Ombudsman Service[a]
National	Franchising Mediation Adviser
National	Horticulture Mediation Adviser
National	Immigration Ombudsman
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[a]
National	Produce and Grocery Industry Ombudsman
National	Taxation Ombudsman
National	Telecommunications Industry Ombudsman[a]
NSW	Anti-Discrimination Board of New South Wales
NSW	Energy and Water Ombudsman New South Wales[a]
NSW	Health Care Complaints Commission
NSW	Information and Privacy Commission
NSW	NSW Fair Trading
NSW	NSW Ombudsman
Vic	Consumer Affairs Victoria
Vic	Disability Services Commissioner
Vic	Energy & Water Ombudsman Victoria[a]
Vic	Freedom of Information Commissioner[b]
Vic	Health Services Commissioner
Vic	Local government Investigations and Compliance Inspectorate
Vic	Mental Health Complaints Commissioner
Vic	Public Transport Ombudsman[a]
Vic	Victorian Equal Opportunity and Human Rights Commission
Vic	Victorian Ombudsman
Vic	Victorian Privacy Commissioner

(Continued next page)

Table D.2 (continued)

Qld	Anti-Discrimination Commission Queensland
Qld	Energy and Water Ombudsman Queensland[a]
Qld	Health Quality and Complaints Commission
Qld	Fair Trading
Qld	Information Commissioner
Qld	Queensland Ombudsman
WA	Consumer Protection
WA	Energy and Water Ombudsman Western Australia[a]
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 and Water Ombudsman South Australia [a]
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[a]
Tas	Health Complaints Commissioner
Tas	Ombudsman Tasmania
ACT	ACT Human Rights Commission
ACT	ACT Ombudsman
ACT	Regulatory Services
NT	Consumer Affairs
NT	Health and Community Services Complaints Commission
NT	Information Commissioner; Commissioner for Public Interest Disclosures
NT	NT Anti-Discrimination Commission
NT	Ombudsman Northern Territory

[a] Industry funded ombudsman. [b] This body did not exist in 2011-12 and has been excluded from caseload estimates.

Source: Commission research.

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 expert*[b]	*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*
WA[a]	..	*O. 36A, r. 3*	*O. 36A, r. 5*	..	..	*O. 4A, r. 2(2)(k)*	..	*O. 40, r. 2*[c]	*PD 4 of 2009, para. 28*
TAS[a]	..	..	*r. 460*	..	..	*r. 516*	..	..	*r. 516*
NT[a]	..	..	..	..	*PD 4 of 2009*	*r. 44.05 and PD 4 of 2009*	..	..	*r. 44.05*
ACT	*r. 1200*	*r. 1205*	*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. **c** On the application of a party only.

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); Consolidated Practice Directions 2009 (Supreme Court of Western Australia); 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 available data on self-represented litigants (SRLs) in Australia.

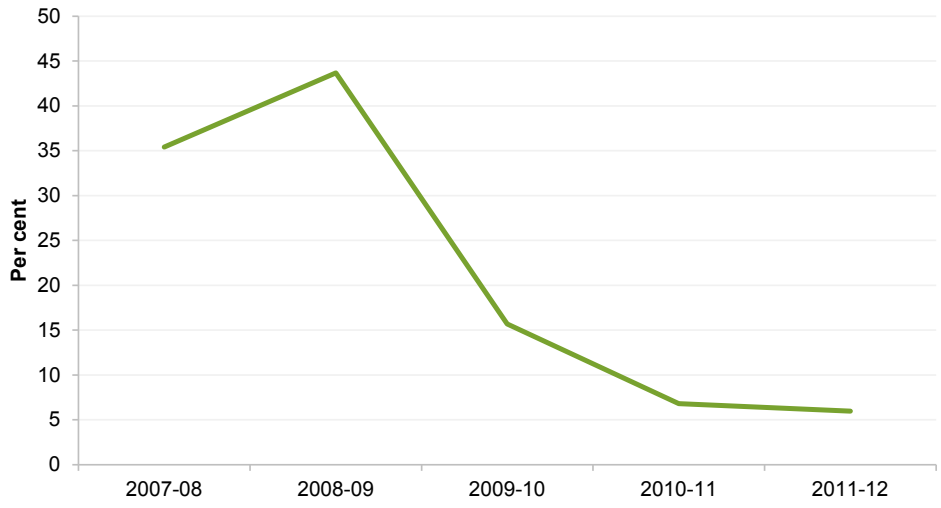
Information about SRLs is collected inconsistently across (and sometimes within) different courts and tribunals. This makes it difficult to assess the nature and extent of self-representation. Section F.1 outlines data from the federal jurisdiction. For comparability, this section also includes information on the Family Court of Western Australia. Section F.2 covers data from 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 (Parliamentary Library 2013).

Figure F.1 **Declining proportion of SRLs in the Federal Court**

Actions commenced by SRLs as a share of total cases commenced, 2007-08 to 2011-12

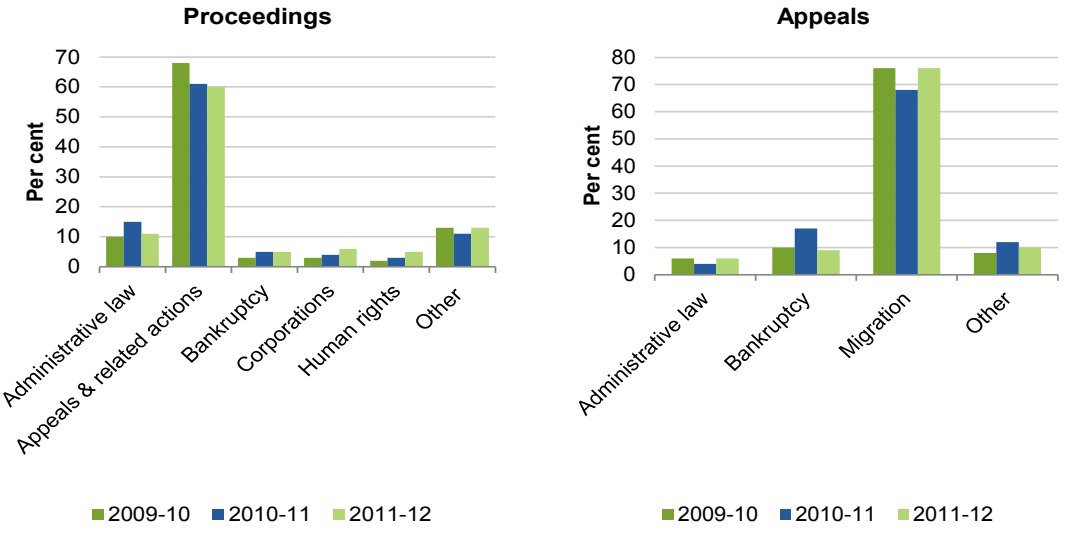


Data source: Federal Court of Australia annual reports, various.

Migration disputes continue to comprise a large share of self-represented cases in the Federal Court of Australia. Over 60 per cent of proceedings commenced by SRLs in the last few years were appeals and related actions. Of the appeals commenced by SRLs, around 70 per cent related to migration matters (figure F.2).

Figure F.2 **SRLs in the Federal Court mostly appeal migration decisions**

Proceedings[a] and appeals[b] commenced by SRLs, by cause of action and year



[a] 'Other' includes admiralty, assisted dispute resolution, bills of costs, competition law, consumer protection, cross claim, fair work, industrial, intellectual property, migration, miscellaneous, native title, and taxation. [b] 'Other' includes admiralty, competition law, consumer protection, corporations, fair work, human rights, industrial, intellectual property, miscellaneous, and taxation.

Data source: Federal Court of Australia annual reports, various.

Changes in data reporting make comparisons over a longer period of time difficult. Earlier Federal Court annual reports included the number and proportion of actions commenced in which either the applicant *or respondent* were self-represented. According to this measure, there has been some variation over time in the share of total cases involving at least one SRL. 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).

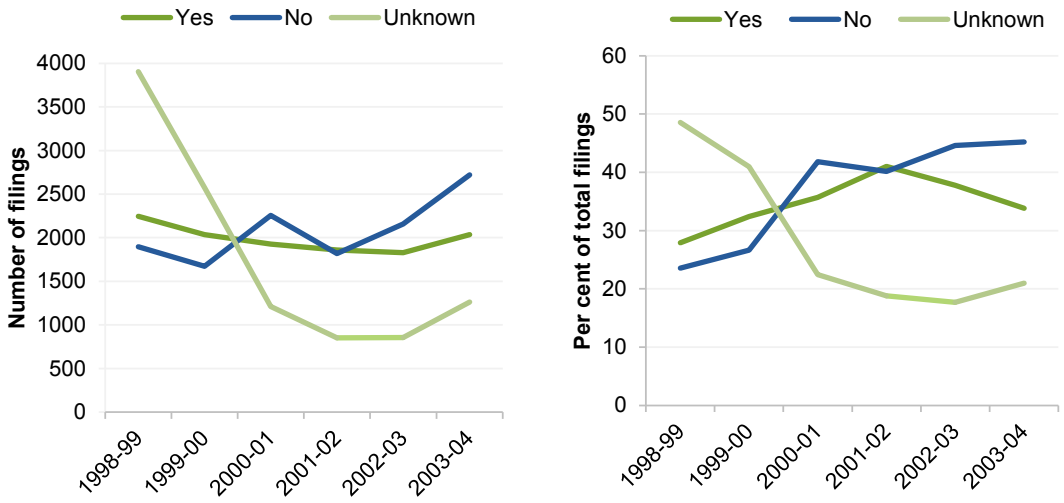
Self-representation is also common in the Family Court of Australia. Between 30-40 per cent of matters involve litigants who self-represent at some point in their proceedings (Family Court of Australia 2003). The proportion of SRLs for both finalised cases and trials has fallen in recent years (figure F.4). By contrast, 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 (Family Court of Australia 2003; Hunter, Giddings and Chrzanowski 2003).

Figure F.3 **Federal Court — self-represented applicants and respondents**

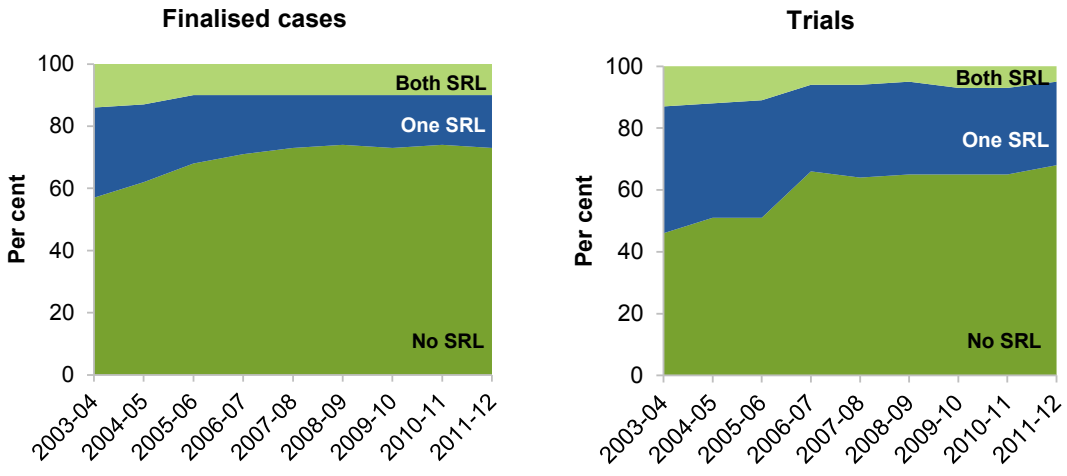
Actions commenced in which at least one party was an SRL, 1998-99 to 2003-04



Data source: Federal Court of Australia annual reports, various.

Figure F.4 **Proportion of SRLs in the Family Court is decreasing**

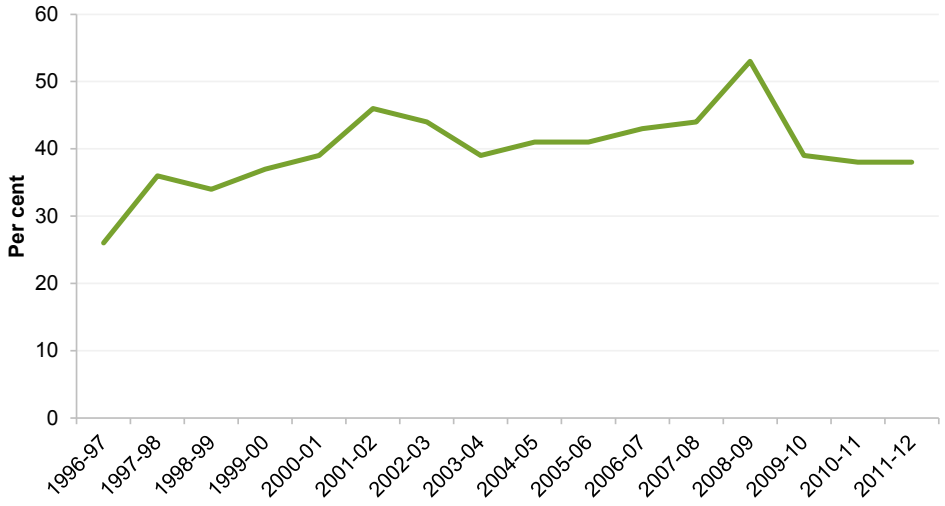
Proportion of litigants by representation status, 2003-04 to 2011-12



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

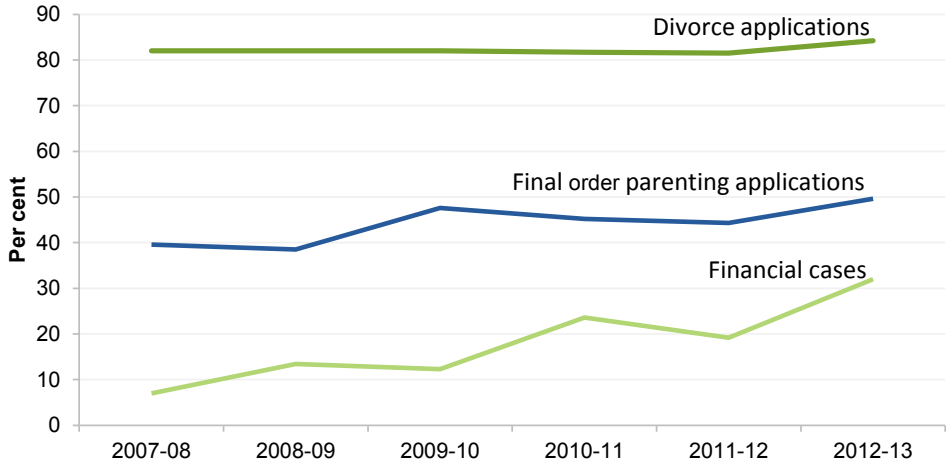


Data source: Family Court of Australia annual reports, various.

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 in 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, 2007-08 to 2012-13

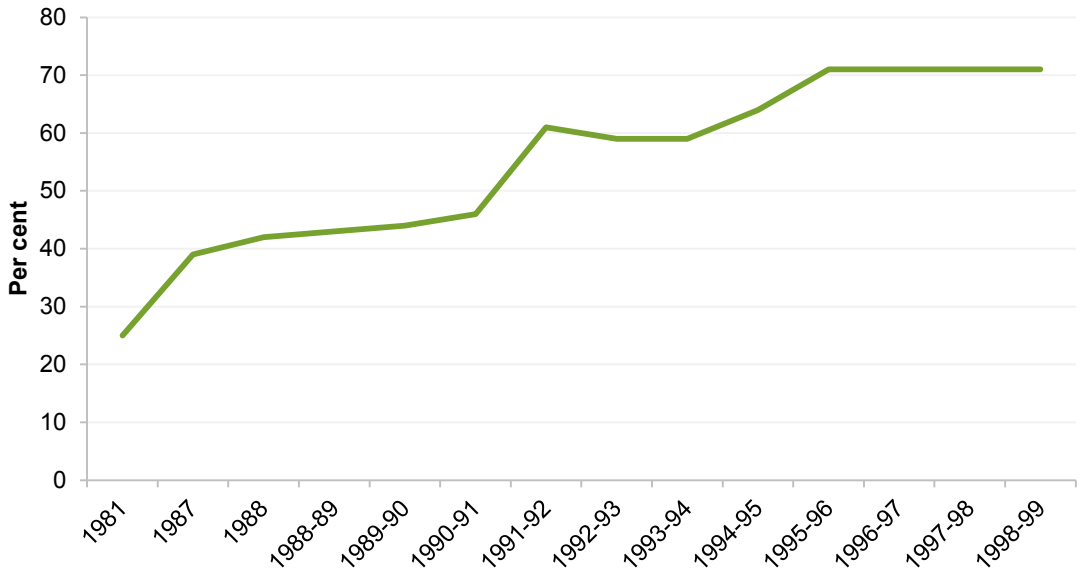


Data source: Family Court of Western Australia annual reviews, various.

A high proportion of divorce applicants in the Family Court of Australia are also self-represented. Published data from the late 1990s suggest that around 70 per cent of applicants self-represented — more than twice the level of the early 1980s (figure F.7). The Federal Circuit Court does not publish data on self-representation in relation to divorce.

Figure F.7 **Most divorce applicants in the Family Court self-represent**

Per cent of divorce applicants who are self-represented



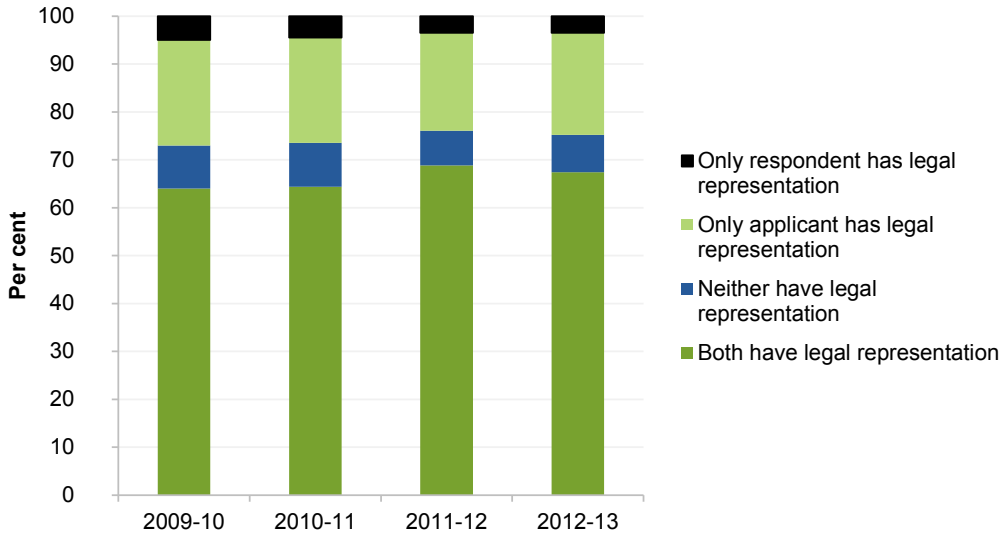
Data source: Family Court of Australia (1999).

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, although 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). Although there are no published data, the FCC said that the divorce jurisdiction also attracts a significant number of SRLs (FCC 2013).

Rates of self-representation are typically much higher in tribunals — which is expected, given that most tribunals 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 recorded for social security, and citizenship and immigration cases (figure F.9). The lowest rates were recorded for veterans' affairs and workers' compensation cases — according to the AAT, this is in part due to greater access to legal aid for veterans' affairs cases, and the fact that costs awards can be made in workers' compensation cases.

Figure F.8 **Representation in the Federal Circuit Court**

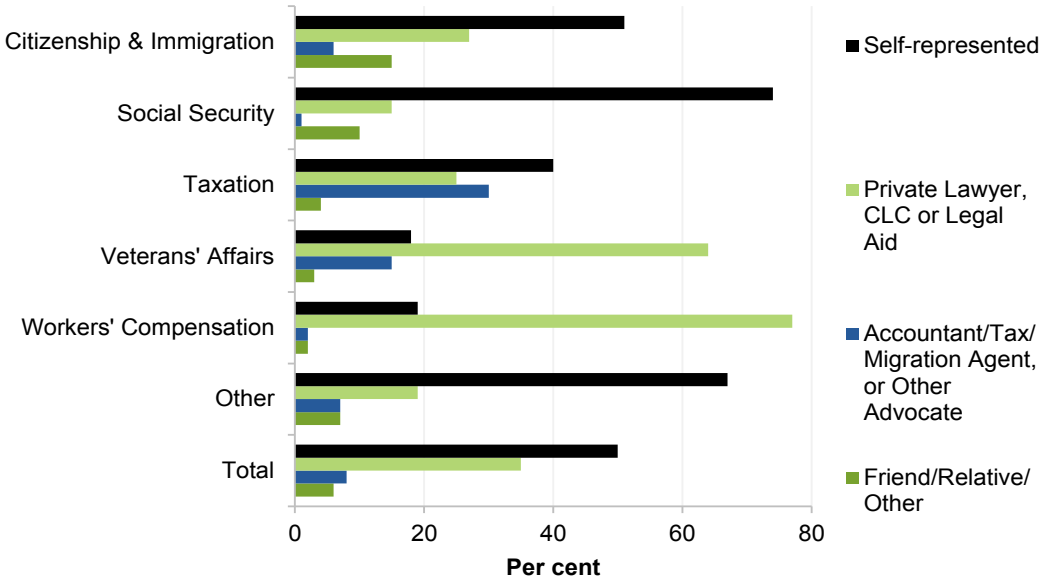
Family law final applications by party representation, finalised in year



Data source: Federal Circuit Court of Australia annual reports, various.

Figure F.9 **Representation of individuals in the AAT**

By jurisdiction, per cent of all cases finalised in 2012-13[a]



[a] The data reflect representation status when the application was finalised. They do not include information about the representation of parties who were not individuals (that is, companies, associations or other organisations).

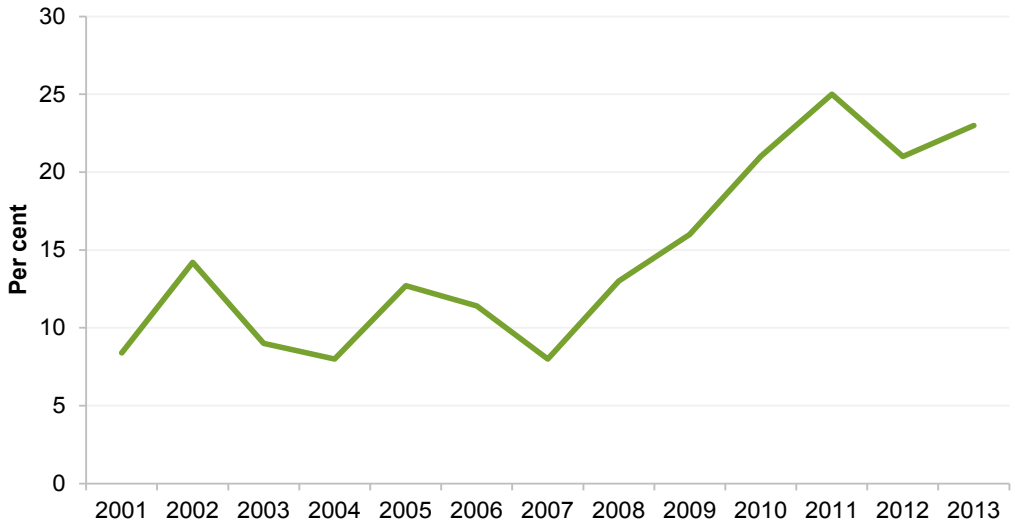
Data source: AAT case management system (sub. 65).

F.2 States and territories

State and territory-level data on SRLs are less comprehensive relative to the federal jurisdictions.

In Victoria, 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 Supreme Court show that the proportion of applications filed in its Court of Appeal by SRLs has increased over time — from 8 per cent in 2001 to 13 per cent in 2008, and remaining above 20 per cent over the last four years (figure F.10; sub. DR324). While the Court also collects information on the types of matters involving SRLs, this information is not published. Information provided by the County Court of Victoria (pers. comm., 21 August 2014) suggests that approximately 65 to 70 per cent of SRLs in that Court appear in matters before the Commercial List.

Figure F.10 **Court of Appeal, Supreme Court of Victoria**
Per cent of matters in civil appeal jurisdiction commenced by SRLs, by year

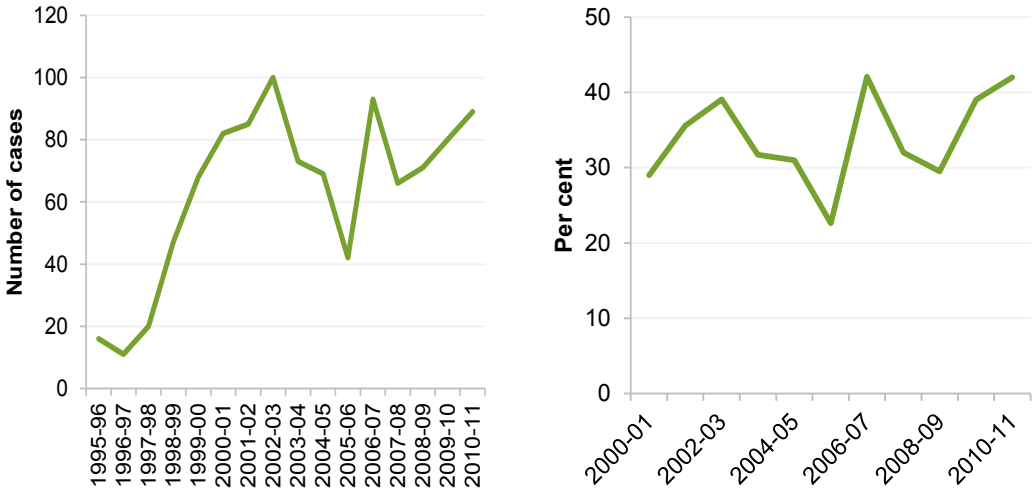


Data source: Unpublished data provided by the Supreme Court of Victoria.

In Queensland, only the Supreme Court publishes numbers of SRLs, and only for its Court of Appeal. Queensland Public Interest Law Clearing House (sub. 58) noted that while all documents filed in Queensland courts contain information about self-representation, this information is not published. The share of civil cases heard in the Queensland Court of Appeal in which one or both parties are self-represented has varied over time (figure F.11). On average around 34 per cent of matters have had at least one SRL since 2000-01.

Figure F.11 **SRLs in the Supreme Court of Queensland**

Court of Appeal, civil cases with at least one party self-represented, by year



Data source: Supreme Court of Queensland annual reports, various.

While there are no firm figures across all Western Australian courts, of the 41 048 matters lodged in the Civil Registry of the Magistrates Court in 2008-09, one or more parties were self-represented in 98 per cent of matters at lodgement and in 53 per cent of hearings (excluding residential tenancy matters) (WA DAG 2009). The Supreme Court of Western Australia said that it lacked the capacity to record meaningful data on the numbers of SRLs or their characteristics, but noted that self-representation is the norm in the Court's probate jurisdiction.

The ACT Magistrates Court was unable to provide the Commission with data on SRLs. The Commission understands that the main jurisdiction in which the Court experiences SRLs is in protection order matters.

The Tasmanian Supreme Court noted that it does not collect data on the numbers of SRLs in civil matters. However, it said that the majority of SRLs before the Court appear in mortgagee possession matters, which tend to resolve quickly in the Associate Judge's court.

The Northern Territory Magistrates Court (sub. 331) said that it was in the process of collating data on SRLs and developing appropriate information systems to assist SRLs in the conduct of court cases, and it is hoped that this project will be completed by the end of 2014.

Data on self-representation in state and territory tribunals are difficult to obtain (chapter 10). Data was not available from the NSW Civil and Administrative Tribunal (which has only just commenced operation), or from the ACT Civil and Administrative Tribunal or the Victorian Civil and Administrative Tribunal (VCAT) (pers. comm., 7 June

and 27 June 2014). Anecdotally, *representation* in VCAT appears to be less than 20 per cent (VCAT 2014, p. 3). Only 2.5 per cent of parties in the Queensland Civil and Administrative Tribunal were represented in 2012-13 (pers. comm., 4 August 2014). Western Australia's State Administrative Tribunal indicated that 6 per cent of all parties were represented in 2012-13, although 29 per cent of matters involved a represented party.

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 how costs should be charged 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 for setting court fees in many 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 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 specific product may be impractical or costly (for example, stationery)
- property charges, which could be both direct and indirect (for example, rent, repairs and maintenance, cleaning and utility charges)

- capital costs (for example, depreciation or interest on working capital). Some could be direct costs dedicated to the provision of particular services; others could be indirect costs, such as assets used by corporate services.

Box G.1 Cost definitions

Direct costs are costs that can be directly and unequivocally attributed to an activity or product. They include labour and materials used to deliver products.

Indirect costs are costs that are not directly attributable to an activity or product and are often referred to as overheads. They can include 'corporate services' costs, such as those of the chief executive officer's salary, financial services, human resources, records management and information technology.

Capital costs comprise the user cost of capital and depreciation. The user cost of capital represents the opportunity cost of funds tied up in the capital used to deliver activities or products. It is the rate of return that must be earned to justify retaining the assets in the medium to long term. Depreciation reflects the portions of assets consumed each period.

Fixed costs are costs that do not vary with the amount of activity or product. Rent and capital are usually fixed costs in the short run.

Variable costs vary with the volume of activity or product and typically include direct labour and materials.

Source: Productivity Commission (2002).

Defining the various parts of a court's operating costs into these categories may be challenging, and a number of approaches could be used. To demonstrate a simplified approach to categorising costs, the Commission has separated the operating costs listed in the Family Court's annual report into direct and indirect costs (though some of the broad descriptions of costs listed in this example as indirect may contain some direct components) (table G.1). The information set out in this example is intended to be illustrative — implementation of the Commission's recommendations would require more detailed analysis to separate direct and non-direct components. For example, distinguishing between information technology services used to directly deliver services to clients (such as video-conferencing) and information technology services used to support corporate services functions.

Table G.1 **Illustrative example of categorising court operating costs**[a]

Using expenditure figures for the Family Court of Australia

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] Assumes 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.

Source: Family Court of Australia (2013).

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 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.

Compared with other forms of FDC, 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') that most closely reflect usage by each product. ABC is not only useful from a cost recovery perspective — it can also help an 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 to implement than 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 conducted 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, the 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 (Vic DoJ 2012).

Differential basis

A third (and the Commission's recommended) 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 Eligibility for legal aid and the cost of extending it

This appendix describes the means test applied by legal aid commissions (LACs) to determine eligibility for grants of legal aid. Estimates of the number of households eligible for these services are discussed in section H.1. Section H.2 details the Commission's approach to estimating the additional cost associated with recommendation 21.4.

H.1 Who is eligible for legal aid?

The LACs ration their services by means, merit and matter. The means tests determine a threshold of income and assets above which applicants are denied legal aid, or are required to make a contribution towards the cost of their case. Some types of legal aid services are not means tested, including minor assistance and information services (chapter 20). This appendix focuses on those services that are means tested — specifically the grants of aid that comprise the bulk of LAC expenditure on civil, including family matters.

The means tests vary considerably between LACs, but all comprise an income and assets test component. The LACs typically use a measure of disposable income — that is, one that takes into account tax and welfare transfers — for the purposes of administering the income test, although some jurisdictions assess gross income. Additional allowances are also often made for the number of dependants and household expenses. The income tests imposed by the different LACs for grants of legal aid are summarised in table H.1.

The assets test also varies considerably across legal aid providers, with different allowances for equity in housing, vehicles, businesses and other assets. Where an applicant's total assets exceed the threshold allowed, then they are usually expected to make a contribution towards the cost of their case. The assets test used by the LACs for grants of legal aid are summarised in table H.2.

Table H.1 **Summary of income test thresholds for which no further contribution is required[a]**

Legal aid commission	***Threshold of income, above which a contribution is required (net of allowances)***	*Allowance for children and dependants*	*Allowances for rental assistance and other household costs*	*Other allowances, notes*
Legal Aid New South Wales	$213 per week	$120 per week per dependant	$320-$455 per week	Net of income tax and Medicare levy, family tax benefits, carer allowance, rent assistance, NDIS amounts; up to $250 per week in childcare costs; up to $120 per week per child in child support payments
Victoria Legal Aid	$255 per week	$130 per week for first dependant, $125 per week for each dependant thereafter	$240 per week	Income tax, the Medicare levy, business expenses; up to $240 per week in childcare costs; up to $125-130 per week in child support payments
Legal Aid Qld	$370-$1 370 per week			Gross income measure that depends on number of children
Legal Services Commission of South Australia	$342 per week	$128 per week for first dependant, $120 per week for each dependant thereafter	See note[b]	Allows a range of deductions for expenses such as tax, childcare and household expenses, but only up to a maximum level linked to the Henderson poverty line
Legal Aid WA	$264 per week	$99 for first dependant, $93 for each dependant thereafter	$260-$390 per week	Net of income tax and the Medicare levy; $148 per week in childcare costs; child support payments using the same scale as the allowance for children and dependants
Legal Aid Commission of Tasmania	$450-$1 005 per week			Gross income measure that depends on number of children
NT Legal Aid Commission	$271 per week	$101 for first dependant, $96 for each dependant thereafter	Equal to rental 'cost of 2 bedroom flat in Darwin'	Net of income tax and Medicare levy; $140.50 per week in childcare costs
ACT Legal Aid Commission	$396 per week	$185 for the first dependant, around $174 for each dependant thereafter	$450 per week	Net of income tax and Medicare levy; childcare costs up to $208 per week

a In practice, most LACs require an initial contribution from clients for a grant of aid. This initial cost ranges from $20 to $110 depending on the jurisdiction and matter. **b** Equal to the 'childcare relief figure' set by the Commonwealth Department of Human Services for up to 50 hours (Legal Services Commission of South Australia 2014a).

Sources: Commission research based on Legal Aid NSW (2010a, 2010b); Victoria Legal Aid (2010a, 2010b, 2010c, 2010d); Legal Aid Queensland (2014); Legal Services Commission of South Australia (2014a, 2014b); Legal Aid WA (2010a, 2010b, 2010c); Legal Aid Commission of Tasmania (2003, 2010, 2014); Northern Territory Legal Aid Commission (2005); Legal Aid ACT (2013); Melbourne Institute of Applied Economics and Social Research (2014).

Table H.2 Summary of assets test thresholds for which no further contribution is required

Legal aid commission	***Threshold of assets, above which a contribution is required (net of allowances)***	*Home equity allowed*[a]	*Vehicle equity allowed*[b]	*Other allowances, notes*
Legal Aid New South Wales	$100-$1 500 depending on the matter	$260 550 to $521 000	$15 100	Allowance is made for the reasonable value of household furniture, clothing and tools of trade; baby bonus and NDIS are exempt, as are lump sum compensation payments if the applicant and family members are not working; allowance of up to $287 750 is allowed for farm or business equity
Victoria Legal Aid	$865	$300 000	$11 280	Household furniture, clothing and tools of trade are excluded from assessable assets; allowance for farm/business equity between $161 500 and $336 500 depending on number of dependents; lump sum payments are excluded unless they affect the receipt of a Commonwealth benefit
Legal Aid Qld	$930-$1 880[c]	$146 000[d]	$16 000	Household furniture and tools of trade are exempt unless they are of 'exceptional value'
Legal Services Commission of South Australia	See note[e]	See note[f]	See note[g]	Household furniture, clothing, and tools of trade; equity in a farm or business up to assets limit under various Centrelink benefit tests
Legal Aid WA	$950-$1 900[c]	$299 614 to $355 051	$14 600	Household furniture, clothing, and tools of trade; equity in a farm or business between $161 500 and $346 000 depending on home ownership and partner status.
Legal Aid Commission of Tasmania	$740-$1 490[c]	$169 000 to $215 750	$11 500	Equity in a farm or business between $118 000 and $251 000 depending on home ownership and partner status
NT Legal Aid Commission	$950-$1 950[c]	$310 000	$13 500	Household furniture, clothing, and tools of trade; some lump sum payments if the applicant and family members are not working
ACT Legal Aid Commission	$1 100-$2 200[c]	$507 250[h]	$16 315[g]	Household furniture and effects that are not of exceptionally high value, clothing, tools of trade, lump sum compensation payments if the applicant and dependants are not working, lump sum child or spouse maintenance where the applicant is receiving a pension/benefit at a reduced rate. Between $196 750 and $421 500 in farm or business equity depending on home ownership and partner status

[a] Typically, these allowances are made for the principal home of the person applying for assistance, with any other real estate being counted against the net assessable assets allowed. Those aged over 60 years are often provided with more leeway in several jurisdictions. [b] Equity allowed is usually up to two vehicles, with any equity in additional vehicles being assessed as assets. [c] Varies by number of dependants. [d] Also allows for savings of up to this amount for the purpose of buying a home, provided that contracts were exchanged prior to knowledge of the legal problem. [e] The figure is set and updated in accordance with the weighted average of the Consumer Price Index and Average Weekly Earnings, with an allowance for dependants. [f] Up to the amount equal to the median value of an established home in Adelaide. [g] Equity allowed up to the published re-sale value for a 5 year old 6 cylinder family car. [h] Equity allowed up to a maximum equal to the median price of an established house in the ACT.

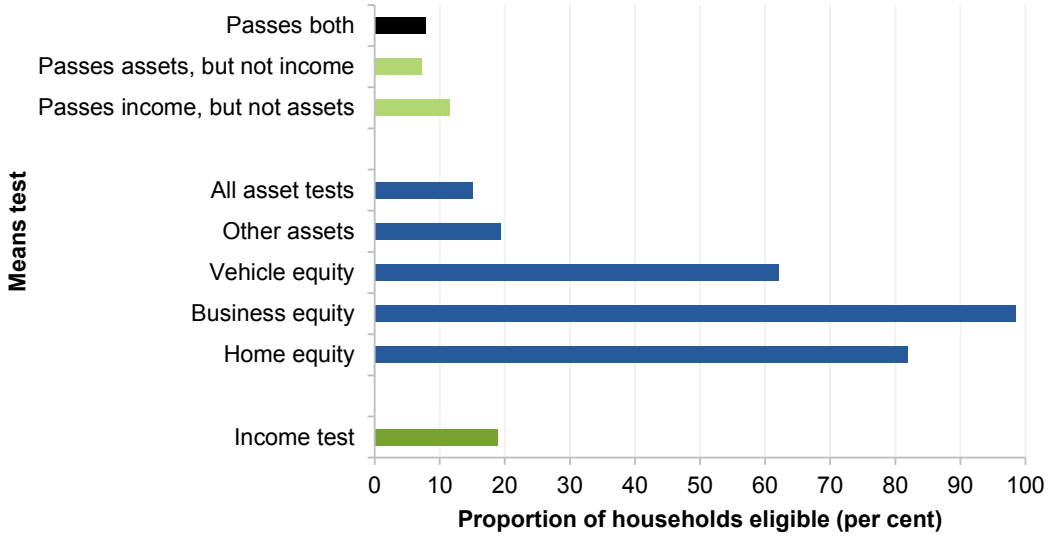
Source: As per table H.1.

Few are eligible for legal aid

It is difficult to determine a 'notional' national means test given the way that eligibility requirements vary considerably between jurisdictions. That said, the Commission has derived such a notional national means test, in an effort to understand the proportion of households that would be eligible for legal aid without having to make a contribution. To do so, the Commission has used the ABS 2009-10 Household Expenditure Survey (HES), as this data source provides consistent information on a range of different income measures and assets. It does not, however, provide detail down to the level that LACs frequently consider — such as the value of tools and household furniture.

The Commission estimates that around 8 per cent of households across Australia are eligible for legal aid without having to make a contribution towards their costs. Based on the income test alone, around 19 per cent of households meet the 'average' LAC criteria, while 15 per cent of households meet the assets criteria alone. Figure H.1 summarises the results of the Commission's estimates, and the assumptions used to derive it. It should be noted that the calculations are indicative only and rely on a number of assumptions, which, if incorrect, could significantly change the estimated proportion of eligible households.

Figure H.1 **Estimated proportion of households eligible for legal aid[a]**



[a] Based on an income test that allows for $300 per week base income, $150 per week per dependant under 15 years of age, $300 per week per household in rental assistance, and $100 per week per household for other household expenses; and an assets test that allows for $500 000 in home equity for the place of residence, $250 000 in business equity, $15 000 in vehicle equity, and $1000 for other assets. Other assets includes the value of accounts in financial institutions, private trusts, shares, debentures and bonds, residential property besides the place of residence, non-residential property, and 'other assets not elsewhere classified' by the Household Expenditure Survey.

Data source: Commission estimates based on ABS (*Household Expenditure Survey, 2009-10*, Cat. no. 6503.0, Confidentialised Unit Record File).

Very different proportions of households are eligible for the different criteria of the assets test. Most households are not constrained by the allowances made for business and home equity — possibly because many households do not own businesses and rent their principal place of residence. The vehicle constraint is more binding, but still not applicable for most households. However, the low threshold for assessable assets means that the constraint on other assets — predominantly liquid assets — renders about 80 per cent of households ineligible for aid without making a contribution.

H.2 How much would it cost to provide more legal aid services?

The Commission, in recommendation 21.4, proposes more funding be provided to legal assistance services for three purposes:

- to maintain existing frontline services that have a demonstrated benefit to the community
- to relax the means tests applied by the LACs and allow more households to be eligible to receive their grants of legal aid
- to provide grants of legal aid in areas of law where there is little assistance being currently provided, by either LACs or other legal assistance services.

The Commission estimates that the collective cost of this recommendation is around $200 million per annum, and should continue as an interim arrangement until sufficient data can be collected to better inform funding of legal assistance services (chapters 21 and 25). This section describes in detail how these estimates were derived.

Providing funding to maintain existing frontline services

Recent decisions taken in the 2013-14 Mid-Year Economic and Fiscal Outlook (MYEFO) Statement and 2014-15 Budget reduced funding to all four legal assistance providers (Australian Government 2013). The announced reductions in funding from MYEFO totalled around $43 million over four years, and were designed to limit policy reform and advocacy activities:

> The Government will achieve savings of $43.1 million over four years by removing funding support for policy reform and advocacy activities provided to four legal assistance programmes. Funding for the provision of frontline legal services will not be affected. (Australian Government 2013, p. 119)

The distribution of these changes in funding, over four years (2013-14 to 2016-17), comprised:

- a $6.5 million reduction to the LACs
- a $19.6 million reduction to the Community Legal Services Program (CLSP), directed to the community legal centres (CLCs)
- a $13.3 million reduction to the Aboriginal and Torres Strait Islander Legal Services (ATSILS)
- a $3.7 million reduction to the Family Violence Prevention and Legal Services (FVPLS) — however, this change in funding did not eventuate (table 20.4).

A further reduction of $15 million to LACs was made in the 2014-15 Budget for that financial year.

However, these adjustments to funding should be considered against the wider context of additional funding that was provided in the 2013-14 Budget. In that budget, additional funds of $30 million were provided to LACs over two years to undertake work in civil areas of law. (The subsequent $15 million reduction in the 2014-15 Budget represented an early end to the provision of those funds.) An additional $10.4 million for four years was also provided through the CLSP (table 20.4).

That said, many legal assistance services have stated that the changes to funding as part of the 2013-14 MYEFO and 2014-15 Budget have affected frontline services. For example, the National Aboriginal and Torres Strait Islander Legal Services stated in respect to the changes outlined in the MYEFO:

> [I]mplementing the announced funding cuts cannot simply be done by removing dedicated law reform and advocacy positions. Given how law reform and advocacy work is shared amongst multiple people with responsibility in areas of frontline services, the implementation of the announced funding cuts will mean that cuts to frontline service delivery will have to be made. Furthermore, ATSILS allocate very few resources to law reform and advocacy work, and the size of the announced funding cuts far exceed what is spent in this area meaning that in order to implement such, other frontline services are going to have to be withdrawn. (sub. DR327, p. 2)

The Commission is satisfied that the changes to funding as part of the 2013-14 MYEFO and 2014-15 Budget have affected frontline legal services (chapter 21). The Commission considers that these adjustments to funding be altered, and funding restored to the LACs and ATSILS. The resulting total cost to the Commonwealth would be around $34.8 million over four years (or around $8.7 million per year). Consistent with recommendation 21.6, more information around appropriate funding levels should then be available to make a comprehensive assessment of what funding is needed for each legal assistance provider.

The case for returning CLSP funding back to the level of the 2013-14 Budget is not as strong. The additional funding provided in that budget comprised of new, additional funds as well as a transfer of funds previously allocated to other government programs (summarised in table 20.4). In practice, it appears that Environmental Defenders Offices

(EDOs) benefited from the additional funding in the 2013-14 Budget, but then lost these gains, as well as funding for their operating budgets, as part of the 2013-14 MYEFO decisions.

Consequently, the Commission considers that the Commonwealth should provide funding for the operating costs of the EDOs (of around $1 million per year, over four years), but does not see merit in restoring to the EDOs those additional funds that they received in the 2013-14 Budget. This adjustment, in conjunction with returning the other CLSP funding that was withdrawn in the 2013-14 MYEFO, would cost the Commonwealth a total of $10.6 million over four years (or around $2.6 million per year).

In total, the cost of these proposals is $45.4 million over four years (or around $11.4 million per year).

Providing additional funding to the LACs to relax their means tests

The Commission has used a variety of data sources in order to cost the recommendation about relaxing the means tests applied by the LACs for civil (including family) matters. These include:

- unpublished administrative data from Victoria Legal Aid (VLA) on the number and average costs of services provided, by matter and method (grants of aid, duty lawyer services, minor assistance services, and information services)
- unpublished administrative data from Legal Aid New South Wales (LANSW) on the number of services provided by matter and method, along with the average cost of grants of aid fulfilled by private practitioners
- published data from the National Legal Aid (NLA) website, which shows the total expenses for each legal aid commission
- the ABS 2009-10 Household Expenditure Survey (HES), which provides information around the distribution of income and assets of households.

However, these data have some limitations. The data provided by the LACs contains some gaps. For example, the data from VLA only contains a sampling of costs for grants of legal aid (which make up the largest proportion of LAC expenditure) at private practitioner rates. Similarly, LANSW was only able to provide the average cost of grants of legal aid for private practitioner rates. This means that there are no data on the cost of providing 'in-house' grants of legal aid. To account for this, the Commission has calculated the total cost of grants of aid at private practitioner rates, then 'scaled down' the result by a factor equal to the number of grants of aid provided in-house as a share of total grants of aid. Such a method implicitly assumes the same ratio of in-house grants of aid to private practitioner grants in any costing calculation.

Another limitation is that LANSW was unable to provide cost estimates for providing duty lawyer services, minor assistance, and information services (but were able to provide the

number of each). To cost these services, the VLA costs have been applied to the LANSW figure as they represent the closest substitute for which detailed data are available. Such a process is not ideal, but is consistent with cost-benefit analysis methods (Department of Finance and Administration 2006).

The data provided by VLA and LANSW have been used to derive the total costs of providing legal services for civil (including family) law matters in those jurisdictions for 2012-13. The resulting estimates, combined with the NLA data, allow for the proportion of costs associated with providing legal aid in those areas of law. This proportion was then applied nationally to determine an imputed total national cost for civil (including family) law services — around 35 per cent of total expenses.

The HES data have been used to plot a distribution of income and assets that, depending on where thresholds are drawn, define how many people are in scope for legal aid. A baseline case is first set by picking a representative income and assets test based on those estimated by the Commission to be eligible for a grant of legal aid (section H.1) — around 8 per cent of households. Changes to the means test allow for a new proportion of households eligible for legal aid to be estimated, and it is the proportionate change between this and the baseline case that determines the additional funding required (by applying it to the national total for civil, including family, law matters).

Choosing a 'baseline' set of eligibility requirements

The Commission has used a simplified approach that considers equivalised household disposable income (box H.1) and a single, combined measure of net assets to determine changes in eligibility. This is a simpler approach than the means tests commonly employed by the LACs as it does not make different allowances for different assets. The choice of this approach has been made on the grounds that it is the limits on 'other assets' that are the main binding constraint, rather than the specific asset types commonly considered (figure H.1).[1]

An initial, or 'baseline' set of income and assets parameters is necessary in order to determine proportional changes in the number of households eligible for legal aid. This baseline set of income and net assets is chosen by examining the distribution of income and assets for those households found to be eligible under the 'notional' national parameters discussed in section H.1. This indicates that:

- a median equivalised disposable household income of approximately $400 per week (or around $20 000 per year)
- most households had net assets of less than $150 000.[2]

[1] In practice, moving towards a 'pooled' assets test is effectively equivalent to relaxing the most restrictive assets test first, and then the next most restrictive, and so forth.

[2] While there could be concerns that such a baseline would omit those that are 'asset-rich' and 'income-poor', such as some Age Pension recipients, it should be noted that that those older than 65 comprise less than 3 per cent of VLA and LANSW clients, and so do not materially affect the costing estimates.

These parameters were used to calculate the baseline case, which in turn indicate that around 8 per cent of households are eligible for grants of legal aid.

Box H.1 Equivalised disposable household income

Comparing the relative wellbeing and economic resources of households is difficult because different households can have different compositions. Comparing the income of a single-person household to that of a couple, who are both employed, with several dependants can be misleading. Some adjustment is necessary to take account of different compositions of households for meaningful analysis.

One established method to do this is to use 'equivalence scales' — factors that control for different compositions of households — to weight income in order to make meaningful comparisons. Applying these equivalence scales means that the resulting 'equivalised' income can be viewed as an indicator of the economic resources available to a standardised household. This enables more accurate comparisons across households to be made.

The ABS HES contains equivalence scales based on a 'modified OECD' approach, and these scales are used by the Commission for its analysis.

Source: ABS (*Household Expenditure Survey, 2009-10*, Cat no. 6305.0, *Household Expenditure Survey User Guide*, pp. 132–137).

Increasing the number of households eligible for legal aid in civil including family matters

As discussed ion chapters 21 and 25, the Commission has recommended that, once further work has been done to improve the evidence base, further analysis and consideration should be given to the quantum of funds necessary to provide legal aid services for those where there is a net benefit from doing so.

At present, however, based on limited data, the number of households eligible for legal aid appears to be very low. Indeed, some means tests are below some common measures of poverty — such as the Henderson Poverty Line and the OECD Relative Poverty Line (described in box H.2). The Commission is not proposing to increase the means test to these levels, although notes that VLA has indicated that the latter benchmark may be an 'appropriate starting point' when determining future means tests:

> We've acknowledged … the OECD as a starting point, it's not an end point, and we recognise that there would be different ways to approach the question of financial eligibility or someone's lack of capacity to meet the full cost of their own legal representation for very severe life-affecting issues. (trans., p. 741)

There are many measures of disadvantage that consider factors beyond relative income, such as including combinations of assets, income and consumption, length of time in poverty, and broader measures of social exclusion (McLachlan, Gilfillan and Gordon 2013). Each of these has benefits and drawbacks when considered as a measure to determine eligibility for legal aid. For example, measures of deprivation — which look at

going without or being unable to afford particular goods and services — may be a poor measure to use to determine eligibility for legal aid as the deprivation in question may not be related to legal need.

Box H.2 Measures of relative poverty

Two commonly used poverty lines are the Henderson Poverty Line and the OECD Relative Poverty Line.

- The Henderson Poverty Line defines benchmarks of poverty on the basis of equivalised disposable income for different household types. A recent estimate found that around 12.4 per cent of Australians were below this poverty line (Melbourne Institute of Applied Economics and Social Research 2013).
- The OECD Relative Poverty Line is defined as household income below 50 per cent of median equivalised household disposable income. Statistics from the OECD indicate that about 13.8 per cent of Australians were below this poverty line (OECD 2014). Another estimate, which used a different measure of equivalised disposable income and other assumptions, found that around 10.3 per cent of Australians were impoverished (McLachlan, Gilfillan and Gordon 2013).

However, these measures do not consider assets in their calculation. One measure that does — a measure of financial poverty (Headey, Krause and Wagner 2009) — considers both equivalised household income as well as a household's net worth. Households with less than $200 000 or little in the way of liquid assets are considered to be poor. It was estimated in 2008 that around 13.7 per cent of the population was classified as poor under this measure.

Regardless of the relative poverty measure used, the proportion of the population considered poor is higher than the proportion of the population eligible for grants of legal aid from LACs under their means tests. This indicates that many households, despite being financially disadvantaged, may still fail the means tests for grants of legal assistance, or be required to make a contribution towards the cost of their case from a position of meagre resources.

An even smaller proportion would be likely to receive a grant of legal aid once the other methods of rationing are considered (chapter 21).

The choice of a measure of disadvantage to determine eligibility for legal assistance services should also be judged against the costs and benefits of providing services for different matters to those with other dimensions of disadvantage. While legal aid could be used to solve various legal needs, it may be the case that it is more cost effective to resolve those needs through, or in conjunction with, other services (which in turn may have their own means tests). Accordingly, more information is needed to best identify the measure or measures that should best be used to determine eligibility for legal aid. The recommendations in chapter 25 outline the best way to improve the evidence base in order to achieve this.

That said, there is clear evidence at present to suggest that legal assistance services are not fully meeting the legal needs of either the impoverished or the disadvantaged as intended, due to a lack of resources (chapters 21 and 22). A review of the National Partnership Agreement governing legal assistance services by the Allen Consulting Group found that

present funding arrangements for LACs mean that legal aid is failing to provide services to the disadvantaged clients that need them:

> Current arrangements do not equip legal aid commissions to provide grants of legal aid to all disadvantaged clients in all matters within stated service priorities, nor do the eligibility principles and service priorities draw a clear line between the types of matters and clients that should attract Commonwealth funded legal assistance services, and those where services should not be provided, or should be provided through other mechanisms. (2014, p. 113)

Given the low number of households eligible for grants of legal aid, and evidence to suggest that financially disadvantaged households may be ineligible, the Commission has calculated the cost of relaxing the means test, relative to the 'notional' national case described above. Because there is a lack of data at present to indicate what proportion of households should be eligible for assistance, the Commission has calculated the cost of increasing the means test (both income and assets) by 10 per cent, relative to the baseline case described above,[3] on the grounds that such a policy represents a reasonable interim arrangement. Such an increase would lead to around 10 per cent of households (or about 9 per cent of the population) being eligible for legal aid services in civil and family matters — a proportion that more closely matches the share of households experiencing relative poverty. Such a shift would also move the eligibility requirements closer towards means tests applied to some other government benefits.

The Commission estimates that increasing the means test by 10 per cent for civil (including family) matters would cost an additional $57 million per year. The Australian Government should provide the bulk of this funding (given that this money would be used to assist clients in areas of Commonwealth law under existing guidelines). The Commission estimates that such a proposal would increase the number of people eligible for grants of aid in civil (including family) matters from around 1.4 million to 1.9 million.

Sensitivity testing the relaxing of the means test

The accuracy of this additional cost can be tested for sensitivity by considering the estimated costs for different changes to the baseline case (table H.3). The sensitivity testing estimates a range of costs from $38 million to $122 million. The higher estimates represent cases where the baseline considered often comprises a very small number of households, which in turn leads to large proportional increases when the means test is increased. Conversely, the lower estimates result from smaller proportional changes in the number of households considered eligible.

One factor that should be noted is the small range of changes in estimates of cost within the income bands (the columns of table H.3). This indicates that once the 'other assets' test is relaxed, the binding variable that controls eligibility is primarily income. This highlights

[3] That is, to an equivalised disposable household income of $22 000 per year and total net assets of $165 000.

the importance of relaxing the means test on other assets (or raising the general assessable asset limit) when increasing eligibility.

Table H.3 **Sensitivity testing of the cost of raising the means tests by around 10 per cent for civil and family matters[a,b]**

	Change in equivalised net disposable household income				
Change in net household assets	*$18 000 to $20 000*	*$19 000 to $21 000*	***$20 000 to $22 000***	*$21 000 to $23 000*	*$22 000 to $24 000*
	$m	$m	$m	$m	$m
$130 000 to $142 500	116	84	56	38	39
$140 000 to $155 000	122	89	61	42	43
$150 000 to $165 000	113	84	**57**	39	40
$160 000 to $175 000	113	84	57	39	41
$170 000 to $187 500	112	85	59	40	42

[a] **Bold** denotes the Commission's preferred estimate. [b] The discreteness of the data does not always allow for an exact 10 per cent increase in income and assets measures, and so the proportional change in some categories may be greater than others.

Sources: Commission estimates based on unpublished VLA and LANSW data; ABS (*Household Expenditure Survey, 2009-10*, Cat. no. 6503.0, Confidentialised Unit Record File).

Providing additional funding for grants of aid in civil matters

Increasing the means test for the present range of services offered would still leave considerable gaps in coverage because LACs do not offer grants of aid in many civil matters. Some areas of civil law are covered by the other legal assistance services, but the Commission has heard many instances where coverage has been 'wound back' or where LACs have suggested that there is unmet legal need in particular areas, but do not have the resources to cover it (chapter 21). For example:

> Then there's looking at areas of law in which we're not adequately meeting unmet need. Particularly in the civil law space we accept that we will never be able to cover the field, but in running effective niche civil law practices which can spotlight systemic problems and tackle issues at their source … we can contribute to the avoidance of legal problems for other people who will never actually be a client. (VLA, trans., p. 744)

However, when pressed on the extent of unmet legal need for civil (as well as family matters), no LAC was able to provide a concrete figure on the level of unmet need, or how much additional funding would be necessary to close the perceived 'gap' in legal services. The inquiry process revealed a number of anecdotes relating to unmet need in the civil

space, but quantifying the costs of resolving that need and the benefits from doing so is not possible to do accurately on such evidence.

The observation that problems tend to be associated, or 'cluster', with family law matters suggests that more assistance is needed for other civil law matters. The *Legal Australia-Wide Survey* found that family problems often clustered with 'credit and debt' problems, and that those with family law problems also frequently had disputes in areas of consumer, criminal, government (including benefits), housing and rights (Coumarelos et al. 2012, pp. 88–89). Given that LACs have identified and provide services to those with family law matters, these data indicate that assistance is needed for other civil matters as well.

On this basis, the Commission has examined the option of increasing the number of (non-family) civil grants of aid to match the number of grants presently provided for family matters — an increase of around 40 000 grants, annually. This represents a substantial increase in the total grants of legal aid, given that (non-family) civil matters are not well covered by LACs at present.

The present lack of coverage in (non-family) civil matters makes it difficult to cost such a proposal with accuracy. Because the LACs do relatively little casework for civil (other than family) matters, the cost information provided by VLA and LANSW may not be a good indicator of the funding they would require if they were to increase their caseload in this area of law. Another issue is the relatively skewed nature of the other civil casework at present — some areas of civil law (besides family) receive a much greater number of grants of legal aid than others. However, while such data may be imperfect, it is the most reliable source that the Commission has had access to at this particular level of disaggregation.

The data about grants of legal aid undertaken by private practitioners provided to the Commission indicated that the cost of a grant of aid for a civil matter ranged from $1923 (for matters relating to mental health in New South Wales) to $24 988 (for consumer matters, including consumer credit, in New South Wales).[4] The weighted cost of a civil grant of aid currently undertaken by VLA and LANSW — based on their cost weighted by their incidence — is around $3100.

Accordingly, the cost of providing an additional 40 000 grants of aid for civil matters is in the order of $124 million. In practice, however, there are likely to be considerable savings in achieving this goal if LACs were able to use in-house lawyers to provide these grants instead of private practitioners. Governments should give consideration to recommendation 21.3 (relaxing the constraints around the use of in-house lawyers by the LACs) to allow such potential savings to be fully realised. State and territory governments should provide the bulk of this funding on the grounds that most of the civil matters (outside of family matters) relate to state and territory areas of law.

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4 The number of grants of aid for consumer matters is relatively low in New South Wales, and the high average cost reported here reflects the effect of a few complex cases.

Sensitivity testing the provision of additional grants of civil aid

A lack of comprehensive cost data for grants of aid in civil matters means that it is difficult to provide an exact figure or confidence interval around the cost of providing these additional grants of aid. One method of sensitivity testing these additional grants of aid is to cost them at the private practitioner rates in the areas of civil law most commonly provided by VLA and LANSW. Two areas of law — financial matters and government matters — are currently provided more often than other civil matters (although they themselves are far less common than areas of family law). Costing an additional 40 000 grants of civil aid at those rates yields an estimate between $80 million and $130 million, respectively.

The Commission estimate of $124 million is towards the higher end of this estimate, reflecting the relatively high cost of grants of aid in civil areas of law (outside of family law) where there are currently fewer cases undertaken by VLA and LANSW — such as migration, housing and human rights. An estimate towards the higher end of the band is considered credible as costs may rise if LACs expand into providing more services in these areas of law.

Summary

The combined cost of these proposals is around $192 million per year, comprising:

- $11.4 million per year to maintain existing frontline services
- around $57 million per year to relax the means tests for LACs
- around $124 million per year to provide additional grants of aid in civil matters.

However, the Commission has recommended a funding increase of around $200 million (recommendation 21.4), due to a number of sensitivities around the methodology employed. These include:

- the potential for a higher cost of providing private practitioner services than what is currently being paid at present (as an increase in the demand for the services has the scope to raise prices)
- concerns that increasing the means test could alter the 'mix' of problems faced by those seeking legal aid, and so alter the costs of grants of aid
- uncertainties around how the intensity, or number of problems per household, changes as the means tests are relaxed.

These factors highlight the need for greater data collection to better understand the cost drivers and legal problems facing those who need legal assistance services. The challenges of building such an evidence base are discussed in chapter 25.

There is also a question as to which level of government should bear the cost of recommendation 21.4. Based on the present principle used under the current National Partnership Agreement — that 'Commonwealth money should be attached to Commonwealth matters' — the Commission estimates that around 60 per cent of the cost associated with recommendation 21.4 should be borne by the Commonwealth. This reflects the cost of changes in funding from MYEFO and the Budget, and the cost of additional family law matters from relaxing the means tests, which are largely Commonwealth responsibilities. The cost of providing grants of aid for these additional non-family civil matters would be more evenly shared between the Commonwealth and the states.

I Location of community legal centres and disadvantage

The locations of community legal centres (CLCs) in many jurisdictions 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).[1] 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 postcodes 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.

[1] These localities are usually recorded as a suburb, which allows for easy linking to a postcode. More cryptic responses are not always mappable, and in some cases data are not recorded for a small number of clients.

Table I.1 **SEIFA deciles of CLCs and their clients**

Per cent, 2011-12

SEIFA decile	*CLC clients*	*CLCs*[d]	
	Total	*Total (unweighted)*	*Total (weighted)*
1	10.0	9.4	9.5
2	9.1	5.5	5.3
3	7.4	5.5	4.6
4	10.4	2.2	3.4
5	10.2	4.1	4.2
6	11.5	4.1	4.1
7	10.0	4.1	3.6
8	10.0	30.1	29.8
9	12.5	22.6	22.4
10	8.0	6.2	8.2
na[a]	0.8	6.3	5.0
Other[b]	0.2		
Total[c]	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] May not sum to 100 due to rounding. [d] CLC location is weighted by the number of clients it serves.

Sources: 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.

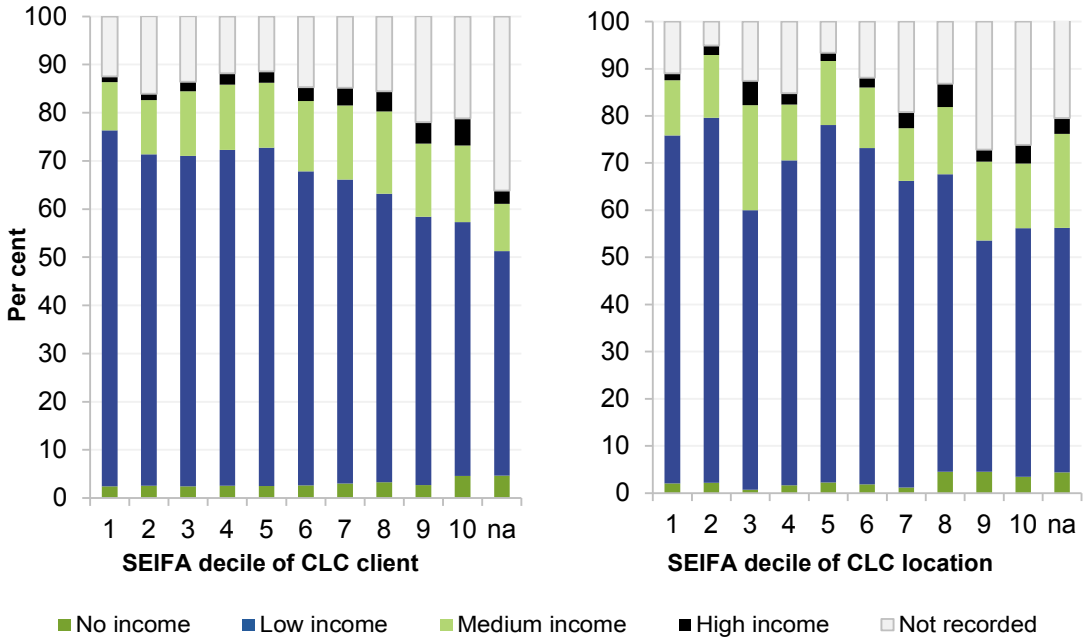
1. The SEIFA scores associated with postcodes reflect the *average* level of disadvantage. There can be relatively disadvantaged individuals in postcodes associated with high SEIFA scores.
2. Many CLCs offer outreach services, and so travel to more disadvantaged locations relative to their main office.
3. Some specialised CLCs provide a particular service that is not aimed at disadvantaged clients. For example, environmental defender offices provide assistance to all members of the community irrespective of their socioeconomic status.
4. Some CLCs focus on particular matters rather than servicing a particular geographical area. In doing so, it may make sense for them to be centrally located (in high SEIFA decile areas) to try and provide services to as many people as possible.

These concerns can be addressed by comparing administrative data on the income of individuals that use CLCs against the SEIFA decile of their postcode (figure I.1). The left hand panel presents this distribution, and indicates that while most CLC clients report low incomes irrespective of their SEIFA decile, the average income of CLC clients from advantaged postcodes is higher than those from disadvantaged postcodes. The right hand

panel in figure I.1 is also consistent with this finding, suggesting that CLCs located in high SEIFA deciles serve smaller proportions of low-income clients than their counterparts located in low SEIFA deciles.

Figure I.1 **Reported income by SEIFA decile of CLC client and CLC location[a]**

2011-12



a 'na' of SEIFA decile refers to those localities linked to postcodes for post-office box purposes only. Income is defined in CLSIS as no income, low income ('under $500 per week or $26 000 per year'), medium income ('between $500 and $1000 per week or $26 000 to $52 000 per year'), high income ('$1000 per week or over or $52 000 per year or over'), not applicable or not stated.

Data sources: 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 25. 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 J.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 the steps taken (or not taken) to resolve legal problems — ideally through time.	• There are no regular surveys of legal need in Australia. 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, which make comparisons difficult, especially across time. • There is a lack of longitudinal information to track individuals through time.	• The *Legal Australia-Wide (LAW) Survey*, undertaken in 2008, examined legal need and responses to legal need. A more contained survey should be repeated on a regular basis. • There should be better collaboration between researchers in this field to ensure that methodologies 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 legal problems? How many have unmet need?	• Information about the characteristics of businesses, their legal problems and the steps taken to resolve them.	• There is no regular survey to address the legal needs 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*.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		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.	• 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 their legal problems, and whether they thought the system was too complicated to understand properly. • Some courts measure user satisfaction by asking court users how clear they found the processes and forms. • Demographic data are collected but may not assist in answering accessibility questions because they are 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 and motor vehicle claims) that can be used to form such a basis. • Comparable sources of legal cost data are needed to allow for study of legal costs over time. • Surveys should be repeated periodically to assist in understanding longitudinal effects and changes to accessibility.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Understanding and navigating the system	
• How many people lack legal capability including knowledge of their rights and the capacity to take action? • Do disadvantaged people have lower levels of legal knowledge and does this affect their access to 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 and whether they know how to get help if they had a legal problem. • '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 and capacity. • 'Disadvantage' needs to be consistently defined so that it is easier to measure the legal knowledge of disadvantaged people.
• How effective and efficient are services that aim to improve legal capability including community legal education (CLE), and legal information? • How effective and efficient are legal health checks, outreach and holistic services? • Are referrals appropriate?	• Cost and activity count of each type of service. • Client satisfaction and follow-up data. • Count of best practice legal information and CLE that is shared amongst legal service providers. • Count of referrals from legal and non-legal service providers.	• 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 including website traffic, number of education sessions, publications printed and referrals. • Aggregate expenditure is recorded but not disaggregated by types of services. • Outcomes are not measured. • Reported data are inconsistent and incomplete across jurisdictions. • Measures of effectiveness are generally not based on empirical evidence or evaluations.	• 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. • Benchmark average costs across jurisdictions over time for each type of service. • Review CLE and information to ensure best practice. • Well-recognised entry points to record whether callers were referred to the helpline and if so, the type of organisation that made the referral. Where callers are referred to should also be recorded.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Protecting consumers of legal services	
• How can consumers be better informed about the costs of taking legal action?	• Publicly available, aggregate 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 and typical 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 achieving effective redress for consumers of legal services?	• 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.	• Complaints bodies should report publicly on outcomes achieved for consumers. • Surveys should 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 the number of lawyers.	• ABS definition of lawyers needs to be redefined to get better survey results.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Alternative dispute resolution (ADR)	
• How effective is alternative dispute resolution (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. • 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 should report on how disputes have been settled and whether ADR was used. • Surveys or studies should ascertain ADR use among general population, including for what kind of legal problem, how it was initiated, and whether it was successful.
		Ombudsmen and other complaint mechanisms	
• 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, 'other' responsibilities 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 ombudsmen so that average costs are not overestimated.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		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, by case type.	• 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 including the value of what is at stake for the parties involved and number of discovered documents. • Surveys of judges' and practitioners' views on the extent to which discovered documents assist in the resolution of the dispute. • Cost 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. Evaluations should include 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; and 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.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Court processes (continued)	
• 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 each type of dispute?	• 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 reasonable costs?	• Periodic calculations of representative costs. • Typical costs awards by case type, amount in dispute and length, relative to legal expense.	• Lack of transparency around how costs awards are determined. Costs awards are based on scales of costs, but method of setting scales is unclear. • Most recent studies of legal costs for state courts released in 1993 and 1994. Legal costs of Federal Court and Family Court are from 1999.	• ABS should collect data on legal costs and costs awards at regular intervals.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Self-represented litigants	
• What proportion of court and tribunal users are self-represented? • What are their characteristics? • Why do people self-represent? • 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 are too high-level. Courts and tribunals do not hold demographic data on users. • Queensland Public Interest Law Clearinghouse (QPILCH) surveys self-represented litigants who have used its 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 should be undertaken in each jurisdiction. • The Family Court or Federal Court are possible models for other courts in this area. • At a minimum, the number and type of legal matter should be collected 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 between 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?	• Fully distributed costing of courts and tribunals activities. • 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. • Many courts do not undertake costing of their activities — service costs and overheads are unclear. • Report on Government Services (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.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Court and tribunal fees (continued)	
• 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.	• Income and demographic data on those who apply for fee relief should be collected, in addition to whether a waiver was granted. • 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, specialisation and governance	
• 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 are reported. • Data on cost-effectiveness of court technological solutions are 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.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Private funding for litigation	
• How can consumers be better informed about options for private funding? • What are the impacts of caps on conditional and damages-based billing? • What are the impacts of different types of billing arrangements?	• Publicly available, aggregate 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 and audits to be undertaken in each jurisdiction by legal complaints bodies to ascertain the prevalence of different billing agreements and compliance with billing regulation.
		Legal assistance landscape	
• Are legal aid commissions (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 and income data on users. • Information on the cost of providing different sorts of services (for example advice, casework, CLE). • Client satisfaction data. • Data on those unable to gain access to services.	• Demographic data are collected on users, 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 to selected stakeholder assessment instead. • Data on those who cannot access the system are not collected frequently and are not precise enough to measure unmet need of particular groups, including Aboriginal and Torres Strait Islander people.	• 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. • Regular surveys should be undertaken to better measure unmet need of particular groups, including Aboriginal and Torres Strait Islander people.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Legal assistance landscape (continued)	
• What are the incomes and assets of people receiving legal aid grants relative to those being rejected? • How restrictive is the means test for a grant of legal aid?	• 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 number and characteristics 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. LACs in New South Wales and Victoria have detailed data on their websites. 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.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Legal assistance landscape (continued)	
• How cost-effective are the strategies used by government agencies to proactively engage with at-risk Aboriginal and Torres Strait Islander Australians to reduce this group's likelihood of needing legal assistance to resolve disputes with government agencies? • Are culturally tailored ADR services for Aboriginal and Torres Strait Islander people cost-effective? • What is the cost of increasing the supply of appropriately qualified interpreter services to better support Aboriginal and Torres Strait Islanders access to justice?	• Cost of culturally tailored ADR, interpreter services and early engagement strategies. • Count of individual culturally tailored ADR processes, interpreter services and early engagement strategies. • Demography of users. • Outcomes of early engagement strategy. • Settlement rates and determinants of settlement, for example referral stage. • Satisfaction with interpreter services.	• Some demographic data are collected. • Cost of service provision is unknown. • Anecdotal evidence suggests culturally tailored early engagement strategies may be cost effective compared with the cost of legal assistance to support disputes with governments. • Anecdotal evidence suggests that ADR is less expensive than going to trial but this is unclear for culturally tailored ADR. • Terminology is often inconsistent and data are reported in an ad hoc way and cannot be easily collated and compared.	• Terminology needs to be agreed on and standardised. • Counts, demography of users, service costs and outcomes of different early engagement strategies, culturally tailored ADR and interpreter services needs to be collected. • Settlement rates and stage of settlement need to be collected for culturally tailored ADR. At a minimum, how settlement was achieved should be recorded. • Legal assistance providers should be required to report on use of culturally tailored ADR services. • Courts and tribunals to report on how disputes have been settled and whether culturally tailored ADR was used. • Surveys and/or studies to ascertain culturally tailored ADR use among Indigenous population, including for what kind of legal problem, how it was initiated, and whether it was successful.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		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 bodies, 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.
		Family law	
• What is the relative efficiency and effectiveness of different models of family dispute resolution (FDR)?	• Costs of service provision and user outcomes for different models of FDR.	• Quantitative research has been undertaken by the Australian Institute of Family Studies (AIFS). In particular, AIFS has conducted a longitudinal study which provides considerable insight into the dispute resolution pathways for separating parents. • Data on the relative effectiveness and efficiency of different models of FDR are lacking.	• Australian Government to ensure that government funded FDR providers, including LACs and FRCs, report on the costs of providing FDR services. • Australian Government to ensure that outcomes for users of different types of FDR services can be tracked through time. This could be done through AIFS studies which seek to distinguish between broad types of FDR models.

Table J.1 **Policy-relevant data**

Policy question	*Data required*	*Available data and gaps*	*Data response*
		Family law (continued)	
• What level of unmet legal need exists for family law matters involving family violence? • What level of unmet legal need exists for low value property disputes? What are the impacts?	• Demographic and income data on users of FDR and on those screened out. • Number of self-represented litigants at family law courts whose matters involve family violence. • Demographic and income data on self-represented litigants at family law courts whose matters involve family violence. • Breakdown of service provision by government funded FDR providers by family law dispute type.	• There is a lack of data on the number of self-represented litigants in the family law courts who experience family violence. • There is a lack of data on the number of people who are screened out of FDR because of family violence and who cannot afford a private lawyer. • There is a lack of data on the extent to which family relationship centres (FRCs) and other Family Support Program (FSP) funded service providers cover family law property matters (whether or not associated with parenting issues).	• In future studies, AIFS should include questions on self-representation at the family law courts and how this is correlated with family violence and income. • All government funded FDR providers, including LACs and FRCs, should report on the number of FDR services they provide for property matters and their rejection or turn away rates. • In future studies, AIFS should seek to explore the reasons for people who nominate 'nothing specific, it just happened' as their main dispute resolution pathway. • General legal needs surveys (as identified above) should be undertaken.

K Measuring the benefits of legal assistance services

As noted in chapter 21, there are strong qualitative arguments for the expansion in legal assistance funding recommended by the Commission. However, consistent with the policy framework outlined in chapter 4, the impacts of legal assistance services should still be quantified where possible — this appendix aims to broadly illustrate how such quantification can be carried out.

Providing accessible legal assistance services (such as legal aid) can deliver a range of benefits to both the clients receiving services and the broader community (chapter 21). Some of these benefits — such as the enforcement of legal rights and the support of social norms — are challenging to quantify in a monetary sense, making it difficult to weigh them against the costs of service provision.

However, legal assistance may also produce tangible benefits that — with sufficient empirical data and reasonable assumptions — can be more easily measured, including:

- the costs to individuals and the community that can arise from unresolved or escalated legal problems
- the costs to the community from the inefficiencies caused by self-represented people using the legal system, especially the courts.

This appendix first outlines some broad principles that should be followed when analysing these tangible benefits, and surveys the existing literature on the benefits of legal assistance. It then illustrates how these principles can be applied — using the limited empirical evidence available — to estimate the benefits to the community from providing legal assistance to victims of family violence seeking an apprehended violence order. Finally, it queries whether legal assistance is justified on the basis of efficiency gains to the legal process, as a number of inquiry stakeholders have argued.

K.1 A conceptual framework for considering the benefits of legal assistance

When analysing the benefits of any government service, including legal assistance, it is not enough to identify a problem to be addressed (that is, unmet legal need), it is also necessary to assess the extent to which providing assistance would make a difference.

Conceptually, that involves comparing the ex-post outcomes from assistance with what would have happened in its absence (the 'counterfactual').

Such an assessment can be challenging with even the best approaches (such as randomised control trials), but it is particularly difficult in the legal assistance sector, where providers have usually not captured data on outcomes that are fit for the purposes of objective evaluation.

When attempting to estimate the benefits of legal assistance, researchers need to be mindful of a number of questions, including:

- what would happen to an individual if legal assistance were not provided?
- how much does receiving assistance affect the legal outcome of a case?
- does obtaining a favourable legal outcome avoid adverse outcomes in the client's life 'outside the court room'?
- what are the costs of these adverse outcomes that are avoided?

What would happen to individuals without assistance?

An important step in estimating the benefits associated with providing a service is identifying the scenarios that would be likely to occur if the service were not provided.

In the case of legal assistance, there are a number of possible outcomes that could arise if an individual were not provided with assistance, including:

- no action being taken, leaving the legal problem unresolved, with the potential to escalate
- the individual taking steps to solve the legal problem without assistance
- the individual acquiring legal representation from the private market
- the legal problem being resolved (or not pursued further) by the other party.

The choice of counterfactuals will have a crucial impact on any estimate of benefits. For example, analysis based on the assumption that an individual will never act on a legal problem without legal assistance may substantially overestimate the benefits of such assistance. Conversely, assuming that legal problems will always go away on their own could significantly underestimate the benefits. The appropriate assumptions can vary depending on the demographics of those with a legal problem and the nature or severity of the legal problem itself.

Previous studies into the benefits of legal assistance have adopted various approaches to choosing counterfactuals. In some studies, a single, consistent outcome is assumed to arise. For example, in estimating the benefits of providing legal assistance in family law matters, PricewaterhouseCoopers (2009) assumed that all parties without access to legal representation or family dispute resolution services would go to court as self-represented

litigants. This approach has the benefit of minimising the number of subjective assumptions that must be made. A downside to this approach is that it may not accurately account for differences in behaviours and outcomes between a wide range of parties — for example, some people may decide not to initiate court proceedings in the absence of assistance, rather than appearing as a self-represented litigant.

Other studies use a weighted set of possible counterfactuals across the population of legal assistance clients based on survey data. For example, a cost-benefit analysis undertaken by the Citizen's Advice Bureau (2010) of legal assistance in the United Kingdom used results from the UK's *Civil and Social Justice Survey* to identify the proportion of people who experience a range of adverse consequences as a result of a civil legal problem. By identifying the number of people for whom assistance would have prevented such adverse problems (see below), the benefits of legal assistance can be more accurately estimated.

In the Commission's view, acknowledging that a number of possible outcomes may arise with varying probability is a desirable approach to identify potential counterfactuals. Where possible, the relative probabilities of these outcomes should be identified from the available data and literature, and the analysis weighted accordingly. In many cases, the available data and evidence may not be able to paint a complete picture of the possible scenarios, at which point informed assumptions should be made.

In contrast, some studies do not use a consistent assumption or methodology to identify the likely counterfactual. For example, a number of inquiry stakeholders pointed to a recent cost-benefit analysis of community legal centres (CLCs) as evidence of the value of CLC services. This study estimated the benefits of legal assistance by making subjective assessments for each of a number of case studies as to what would have happened to CLC clients in the absence of legal assistance (Judith Stubbs and Associates 2012). For some cases, it appears to have been assumed by the authors that without assistance, a client's legal problems would have always remained unresolved, and that with the assistance of a CLC, that the best possible outcome is always achieved. In other cases, it is assumed that without the CLC's assistance, the client may have pursued a resolution to their problem, but via a more expensive or ineffective avenue.

The available evidence suggests that these are not a reasonable set of counterfactuals to assume. For example, the Commission has estimated, based on unpublished *LAW Survey* data, of all finalised problems examined in the *LAW Survey*, just under 20 per cent were resolved because the respondent or the other side did not pursue the matter further. Another 20 per cent of all legal problems were resolved by direct agreement between the parties, without a lawyer or someone else's help. While many of these survey respondents would not have the same characteristics as the clients of legal assistance providers, this nonetheless demonstrates that legal problems can be resolved by parties without legal assistance. It therefore may be unreasonable to assume that without legal assistance, a legal problem would certainly have remained unresolved.

Further, the report by Judith Stubbs and Associates (2012) generally appears to assume that without assistance, clients' legal problems would escalate further, often to what could be

described as a 'worst case scenario'. No attempt is made within the analysis to account for the possibility that such a scenario may not have occurred. For example, in matters involving violence intervention orders, the study assumes that any intervention order sought would require enforcement comprising a police response and a custodial sentence, costing a total of $3350. In some cases involving violence, it was also assumed that without a CLC's assistance, an individual would have required state care costing more than $1 million. The result is a very high estimated benefit-cost ratio of 18:1.

While some stakeholders described this estimated ratio as conservative (NACLC, sub. 91 and sub. DR268; Community Legal Centres Tasmania, sub DR294), in the Commission's view the estimated benefits of many of the case studies represent the most optimistic interpretation of the value of these services. Such 'optimism bias' is a common problem in cost-benefit analysis, as noted in the Department of Finance's *Handbook of Cost-Benefit Analysis:*

> Optimism bias occurs when favourable estimates of net benefits are presented as the most likely or mean estimates. It is an endemic problem in cost-benefit analysis and may reflect overestimation of future benefits or underestimation of future costs. … Varying each parameter to their pessimistic values one by one and collectively can uncover a great deal of the over-optimism that may underpin an analysis. This process must be done honestly and should, if anything, err on the pessimistic side. (Department of Finance and Administration 2006, p. 78)

Accounting for optimism bias is likely to be particularly pertinent when analysing benefits in the legal assistance sector, where there is considerable ambiguity in outcomes. The Commission's analysis of assistance for family violence matters (outlined below) provides a simple example of this, by providing lower and upper estimates of the parameters for analysis.

How does legal assistance affect the legal outcome of a case?

Provision of legal assistance is based on the premise that a client would generally be more likely to obtain a favourable legal outcome when assisted than if they were left to resolve the dispute on their own. However, as noted in chapter 14, evidence on the effect of representation on legal outcomes for parties is patchy. Further, the extent of any improvements in legal outcomes for legal assistance clients is not well understood in the Australian context, as legal assistance providers in Australia do not consistently record the outcomes they have obtained for clients. This undermines the ability for researchers to estimate the benefits that legal assistance brings to clients.

The outcomes of legal assistance are better understood in the United Kingdom, where legal assistance providers are required to report the outcomes obtained for clients. The Citizen's Advice Bureau (2010) estimated that more than 60 per cent of legal aid work led to outcomes that were of substantial benefit for clients.

While such outcomes data is useful, it must also be compared against how successful clients would be in the absence of representation. There are numerous observational

studies, particularly from the United States, that observe differences in the rates of success between represented and unrepresented parties, and thus infer a positive correlation between representation and success (Engler 2009). However, most of these studies do not use randomised control trials,[1] and so cannot infer a causative relationship between representation and favourable legal outcomes because they do not account for other possible differences between professionally represented and self-represented parties (and their cases).

Where randomised control trials have been used to measure the effect of representation on legal outcomes, the results have been mixed. In a randomised control study of legal aid in a housing court in the United States, Greiner, Pattanayak and Hennessy (2013) found that receiving full representation led to a favourable outcome in two thirds of cases, compared with only one third for those who received 'unbundled' assistance. However, in a previous randomised control trial for unemployment benefits appeals, no firm conclusion could be drawn on whether being represented affected the probability that a claimant would prevail (Greiner and Pattanayak 2012). It was found that being offered representation (regardless of whether the offer was accepted) had no statistically significant effect on outcomes.

Based on the available evidence, it would appear that parties are more likely to obtain a successful legal outcome when they receive legal assistance — although the degree of success varies widely between studies, dispute types, and jurisdictions. However, this does not mean that unassisted parties will always be unsuccessful, nor will an assisted party always obtain a favourable outcome. Estimates of the benefits of legal assistance should factor these considerations into their analysis.

Do favourable legal outcomes translate into positive practical outcomes?

While legal assistance is generally provided to address the legal problems of clients, obtaining a favourable legal outcome or decision may not necessarily translate into a positive outcome 'outside the court room'. While formal acknowledgment of a particular legal right may bring some emotional benefits to the individual in question (which may be important), many of the potential tangible benefits from legal assistance will only arise if the formal acknowledgment actually causes a practical change in circumstances.

For example, obtaining an AVO for a victim of family violence will only produce benefits to the client (and society) if the order actually prevents further violence from occurring. This is not the case, for example, if the offender breaches the order, or if it is likely that the violence may have ceased regardless of whether an order was obtained. This example is discussed in further detail later in this appendix.

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[1] Randomised control trials allocate people at random to receive one of a number of interventions (or 'treatments'), usually along with a randomly assigned 'control' group that receives no intervention. This reduces the effect of selection bias between treatment groups, and thus any significant differences in outcomes between the groups can be more conclusively attributed to the interventions received.

Assumptions about the duration of outcomes are also critical. For example, preventing an eviction order against an individual could lead to tangible social benefits in the prevention of homelessness. But the benefits of such an outcome may be overstated if the individual is still unable to secure stable housing in the long run, and becomes homeless despite receiving legal assistance.

What are the costs of the adverse outcomes that may be avoided?

Adverse outcomes that are often suggested to arise from unresolved legal problems can include loss of employment, financial distress, homelessness, relationship breakdown, family violence, mental illness and substance abuse (Coumarelos et al. 2012). These outcomes can lead to substantial costs to individuals, governments and the wider community — costs which may be avoided in some cases by providing legal assistance. The social costs of many of these adverse outcomes have been previously investigated — for example, the social costs of family violence in Australia have been estimated extensively in the past (section K.2).

As noted in chapter 21, not providing legal assistance for civil matters can be a false economy where the costs of unresolved problems are shifted to other areas of government spending such as health care, housing and child protection. It is desirable, from a budgetary perspective, for government to understand the extent to which these costs are avoided through legal assistance. Even within a given set of budget constraints, additional outlays on legal assistance are likely to be justified if they reduce outlays in other areas of government spending by a similar or greater amount.

However, of greater economic significance are the costs to the community as a whole that may be avoided by providing assistance with legal problems. In many types of adverse outcomes, the costs are mainly borne by groups other than the government. For example, more than two thirds of the costs of family violence are estimated to fall upon victims, their families and employers (Access Economics 2004). Thus, reducing the incidence of these adverse outcomes may be welfare-enhancing across society, even if this comes at a net budgetary cost to government and so, in principle, may justify public funding of legal assistance.

K.2 Illustrating costs avoided by providing legal assistance for family violence matters

Prevention of family violence has been featured as a benefit arising from legal assistance in a number of previous studies, both in Australia and overseas (Florida TaxWatch 2010; Judith Stubbs and Associates 2012; Kushner 2012). Legal assistance providers can provide people seeking an apprehended violence order (AVO) with assistance, including preparation and assistance with documentation, and representation at court proceedings.

This section demonstrates how the principles outlined previously in this appendix can be used to estimate the benefits of providing such assistance with AVOs.

What would happen to clients without assistance?

Some previous studies have assumed that a lack of assistance with an AVO will lead to a continuation of violence for victims. However, this does not appear to be a reasonable assumption as:

- some victims may take steps themselves to obtain an AVO without assistance
- in some cases where an AVO is not obtained, the perpetrator may cease to commit violent behaviour anyway
- some victims may undertake other actions to prevent or reduce the risk of further violence.

This is evident in the empirical literature surrounding family violence — discussed further below — which indicates that over time, a significant share of victims do not continue to be subjected to ongoing family violence, even in the absence of legal protections such as AVOs.

However, it is less clear to what extent some individuals would take steps to obtain AVOs without assistance. There is little evidence on how the *presence* of a duty lawyer would affect the decision of an individual to attend court proceedings seeking an AVO. On the one hand, the knowledge that such a service is present could encourage attendance. On the other hand, the knowledge that the service would not be provided in advance, or be particularly tailored to the individual's circumstances may not encourage attendance to any greater degree than if the duty lawyer were not present.

For this analysis, the Commission has assumed that, in the absence of duty lawyer services, victims of family violence would represent themselves in proceedings to obtain an AVO — though it is not assumed they would always successfully obtain an AVO following proceedings. This assumption is based on the fact that duty lawyer services are generally located 'in-court', meaning that at the point at which assistance is received, the victim has already made the decision to attend proceedings.

How effective are legal assistance providers in obtaining AVOs?

Measuring the benefits of legal assistance requires an estimate of how often providers are able to obtain a favourable outcome for their clients, compared with a situation where the individual had received no assistance. In the case of family violence, this could be measured by comparing the rates at which AVOs are successfully obtained by LAC clients and the wider population (bearing in mind both the merit test applied by LACs, and the possibility that a LAC client may be less capable than others of securing an AVO if self-represented).

However, in Australia, the 'success rate' of AVO applications does not appear to have been measured. While data is generally available on the number of AVOs granted annually, the number of AVO applications each year is not published. When approached by the Commission, several LACs were also unable to produce data outlining how many of their applications for AVOs were successful. This poses a challenge to measuring the extent to which legal assistance providers affect legal outcomes for clients seeking AVOs.

However, there is some evidence from overseas that legal representation is correlated with success in obtaining a protection order — for example, a study from the United States found that 83 per cent of women who were professionally represented were successful in obtaining an order, compared to 32 per cent of self-represented women (Murphy 2002). This is supported by the broader literature outlined above on the benefits of representation in other case types. Those cases represented by LACs may also be expected to be more likely to be successful given the merit test applied by LACs when considering whether to represent a client.

Other studies have assumed a smaller advantage is gained by being represented. In a previous cost-benefit analysis of legal aid provision in Florida, a success rate of 69 per cent was assumed for legal aid clients securing a restraining order, compared with 55 per cent for those seeking a restraining order without legal aid assistance (Florida TaxWatch 2010). While the authors of this study suggest that these assumptions are based on research, they do not point to any specific sources or studies that comprised this research.

How often do AVOs prevent family violence?

Some previous studies into the benefits of legal assistance have assessed the benefits of an AVO as being the full cost of an avoided case of violence or assault. For example, Judith Stubbs and Associates (2012) estimated the community benefits of assisting an individual with an AVO at $37 000, based on estimates of the costs of family violence by Access Economics (2004). However, for this to be a reasonable estimate of the benefits of assistance with an AVO, it must also be assumed that:

- the perpetrator will not breach the AVO
- in the absence of the AVO, the perpetrator would have continued to commit abuse
- without the AVO, the victim would not have taken other actions to prevent or reduce the risk of family violence.

The available evidence suggests that these are not reasonable assumptions on which such estimates should be based. First, in practice, perpetrators of family violence are known to breach AVOs — for example, roughly one in three AVOs were breached in Victoria in 2012-13 (Spooner and Butt 2013). Second, as noted above, there may be some cases where an AVO is not obtained, but the perpetrator ceases their violent behaviour anyway. Finally, as acknowledged by Kushner (2012), those that do not obtain an order may still undertake other actions to prevent, or reduce the risk of, further violence.

Empirical research on the effectiveness of AVOs at reducing subsequent violence is limited, especially in the Australian context. While some studies have shown reductions in the incidence of family violence for those who did obtain a protection order, most of these do not include a comparison with the rate of subsequent violence for those who did not obtain a protection order.

A study from the Australian Institute of Criminology of young women (aged 18-23 years) experiencing violence found that among those who obtained both an AVO and police assistance, 55 per cent experienced no subsequent violence. Of those who only received police assistance (without an AVO) this figure was 40 per cent (Young, Byles and Dobson 2000). However, it is worth noting that the study found that after a 12 month period, violence had ceased for similar shares of young women (91 per cent compared with 90 per cent) whether or not they had sought any form of legal protection (such as an AVO or police protection).

The available evidence from Australia can also be compared with similar studies from overseas jurisdictions, such as the United States. A study from Washington State found that in the 12 month period following an initial incident of domestic violence, women who obtained protection orders experienced 11.1 fewer incidents of physical violence per 100 women than a group without protection orders (2.9 incidents of physical abuse per 100 person years for those with protection orders compared with 14.0 incidents of physical abuse for those without orders) (Holt et al. 2002). This study was also used by Kushner (2012) to estimate the number of incidents of abuse avoided by providing legal aid.

Other studies have aimed to establish a direct link between the provision of legal assistance for family violence and reductions in family violence. Farmer and Tiefenthaler (2003) found that increased provision of legal services for victims of family violence likely contributed significantly to declines in the incidence of family violence during the 1990s in the United States. Another study, using unpublished evidence from Virginia, found that an expansion of legal aid in Southwest Virginia coincided with a 35.5 per cent reduction over four years in requests for protection orders in that region, compared with a statewide reduction of only 16.2 per cent — while the violent overall crime rate increased by 12.7 per cent (Abel and Vignola 2010).

How much does family violence cost government?

As noted previously, the costs of adverse outcomes such as family violence must be calculated in order to determine the benefits associated with their avoidance. In the case of family violence, the costs to government and society have been the subject of many studies. A frequently cited estimate of the economic and social costs of family violence comes from analysis by Access Economics (2004). They estimated that the annual costs to government from family violence exceeded $1.3 billion in 2002-03, with broader costs to society of approximately $8.1 billion. Averaged across the estimated number of victims, this amounted to more than $3000 per victim in annual costs to government, and almost $20 000 per victim in annual costs to society.

The estimates by Access Economics for 2002-03 were subsequently updated by KPMG (2009) to project the costs of violence against women in the year 2021-22. They estimated the annual costs to government will be $7640 per victim, with broader social costs of more than $40 000 per victim each year in 2021-22.

Such estimates are not without their own shortcomings and uncertainties, especially for an issue such as family violence. Some of the costs associated with violence — such as the pain and suffering experienced by victims — are less tangible (though are nonetheless significant) and thus can be challenging to quantify in monetary terms. Further, as noted by the Access Economics report, many of the costs often attributed to violence are also long-term, such as health costs, premature mortality, loss of income, and effects on children exposed to violence. This can make their quantification more difficult, especially where violence intersects with other complex issues and underlying causes of disadvantage (making it challenging to disentangle the costs and attribute them to any given cause).

However, the drawbacks of such costing approaches are not the primary concern of this appendix. Rather, for a given estimate of the costs of family violence, the more relevant concern is the soundness of the methodology used to calculate how often such costs are avoided by an intervention such as legal assistance. Given the breadth and complexity of conducting such an estimate, the Commission has not attempted to make its own detailed estimates of the costs of violence in 2014-15. Rather, this Appendix has used the Access Economics and KPMG studies to construct two possible bounds ('lower' and 'upper' estimates) to estimate the costs of family violence in 2014-15 (see table K.1).

Table K.1 **Estimating the annual cost to government of family violence**

	Access Economics	*KPMG*	*PC lower estimate*	*PC upper estimate*
Year	2002-03	2021-22	2014-15	2014-15
Cost to government	$1.3 billion[a]	$2.9 billion	$1.8 billion	$2.6 billion
Cost to society	$8.1 billion	$15.6 billion	$12.6 billion	$13.6 billion
Number of female victims	353 600	385 426	360 000	370 000
Cost to government per victim	$3 270	$7 640	$5 000	$7 000
Total social cost per victim	$19 800	$40 400	$35 000	$36 750

[a] Calculated by combining the estimated costs to the Australian government of $848 million and state and territory governments of $487 million.

Sources: Access Economics (2004); KPMG (2009); Productivity Commission estimates.

It is also worth noting that the use of the Access Economics and KPMG estimates will lead to a small degree of 'double counting', as these estimates include some expenses associated with family violence — such as the cost of legal aid — which would still be incurred when legal assistance is provided to victims of family violence. However, given

that such costs appear to be relatively negligible compared to the overall estimates, these are unlikely to substantially affect the results of such analysis.

In the next section, the Commission has used its estimates of costs of family violence to the government and society overall, to approximate the costs that may be avoided where legal assistance with AVO applications may prevent further incidents of family violence.

What are the benefits of providing legal assistance for AVOs?

Based on the evidence outlined above, the Commission has constructed some illustrative estimates of the benefits of providing duty lawyer services to people seeking AVOs in family violence matters. The parameters used to construct these estimates have been based on the empirical literature outlined previously in this appendix. To account for uncertainty arising from a lack of empirical data collection by providers, the Commission has used a range of parameters to construct lower and upper bounds for its estimates.

For those who do receive duty lawyer assistance, the Commission has assumed, based on the literature outlined above, that the probability of successfully obtaining an AVO is increased by between 40 and 60 per cent. Based on the available evidence, the Commission has estimated that further incidents of violence would have occurred without an AVO in between 10 and 20 per cent of cases. These parameters for analysis, and the resulting estimates of expected benefits, are set out in table K.2.

Table K.2 **Estimating the benefits of providing legal assistance for Apprehended Violence Order applications in 2014-15**

	Lower estimate	*Average estimate*	*Upper estimate*
Parameters			
Cost to governments per victim	$5 000	$6 000	$7 000
Cost to the community per victim	$35 000	$35 875	$36 750
Additional probability of obtaining an AVO with legal assistance	40 per cent	50 per cent	60 per cent
Probability that an incident of violence will be avoided due to obtaining an AVO	10 per cent	15 per cent	20 per cent
Estimated benefits			
Expected avoided cost to government per instance of assistance for an AVO application	$200	$450	$840
Expected avoided cost to society per instance of assistance for an AVO application	$1 400	$2 690	$4 410

Source: Productivity Commission estimates.

The above estimates suggest that the expected benefits to the wider community from providing assistance with family violence matters may be substantial — ranging from $1400 per case to more than $4400 per case, depending on the parameter values chosen.

However, even if the significant potential benefits to the whole community — including victims of family violence — are overlooked, the above results suggest that funding legal assistance in these matters is likely to be justified from a budgetary perspective alone. The Commission has estimated that providing duty lawyer assistance for AVOs may, on average, generate expected savings to government of approximately $450 per case (noting that this figure may range between $200 and $840, depending on the assumptions adopted). Based on cost data from legal assistance providers, this is likely to more than offset the cost of providing a duty lawyer in each case (chapter 14).

Another implication from this analysis is that the estimated benefits vary widely based on the parameters that are used — this illustrates the sensitivity of such approaches, and the vulnerability of these results to being skewed by spurious assumptions. While the above parameters have been informed where possible by existing studies into family violence and legal representation, they remain imperfect approximations in the absence of a consistent evidence base. The Commission has made numerous recommendations to improve the collection of relevant and consistent data in the civil justice system (chapter 25). Without improved data collection, the reliability of such analysis will continue to be limited by a lack of evidence, and the benefits of legal assistance will continue to be poorly quantified.

K.3 Do the costs of self-represented litigants justify legal assistance funding?

It is often suggested that self-represented litigants (SRLs) can impose a resource burden on the courts and the legal process — and especially so in superior courts, where procedures generally operate on the assumption that parties are represented (chapter 14). Some have thus argued that providing publicly-funded legal representation can save the government money through more expedient court processes.

Numerous stakeholders to this inquiry have pointed to PricewaterhouseCoopers' (PwC) report *The Economic Value of Legal Aid* as evidence of the benefits of legal aid funding (Law Council of Australia, sub. 96, sub. DR266; Law Institute of Victoria, sub. DR221; Law Society of Western Australia, trans., p. 489). This report focused on quantifying the benefits of such efficiency gains, and concluded that there are net efficiency benefits — with a reported benefit-cost ratio of 1.60 to 2.25 — from providing the existing legal aid service mix of Family Court representation, duty lawyers and family dispute resolution (FDR) services (PwC 2009).

However, in the Commission's view, the PwC report does not, in and of itself, provide a compelling case for the benefits of legal assistance for two main reasons:

- the findings of PwC's analysis rest largely upon an assumption regarding the inefficiency of SRLs which may not be generally applicable
- the figures contained within the report indicate that legal aid representation and duty lawyer services do not deliver a positive net benefit (in terms of efficiency gains).

The Commission has previously noted that any additional costs imposed by SRLs on the courts are not well quantified (chapter 14). Thus PwC's analysis is underpinned by a key assumption that cases involving SRLs are assumed to take 20 per cent longer to resolve. This figure was also used by Judith Stubbs and Associates (2012) to estimate the costs of SRLs for a cost-benefit analysis of CLCs. This assumption is based on a single finding for civil appeals cases in a 2004 annual review of the Western Australian courts. The annual review does not report the sample size, measurement approach, or any other details as to how this figure was calculated.

Further, as acknowledged by PwC, the procedures and requirements of a civil appeals court are different to (and are likely to be more onerous than) those of family law courts. Yet their analysis goes on to assert that this 20 per cent figure is 'considered to be a conservative estimate' (p. 29). There are no comparisons with other evidence or studies on SRLs to determine whether this assumption is reasonable, or indeed conservative.

The PwC report also assumes an efficiency gain of 5 per cent where parties are assisted by duty lawyers. No evidence is used to form the basis of this assumption, and thus it may be a significant over- or under-estimation of any such efficiency benefits.

For FDR services, PwC assume that without FDR the parties would bring their dispute to the courts as SRLs. This is calculated as an efficiency cost of 120 per cent — the full cost of the court proceedings that may have otherwise been avoided, plus the 20 per cent efficiency cost of the parties self-representing.

However, even if these efficiency benefit assumptions are accepted, the net efficiency benefits of providing representation are not strongly supported by PwC's own analysis. While the existing legal aid case mix — comprised of representation, duty lawyers and FDR — is found to deliver a positive net benefit, these benefits primarily stem from the provision of FDR, rather than representation or duty lawyers. This echoes analysis by KPMG (2008), who found that the benefits of FDR exceeded the costs of the service.

Disaggregating the figures from PwC's analysis by each service type suggests that the assumed efficiency benefits do not outweigh the costs of providing representation in family law matters (table K.3). Further, the provision of duty lawyers only provides a cost saving where average court costs are assumed to be higher (and thus the efficiency gain is greater). Indeed, PwC's own analysis of a scenario where only representation services are funded delivers a negative net benefit (in terms of the efficiency of proceedings).

Put more simply, it may be easy to misinterpret PwC's finding that the current legal assistance service mix overall provided a net benefit to mean that each component — representation, duty lawyer services and FDR — was also found to have produced a net benefit. But a more thorough examination of PwC's findings indicates that this is not the case for representation services, and possibly duty lawyers. This highlights the importance of effectively communicating what can ultimately be a complicated message regarding the benefits of legal assistance, and the need for stakeholders to carefully scrutinize the available evidence.

Table K.3 **Disaggregating the results of *Economic Value of Legal Aid***
By legal aid service type

	Family law representation	*Duty lawyer*	*Family dispute resolution*
Legal Aid service cost per case[a]	$4 143	$615	$1 411
Efficiency cost of SRLs in court[b]	20 per cent	5 per cent	120 per cent
Case outcome assumption A[c]			
Cost to courts per case[d]	$10 763	$10 763	$10 763
Efficiency benefit per case[e]	$2 153	$538	$12 916
Benefit-cost ratio[f]	0.52	0.88	9.15
Case outcome assumption B[c]			
Cost to court per case[d]	$15 106	$15 106	$15 106
Efficiency benefit per case[e]	$3 021	$755	$18 127
Benefit-cost ratio[f]	0.73	1.23	12.85

[a] From table 5.1, p. 30 of PwC report. [b] From p. 29 of PwC report. [c] Two case outcomes assumptions are used to calculate court costs, with the share of cases finalised by mediated and final agreements varied (see pp. 30–34 of PwC report). [d] From table 5.5, p. 34 of PwC report. [e] Calculated by multiplying the efficiency cost of SRLs by the cost to the courts per case. [f] Calculated by dividing the efficiency benefit of each legal aid service by the legal aid service cost per case. A ratio below 1 implies that costs exceed benefits.

Source: Commission estimates based on figures and results contained in PwC (2009).

This is not to suggest that the overall benefits of providing legal representation are necessarily outweighed by the costs — rather, it indicates that the cost of providing legal aid representation is not justified by these assumed efficiency gains alone. However, as noted above, other benefits to the community — such as avoiding greater costs to government that can arise from an unresolved legal problem — may outweigh the costs of providing legal assistance.