

Inquiry into Access to Justice Arrangements

Legal Aid NSW Submission

to the

Productivity Commission

October 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, referral, community legal education, advice, minor assistance, alternative dispute resolution and representation, through a large in-house legal practice and private practitioners. Providing assistance to resolve civil, family and criminal law problems, Legal Aid NSW delivers its services across NSW through its 21 offices and 164 regular outreach locations.

Legal Aid NSW also administers funding, on behalf of the Commonwealth and State Governments and the Public Purpose Fund, for a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW works closely with the NSW legal assistance sector through participation in the New South Wales Legal Assistance Forum (NLAF) and its numerous working groups. In addition, Legal Aid NSW targets the legal need of disadvantaged people through its collaborations with the Aboriginal Legal Service, Community Legal Centres and LawAccess NSW.

Legal Aid NSW welcomes the opportunity to make this submission to the Inquiry into Access to Justice Arrangements.

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*The section numbers reflect those in the Issues Paper.

Abbreviations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACOSS	Australian Council of Social Services
ADVO	Apprehended Domestic Violence Order
ADT	Administrative Decisions Tribunal
ALS	Aboriginal Legal Service NSW/ACT
ASIC	Australian Securities and Investments Commission
AVL	Audio Visual Link
BOCSAR	Bureau of Crime Statistics and Research
CALD	Culturally and Linguistically Diverse
CARS	Client Assessment Referral Service
CLC	Community Legal Centres
CLE	Community Legal Education
CLSD	Cooperative Legal Service Delivery Program (CLSD)
COMP	Court Ordered Mediation Program
DAGJ	Department of Attorney General and Justice (NSW)
DRC	Dispute Resolution Conferences
EDR	Early Dispute Resolution
EIU	Early Intervention Unit
FDR	Family Dispute Resolution
FOS	Financial Ombudsman Service
FRC	Family Relationship Centre
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
HSU	High Service User
ICL	Independent Children Lawyer
IDR	Internal Dispute Resolution
ILAG	International Legal Aid Group
LAC	Local Area Command (NSW Police)
LAW Survey	Legal Australia Wide Survey: Legal need in Australia
LGA	Local Government Area
LJF	Law and Justice Foundation of NSW
MHAS	Mental Health Advocacy Service
MHRT	Mental Health Review Tribunal
NDIS	National Disability Insurance Scheme
NLAF	New South Wales Legal Assistance Forum
NPA	National Partnership Agreement on Legal Assistance Services
PPF	Public Purpose Fund
ROCP	Regional Outreach Clinic Program
SDRO	State Debt Recovery Office
SEIFA	Socio-Economic Indexes for Areas
SPRC	Social Policy Research Centre
SSAT	Social Security Appeals Tribunals
TIO	Telecommunications Industry Ombudsman
VRB	Veteran Review Board
WDO	Work and Development Order

Introduction

Legal Aid NSW is the largest legal aid agency in Australia. It provides legal aid for case grants matters and other legal services to the people of NSW with a particular focus on the legal needs of the socially and economically disadvantaged, through 21 regional offices and 164 regular outreach locations.

Legal Aid NSW delivers a continuum of services that range from high volume legal information, advice, minor assistance and duty services through to highly targeted casework for dispute resolution and litigation services. The majority of services are 'discrete' and 'unbundled' with advice or duty services provided on the day, without ongoing case management.

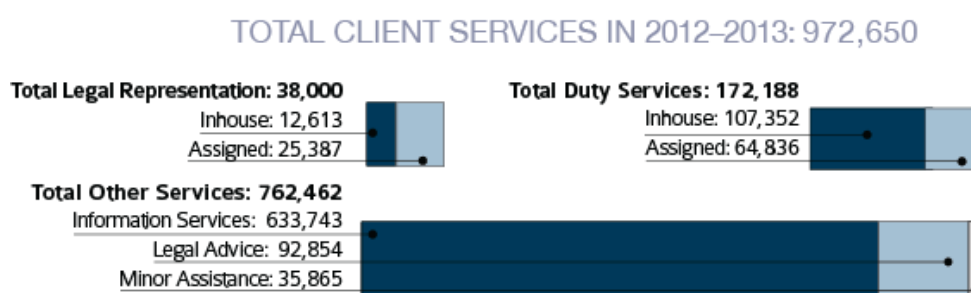


Figure 1: Total Legal Aid NSW services 2012-2013 Family, Civil and Crime

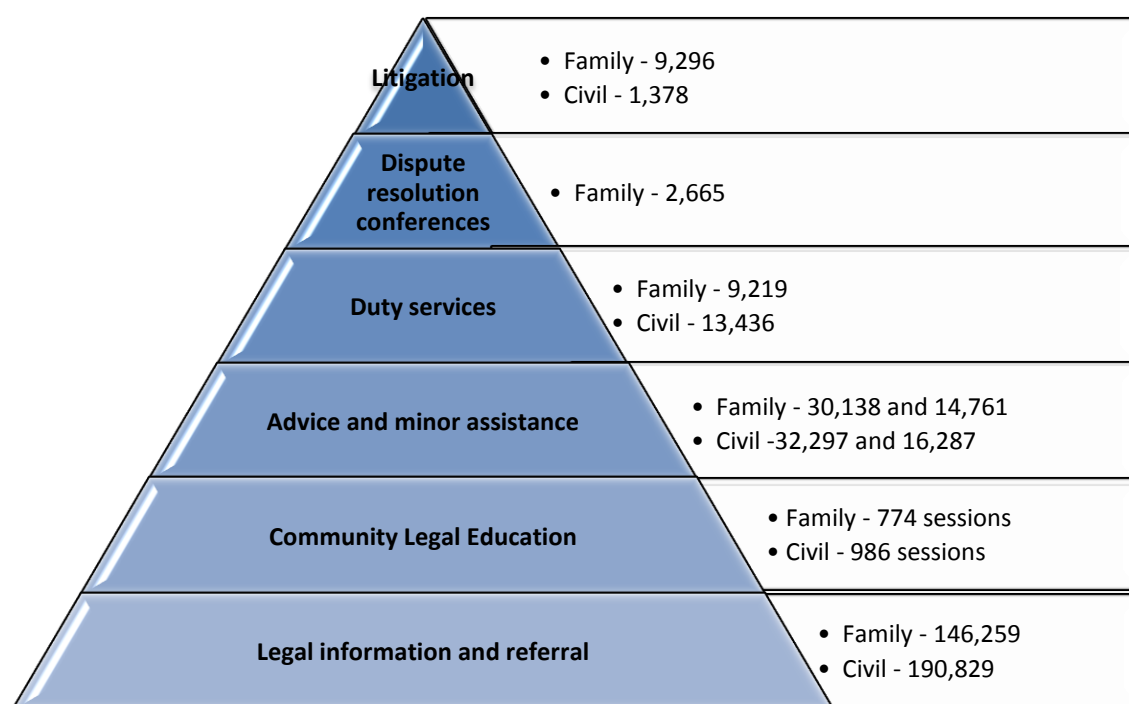


Figure 2: Breakdown of Legal Aid NSW family and civil law services for 2012-2013

A person can contact LawAccess NSW,¹ receive legal information and be referred to Legal Aid NSW for further advice or to access a duty service. Dependent upon the person's level of disadvantage, capacity and legal need they may then be assisted to obtain a grant of legal aid for a dispute resolution conference (mediation) or representation in court for complex litigation. Annexure A contains a diagram detailing some of the potential pathways to resolve legal problems.

The Legal Aid NSW in-house practice provides a comprehensive network of services through the Family, Civil and Criminal Law Divisions. Representation services are delivered in partnership with the private profession, through both the in-house practice and private legal practitioners. This is known as the mixed model of service delivery.²

The ability to provide a comprehensive network of services across family, civil and criminal law is key to effective access to justice. The network of services ensures that disadvantaged groups can access appropriate legal services to address the range of legal problems they encounter in their everyday lives and resolve those problems as early as possible. Also supporting this network is a range of specialist services where inhouse legal practitioners are experts in their field:

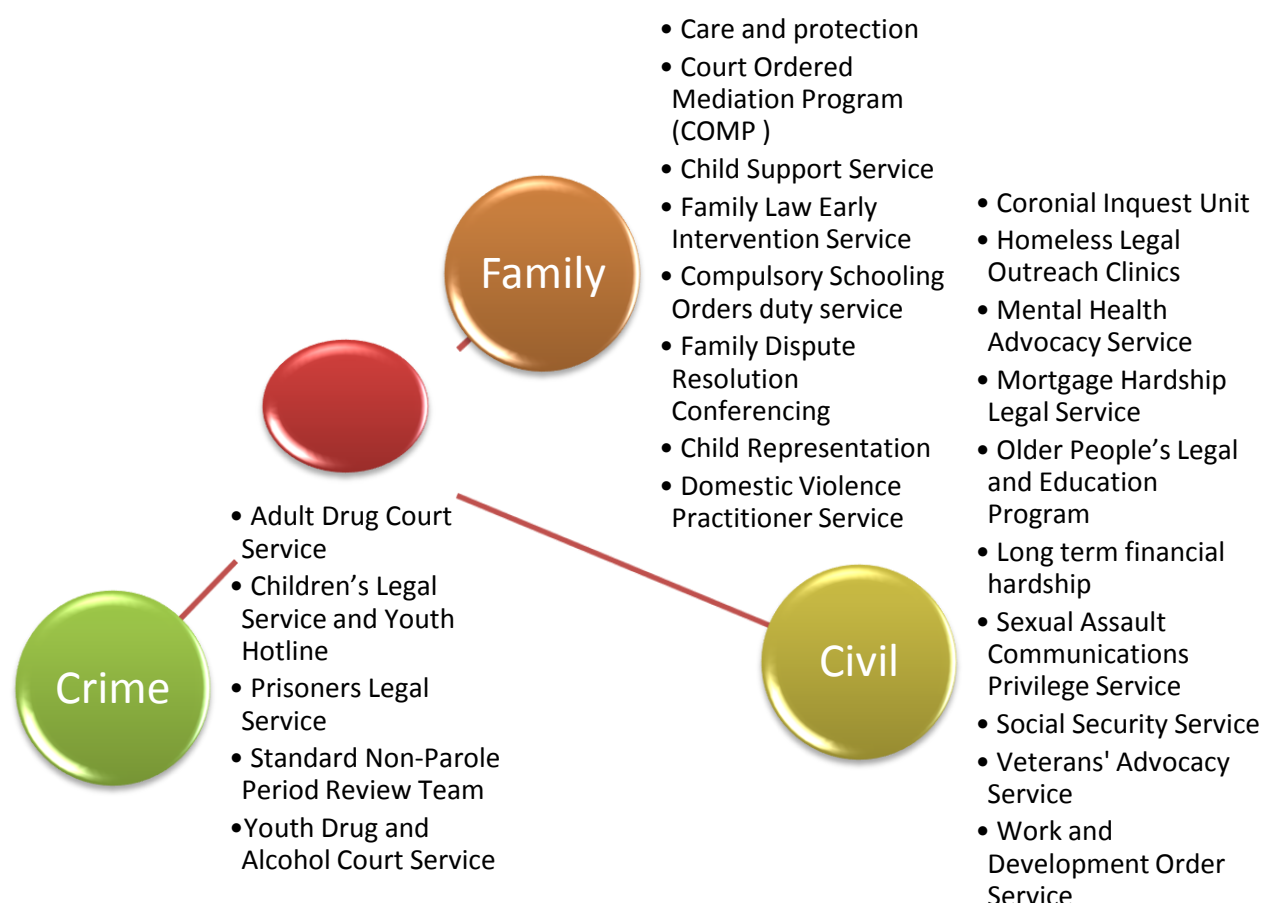


Figure 3: Legal Aid NSW specialist services

¹ LawAccess NSW is a cooperative initiative of Legal Aid NSW, Department of Attorney General and Justice, Law Society of NSW and NSW Bar. LawAccess NSW has been recognised internationally as a world leader in its integrated approach - Roger Smith ILAG Conference June 2013.

² In 2012-2013, 79.6% of grants for legal aid in family law matters were assigned to private practitioners and 21.3% of duty services. 42.7% of grants in civil law matters were assigned to private practitioners and 79.6% of duty matters. See section 12 for more detail on the mixed model.

The scope and range of services provided by Legal Aid NSW are in accordance with its legislative duties which include:

- Ensuring that legal aid is provided in the most effective, efficient and economical manner.
- Having regard for legal aid to be readily available and easily accessible to disadvantaged people throughout NSW.
- Ascertaining and keeping under review community needs in relation to legal aid.³

As a State-wide service Legal Aid NSW is well placed to:

- Deliver services to remote areas, particularly those identified as having the greatest unmet legal needs.
- Coordinate services across a number of agencies, particularly in regional, rural and remote areas through Cooperative Legal Service Delivery (CLSD) program and other strategies.
- Work with stakeholders and other non-legal support services such as medical services and Family Relationship services, to achieve appropriate referrals for people in need of legal assistance.
- Mobilise experienced and specialist staff to deliver targeted legal services at times of acute legal need such as mass employee lay-offs, floods, fires and other natural disasters.

The daily experience of legal aid lawyers assisting high volumes of disadvantaged clients is harnessed to identify systemic issues and provide input into law reform processes. In 2013-2014 Legal Aid NSW made 34 law reform submissions on wide range of issues across different jurisdictions.⁴ In addition, because of the extensive coal face experience of its lawyers, Legal Aid NSW is regularly invited to make submissions to Inquiries and participate in round tables examining law reform issues.

The expertise of Legal Aid NSW lawyers also underpins the broad range of highly effective plain language legal information publications and Community Legal Education (CLE) sessions. Through these publications and CLE sessions, Legal Aid NSW lawyers explain the practical implications of the law and dispute resolution processes.

Legal Aid NSW has over 95 civil and family law plain language publications.⁵ Resources range from factsheets, toolkits and guides⁶ to interactive websites such as *Best for Kids*. Legal Aid NSW distributed 731,526 hardcopy legal publications⁷ in 2012-2013, in addition to approximately 400,000 online downloads from its website www.legalaid.nsw.gov.au.

³ *Legal Aid Commission Act 1979* (NSW) section 12(a)-(c)

⁴ Legal Aid NSW law reform submission are published on the Legal Aid NSW website www.legalaid.nsw.gov.au/what-we-do/law-reform and a list is included in the Legal Aid NSW Annual Report.

⁵ Publications cover specialist services and a range of topics including family separation, child arrangements, debt, mortgages, disaster recovery and insurance, employment, family violence, traffic offences, social security, immigration and many others.

⁶ Examples include the *Mortgage Stress Handbook* and *Discrimination Toolkit*

⁷ Total publications includes Family, Civil and Criminal law.

Approximately 60% of publications are translated into over 30 community languages.⁸ Aboriginal specific publications have been developed to address common family and civil law problems, fines, mental health, family breakdown, child support, stopping family violence and working out what's best for the kids.

CLE helps people anticipate and avoid legal problems, act more quickly when problems do occur and deal with legal problems more effectively through knowing when and where to get assistance. In 2012-2013, Legal Aid NSW lawyers provided 1,760 family and civil law Community Legal Education (CLE) sessions. While many of the legal education sessions target particular communities and legal issues,⁹ Legal Aid NSW also provides CLE programs to community workers. For example, *Law for Community Workers*¹⁰ encompasses 18 legal topics and is delivered across NSW.¹¹

Legal Aid NSW clients

Due to funding constraints, grants of legal aid for targeted casework are limited by the Legal Aid NSW means test and policy restrictions on the types of matters for which grants of legal aid are available. The means test is 'mean': the means test income limit is 52.4% of the minimum weekly wage. As a result, legal aid has become increasingly welfarised. For example, 88.2% of people applying for aid in 2012-2013 were on a Centrelink benefit.

Legal Aid NSW is unable to increase its means test without a specific funding allocation on a recurrent basis. Legal Aid NSW was last able to adjust the means test income limits in 2008 when it received additional funding from the Public Purpose Fund (PPF).¹²

⁸ The most common translations are Chinese, Vietnamese & Arabic, followed by Turkish & Spanish but increasingly, new & emerging languages such as Farsi, Korean. The *Welcome to Legal Aid* CD-ROM is in key African, Middle Eastern & Burmese (3 Burmese dialects).

⁹ *What is the Law?: Australian law for new arrivals* delivers information about the law through English for Speakers of Other Languages (ESOL) classes; *Back on track* and *Legal Literacy for Prisoners* programs for prisoners; Older Persons Legal and Education Program runs a series of legal education sessions on matters affecting older people; *Super Cuz: Adventures of a Koori superhero who fights for justice* radio plays targets primary school children; and *BURN* is a criminal law program for secondary school students; *Best for kids* is a multimedia website for separating families.

¹⁰ www.legalaid.nsw.gov.au/what-we-do/workshops/law-for-community-workers

¹¹ The July – November 2013 program includes Bankstown, City, Parramatta, Gosford, Maitland, Newcastle, Nowra, Shellharbour, Wollongong, Albury, Bathurst, Coffs Harbour, Dubbo, Lismore, Orange, Port Macquarie, Tamworth, Tweed Heads, and Wagga Wagga.

¹² The Public Purpose Fund (PPF) provided an increase in recurrent funding to enable change to the means test in 2008-2009 building on additional recurrent funding for means test adjustments in 2006-2007 and 2007-2008.

Legal Aid NSW client profile

Based on total case grants and inhouse duty services

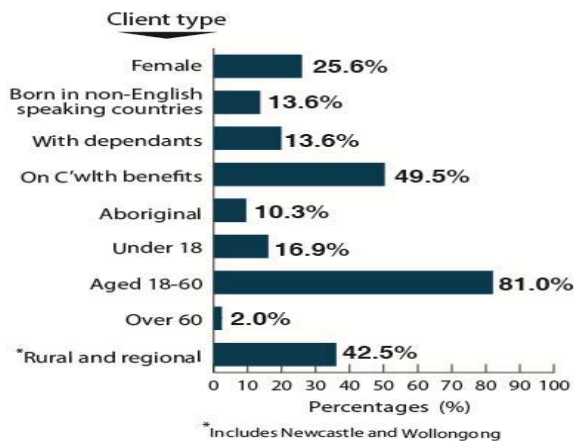


Figure 4: Legal Aid NSW client profile 2012-2013

While 25.6% of Legal Aid NSW clients are female, the client gender profile changes significantly when criminal law clients are excluded. In 2012-2013, the majority of family and civil law case grants recipients (60%) and duty service¹³ clients (52%) were women.¹⁴

Legal Aid NSW clients are among the most disadvantaged members of the community, suffering deep and persistent disadvantage. These clients have complex and multiple needs and complex legal problems. Many of these clients lack the capacity to self help because they are illiterate, have English as a second language or suffer from cognitive impairment, mental health impairment or low educational attainment.

Disadvantaged people are more vulnerable to multiple and substantial legal problems with greater adverse consequences.¹⁵ The clusters of problems experienced by Legal Aid NSW clients reflect those of disadvantaged people generally. Legal Aid NSW clients are particularly vulnerable to compounding criminal, civil and family law issues with significant adverse consequences.

For this group of deeply and persistently disadvantaged people, structural changes and reforms to increase legal information and advice, community legal education, self help resources and self representation will have a limited impact. For this group of people, the level of disadvantage is such that *access to justice* must to be facilitated through an advocate and/or lawyer, if it is to exist at all.

Ms R has limited English and is on a Disability Support Pension. She had registered her vehicle for 6 months and had to renew her registration for the subsequent six months. As a pensioner she was not required to pay a registration fee to RMS, but was required to purchase CTP insurance and notify RMS in order to activate her registration. Ms R was confused as to the process and while she paid for a further six months CTP insurance she failed to notify RMS, resulting in a lapse of the vehicle's registration.

¹³ Duty service demographics are recorded for inhouse duty services.

¹⁴ The Review of outreach services indicates that 56.6% of outreach assistances on the Mid North Coast were provided to women.

¹⁵ *Concentrating disadvantage: a working paper on heightened vulnerability to multiple legal problems*, Law and Justice Foundation of NSW, 2013

[www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_24_Concentrating_disadvantage_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_24_Concentrating_disadvantage_FINAL.pdf)

Shortly after this a police scanner detected that her vehicle was unregistered. She was fined approximately \$1200, which she was unable to pay. While Ms R had the option of entering into a time to pay arrangement, her limited English may prove a barrier. A likely outcome would have been the State Debt Recovery Office commencing enforcement action against her, potentially resulting in the loss of her Driver's Licence and cancellation of her car registration.

Legal Aid NSW assisted the client to make a plea in mitigation explaining her circumstances and the circumstances surrounding the offence. As a result she was no longer required to pay a fine. All she was required to pay was approximately \$80 court costs.

1. How the Commission can best add value?

In what areas can the Commission most add value in undertaking this inquiry?

Legal Aid NSW welcomes the Productivity Commission's Public Inquiry into Access to Justice Arrangements. As noted in the Issues Paper, there have been a large number of reviews and reports aimed at improving access to justice. Legal Aid NSW believes the Productivity Commission can most add value in its economic analysis of the social and economic costs of not providing access to justice. Furthermore, the Productivity Commission's Report findings will provide the economic basis for a sustainable legal assistance service funding model for both Commonwealth and State matters.

In undertaking this Inquiry the Productivity Commission also has the opportunity to acknowledge the value the legal assistance sector provides to the justice system, particularly the legal assistance sector's contribution to the effective and efficient operation of the justice system.

A number of studies have explored the economic value of legal assistance services. For example, the PriceWaterhouseCooper 2009 study of the *Economic value of legal aid* found the provision of duty, litigation and dispute resolution services for family law matters has a net positive efficiency benefit for the justice system, outweighing the cost of providing these services, with a return of \$1.60 to \$2.25 for every dollar spent.¹⁶

In addition the study found that these efficiency benefits are magnified through the provision by legal aid of legal education, information and advice services as these services reach a broader group of clients and are likely to lead to appropriate and efficient pathways through or diversion from the justice system. It found that the benefits from quality and effective justice outcomes and resolution of matters, achieved through legal assistance, accrue to both individuals and the community.¹⁷

The key finding of the study was that there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and qualitative benefits this funding can return to individuals, society and government.¹⁸

¹⁶ *Economic Value of legal aid: Analysis in relation to Commonwealth Funded matters with a focus on family law*, PriceWaterhouseCoopers for National Legal Aid (2009) p.ix

www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf

¹⁷ Ibid p.ix

¹⁸ Ibid

Other studies which have also explored the economic value of legal assistance services that the Productivity Commission may wish to consider are: *Family Dispute Resolution services in legal aid commissions: Evaluation Report*,¹⁹ prepared for Commonwealth Attorney-General's Department by KPMG, (2009); and *Economic Cost Benefit Analysis of Community Legal Centres*,²⁰ prepared for the National Association of Community Legal Centres by Judith Stubbs' and Associates (2012).

There is a strong economic argument for increasing government support for access to justice arrangements and the availability of legal aid. The Productivity Commission's findings and recommendations could provide the impetus for a new paradigm for legal assistance services. Legal Aid NSW believes that the future of effective legal assistance services and access to justice for disadvantaged people depends upon a strong partnership between the Commonwealth and the States with agreement on:

- Priority areas of law and legal problems
- Priority clients
- Eligibility for legal aid – means test
- Level and division of funding
- How services will be delivered and by whom
- Coordination of legal assistance service funding to avoid duplication

Legal Aid NSW notes the Productivity Commission's focus on legal assistance funding in the Issues Paper and submits this is an areas where the Productivity Commission could provide the impetus for a true partnership between the Commonwealth and the States.

Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?

While the priority of Legal Aid NSW is the provision of legal assistance to the disadvantaged, it provides a wide range of services including legal information, referral, community legal education and legal advice and minor assistance to the broader community. In part, these services are provided in recognition of the 'justice gap' for a large section of the community including the so called 'working poor'. Specifically, while they are not eligible for legal aid due to means or policy restrictions, they cannot afford to pay for private legal advice and representation.

The Inquiry provides the opportunity to generate benefits for both the individual and the broader community by addressing the 'justice gap', as lack of access to justice results in higher social and economic costs for both the individual and the community. These costs arise when people fail to resolve their legal problems, but also when people pursue their legal options self-represented.²¹

¹⁹ www.legalaid.nsw.gov.au/_data/assets/pdf_file/0016/5434/FDR-Evaluation-Report.pdf

²⁰ www.naccl.org.au/resources/Cost_Benefit_Analysis_Report.pdf

²¹ Self-represented litigants are more likely to have adverse outcomes and impose transaction costs on third parties (negative externalities). The impact of self-represented litigants is discussed in section 5.

2. Avenues for dispute resolution and the importance of access to justice

Avenues for dispute resolution

The Commission invites comment and evidence on the main strengths and weaknesses of the civil justice system. What should the objectives of the civil justice system be, and are they being achieved?

Legal Aid NSW notes the increases in the number of people living in poverty, in particular the incidence of poverty in regional, rural and remote communities. The ACOSS *Poverty in Australia* report indicates that 13.1% of people living outside capital cities are living below the poverty line, while almost 25% of people living in remote areas are low income families with children compared to 8.8% of the urban population.²²

A key issue for the justice system is how it will respond to increasing demand for assistance with 'poverty-related' legal issues, particularly increases in demand in rural, regional and remote areas. This challenge is highlighted by the level of unmet demand demonstrated in the latest Australian Community Sector Survey 2013.²³ Sixty three percent of legal assistance services reported not being able to meet demand and had the highest turn-away rate (20%) across all community service types.

While many poverty related legal issues do not need to be dealt with by a court or tribunal, some form of assistance will be required if they are to be resolved. Resolution might require some form of advocacy or assistance in negotiating a complex system for issues such as fines, NDIS, social security, superannuation, family relationship debt and care and protection. Legal Aid NSW clients' level of disadvantage is such that they struggle within complex systems.

Many of the issues experienced by clients do not involve a 'dispute'. They are everyday problems that have a legal component. However, if these legal problems are not resolved at any early stage there can be an escalation of the issues resulting in the matter proceeding to a court or tribunal. Investing resources into early resolution avoids the costs of more resource intensive court or tribunal proceedings.

M is a 33 year old woman who ran away from home at 14 as a result of emotional, physical and sexual abuse by her step father. She has multiple scars to her neck and both wrists as a result of self harm. M had also been a victim of family violence in her adult years. M disclosed that she had been physically and sexually assaulted when she was homeless.

²² ACOSS, *Poverty in Australia*, 2012 p. www.acoss.org.au/policy/poverty/

²³ *Australian Community Sector Survey 2013 National Report*, Australian Council of Social Services (ACOSS), acoss.org.au/images/uploads/Australian_Community_Sector_Survey_2013_ACOSS.pdf
Results of the Survey include: 63% of legal service providers reported not being able to meet demand for services, and legal services ranked second highest on inability to meet demand; 20% of all clients in need of assistance from surveyed community legal services were turned away in 2011/12, the highest turn-away rate across all service types; 85% of legal services reported having targeted their services more tightly or limiting service levels to meet demand; 67% reported being underfunded; 59% said they had increased waiting times for services; and 76% of services asked staff and volunteers to work additional hours in attempt to meet demand.

An FOI request revealed multiple contacts with the Police relating to self harm incidents, being a victim of assault and as a person of interest in matters such as stealing, drugs and receiving stolen property. M had a history of illicit drug use and homelessness from the time she was an adolescent.

M sought advice at a Legal Aid NSW homeless outreach clinic because she was at risk of being homeless. The Legal Aid NSW lawyer built a relationship with M over the weeks and months to address issues the multiple legal issues that were impacting on M's life.

One of these issues related to her tenancy with Housing NSW. The lawyer assisted M to resolve the dispute with Housing NSW. Despite M initially losing her accommodation, the lawyer was able to have M reinstated with Housing NSW and into suitable accommodation. The lawyer has been working through M's other legal issues helping M to access other supports in order to ensure that M retains her housing.

Legal Aid NSW submits that the main strengths of the civil justice system are the different mechanisms to resolve legal problems. For example in consumer protection matters, Early Dispute Resolution (EDR) mechanisms provide informal, lower cost and highly specialised dispute resolution, while access to courts and tribunals enables resolution of complex issues of statutory interpretation and clarifies the operation of law.

In family law matters, legislation prescribes and encourages early resolution of disputes. Mandatory pre-action procedures direct parties to attend mediation prior to filing documents. Consent orders reflecting agreed terms of settlement can be filed and dealt with in Judge's Chambers. These methods are a positive alternative to litigation and are cost effective.

The weaknesses of the civil justice system include the lack of access to most suitable form of assistance or forum; lack of consistency across jurisdictions; lack of access to legal assistance early in the onset of a legal problem; and lack of consistency in access across geographical locations and disadvantaged groups. These issues are discussed in more detail in the relevant sections of this submission.

Why access to justice is so important?

Confidence in the rule of law is fundamental to a democratic society and the successful operation of a market economy. Underpinning the rule of law is the principle that the law must be accessible, clear and predictable. If people are bound by the law they must have the means to fairly and effectively participate in the justice system.

Access to justice requires access to a system of just laws and remedies and where necessary as a last resort, access to the courts to enforce those laws. There is a strong link between the rule of law and economic prosperity. Difficulties in obtaining access to justice reinforce poverty and disadvantage²⁴ and therefore reduce productivity. Without access to justice there is a loss of confidence in the rule of law, increased poverty and exclusion, and a negative effect on economic prosperity.

²⁴ A Strategic Framework for Access to Justice in the Federal Civil Justice System, Report of the Access to Justice Taskforce Attorney-General's Department, September 2009 p.2

Disadvantaged people are enveloped by the law. The Law and Justice Foundation (LJF) legal need survey (LAW Survey) provides evidence that those with multiple disadvantages are more vulnerable to substantial and multiple legal problems.²⁵ With high levels of legal need and low capacity to resolve legal problems those most disadvantaged will need legal assistance if they are to have equality before the law.

Ensuring that the most vulnerable have a form a redress through litigation is recognised by the *Strategic Framework for Access to Justice in the Federal Civil Justice System* as a fundamental element of access to justice:

Legal assistance continues to be fundamental to achieving access to justice, ensuring that people can access legal advice and representation where they need it but cannot afford it.²⁶

Litigation is not only concerned with dispute resolution but also fulfils the important function of dispute prevention and creates binding precedents, so that parties can predict the likely outcomes in their choice whether to pursue disputes.²⁷

As an equity measure or 'merit good', legal aid not only enables people to interact more efficiently and effectively with the civil justice system but also enables the justice system to work more efficiently and effectively. It was the view of the then Office of Regulation Review that legal aid can improve the efficiency of the legal system and in the process improve access to justice, whether through litigation or settlement.²⁸

In economic terms 'merit goods' are goods or services which benefit society as a whole. As such government intervention is justified to adjust the market mechanism of allocation of legal services by providing access to legal assistance for people who would not otherwise be able to afford those services.

If legal aid is not available there is a high risk that disadvantaged people will not resolve problems that have a legal dimension, leading to higher social and economic costs for both the individual and the community. These costs are outlined later in this section and section 3. If disadvantaged people do pursue their legal options, as self-represented litigants they are more likely to have adverse outcomes²⁹ and impose transaction costs on third parties (negative externalities).

²⁵ *Concentrating disadvantaged: a working paper on heightened vulnerability to multiple legal problems*, Law and Justice Foundation of NSW 2013

[www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_24_Concentrating_disadvantage_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_24_Concentrating_disadvantage_FINAL.pdf) Disadvantaged groups included disability, unemployment, single parent, disadvantaged housing indigenous, low education, low income, having a non-English main language and living in a remote or outer regional area.

²⁶ *The Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009 p.58

²⁷ *The Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009 p.31

²⁸ Office of Regulation Review, *The use of cost litigation rules to improve the efficiency of the legal system*, submission to the Australian Law Reform Commission review of cost litigation rules, March 1995 p. 16 pc.gov.au/office-regulation-review/submission/costlitigationrules

²⁹ *Middle Income Access to Civil Justice Steering Committee, Background Paper*, University of Toronto Faculty of Law, February 2011 p.21

The Judicial Working Group on Litigants in Person found that self-represented litigants have difficulty: understanding procedural requirements and are less likely to conform with requirements (particularly timeframes); understanding the concept of evidence and cause of action; asking appropriate questions and cross examining; identifying determinative issues; identifying and paying for expert evidence and interpreters; and working with opposing counsel.³⁰ Further research on the costs of self representation is outlined in section 5.

The Legal Aid NSW mixed model of service delivery leverages the spread and expertise of private practitioners across NSW, while the inhouse practice specialisation in welfare law and experience in assisting disadvantaged people underpins the network of legal aid services.

Legal services are critical in order for people to understand their legal entitlements, rights and responsibilities. Legal Aid NSW focuses on delivering services to those in the community that are not able to adequately represent themselves or their interests in relation to legal problems that impact on their lives. Without this assistance, the consequences for this group can be very significant, such as loss of their children, their income or their home. These clients will need assistance to end a relationship in a way that ensures their own physical and economic safety and that of their children.

Legal assistance is part of the safety net of social services, with Legal Aid NSW lawyers regularly needing to go outside the scope of normal legal service provision to assist clients to resolve their everyday legal problems. A problem solving approach is used by Legal Aid NSW lawyers to address family violence, debt, homelessness, fines or lack of access to appropriate government benefits. The inclusion of legal services within social services enables an integrated response to the problems faced by those with multiple and complex needs. It is often the cases that there is a strong connection between a legal problem and social problems, such as an uncontrolled mental health problem leading to multiple unpaid fines. It is often ineffective in the long term to resolve one problem without resolution of the other.

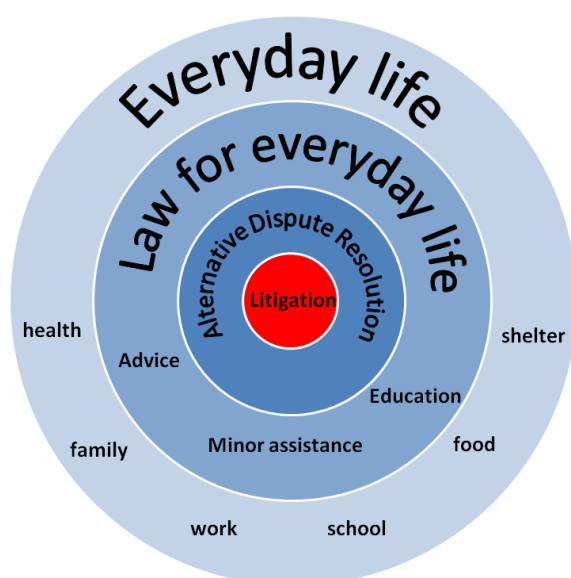


Figure 5: Problem solving approach

³⁰ July 2013 www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf

A mother with an intellectual disability and her disabled adult son (accompanied by a support worker and disability advocate) sought advice from a Legal Aid NSW Family Law clinic. After a 20 year violent marriage this client had escaped to a refuge. All their possessions were still in the family home.

The only asset of the marriage was the Husband's Superannuation Fund of about \$500,000. The client had not lived independently for over 20 years and was very fearful of how she would face the future. The adult son was visibly shaking as he had been ordered by his father to come home, which he did not want to do. The mother and her son wanted their personal possessions from the home and needed to be assured of their safety.

Legal Aid was able to liaise with the police domestic violence liaison officer to obtain assistance in entering the home with the mother and son to retrieve their possessions.

Under the Legal Aid special disadvantage policy, the client would qualify for representation to seek orders for spousal maintenance and an order for the Superannuation Fund Trustees to split the husband's superannuation. The family lawyer was able to advise the son that he was not legally obliged to do anything his father told him to do.

In this circumstance, a shuttle mediation would be attempted with the aim of avoiding litigation if possible. Without legal aid assistance, the client would have no recourse to family law proceedings as a private practitioner would not undertake this kind of work where there are no funds from which to draw a fee. The mother's mental state improved immediately she learned a solution was available.

What are the benefits to individuals and the community of an accessible civil dispute resolution system? How does a failure to provide adequate access to justice impact on individuals and the community more broadly?

Legal assistance to resolve and prevent escalation of legal problems reduces the avoidable economic and social costs that would otherwise be experienced by the individual, community and government.

A number of legal need surveys have examined the adverse consequences on economic, health and social circumstances arising from legal problems, the most common being income loss or financial strain (29%), stress related illness (20%), physical ill health (19%), relationship breakdown (10%) and moving home (5%).³¹

For example, debt problems can cause a range of adverse impacts including ill health, relationship breakdown and unemployment.³² Legal assistance can reduce the social costs on the individual (impact on quality of life) but also the spill-over social effects on the

³¹ Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S 2012, Legal Australia-Wide Survey: Legal need in Australia (LAW Survey), Law and Justice Foundation of NSW, Sydney p.xvi

³² Pleasence et al. (2007) *A helping hand: the impact of debt advice on people's lives*, Legal Services Research Centre London as cited in *Legal Australia Wide Survey: Legal need in Australia*, Law and Justice Foundation of NSW 2012, p.27.

community. For example, legal assistance can reduce the negative impact on social capital such as trust, civic engagement, perceptions of safety and equality of opportunity.

Failure to provide assistance to resolve legal problems contributes to the vicious cycle of vulnerability involving health problems, inability or disruption to work, loss of income, non-payment of rent, eviction and homelessness.³³

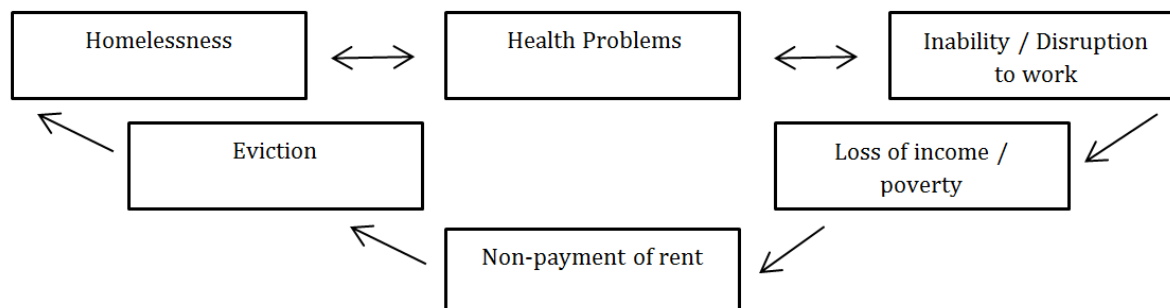


Figure 6: A Vicious Cycle of Vulnerability (Pleasence et al., forthcoming, adapted from Tobin Tyler et al. 2011, p.236)³⁴

The following case study demonstrates this cycle of vulnerability arising from legal problems.

Q was a 32 year old male with a long history of untreated schizophrenia and using alcohol as means of self-medicating his mental illness. He had poor literacy, having left school at year 9. Q lost his job as a concreter when he lost his drivers licence for mid-range drink driving. Q became homeless and lived in his car. As Q was still suspended from driving, he committed further driving offences while driving his vehicle from one location to the next in search of a safe place to sleep.

Q started his traffic offending by receiving traffic infringements, not being able to pay his fines and not seeking advice. After his driver's licence was suspended for fine default, continuing to drive whilst his licence was suspended resulted in further and more serious traffic offences and multiple habitual traffic offender declarations preventing him from driving for 10 years. The client had represented himself at court, as legal aid was not available for representation.

Q had been housed in temporary accommodation, his mental health had been medically stabilised. Q indicated that he wanted to return to work and that he could easily gain employment if he could get his driver's licence back. His mental health nurses were of the view that gaining employment would not only significantly improve the client's financial circumstances enabling him to secure more stable accommodation, but would also assist with his mental health treatment.

³³ Law and disorders: illness/disability and the experience of everyday problems involving the law, Justice Issues, Paper 17 September 2013, Law and Justice Foundation of NSW [www.lawfoundation.net.au/ljf/site/templates/justiceissues/\\$file/JI17_LawAndDisorders_FINAL_web.pdf](http://www.lawfoundation.net.au/ljf/site/templates/justiceissues/$file/JI17_LawAndDisorders_FINAL_web.pdf)

³⁴ Pleasence, P., Coumarelos, C., Forell, S., McDonald, H.M. and Mulherin, G. (forthcoming) *Legal Needs and Services in Context: Building on the Evidence Base*, Sydney: Law and Justice Foundation. Tobin Tyler, E., Lawton, E. Conroy, K., Sandel, M. and Zuckerman, B. (2011) *Poverty, Health and the Law: Readings and Cases for Medical-Legal Partnership*, Durham, North Carolina: Carolina Academic Press.

Legal Aid NSW assisted Q to make an application to quash the habitual traffic offender declarations. The court was provided with a support letter from his support service outlining the Q's progress. While the Magistrate did not find that the 10 year disqualifications were a disproportionate and unjust consequence having regard to the client's total driving record, the magistrate was persuaded that the client's circumstances did justify quashing the declarations.

Having quashed the habitual traffic offender declarations Legal Aid NSW assisted the client to sign up to a Work Development Order which resulted in the lifting of driver licence restrictions. The client was also assisted to successfully appeal the demerit point suspension which RMS sought to impose after his habitual traffic offender declarations had been quashed.

The client has been able to gain employment and he is looking at securing a private rental. He is now also looking at addressing some of his family law issues and resume contact with his child.

3. Exploring legal needs

What is legal need?

The Commission invites comment on how best to define and measure legal need. How does legal need relate to the concept of access to justice?

Legal Aid NSW supports the 'justiciable approach' to defining legal need developed in Genn's Paths to Justice study adopted by the LJF.³⁵

Legal need is broadly defined as arising when a problem with a potential for legal resolution is experienced and continues until that problem is satisfactorily resolved.³⁶ This definition encompasses everyday problems that have a legal dimension, regardless of whether those experiencing the problem recognise the legal component, whether a legal resolution is actively sought or whether it involves a dispute between two or more parties.

Legal need can be described as 'express', 'unexpressed', 'met' or 'unmet'. As noted by the LJF, 'it is widely accepted that by seeking legal information, advice or assistance a person is expressing a legal need'.³⁷ This is 'express' legal need. 'Unexpressed' legal need is where people have a problem with a legal dimension but do not seek assistance to resolve it.³⁸

Met legal need is where a person has obtained the assistance to satisfactorily resolve their legal problem.

In accordance with the approach by Dignan (2004), outlined in the LJF LAW Survey, unmet legal need 'constitutes a gap between experiencing a legal problem and satisfactorily solving that problem'.³⁹ Unmet legal need includes problems which are not resolved because

³⁵ Genn, H (1999) Paths to justice: what people do and think about the law, Hart Oxford

³⁶ LAW Survey p.46

³⁷ Ibid p.4

³⁸ Coumarelos, C, Wei, Z & Zhou, AH 2006, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, Sydney p.3
[www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/\\$file/Justice_Made_to_Measure.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/B9662F72F04ECB17CA25713E001D6BBA/$file/Justice_Made_to_Measure.pdf)

³⁹ LAW Survey p.4

people are unaware of their legal rights or are unable to assert those rights because of the barriers they face including a lack of capacity to resolve their legal problem.⁴⁰

The definition proposed in the Issues Paper implies that the individual is aware that their problem has a legal dimension and a possible legal solution, which is often not the case. Legal Aid NSW recommends that the Productivity Commission follow the justiciable approach and adopt the more comprehensive Dignan definition:

Legal needs are the legal problems that the citizen cannot solve effectively by his or her own means. A legal problem refers to a situation in which knowledge of, or use of, legal services could be expected to lead to better outcomes and improved welfare for the citizen, compared to what would be expected to occur if such services were not used and/or the citizen lacked knowledge of his or her legal rights. That is, in the absence of such services or knowledge of legal rights, the citizen may potentially suffer loss or disadvantage.⁴¹

Increasingly, areas of everyday life are regulated or have some kind of interface with the law. As systems get more complex the disadvantaged and vulnerable need assistance to negotiate for them to ensure they are accessing appropriate services and entitlements. For example, there will be disadvantaged people potentially eligible to participate in the National Disability Insurance Scheme (NDIS) who will need assistance to access the scheme or to ensure they receive an appropriate entitlement.

Relationship breakdowns produce a wide range of legal needs. For example, many people are unaware of equitable financial interests that accrue as a result of their contributions during a relationship. In addition, changes to living arrangements of parents and children, and often family violence, will create complex legal needs with far reaching social and economic consequences for the individuals involved and the wider community. This legal need must be addressed for effective resolution of these problems.

Express, unexpressed, meet and unmet legal need can be measured through survey methodologies. In addition, legal need expressed within the legal assistance sector can be measured through legal assistance service data collection. Within NSW the LJF Data Digest tracks the express legal need of Legal Aid NSW, LawAccess NSW and Community Legal Centre (CLC) clients. Legal Aid NSW also notes Dignan's proposed framework for measuring legal need.⁴²

Legal need can be both express and unmet. For example a person might seek assistance (express need), but due to policy constraints on the supply of legal assistance services their legal need remains unmet.

By definition, all unexpressed legal need is also unmet legal need, as a person is unable to resolve their legal problem by their own means and have not sought assistance.

⁴⁰ Ibid p.4-5

⁴¹ *Legal Need in Northern Ireland: Literature Review*, T. Dignan, Final Report prepared for Northern Ireland Legal Services Commission July 2004, pg.113
www.nilsc.org.uk/uploads/research/documents/legalneedsfinal.pdf

⁴² Ibid p.115

The identification of legal need, express, unexpressed, met and unmet, is fundamental to the concept of access to justice. Legal need research demonstrates both the level of demand and failures in the availability of supply of legal assistance services and thus failures in access to justice arrangements.

Legal need research enables evidence based decision making and underpins the planning of legal assistance service delivery and the development of innovative strategies to address legal need and access to justice. Legal Aid NSW has used the research of the LJF *Access to Justice and Legal Need program*⁴³ to target service delivery since the program commenced in 2002. See section 12 for more detail on evidenced placed planning.

What constitutes unmet need in the civil dispute resolution system and how significant is it? How has the level of unmet legal need changed over time? What has driven this change and what evidence is there to support it?

As the Issues Paper notes, 50% of respondents in the LAW Survey experienced one or more legal problems in the previous 12 months, with 22% of respondents experiencing three or more legal problems.⁴⁴ Applying the LAW Survey sample to population counts, approximately 8.5 million people aged over 15 experienced a legal problem and 3.7 million people aged over 15 experienced three or more legal problems in the previous 12 months.⁴⁵ Those with a substantial legal problem translate to approximately 4.66 million people aged over 15.⁴⁶

If the LAW (NSW) Survey sample is applied to population counts, in NSW alone approximately 2.8 million people aged over 15 years experienced a legal problem within a 12 month period and approximately 1.3 million experienced three or more problems.⁴⁷ Those with a substantial legal problem translate to approximately 1.6 million people aged over 15.⁴⁸ That is 1.6 million people in NSW had a legal problem which had acute consequences on their everyday lives.

When the legal need of 1.6 million people with potentially multiple legal problems (demand) is compared with the available supply of legal assistance services, the extent of unmet legal need and the limitations of existing access to justice arrangements becomes apparent.

Legal Aid NSW does not argue that everyone with a legal problem requires legal assistance. However, if a problem with legal dimensions has acute consequences on an individual's everyday life then legal assistance is required in order to reduce the economic and social costs on the individual and society arising from the access to justice failure.

Legal need is also measured along a continuum against the capacity of an individual and the complexity of the legal process to resolve a particular problem. The simpler the process, the less capacity is needed of an individual to negotiate the process on their own. The more

⁴³ www.lawfoundation.net.au/ljf/app/54A6A9F9FFD485F0CA25746400187A24.html

⁴⁴ LAW Survey Australia p.xiv

⁴⁵ Ibid p.57

⁴⁶ Ibid p.59

⁴⁷ Coumarelos, C, Macourt, D, People, J, MacDonald, HM, Wei, Z, Iriana, R & Ramsey, S 2012, *Legal Australia-Wide Survey: legal need in New South Wales (LAW Survey NSW)*, Law and Justice Foundation of NSW, Sydney p.57

⁴⁸ Ibid p.59

complex the system, the more people will require assistance, including those who may have some degree of education.

Legal assistance services are experts in being able to gauge how much assistance is required in relation to different systems that apply to legal problems involving social security, housing and insurance, and what level of capacity and support is needed for people to be able to negotiate more of the system for themselves, such as CLE or publications.

The LAW Survey data in relation to how people respond to legal problems reinforces the evidence of high unmet legal need and an access to justice gap. In 18.3% of legal problems no action was taken. In the LJF study of legal need in six disadvantaged areas the low level of response to legal problems is even starker with 32.8% doing nothing, rising to 50.9% for Aboriginal respondents.⁴⁹ Sixteen percent of respondents handed the problem alone.

The LAW Survey provides evidence of reasons for inaction including having bigger problems (28-35%), being too stressful (26-31%), costing too much (19-29%) and not knowing what to do (15-23%).⁵⁰

Legal Aid NSW suggests that the level of unmet legal need reflects population changes, legislative and regulatory activity and the increasing complexity of the law. The world we live in is 'thick' with the law, particularly for disadvantaged people.

There are numerous examples of 'legal inflation', where new legislation and amendments to existing legislation impact on the level of unmet legal need and demand for legal assistance. For example at its inception the Fines Act 1996 (NSW) contained 43 statutory provisions. It has since grown to 110 statutory provisions creating more than 7,000 offences that can be enforced by way of penalty notices.⁵¹ Research by the LJF reveals that in NSW a median of 117 Acts were passed by Parliament each year between 1990 and 2009, approximately one Act every three calendar days.⁵²

A recent example is the *National Disability Insurance Scheme Act 2013* (NDIS Act) which creates a new framework for the support of people with disabilities, including a system of reviewing certain decisions made by DisabilityCare Australia which adversely affect people's rights and entitlements under the NDIS Act. These decisions are reviewable under the Act by way of Internal review and then external merits review by the Administrative Appeals Tribunal (AAT). A separate division of the AAT has been established to conduct these reviews. The NDIS Act has over 200 sections and 16 associated statutory rules and operational guidelines, creating a new and complex legal framework around the provision of this support. The complexity is such that navigation of this legal framework will require legal advice and advocacy, particularly given the disadvantaged client group.

⁴⁹ Coumarelos, C, Wei, Z & Zhou, AH 2006, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, Sydney p. 94 – 97
www.lawfoundation.net.au/report/survey2006

⁵⁰ LAW Survey Australia op cit p.184

⁵¹ *Penalty notice*, NSW Law Reform Commission, February 2012 p.5

⁵² Nheu, N & McDonald, H 2010, *By the people, for the people? Community participation in law reform*, Law and Justice Foundation of NSW, Sydney p.136
[www.lawfoundation.net.au/ljf/site/articleIDs/CC42E4B3179ECC48CA2577EB000460AF/\\$file/ByThePeopleForThePeople_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/CC42E4B3179ECC48CA2577EB000460AF/$file/ByThePeopleForThePeople_web.pdf)

What are the consequences of unmet legal need? For example, what are the social and economic impacts arising from problems that are either unresolved or escalate due to lack of access to legal assistance?

Unmet legal need leads to entrenchment in poverty and disadvantage, social and family dislocation and interface with the criminal justice system.

At an individual level, the social and economic impact arising from unresolved legal problems include a reduced standard of living. Adverse consequences arising from problems with a legal dimension include income loss or financial strain (29%), stress related illness (20%), physical ill health (19%), relationship breakdown (10%) and moving home (5%).⁵³

Debt problems have been found to cause a range of adverse impacts including ill health, relationship breakdown and unemployment.⁵⁴ The Law Survey also found that some types of legal problems are more likely to result in adverse consequences:

Family problems stood out as severe problems with a broad range of negative consequences on health, financial and social circumstances. In Australia as a whole, family problems comprised the highest proportion of substantial problems (78%) and had the highest mean number of adverse consequences.⁵⁵

Failure to provide adequate access to justice can lead to a vicious cycle of vulnerability involving health problems, inability or disruption to work, loss of income, non-payment of rent, eviction and homelessness.

The material living standards of the broader community will also be negatively affected due to spill-over effects on labour force participation, underemployment, productivity and investment. There is also the fiscal cost and the opportunity cost of expenditure on 'regrettables' such as corrections, juvenile justice, victims compensation, child protection, health system and other government interventions. In addition, unmet legal need will have negative impact on social capital such as trust, civic engagement, perceptions of safety and equality of opportunity.

The LAW Survey research has shown that people with a disability, single parents, people in disadvantaged housing and the unemployed are particularly vulnerable to civil law problems. Unresolved legal problems can result in financial strain, stress related illnesses, physical ill health and relationship breakdowns.

Due to resource constraints, the provision of civil law services needs to be highly targeted to those communities in most need and to the legal issues that impact most on their lives. Advice and minor assistance is targeted through outreach and targeting certain disadvantaged communities. More intensive legal assistance is focused on areas of law that impact most on those communities.

⁵³ LAW Survey Australia op cit p. xvi

⁵⁴ Pleasence et al. (2007) A helping hand: the impact of debt advice on people's lives, Legal Services Research Centre London as cited in Legal Australia Wide Survey: Legal need in Australia, Law and Justice Foundation of NSW 2012, p.27.

⁵⁵ Law Survey Australia p.xvi

The inability to meet demand in the areas of civil and family law has serious consequences for disadvantaged people as:

- social disadvantage can be a cause, and a consequence, of legal problems
- the existence of a legal problem can trigger further legal problems including criminality, child protection and family violence
- there is a greater vulnerability to substantial legal problems with adverse consequences
- the inability of people to get the legal assistance they need can form patterns of intergenerational behaviour of not seeking assistance at all when faced with a legal problem.

P who was in her late forties attended the Legal Aid Family Law advice clinic. She had separated from her husband two years ago and she was in financial difficulty. Her husband had relied on joint credit cards to make repayments on a business he had purchased from his father, resulting in a \$33,000 debt. P's mother had also refinance her house to put \$60,000 into the business. After the business failed the bank foreclosed on P's and her mother's homes.

To manage the \$50,000 debt, P cashed part of her superannuation early resulting in costly tax implications. Her husband moved his superannuation into a self managed superfund to avoid a claim by her. The stress of these financial difficulties has led to P experiencing mental health issues for which she was hospitalised.

Until she visited the Family Law Advice Clinic, P was unaware that she may have a valid claim for a portion of the husband's superannuation. She was also unaware she could seek orders in respect of the debts of the relationship and have the percentages of liability reassigned. There were also legal avenues available to P's mother which she could investigate as a third party to the property settlement. P was sent to the Civil Law Advice Clinic to get urgent assistance with the Credit Card debt.

Given the finite resources that are available to respond to legal need, are there particular types of civil legal need that are less critical?

Legal Aid NSW submits that this question should be analysed in the context of the level of assistance available for different civil law needs. For example, Legal Aid NSW will provide legal information and advice on most legal topics. Minor assistance is provided to more disadvantaged clients.

More intensive case work assistance is targeted to legal problems that have the biggest impact on people's lives. Priorities are based on: levels of capacity of the client; the consequences if no assistance is provided to individuals, families and the legal system; and the likely effectiveness of the service. For example, Legal Aid NSW does not provide legal aid for matters which can be conducted under conditional costs agreements by private lawyers, such as personal injury.⁵⁶ These are matters for which there is a market solution.

⁵⁶ Civil matters for which grants of legal aid are not available is outlined at www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.26.-the-types-of-matters-for-which-legal-aid-is-not-available

In times of financial constraint, Legal Aid NSW will apply its Availability of Funds test to types of legal matters that are of a lesser priority. This results in legal aid not being available for these types of matters until funds become available.

In some civil matters a grant of legal aid will only be made if the matter raises a complex or novel legal issue and Legal Aid NSW is satisfied that the public interest would be significantly advanced if the applicant was represented.

Legal Aid NSW provides assistance in employment law matters taking into consideration the capacity of clients to take part in these proceedings unassisted and the consequences if no legal assistance is provided.

Legal Aid NSW employment law services target people at risk of long term exclusion from work force who lack capacity to represent themselves. By addressing unfair dismissal, bad references and incorrect reasons for termination, clients have a greater chance of being reinstated or gaining other employment.

Legal Aid NSW assists vulnerable families who are at risk of Community Services placing their children into care. The removal of a child into foster care and the ensuing legal process has a significant social and economic impact on the child, the family unit and the broader community. The Legal Aid NSW Care and Protection service assists vulnerable parents and children at the point of crisis. In addition, the service provides early intervention strategies in conjunction with Community Services to resolve issues as early as possible, while providing a safe outcome for the child.

How many Australian's experience legal need?

How frequently do Australians — including individuals, businesses and other organisations — experience substantial civil legal disputes including in the area of family law? What is the nature of these disputes?

Legal Aid NSW believes the categorisation of legal problems as 'disputes' to be problematic and potentially misleading. The term 'civil legal dispute' carries the implication that there is a 'dispute' between parties; or that an individual knows they have a legal dispute. Particularly for disadvantaged groups, civil or family law disputes are better characterised as problems which involve either the need to negotiate a system, such as for social security, fines or care and protection; or the need for an appropriate resolution to a life event, such as a relationship breakdown, disaster, lack of access to essential services such as housing, or financial hardship.

The research and evidence also indicates that people, particularly disadvantaged people, do not identify problems as having a legal dimension. This in turn has implications on the options people think they have available and the paths they use to resolve these problems. Furthermore, the term 'legal dispute' risks assumptions of a two way process occurring. Disadvantaged people tend to be subject to a legal problem that they have little or no control over and that they find almost impossible to address, rather than being an equal participant in a dispute.

Legal Aid NSW refers the Productivity Commission to the results of the LAW Survey for the incidence of substantial legal problems and the nature of the problems⁵⁷ noting that 55% of the legal problems in Australia as a whole were 'substantial', having a 'severe or moderate impact on everyday life'.⁵⁸

The LAW Survey measures the prevalence of 129 specific types of legal problems which are categorised into 12 problem groups and 27 subgroups.⁵⁹ The high proportion of substantial legal problems (55%) means that adverse consequences are experienced across all problem groups. Legal Aid NSW suggests that the further analysis of the LAW Survey data should be undertaken to identify the most common types of substantial legal problems experienced by disadvantaged groups which had adverse consequences.

It is clear however that the most common areas of unmet legal need are civil law based. Eighty percent of problems experienced by participants related to civil law, the most common being consumer, housing and government issues. Family law issues are reported to have significantly more adverse consequences, including stress related illness (43%) and income loss or financial strain (56.2%).⁶⁰

Family law problems encompass a wide range of matters, from child support and paternity issues, to arrangements for the care of children. There are often acrimonious separations where unresolved property and children's issues have created serious conflict. In addition, there are associated problems such as escalating family violence and AVO applications, airport watchlist and child abduction concerns, urgent recovery orders, orders for injunctions to restrain disposal of property and spousal maintenance applications. Conflict and unresolved disputes within the family cause considerable associated economic and social losses. Parties invariably experience significant financial consequences and the children are the victim when parents are unable to manage the conflict without assistance.

S aged 19 was given a mother's day present by her 25-year-old partner of a half-day spa treatment. She returned to an empty home to find her partner and nine-month old child missing – and the child's belongings gone.

S called the police and was directed to the Family Court. She saw a duty lawyer at 12.30 pm and an application asking for the child's name to be placed on the airport watch list was drafted and filed urgently that day. The matter was listed that afternoon. A successful urgent oral application was made for watch list and recovery orders. The matter was re-listed the following day.

The duty lawyer made enquiries with the Australian Federal Police and International Social Services. The next morning it was confirmed that the father had left with the child for a non-Hague country on a passport that had been fraudulently obtained by a family member. Phone conversations with that family member indicated that she intended to leave Australia to join the father. An urgent application to join that family member was granted and the family member was ordered to be placed on the airport watch list.

The relative was directed to attend court on the following Monday. At court, a telephone

⁵⁷ In addition the NSW Legal Needs Survey in Disadvantaged Areas (2006) provides evidence on the frequency and types of legal problems specifically experienced by people in disadvantaged areas.

⁵⁸ Ibid p.xvi

⁵⁹ Ibid Appendix Table A2.1

⁶⁰ Ibid pp.86-87

number for the father was provided and he was contacted overseas. The duty lawyer conducted negotiations between S, the father and the family member who had attended court. The following Sunday the police recovered the child from an inbound flight at Sydney International Airport. S and the child were reunited.

It is extremely rare to recover a child from a non Hague convention country.

How strong is the evidence that a relatively small number of individuals account for the bulk of civil legal disputes at a given point in time and/or over time? How well does the legal system identify and deal with cases of persistent need?

The LAW Survey provides evidence that those with multiple disadvantages are more vulnerable to substantial and multiple legal problems.⁶¹ As a result of this vulnerability, 9% of respondents accounted for 65% of the legal problems reported.

The association between legal problems and disadvantage arises from more frequent interaction with state services and disparity of resources and authority.⁶² In addition, disadvantaged people have fewer resources and less capacity to avoid or mitigate problems.

As noted in recent Canadian studies:

People living in poverty tend to experience more and different kinds of legal problems with more serious consequences than those with higher incomes. The poor are not just the middle class without money; they tend to be exposed to the sharp edges of the law in a way the middle class generally have not. Studies of civil legal needs have found that poverty has a profound impact on legal needs, and that people living in poverty tend to be 'enveloped by the law'.

People living in poverty are also likely to confront legal issues that threaten very basic needs, for example fighting eviction from public housing that result in homelessness, trying to resolve bureaucratic problems with government benefits that represent the sole source of household income, and defending themselves against state action, by police, immigration officials or child protection agencies.⁶³

It is the experience of Legal Aid NSW that the legal system does not identify or deal well with cases of persistent need. However, Legal Aid NSW has a number of services targeted at clients with multiple and complex needs.

⁶¹ *Concentrating disadvantaged: a working paper on heightened vulnerability to multiple legal problems*, Law and Justice Foundation of NSW, 2013
[www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_24_Concentrating_disadvantage_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_24_Concentrating_disadvantage_FINAL.pdf) Disadvantaged groups included disability, unemployment, single parent, disadvantaged housing indigenous, low education, low income, having a non-English main language and living in a remote or outer regional area.

⁶² *Law and disorders: illness/disability and the experience of everyday problems involving the law*, Justice Issues, Paper 17 September 2013, Law and Justice Foundation of NSW
[www.lawfoundation.net.au/ljf/site/templates/justiceissues/\\$file/JI17_LawAndDisorders_FINAL_web.pdf](http://www.lawfoundation.net.au/ljf/site/templates/justiceissues/$file/JI17_LawAndDisorders_FINAL_web.pdf)

⁶³ The Canadian Bar Association *Underexplored alternatives for the middle class*, February 2013 citing Buckley, M. *Access to Legal Services in Canada: A Discussion Paper*, April 2011, Wexler, S. 'Practicing Law for Poor People' (1970) *Yale Law Journal* 1049 and *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*, 2010

Legal Aid NSW participates in four regional interagency Homelessness projects funded under the National Partnership Agreement on Homelessness.⁶⁴ An evaluation of the role of Legal Aid NSW lawyers in homelessness projects found that the legal services being provided were extremely effective in not only improving outcomes for individual clients of programs but also in increasing the access of legal services to the broader community of homeless and disadvantaged people in each region.⁶⁵

The NSW Premier's Council on Homelessness has identified the particular challenges faced by Aboriginal women leaving custody in obtaining accommodation. Legal Aid NSW is providing a legal service to Aboriginal women in custody, primarily at Silverwater Metropolitan Remand and Reception Centre, to address the legal issues preventing these women from obtaining suitable housing on release.

Legal Aid NSW has been successful in removing former unsatisfactory tenant classifications which prevent disadvantaged people from accessing social housing, through investigation and advocacy. Access to affordable housing has direct implications on the restoration of children and other key indicators to prevent re-offending. The casework provided in this area is informing Housing NSW in its review of its policy on unsatisfactory former tenants.

What are the characteristics of individuals who experience multiple problems and what types of disputes are they typically involved in?

The LAW Survey identifies the following disadvantaged groups as being vulnerable to multiple and substantial legal problems:

- People with a disability
- Aboriginal people
- Unemployed people
- Single parents
- People living in disadvantaged housing
- People living in a remote or outer regional area
- People with a low income
- People with low education levels
- People with English as a second language

In addition, the research suggests that each additional indicator of disadvantage has an additive effect which increases the number and severity of the problems experienced.⁶⁶

⁶⁴ Rural Interagency Homelessness Project for people with complex needs in the Riverina (Wagga Wagga), Community Connections – South Coast (Nowra), North Coast Accommodation Project (Lismore) and Newcastle Assertive Outreach Service (Newcastle).

⁶⁵ *Evaluation of the legal component of the Riverina Homelessness Interagency Project and Reaching Home Newcastle*, Matrix on Board (2012) p.6
www.legalaid.nsw.gov.au/_data/assets/pdf_file/0006/15828/Legal-Aid-NSW-Homelessness-Projects-Final-Dec2012.pdf

⁶⁶ Concentrating disadvantage: a working paper on heightened vulnerability to multiple legal problems, Law and Justice Foundation NSW, 2013 p. 3
[www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_24_Concentrating_disadvantage_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_24_Concentrating_disadvantage_FINAL.pdf)

The homeless and prisoners are additional groups that are particularly vulnerable to multiple and substantial legal problems. This vulnerability is evidenced in the LJF legal need studies of the homeless and prisoners.⁶⁷ These groups were not included in the LAW Survey results because of the survey methodology's reliance on landline access. The LJF acknowledge that the LAW survey under represents these disadvantaged groups.⁶⁸

As discussed previously, disadvantaged people are more vulnerable to multiple or clusters of legal problems. Legal Aid NSW refers the Productivity Commission to the LJF survey data, but notes that the majority of problems experienced by disadvantaged people will be civil and family law and what is described as 'welfare law'. While family law problems are of course not unique to disadvantaged people, family law problems experienced by clients of Legal Aid NSW tend to raise difficult issues including allegations of abuse, parental neglect, drug and alcohol dependencies and incidence of mental illness.

Access to justice for disadvantaged people requires a more resource intensive and integrated service approach. Disadvantaged people with multiple and complex needs are by definition 'socially isolated' or 'hard-to-reach',⁶⁹ due to remote location, language or cultural barriers, disability, homelessness or other personal circumstances.

The legal advice outreach clinics at Migrant Resource Centres by Legal Aid NSW family and civil lawyers is an example of a targeted integrated service approach. More detail of this service model is provided in section 12.

J is a 33 year old indigenous man referred to Legal Aid NSW by Housing NSW after he visited a homeless outreach clinic. J was referred to Legal Aid NSW to discuss the issue of his outstanding fines with the State Debt Recovery Office (SDRO). J had accumulated a large amount of fines over several years. These included fines for riding without a bicycle helmet, driving an unregistered and uninsured car whilst unlicensed.

J met the eligibility criteria for a Work and Development Order (WDO). Legal Aid NSW contacted a WDO approved organisation who agreed to support J's WDO application. Legal Aid assisted J in completing the WDO paperwork and wrote a letter in support of his homelessness status.

J was also referred for assessment and submission of an application for a Social Housing Intensive Support Package under the Riverina/Murray Homelessness Action Plan. J was successful with his application and was able to secure funding for case management of 8 hours per week and the purchase of new furniture. J was placed in accommodation and was able to resume contact with his daughters.

Legal Aid NSW contacted J in relation to the progress of his WDO. J admitted that he had lost his paperwork prior to lodging it with the SDRO. Legal Aid NSW again assisted J with his WDO application. In establishing J's acute financial hardship J disclosed his

⁶⁷ Forell, S, McCarron, E & Schetzer, L 2005, *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney and Grunseit, A, Forell, S & McCarron, E 2008, *Taking justice into custody: the legal needs of prisoners*, Law and Justice Foundation of NSW, Sydney

⁶⁸ LAW Survey p.54

⁶⁹ Forell, S & Gray, A 2009, Outreach legal services to people with complex needs: what works? Justice Issues Paper 12, Law and Justice Foundation of NSW, Sydney p.3

gambling addiction. Legal Aid NSW followed up with J's caseworker in relation to gambling assistance for J.

4. The costs of accessing civil justice

Financial cost

The Commission invites comments on the financial costs of civil dispute resolution and the extent to which these costs dissuade disputants from pursuing resolution. Data are sought — from parties, lawyers, the courts and other institutions — on these financial costs, including the costs of advisory services, alternative dispute resolution and litigation.

Financial costs do dissuade people from pursuing their legal options. However, Legal Aid NSW notes that financial costs are just one of the barriers disadvantage people face in resolving legal problems. As discussed previously in section 3, other barriers include a lack of access to assistance, lack of understanding that a problem has a legal dimension, lack of ability to negotiate a court or tribunal, and lack of understanding of entitlements.

Analysis from the LAW Survey indicates that services such as legal aid have mitigated the impact of cost for those on the lowest incomes.⁷⁰ However this research also indicates that cost still imposes a significant barrier for disadvantaged people as 'the small percentage of people who take no action to resolve severe problems because of cost concerns are characterised by their relative disadvantage'.⁷¹ Furthermore, the findings highlight the difficulty faced by the so called 'working poor' with a 'U'-shaped relationship between income and lawyer use in the case of family problems:⁷² representation is skewed towards the very poor who are eligible for legal aid on the one hand and those who can afford to pay for private lawyers on the other. The working poor fall into the justice gap in between.

The 'U'-shaped relationship between income and lawyer extends to any area of law where legal aid is available for representation. The shape of the 'U' is modified by the broader availability of advice and minor assistance services.

Legal Aid NSW supports the use of Early Dispute Resolution (EDR), Family Dispute Resolution (FDR) and other lower cost alternatives, but notes the importance of having a litigation pathway if the legal problem is unable to be satisfactorily resolved.

A major financial cost of litigation in family law disputes arises from the need for parties to obtain expert evidence. Expert reports are an important way in which Family Courts determine what outcome is in a child's best interest. These reports assess parenting capacity, a child's bonding and attachments and a range of other issues. In some cases a

⁷⁰ What price justice? Income and the use of lawyers, *Updating Justice*, Law and Justice Foundation of NSW, September 2013 p.4

[www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_31_Lawyer_use_and_income_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_31_Lawyer_use_and_income_FINAL.pdf)

⁷¹ Ibid p.4

⁷² Ibid p.4

parent may allege that another parent has a psychiatric illness or has sexually abused a child. The only way for a make a finding on such allegations is through expert evidence.

Arguably the shortage of child and family experts willing to practice in the family law jurisdiction (both psychologists and psychiatrists) has resulted in a market rate in excess of \$5,000 per report. Legal Aid NSW will fund some reports for those who are legally aided and meet guidelines, but due to limitations on funding cannot approve all requests. Many self-represented litigants are unable to afford such reports. Expert reports are often an important tool in resolving matters as courts are persuaded by the recommendations that experts make. Matters that might resolve with the assistance of an expert report will therefore require a judicial determination, or conversely parties are forced to withdraw from proceedings due to a lack of evidence.

What evidence is there that the financial costs of civil dispute resolution are changing? Where in the legal process and/or in which areas of the law are these changes in cost accruing?

Legal Aid NSW notes and supports the increased use of industry based EDR for consumer protection problems, including credit and insurance. Legal Aid NSW has found EDR schemes to be effective in resolving consumer law matters early and effectively.

To what extent are the costs of dispute resolution proportional to the matters at stake? How frequently are parties dissatisfied with their legal expenses and has this been changing over time?

Civil

The Legal Aid NSW Civil Law Division mostly provides assistance in jurisdictions where there is a market failure and the areas of law impact disproportionately on disadvantaged people. Where litigation is required in these areas, a cost benefit analysis is undertaken to ensure the costs are proportional to the matters at stake.

There is often a need for low cost legal assistance for plaintiffs to address the power imbalance arising where defendants have inhouse legal counsel or advocates. The cost of legal services and the risk of cost orders, particularly for the self-represented, discourage some people from accessing the court system. However, lack of awareness of a legal problem or a potential to enforce rights or entitlements, and a lack of access to appropriate legal assistance also heavily contributes people not accessing the court system.⁷³

An example of market failure is in the State jurisdiction for discrimination complaints. It is a no-costs jurisdiction and applicants who have meritorious claims are unlikely to be able to engage a private lawyer. Private practitioners will not act on a speculative basis as they are unable to recover their costs through a cost order and any damage awards are unlikely to cover their costs.

In the Federal jurisdiction for discrimination claims, matters that fail to settle at the Australian Human Rights Commission stage are appealed to the Federal Circuit Court, which

⁷³ An example of a lack of awareness being the barrier is where a person is unaware that they can get redress for a faulty product or service.

is a costs jurisdiction for discrimination matters. However, if a person attempts to run the very complex case self-represented and lose they will have to pay the other side's costs, or abandon the matter.

Similar issues arise in employment matters, both at the Fair Work Commission (FWC) and at the Federal Circuit Court level, where costs do not follow the event, although in the FWC costs can be awarded in some circumstances.

Family

The majority of Legal Aid NSW family law matters are not litigated in Court, but are resolved at the mediation level through FDR, resulting in lower costs for both parties and the court system.

As outlined in section 5, the cost of protracted litigation in the Federal Family Law Courts is beyond the capacity of the average family law litigant. It is the experience of Legal Aid NSW that the costs can be disproportionate to the issues at stake. Where the issues of contention can be narrowed or settled altogether, the costs become more proportional. The subsection on *Usability and simplicity* provides details of the Court Ordered Mediation Program (COMP).

Timeliness and delays

How have particular mechanisms, court practices or processes increased or reduced delays?

The justice system needs mechanisms to limit the size and number of documents in proceedings in order to reduce the costs and complexity of matters. It is the experience of Legal Aid NSW that litigation increasingly requires the preparation and filing of numerous and lengthy documents. Legal Aid NSW is not satisfied there is sufficient value in lengthy pleadings and supporting documents when compared to the resources required to produce them. Furthermore, Legal Aid NSW questions whether such documents facilitate the narrowing of the issues in dispute.

Usability and simplicity

The Commission invites comments and evidence on the 'user friendliness' of the civil dispute resolution system.

Alternative Dispute Resolution such as EDR schemes has increased 'user friendliness' in some jurisdictions. However, participation in ADR still requires a certain level of capacity to effectively participate. In addition, there is often a power imbalance between vulnerable individuals and corporations or government departments. In the ADR context, there are not the same safeguards as there are in a court or tribunal for individuals who lack capacity or who are vulnerable and self-represented.

It is the experience of Legal Aid NSW that FDR lawyer assisted mediations provide a more 'user friendly' mechanism to resolve complex family legal problems. For example, the use of 'shuttle' conferencing techniques or telephone attendance assists victims of family violence to resolve their family issues in a safe environment. Having access to a lawyer to explain the

implications of any agreements assists the drafting of appropriate consent orders on the day of the mediation.

The benefits of EDR and ADR are outlined in sections 7 and 8.

Does the way in which civil laws are drafted contribute to the complexity of the law, and could it usefully be reformed? Do legal practitioners contribute to complexity, and if so how? What, if any, incentives do legal practitioners face to contribute to a more user-friendly system?

Civil

Social security law is an example of an area of law that has become increasingly complex, as governments ensure that benefits are targeted to those most disadvantaged and in need. However, this complexity contributes to a lack of understanding about eligibility for payments, which in turn leads to unnecessary or incorrect determination claims. It is the experience of Legal Aid NSW that people often pursue their social security appeal options because they do not understand why they are not entitled to a payment.

Legal Aid NSW specialist social security lawyers have extensive expertise in social security and family assistance laws. They provide duty advice services at both the Social Security Appeals Tribunal (SSAT) and the AAT. This service is often the first time people receive 'independent' advice about the merits of their appeal. After getting legal advice, clients often withdraw their appeal or obtain the evidence they need to qualify for a payment. These matters can then be resolved without going to a hearing. As the appeals process can be stressful and time consuming, Legal Aid NSW lawyers are committed to resolving legal problems as early as possible and limiting client's exposure to the tribunal process.

Family

Legal Aid NSW notes that both the Family Law Court and Federal Circuit Court rules are complex and that there are different rules, forms and procedures for each jurisdiction. This creates additional difficulties for self-represented litigants and legal practitioners. Further details on these difficulties are outlined in section 5.

Which particular parts of the civil system are unnecessarily complex? Are there leading examples of reducing complexity and promoting transparency? How does complexity impact on parties to a dispute?

Civil

Legal Aid NSW notes the value of the Uniform Civil Procedure Rules (UCPR) in the State jurisdiction and would encourage the consideration of uniform rules of procedure and forms in the Federal jurisdiction.

Legal Aid NSW also notes the complexity of workers compensation legislation. Through incremental amendments since the 1980s, the legislation is so complex it requires a specialist compensation lawyer to interpret it. Legal Aid NSW suggests that worker's compensation legislation would benefit from plain language harmonisation into a single act.

Family

It is the experience of Legal Aid NSW that self-represented litigants in the Family Law system are particularly disadvantaged by the complex court processes. For example, the numerous and complex court forms and appearances hamper a self-represented litigant's ability to resolve their family law problems. In addition, this complexity increases the costs for parties and legal assistance services.

The Family Law Early Intervention Unit (EIU) duty service assists self-represented litigants by providing discrete and unbundled services on the day at Court. Judges regularly send self-represented litigants to the duty service, holding over matters until they receive legal advice which assists them to understand the complex forms and processes.

Which particular mechanisms, processes or court practices have improved the 'user friendliness' of the legal system?

As discussed in the prior question, Legal Aid NSW submits that the growth of ADR including EDR, has improved the 'user friendliness' of the legal system in some jurisdictions but notes that assistance may be required to navigate and effectively participate in these proceedings.

For example, in the child protection jurisdiction, lawyer assisted Dispute Resolution Conferences (DRC) have increased the 'user friendliness' of the system by narrowing the issues and facilitating negotiations with Community Services case workers. It is the experience of Legal Aid NSW that these conferences may be the first opportunity for the family members to express their views and participate in decision making about their children. Legal assistance in DRC is critical as these clients are among the most disadvantaged and lack capacity to effectively negotiate with Community Services.

The Legal Aid NSW Court Ordered Mediation Program (COMP) provides a more 'user friendly' environment to narrow family law issues in dispute. In the COMP scheme parties are diverted by the direction or order of a Judge to participate in mediation before further decisions are made. Many legal issues are resolved at these intervention conferences. COMP currently operates in Parramatta, Sydney and occasionally Dubbo Family Court registries. The service also provides litigation intervention for those litigants who were initially exempted from attempting to resolve their matter by mediation prior to filing. Eighty four percent of COMP participants had been previously exempted from participating in mediation.⁷⁴

Although these matters were previously deemed unsuitable for mediation at the time of filing, of the 172 mediations conducted in 2012-2013, 44% achieved full agreement, saving 129 days of hearing time. A further 44% of mediations achieved partial resolution, saving court time by narrowing the issues still in dispute. Legal Aid NSW estimates that these resolutions via the COMP scheme saved it funding 253 days of hearing. This amounts to a savings of at least \$460,460.⁷⁵ This figure does not include the savings to the Court.

⁷⁴ Percentage of previously exempt participants from the 67 mediations conducted between 1 July 2013 and 30 October 2013.

⁷⁵ Legal Aid NSW fee scale provides a daily rate of \$700 for a solicitor to attend a hearing and a minimum of \$1,120 for counsel's appearance. Often Legal Aid NSW funds more than one party in a matter.

Legal Aid NSW assisted in a Family Lawyer matter which had four parties: the father, mother, paternal aunt and an Independent Children's Lawyer (ICL). Both parents had significant disabilities as they were profoundly deaf and mute and required Auslan interpreters. The Aunt, who had been responsible for the day to day care for the two children, required an Arabic Interpreter. All parties were in receipt of legal aid funding.

The mother had no contact with the boys, following allegations of an assault. A Court Ordered Mediation was held between the parties to resolve the contact issues. By the end of the conference an Interim Agreement was reached whereby the mother gained increasing contact with the boys.

The matter was listed for a final four days of Court hearing but on the first day of the hearing the judicial officer requested that the parties participate in a mediation arranged through the Legal Aid NSW COMP program. As a result of the mediation the Aunt indicated that she was confident that both parents were capable of looking after the boys. The ICL had obtained an Experts Report recommending a shared parenting arrangement. After a five hour mediation agreement was reached, saving 4 days of judicial hearing time and considerable cost to Legal Aid NSW and the court (the interpreter fees alone were estimated to be \$15,000).

The ability for participants to have private meetings with the mediator and the ICL assisted each of the express their concerns.

How should non-financial factors such as psychological and physical stress caused by legal disputes be taken into account when they relate to access to justice issues?

Legal Aid NSW notes the LJF research on health impacts of legal problems.⁷⁶ In addition, extensive research in the United Kingdom has demonstrated the strong causal connection between legal need and health outcomes, the law being considered one of the 'most important social determinants of health'.⁷⁷ In the LAW Survey, adverse consequences arising from problems with a legal dimension included stress related illness (20%) and physical ill health (19%),⁷⁸ in particular for family law problems.⁷⁹

Legal Aid NSW submits that these adverse consequences are exacerbated for the self-represented. For example, clients appealing disability support pension decisions to the AAT or SSAT report to Legal Aid NSW duty lawyers that the process has exacerbated their conditions of anxiety and depression and that if they had been given the advice from Legal Aid at an earlier stage they could have dealt with their problem earlier, and saved themselves significant stress.

⁷⁶ Law and disorders: illness/disability and the experience of everyday problems involving the law, Justice Issues, Paper 17 September 2013, Law and Justice Foundation of NSW [www.lawfoundation.net.au/ljf/site/templates/justiceissues/\\$file/JI17_LawAndDisorders_FINAL_web.pdf](http://www.lawfoundation.net.au/ljf/site/templates/justiceissues/$file/JI17_LawAndDisorders_FINAL_web.pdf)

⁷⁷ Ibid p.3 citing Zuckerman, Sandel, Lawton and Morton 2008 p.161 and Parmet, Smith and Benedict 2012 p.21

⁷⁸ LAW Survey Australia op cit p. xvi

⁷⁹ LAW Survey Australia op cit p. xvi. Family law problems comprised the highest proportion of substantial problems (78%) and had the highest mean number of adverse consequences.

Geographic constraints

How important is face-to-face contact with lawyers or court officers? Does a lack of physical proximity represent a barrier to accessing justice? To what extent can technology overcome geographic barriers?

Importance of face-to-face contact and barriers due to lack of proximity

It is the experience of Legal Aid NSW that face-to-face contact can be fundamental for access to justice, particularly for disadvantaged client groups with complex needs and complex legal problems. The LAW Survey confirms that disadvantaged people with complex legal problems, low literacy and poor communication skills may require intensive face-to-face assistance to resolve their legal problems.⁸⁰ In the experience of Legal Aid NSW, other factors that increase the need for face-to-face assistance include mental illness, homelessness and cultural norms.

Face-to-face outreach services have additional benefits for the host agencies because the relationship builds the capacity of the host agency to spot legal problems and explore options for assistance, something that cannot be achieved using technology such as telephone and internet services. For example, the Legal Aid NSW civil law outreach at the Mt Druitt Aboriginal Medical Service and the family law outreach service at The Shed, a men's suicide prevention service in Mt Druitt, have resulted in health professionals spotting legal problems earlier and making appropriate referrals.

Barriers faced by people in accessing face-to-face legal assistance in regional, rural and remote locations include low levels of car ownership and public transport options⁸¹ and conflict issues. For people in regional, rural and remote areas lack of proximity to the court or tribunal also imposes social and economic costs on parties to proceedings. In the family law jurisdiction, parties who reside substantial distances from court registries are often required to appear in person. Public transport links may necessitate overnight stays in the location of the court registry, an even bigger financial imposition if children are in a party's care. Grants of legal aid do not extend to providing financial assistance for transport and accommodation. Legal Aid NSW lawyers report many occasions where family law clients have withdrawn from participating in proceedings or pursuing court action due to these constraints, particularly Aboriginal clients.

In care and protection matters, the Children's Court conducts frequent mentions and directions hearings and parents without transport can have difficulty attending Court. The absence of a parent in Court is noted and adverse conclusions may be drawn, which can affect the outcome of the matter. Similarly, parents in prison face disadvantages. Whilst Audio Visual Link (AVL) is used, it is the experience of Legal Aid NSW family lawyers that seeking instructions and explaining the court process by AVL is challenging and not optimal. If the system malfunctions the prisoner cannot hear or see the proceedings.

⁸⁰ LAW Survey Australia, op cit p.217

⁸¹ Ibid p.1 referencing Rosier and McDonald 2011.

Technological solutions to overcome lack of proximity barriers

For some people with a legal problem, technology will overcome geographic barriers, particularly where the client has capacity and their legal problem is not complex. Legal Aid NSW has a number of long term and new initiatives utilising technology to increase access to justice and the resolution of legal problems.

Legal Aid NSW is a key stakeholder of LawAccess NSW, a state-wide legal information, referral and advice telephone service.⁸² In 2012-2013, LawAccess NSW answered 201,899 calls and provided 21,603 legal advice sessions. The LawAccess NSW model is highly successful with high levels of client satisfaction.⁸³ Recognised as a world leader in its integrated approach,⁸⁴ LawAccess NSW is a triage service, providing legal information on all areas of law, advice to priority groups, including people in rural and regional areas, and referrals to face-to-face services whenever clients require additional assistance to resolve their legal problems.

The LawAccess NSW model recognises that telephone legal advice is not going to be appropriate for all people with a legal problem, particularly people with complex needs or complex legal problems.⁸⁵ Therefore, referral to face-to-face services for legal advice, duty services and representation is a key part of the success of the model. In 2012-2013 LawAccess NSW made 112,617 referrals to legal assistance services including Legal Aid NSW.

In addition to the telephone service, LawAccess NSW provides access to plain language legal information through LawAccess Online www.lawaccess.nsw.gov.au and LawAssist www.lawaccess.nsw.gov.au/lawassist. LawAssist has practical guides aimed at assisting people with a legal problem who are representing themselves.⁸⁶ With 423,629 visits in 2012-2013, LawAssist is targeted at people with the capacity to self help, while providing pathways to face-to-face legal advice services.

Legal Aid NSW has rolled out legal advice clinics in targeted rural and remote communities using desktop web conferencing technology. After an initial trial in 2012 in partnership with the Aboriginal Legal Service (NSW/ACT) Field Officers, Legal Aid NSW has established a small number of web conference advice clinics in rural and remote NSW. Each clinic is established in partnership with a trusted local community agency, such as a neighbourhood centre. The clinic is provided by a Legal Aid NSW lawyer from their desk in a larger metropolitan and regional centre. Clinics are being established in communities where Legal Aid NSW has no outreach service or a limited presence.⁸⁷ In establishing the web conference clinic program,

⁸² LawAccess NSW is a unique cooperative initiative of Legal Aid NSW, Department of Attorney General and Justice, Law Society of NSW and NSW Bar which commenced in 2001.

⁸³ The 2013 LawAccess NSW Customer Satisfaction Survey indicates an overall satisfaction of 95.2%, with 97.1% stating they would recommend LawAccess NSW to another person. LawAccess NSW customer satisfaction surveys can be access at info.lawaccess.nsw.gov.au/lawaccess/lawaccess.nsf/pages/survey

⁸⁴ Roger Smith International Legal Aid Group Conference June 2013

⁸⁵ LawAccess NSW Policy and Service Standards Manual [info.lawaccess.nsw.gov.au/lawaccess/lawaccess.nsf/files/PolicyStandardsManual2012v1.pdf/\\$FILE/PolicyStandardsManual2012v1.pdf](http://info.lawaccess.nsw.gov.au/lawaccess/lawaccess.nsf/files/PolicyStandardsManual2012v1.pdf/$FILE/PolicyStandardsManual2012v1.pdf)

⁸⁶ LawAssist guides include: debt – small claims, car accidents, Apprehended violence orders, fines, fences, employment rights and recovery of goods.

⁸⁷ Gloucester, Cooma, Cootamundra and Goulburn

Legal Aid NSW has applied key learnings from the research evidence.⁸⁸ For example, one of the 'best practice' elements being applied to the small program is the need to have trusted intermediaries as 'problem noticers' facilitating contact between clients and lawyers, and supporting the client during and after the web conference.

Legal Aid NSW will continue to evaluate the effectiveness of the web conferencing clinics, but notes the geographic limitations of internet speed which affect the quality of the web conference.

Part of the success of Legal Aid NSW technology based initiatives is that these services do not sit in isolation but are part of the network of legal aid services which include face-to-face service delivery and where necessary, provide a pathway to litigation assistance.

Which particular regions, groups or case types face geographic constraints to accessing the justice system? What are the costs to individuals and the community as a result of geographic barriers? Which particular mechanisms or jurisdictions have been effective at dealing with these barriers?

Legal Aid NSW submits that anyone outside metropolitan Sydney⁸⁹ faces geographic constraints in accessing the justice system. These constraints increase the further people live from the capital city and major regional centres in NSW. Crucially, LJF research has found that there are 19 local government areas (LGAs) in NSW without a single practising lawyer and a number of LGAs with only one or two lawyers.⁹⁰ These LGAs are characterised by substantial levels of socio-economic disadvantage, declining populations and high levels of aged and Aboriginal people. The majority of LGAs without a practising lawyer are located in outer regional, remote or very remote areas of NSW. There are only 15 practising lawyers across the remote and very remote areas of NSW.⁹¹

In addition to the social and economic costs outlined in section 3, people in regional, rural and remote NSW experience particular access to justice issues. Research by the LJF has shown that the overall use of legal services decreases with remoteness, along with the use of self help strategies.⁹² Analysis of the LAW Survey data reveals 10.6% of problems resulted in the use of legal advisors in very remote areas compared with 17.8% of problems in inner regional areas.

⁸⁸ Forell, S., Laufer, M. and Digusto, E. 2011, *Legal assistance by videoconferencing: what is known?* Justice Issues Paper 15, Law and Justice Foundation of NSW, Sydney
[www.lawfoundation.net.au/ljf/site/articleIDs/69EBF819BDD1BB8BCA25766A0082208C/\\$file/JI12_Complex_Needs_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/69EBF819BDD1BB8BCA25766A0082208C/$file/JI12_Complex_Needs_web.pdf)

⁸⁹ Legal Aid NSW notes that within metropolitan Sydney there will be communities experiencing geographic constraints due to the lack of public transport. For example, the older large social housing estates in South West and Western Sydney.

⁹⁰ *Recruitment and retention of lawyers in regional, rural and remote New South Wales*, Law and Justice Foundation of NSW, 2013 update.

⁹¹ Ibid

⁹² Awareness of legal services and responses to legal problems in remote Australia, Law and Justice Foundation of NSW, *Updating justice* No. 26 July 2013
[www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/\\$file/UJ_26_Awareness_and_strategy_in_remote_areas_FINAL.pdf](http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_26_Awareness_and_strategy_in_remote_areas_FINAL.pdf)

LJF research also suggests that finding a local lawyer with the right skills who is prepared to undertake legal aid work, particularly in the areas of care and protection matters and civil and family law, is more difficult in areas with fewer lawyers.⁹³

People living in regional and rural areas can suffer additional costs arising from the professional conduct conflict of interest rules. A recent research project undertaken by Deakin University School of Law⁹⁴ explored whether regional communities are disadvantaged in their administration of law, compared with their metropolitan counterparts. Using the results of 62 interviews and 117 survey responses, one of the key findings of the research was that 69% of regional lawyers surveyed regarded the potential for 'conflict of interest' as an issue which adversely impacted on their ability to provide services to regional clients.

The relatively uniform conflict of interest rules across Australia mean that if a legal firm or legal assistance service has given any form of legal assistance to a person in the same or a related matter then it cannot provide legal assistance to another party to the dispute.

Conflict of interest case law is derived exclusively from litigation experience. In turn, it is this case law that has informed the development of the conflict rules. Consideration of client conflict is focused on traditional legal services extending over a substantial period of time. Where a lawyer is providing a one-off advice or duty service a different type of solicitor/client relationship is created, in that the retainer is very limited and the client has no reasonable expectation that the relationship is ongoing. There is also no risk of confidential information being disclosed during such limited retainers.

Public legal assistance services such as legal aid commissions, the ALS and CLCs are often prevented from providing much needed legal advice services to disadvantaged clients by an approach to conflict that is appropriate for case work but is unnecessarily restrictive for discrete legal services. As indicated by the Deakin University research, private practitioners are also affected in their ability to provide legal services due to the present form of the conflict of interest rules.

Legal Aid NSW has made submissions to the Law Council of Australia and the Law Society of NSW that the professional conduct rules should include a supplementary rule which recognises the limited solicitor/client relationship that arises in the provision of discrete legal services. The rule should provide that a lawyer can provide a discrete legal service unless the lawyer has actual knowledge of confidential information that could rise to a conflict. Such a rule would be consistent with current law. It would also be consistent with international approaches to limited legal representation and conflict of interest that have been in place in Canadian provinces and various states of the United-States for some time.

Legal Aid NSW submits that such a supplementary rule would greatly assist in reducing the social and economic costs that arise from people being 'conflicted out' from receiving discrete legal assistance service. Legal Aid NSW believes that support from the Productivity Commission for a supplementary rule would assist in progressing this reform.

⁹³ *Recruitment and retention of lawyers in regional, rural and remote New South Wales*, Law and Justice Foundation of NSW, 2013 update.

⁹⁴ Coverdale, R., *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria*, Deakin University Centre for Rural and Regional Law and Justice, July 2011.

Mechanisms effectively dealing with barriers

Legal Aid NSW has a number of mechanisms to address geographical barriers. These include its partnership with LawAccess NSW, outreach services, targeted projects, the locally based Cooperative Legal Service Delivery Program (CLSD) and the Regional Outreach Clinic Program (ROCP).

Outreach services

It is in response to the need for face-to-face legal assistance that Legal Aid NSW provides extensive outreach services. Outreach services have been shown to effectively reach people with complex needs who have not sought assistance before or who would have otherwise not sought legal assistance.⁹⁵ In 2012-2013, Legal Aid NSW provided 12,781 advice services through outreach.

Outreach locations and host agencies are selected based on legal need,⁹⁶ existing use by targeted client group and accessibility. Outreach service locations include homeless services, Aboriginal medical services, Aboriginal community organisations, Migrant Resource Centres, Neighbourhood Centres, Settlement Services, Centrelink, courts and correctional facilities.⁹⁷

An evaluation of the role of legal aid lawyers in homelessness projects found that the legal services being provided were extremely effective in not only improving outcomes for individual clients of programs but also in increasing the access of legal services by the broader community of homeless and disadvantaged people in each region.⁹⁸

Legal Aid NSW notes that some jurisdictions enable remote access to justice. For example, the weekly outreach advice services provided at the AAT and SSAT in social security matters result in all applicants to these tribunals being able to access legal advice, no matter where they live in NSW. The lawyers attend the tribunals and have access to the tribunal papers before advising the client. Legal Aid NSW lawyers will phone clients who are not able to physically attend the tribunal.

⁹⁵ Outreach legal services to people with complex needs: what works, Law and Justice Foundation of NSW, *Justice Issues* Paper 12 October 2009, [www.lawfoundation.net.au/ljf/site/articleIDs/69EBF819BDD1BB8BCA25766A0082208C/\\$file/JI12_Complex_Needs_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/69EBF819BDD1BB8BCA25766A0082208C/$file/JI12_Complex_Needs_web.pdf)

⁹⁶ In addition to analysing express and unmet legal need, Legal Aid NSW staff use the Find a legal aid advice service, which now includes Community Legal Centre outreach services.

⁹⁷ One third of Legal Aid NSW outreach clinics are in community centres, 16% in Aboriginal services and 25% in courts and tribunals.

⁹⁸ *Evaluation of the legal component of the Riverina Homelessness Interagency Project and Reaching Home Newcastle*, Matrix on Board (2012) p.6
www.legalaid.nsw.gov.au/_data/assets/pdf_file/0006/15828/Legal-Aid-NSW-Homelessness-Projects-Final-Dec2012.pdf

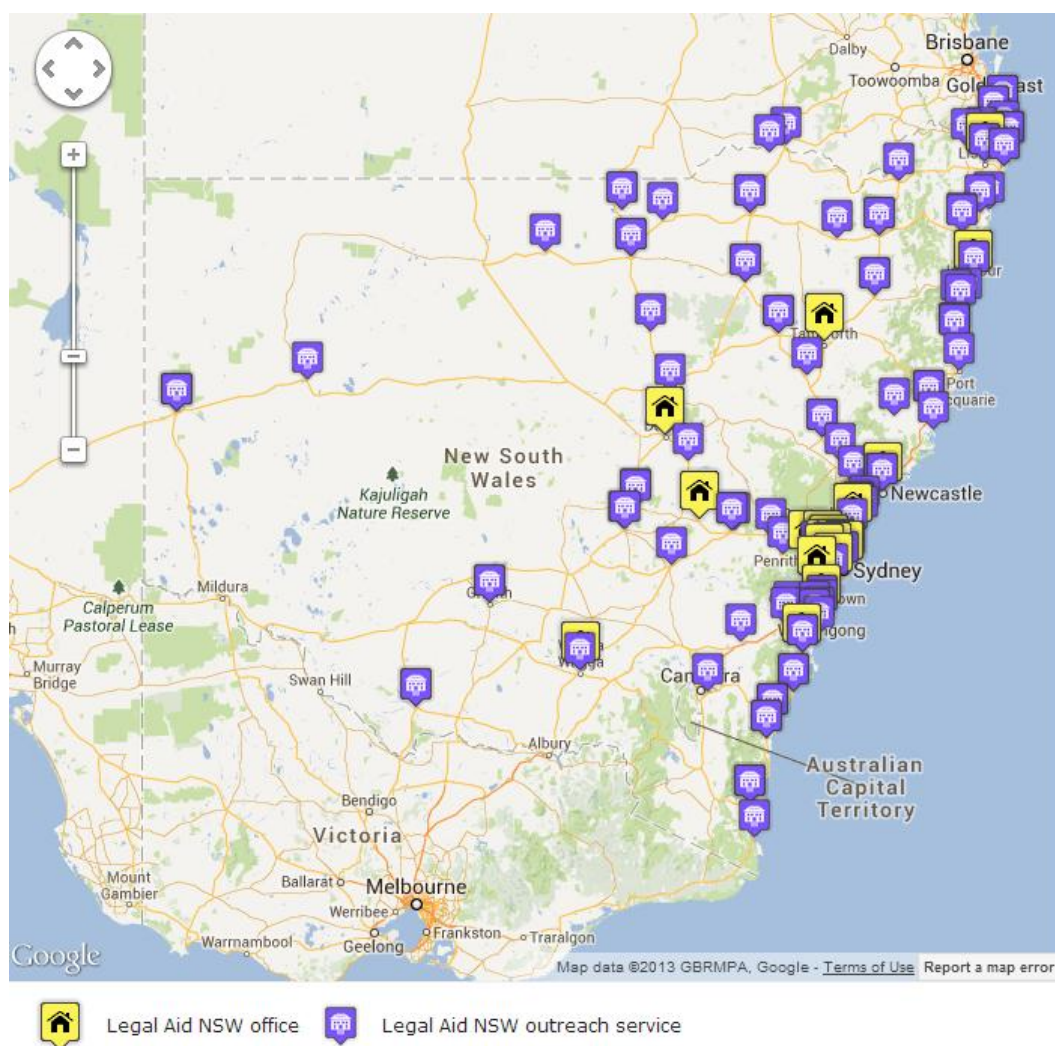


Figure 7: Map of Legal Aid NSW regional offices and outreach locations

Legal Aid NSW coordinates its outreach program through its Outreach Network. Using the research from the LJF it has developed Best Practice Principles for Legal Aid NSW Outreach Service.⁹⁹ A recent evaluation of Legal Aid NSW outreach by the Law and Justice Foundation of NSW (LJF) provides a statistical overview of outreach services, including reach of this service model into disadvantaged groups.¹⁰⁰

⁹⁹ The Best Practice Legal Aid NSW Outreach Services are: *Planned* in response to evidence of need; *Collaborative* across Legal Aid practice areas, and with external legal and community partners; *Holistic*, recognising that clients often have complex and interrelated legal and non legal issues and face significant barriers in accessing legal assistance; *Consistent* in delivery; *Sustainable*, leaving follow up and referral options behind for when we are not on the ground; and *Evaluated* to ensure the outreach is achieving its aims and complying with best practice.

¹⁰⁰ Review of Legal Aid NSW outreach legal services - Stage 1 report Statistical overview of services 2010-2012, Law and Justice Foundation of NSW, 2013
[www.lawfoundation.net.au/ljf/site/articleIDs/3495F5A93BBB91BDCA257BD000143795/\\$file/Review_of_LegalAidNSW_outreach_Stage1_FINAL_Web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/3495F5A93BBB91BDCA257BD000143795/$file/Review_of_LegalAidNSW_outreach_Stage1_FINAL_Web.pdf) The Evaluation found high rates of assistance provided in the Far West and Orana, Riverina, Coffs-Harbour/Grafton and Richmond Tweed regions, in particular to clients living in Wilcannia, Walgett, Menindee, Lightning Ridge, Urana, Brewarrina, Myall Park and Yenda

Targeting communities with high unmet legal need

In addition to regular family and civil law outreach services, Legal Aid NSW targets communities with high levels of unmet legal need. Examples of Legal Aid NSW Civil Law Division mechanisms to counter the barriers arising from geographic isolation include Fine Days, disaster recovery and mass redundancies assistance and the targeting of consumer issues in remote Aboriginal communities.

The Legal Aid NSW Work and Development Order (WDO) Service has used State Debt Recovery Office (SDRO) data to target areas of high levels of fines debt and conduct 'Fines Days'. An intensive fines outreach campaign was undertaken, which included six road trips to regional and remote NSW.¹⁰¹ The Outreach Fines Campaign also conducted 21 outreach clinics and assisted 307 clients to resolve their unpaid fines and other legal problems. In 2012-2013 over \$7.5 million in debt was cleared by the scheme with a cumulative total of \$29 million of outstanding fines being managed since the scheme commenced. There are now WDOs being provided in over 1,000 locations across NSW.

Legal Aid NSW has extensive experience in responding to disaster events, providing an advice and casework response to floods and fire across NSW.¹⁰² Legal Aid NSW is the key legal services provider at all NSW Government Disaster Recovery Centres.

Legal Aid NSW has the infrastructure and expertise to respond quickly to disasters. Participation in recovery centres and coordination with other service providers enables assistance to people who are not aware that their problems have a legal dimension. This assistance is vital for clients whose homes have been destroyed and are potentially homeless. Services include assisting clients in relation to insurance claims, securing hardship variations to mortgage repayments and replacing important documents such as birth certificates and title deeds. Legal Aid NSW assists clients to rebuild their lives and for these people takes away some of the stress involved in dealing with these legal issues after a traumatic event.

Legal Aid NSW also identifies systemic issues that arise following natural disasters. For example, in assisting with the Queensland Floods through casework and policy responses Legal Aid NSW was able to identify and address systemic issues in insurer practices. As a result, Legal Aid NSW was able to assist a large number of affected clients with the same issue and to successfully advocate for reforms to insurance policies.

Targeted projects focusing on consumer issues in remote indigenous communities are another example of mechanisms to address the barriers that arise from geographic constraints. Legal Aid NSW works closely with the Australian Securities and Investments Commission (ASIC), the Office of Fair Trading and Aboriginal leaders to identify remote vulnerable communities which are being targeted by unscrupulous businesses or scams.

¹⁰¹ The road trips included towns with very high levels of social disadvantage such as Wilcannia, Menindee, Walgett, Bourke and Kempsey.

¹⁰² Western Sydney Hail (2007), Goulburn storm (2007), Central Coast & Newcastle floods (2007), North Coast floods (2008), Dubbo floods (2009), North Coast floods (2009), Central West Floods (2009), Riverina floods (2010), Queensland floods (2011), Moree floods (2012), Riverina floods (2012), Bankstown apartment fire (2012), Coonabarabran bushfire (2013), Grafton floods (2013), Mulwala tornado (2013) and NSW Fires (2013).

These projects aim both to warn the community and prevent economic loss, and to build the capacity of the community to identify unlawful business practices in the future.

Cooperative Legal Service Delivery Program (CLSD)

The CLSD Program is a regionally-based approach to legal service delivery that aims to improve access to legal services in regional areas of NSW. It does this by building cooperative networks between local agencies.¹⁰³ The recent evaluation of the CLSD program found participants from 171 different service types attended CLSD meetings.¹⁰⁴

In 2012, the CLSD Program expanded to a further two regions on the mid north coast. There are now 11 CLSD partnerships across regional NSW.

Each CLSD partnership has a Regional Coordinator based at a local organisation that provides support for the partnerships. CLSD partners work collaboratively on projects that respond to locally identified, emerging and unmet legal needs. Initiatives undertaken under the auspices of CLSD partnerships typically include community legal education, workshops, training and outreach advice clinics. The work of CLSD partnerships is informed by strategic planning workshops which use local and empirical evidence of disadvantage and legal need to determine service priorities set out in regional Action Plans.

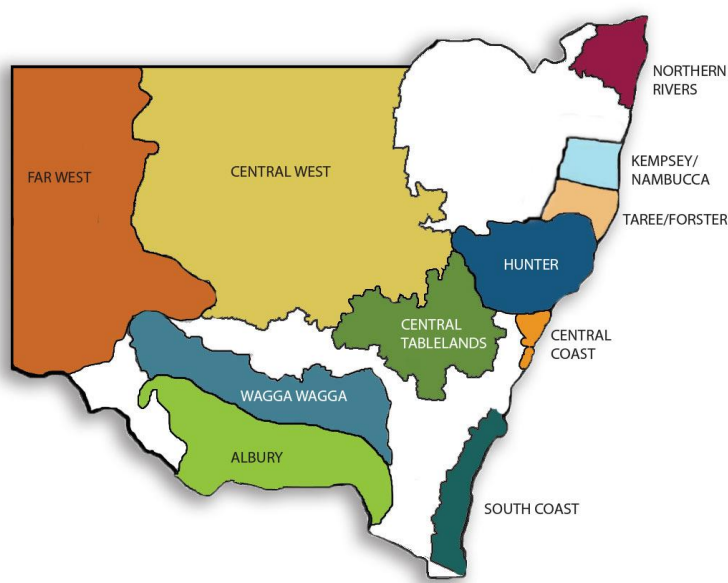


Figure 8: CLSD regions

The CLSD partnerships provide a good opportunity for external agencies to consult on regionally based issues, views which may not otherwise be heard. CLSD partners can have direct input into the impact of legislation and reforms on their disadvantaged clients in

¹⁰³ Networks typically include Legal Aid NSW regional offices, Community Legal Centres, the Aboriginal Legal Service (NSW/ACT) Ltd, Aboriginal Programs including Aboriginal Community Justice Groups and Circle Sentencing, LawAccess NSW, Local Courts, tenancy, family violence, youth, disability and financial counselling services, local community, neighbourhood and settlement services as well as pro bono legal services, government departments, health services and regional Legal Information Access Centres through local libraries.

¹⁰⁴ www.legalaid.nsw.gov.au/__data/assets/pdf_file/0012/15240/Evaluation-CLSD-Final-Report-August-2012.pdf

regional and remote NSW. The model also enables services to work closely in their planning and delivery of outreach services across regional NSW.

Regional Outreach Clinic Program (ROCP)

The recently evaluated ROCP aims to improve access to legal assistance in rural and remote areas of NSW by funding selected private law firms and CLCs to provide regular legal advice clinics. Outreach clinic locations are selected on the basis of high socio-economic disadvantage and relative lack of access to free legal services.¹⁰⁵ Providers are selected through a competitive expression of interest process.

Clinics are generally hosted in Local Courts or community agencies. Over time, the ROCP clinics have been working collaboratively with Legal Aid NSW and CLC outreach services to provide more regular clinics covering broader areas of expertise.

In 2012-2013, a total of 687 advice and minor assistance services were provided through the ROCP by CLCs and private practitioners, with almost 21.7% of the services provided to Aboriginal people.

In addition to financial costs, timeliness, complexity and geographic constraints, what other issues affect accessibility?

The capacity of disadvantaged clients to address legal problems affects accessibility and access to justice. As outlined in section 7, a key challenge is a general lack of awareness of the legal dimension of everyday problems and potential legal remedies.

For example social security recipients are often not aware that their 'Centrelink problem' has a legal dimension and is governed by detailed legislation. Their assumption is that a particular Centrelink officer has 'got it in for them' until they are made aware of the complex legislation, policy and procedures surrounding their issue.

Similarly, single parents who have had their Centrelink parenting payment reduced because the father of the child denies paternity are usually unaware of their legal options. Without legal advice and a court order for a DNA test, single parents are unable to access their full parenting payments.

5. Is unmet need concentrated among particular groups?

What groups are particularly disadvantaged in accessing civil justice and what is the nature of this disadvantage?

The LAW Survey identifies the following disadvantaged groups as being particularly vulnerable to multiple and substantial legal problems:

¹⁰⁵ ROCP clinics are located at Bega, Bathurst, Boggabilla, Brewarrina, Dareton, Lightning Ridge, Taree, Tenterfield, Moree, Bowraville, Lithgow, Orange, Macksville, Nambucca Heads, Toomelah and Wentworth. Legal Aid NSW undertakes a systemic review of ROCP locations to ensure they are appropriately targeted.

- People with a disability
- Aboriginal people
- Unemployed people
- Single parents
- People living in disadvantaged housing
- People living in a remote or outer regional area
- People with a low income
- People with low education levels
- People with English as a second language

The homeless and prisoners are additional groups that are particularly vulnerable to multiple and substantial legal problems. This vulnerability is evidenced in the LJF legal need studies of the homeless and prisoners.¹⁰⁶ These groups were not included the LAW Survey results because of the survey methodology's reliance on landline telephone access. The LJF acknowledge that the LAW survey under represents these disadvantaged groups.¹⁰⁷

Legal Aid NSW clients include children, older persons, Aboriginal people, prisoners, the homeless, people with a cognitive impairment, mental illness or drug/alcohol dependency, people with a sight or hearing impairment and people from non English speaking backgrounds. Clients often have multiple characteristics of disadvantage and clusters of legal problems. The availability of resources limits the level of legal assistance that can be provided to clients whose problems may be entrenched through generations of social exclusion and disadvantage.

The Legal Aid NSW family and civil law grants for casework for dispute resolution and litigation reflect the LJF research on legal need. For example in 2012-2013, 66% of legal aid grant recipients were on a Centrelink benefit, 55% were sole parents, 14% were Aboriginal and 8% were born in a non English speaking country.

Legal Aid NSW refers the Productivity Commission to the LJF Access to justice and legal needs project which outlines both the general nature of disadvantage and the specific and systemic nature of disadvantaged experienced by particular groups such as the homeless, older people, prisoners and people with a mental illness.¹⁰⁸

¹⁰⁶ Forell, S, McCarron, E & Schetzer, L. 2005, *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney and Grunseit, A, Forell, S & McCarron, E 2008, *Taking justice into custody: the legal needs of prisoners*, Law and Justice Foundation of NSW, Sydney

¹⁰⁷ LAW Survey p.54

¹⁰⁸ Ellison, S, Schetzer, L, Mullins, Perry, J & Wong, K 2004, *The legal needs of older people in NSW*, Law and Justice Foundation of NSW, Sydney; Forell, S, McCarron, E & Schetzer, L 2005, *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney; Karras, M, McCarron, E, Gray, A & Ardasinski, S 2006, *On the edge of justice: the legal needs of people with a mental illness in NSW*, Law and Justice Foundation of NSW, Sydney; Grunseit, A, Forell, S & McCarron, E 2008, *Taking justice into custody: the legal needs of prisoners*, Law and Justice Foundation of NSW, Sydney; Gray, A., Forell, S & Clarke, S 2009, *Cognitive impairment, legal need and access to justice*, Justice Issues Paper 10, Law and Justice Foundation of NSW, Sydney; Clarke, S, Forell, S & McCarron, E 2008, *Fine but not fair: fines and disadvantage*, Justice Issues Paper 3, Law and Justice Foundation of NSW, Sydney; and Schetzer, L, Mullins, J & Buonamano, R 2003, *Access to*

The nature of disadvantage experienced by vulnerable groups must be considered in the context that decisions made about whether or not to seek legal assistance are not necessarily rational ones. This is particularly the case with family law problems where the issues can be emotionally charged and decisions based on emotion.

General barriers¹⁰⁹ faced by vulnerable groups include a lack of:

- Knowledge that their everyday problems have a legal dimension and a legal resolution
- Understanding of rights and responsibilities
- Awareness of avenues to pursue their legal issue including legal assistance services
- Capacity to take effective action or self help, including seeking advice
- a Stable address affecting the ability to receive correspondence
- Communication skills (including language and educational barriers) to navigate legal processes and complexities of the law
- Resources to pursue legal option if free legal assistance is unavailable

On a personal level people can have more basic priorities than resolving their legal problems. For example, for people who are homeless or facing family violence their primary concern is where they are going to sleep. Research from the LJF also demonstrates disadvantage in accessing civil justice can also arise from people: feeling overwhelmed by their legal problems; being reluctant to complicate issues; feeling intimidated by the legal system; accepting legal problems as the norm; or having negative experiences and perceptions of legal processes.¹¹⁰ These barriers can result in people doing nothing when faced with a legal problem or ignoring the problem until there is a crisis, which can result in the escalation of legal problems.

Legal Aid NSW has used the research on legal need and barriers faced by disadvantaged groups in its planning and targeted delivery of legal assistance services and to develop creative and innovative services models to assist people to address their legal problems. Some examples include responding to the reports on the legal needs of Older people (2004);¹¹¹ Homeless people (2005);¹¹² People with a mental illness (2006);¹¹³ Prisoners (2008);¹¹⁴ and Outreach programs for people with complex needs (2009),¹¹⁵ by developing a

justice & legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Background paper, Law and Justice Foundation of NSW, Sydney, 2002

¹⁰⁹ Schetzer, L, Mullins, J & Buonamano, R 2003, Access to justice & legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Background paper. Law and Justice Foundation of NSW, Sydney, 2002 p.16 ,www.lawfoundation.net.au/report/background

¹¹⁰ Forell, S, McCarron, E & Schetzer, L 2005, *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney p.114-135
[www.lawfoundation.net.au/ljf/site/articleIDs/46AFCFE76A8314F8CA25707500815B9F/\\$file/no_home_no_justice.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/46AFCFE76A8314F8CA25707500815B9F/$file/no_home_no_justice.pdf)

¹¹¹ Ellison, S, Schetzer, L, Mullins, Perry, J & Wong, K 2004, *The legal needs of older people in NSW*, Law and Justice Foundation of NSW, Sydney

¹¹² Forell, S, McCarron, E & Schetzer, L 2005, *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney

¹¹³ Karras, M, McCarron, E, Gray, A & Ardasinski, S 2006, *On the edge of justice: the legal needs of people with a mental illness in NSW*, Law and Justice Foundation of NSW, Sydney

¹¹⁴ Grunseit, A, Forell, S & McCarron, E 2008, *Taking justice into custody: the legal needs of prisoners*, Law and Justice Foundation of NSW, Sydney

number of Legal Aid NSW programs including the Older Persons' Legal and Education Program, Homeless Outreach Clinic, NLAF legal needs of prisoners working group, 'Back on Track' Community Legal Education for prisoners and the NLAF Prisoners Forum and the Legal Aid NSW Outreach program. The *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas (2006)* underpinned the expansion of the Cooperative Legal Service Delivery (CLSD) Program and the coordination of legal and non-legal services in CLSD regions.

In addition to using the LJF Research, Legal Aid NSW has also commissioned research into the *Family and Civil law needs of Aboriginal people in NSW (2008)* to assist in the delivery of services to Aboriginal clients.

How can disadvantage in accessing justice be meaningfully measured? What data and information is available on the extent of disadvantage faced by particular groups?

Legal Aid NSW suggests that disadvantage in accessing justice can be meaningfully linked to other indicators of disadvantage. Legal Aid NSW notes the recent Productivity Commission Staff Working Paper on deep and persistent disadvantage.¹¹⁶

In addition, Legal Aid NSW refers the Productivity Commission to the groups identified in the LAW Survey as being vulnerable to multiple and substantial legal problems discussed earlier in this section.

Legal Aid NSW uses indicators of disadvantage to effectively target those most disadvantaged in accessing justice. For example, each CLSD region conducts an annual planning session to ensure CLSD projects and initiatives target the highest areas of unmet legal need. As part of the planning process a regional profile is developed for each region. Taking a 'place based' approach, the profile includes the LJF identified disadvantaged groups with high prevalence of legal need, regional priorities under the NSW 2021 Regional Action Plan, Australian Bureau of Statistics (ABS) Census Data including Socio-Economic Indexes for Areas (SEIFA) maps, LJF Data Digest express legal need data, Legal Aid NSW and LawAccess data, other data from the Bureau of Crime Statistics and Research (BOCSAR) and SDRO and legal needs identified by local services.

Following analysis of the regional profile data the Central Tablelands CLSD have for example, identified Glenroi and Kelso as priority areas for delivering targeted joint service outreach¹¹⁷ and addressing the legal need in these highly disadvantaged communities.

¹¹⁵ Forell, S & Gray, A 2009, Outreach legal services to people with complex needs: what works? Justice Issues Paper 12, Law and Justice Foundation of NSW, Sydney

¹¹⁶ *Deep and Persistent Disadvantage in Australia: Productivity Commission Staff Working Paper*, July 2013

¹¹⁷ Outreach services provided jointly by Legal Aid NSW, Aboriginal Legal Service (ALS) and Community Legal Centres (CLCs)

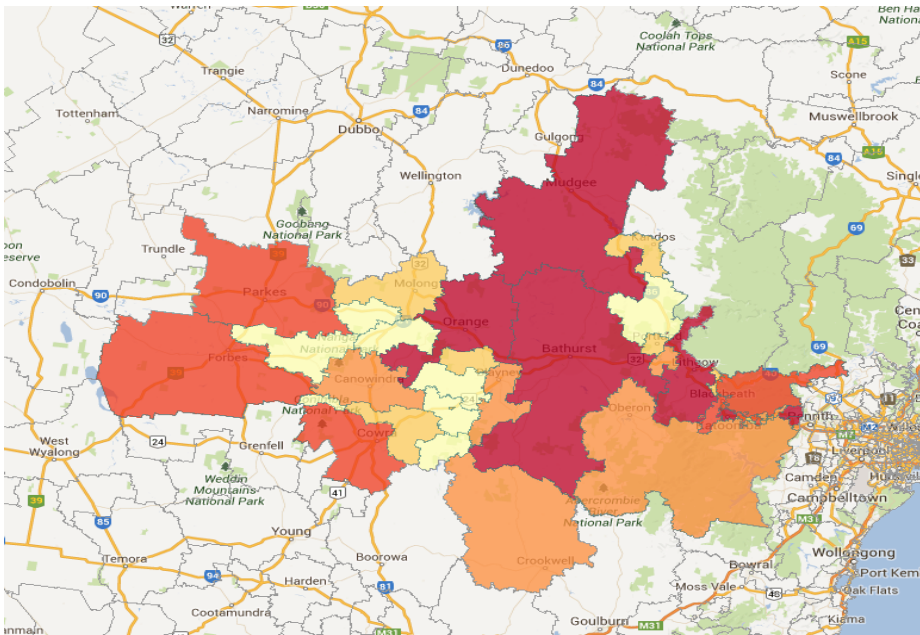


Figure 9: Central Tablelands LJJ Data Digest express legal need¹¹⁸

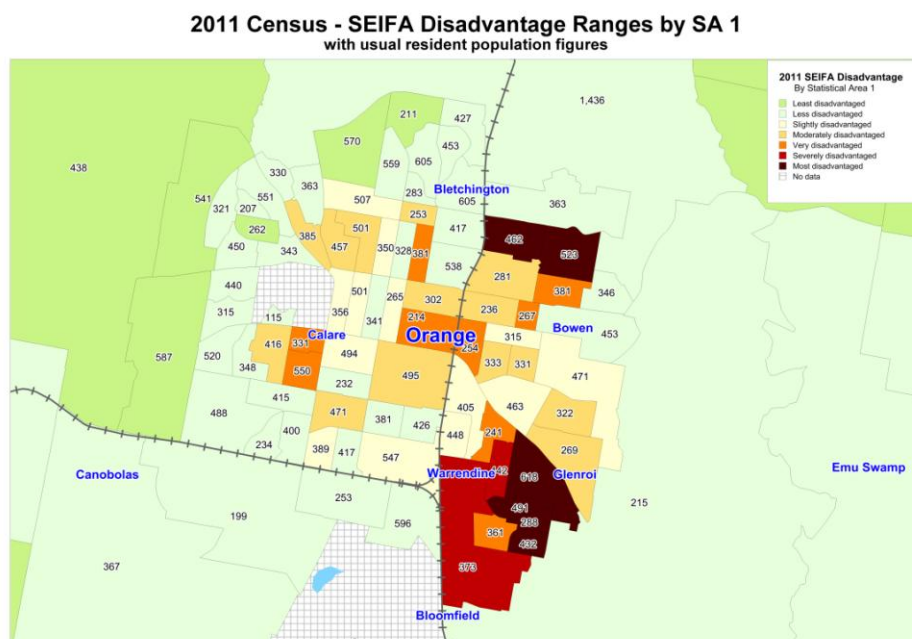


Figure 10: Orange SEIFA data

Another example of successfully using existing indicators of disadvantage in conjunction with legal need to target service delivery is the WDO Service. In planning the priority locations for the WDO service, Legal Aid NSW analysed aggregated data from the SDRO and ABS collated by the Department of Attorney General and Justice (DAGJ), which evidenced the strongest areas of need.

¹¹⁸ The Data Digest contains service data from Legal Aid NSW, LawAccess NSW and NSW CLCs.

Work Development Order Scheme - Location for Approved Organisations
Identifying target areas for WDO Scheme promotion, considering number of SDRO clients, total SDRO debt & socio-economic disadvantage

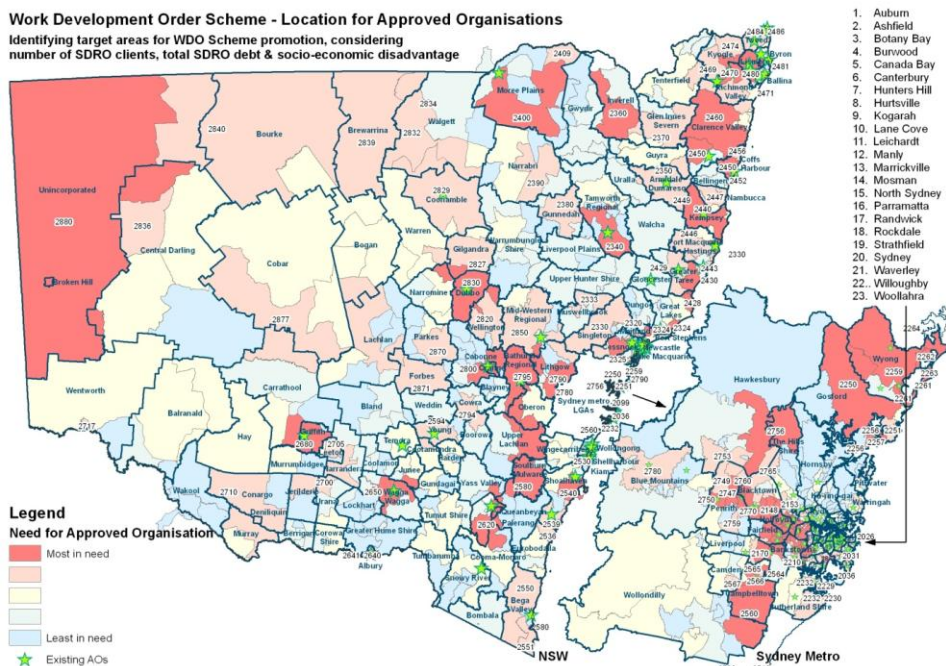


Figure 11: Target areas for WDO Service

WDO Service activities continue to be evidence based. Expansion priorities are determined by mapping undertaken by DAGJ that takes into account fines debt by postcode data, current numbers of approved WDO sponsors, SEIFA maps, and more recently, remoteness.¹¹⁹ Since the introduction of the service, the number of WDO sponsor organisations has increased by 428%.

Fines days, fines clinics and other innovative outreach strategies are used to assist people in rural, regional and remote communities, and where appropriate, link them with the WDO Scheme. Most outreach days are delivered in Aboriginal communities or in areas with high Aboriginal populations.

As outlined in section 12, Legal Aid NSW has undertaken research in conjunction with Professor Saunders and the Social Policy Research Centre (SPRC) to identify indicators of social disadvantage. The research examined the extent of social exclusion among applicants for grants of legal aid. Legal Aid NSW intends to pilot a new eligibility test in employment law matters based on indicators of social disadvantage.

¹¹⁹ In its first year of operation, the WDO Service concentrated activities on the South Coast, Central West, Mid North Coast and South West Sydney. Further expansion and support work has now commenced in the Far West, North West, North East, Southern Tablelands, Western Sydney and the inner city.

Self-represented litigants

Why do individuals or organisations choose to represent themselves in courts? What has driven the apparent growth in SRLs? What data are available on the numbers of SRLs and the reasons for self-representation?

Research consistently shows that the percentage of self-represented litigants who choose to represent themselves, as opposed to being ineligible for legal aid or unable to afford representation, is very low.¹²⁰

Research conducted in 2003 examined the relationship between the limited availability of legal aid funds for family law matters and the phenomenon of self-represented litigants in the Family Court.¹²¹ The study found that around half of self-represented litigants had applied for legal aid and of these 25% were rejected on the basis of means assessment.

Significantly the study found that the majority of self-represented litigants (75%) who had not applied for legal aid, had been told, or had considered, that they were ineligible on the basis of means.¹²²

The data suggests that the level at which the means test is currently set does not accurately reflect the level at which people can and cannot afford to pay for their own lawyer, but rather creates a group of people who are not eligible for legal aid but who are unable to afford private representation. These people become self-representing.¹²³

The contraction of the availability of legal aid due to reduced funding is reflected in the increasingly restrictive means tests in real terms and policy restrictions. The resulting justice gap has significantly contributed to the growth of self representation.

The Family Court of Australia 2011-2012 Annual Report indicates that for 27% of litigants in finalised cases, only one or neither party had representation; 32% of litigants in trials had only one or neither party with representation;¹²⁴ and 31% of family law final applications finalised in the Federal Magistrates Court of Australia, now the Federal Circuit Court of Australia, during 2011-2012, had only one or neither party with representation.¹²⁵

The cost of representation is outside the reach of a growing proportion of the population. The Commonwealth Attorney-General's Department extrapolated cost information from a 1997/98 survey to provide 2007/08 data on the basis of an increase in cost consistent with the wage price index (WPI) over the same period.¹²⁶ extrapolated figures for the cost of

¹²⁰ A Canadian study found 10% of self-represented participants choose to represent themselves.

¹²¹ Hunter, R., Giddings, J., & Chrzanowski, A. (2003) *Legal aid and self-representation in the Family Court of Australia*, Socio-Legal Research Centre, Griffith University.

¹²² Hunter, R., Giddings, J., & Chrzanowski, A. (2003) *Legal aid and self-representation in the Family Court of Australia*, Socio-Legal Research Centre, Griffith University, 5.4

¹²³ Ibid p.v

¹²⁴ Family Court of Australia 2012-2013 Annual Report p.62

www.familycourt.gov.au/wps/wcm/resources/file/ebd4d80901c31bd/AR2012_FINAL%28280pp_cov%29.pdf

¹²⁵ Federal Magistrates Court of Australia 2011-2012 Annual Report

www.federalcircuitcourt.gov.au/pubs/html/AR1112.html

¹²⁶ Attorney-General's Department (2009) *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Commonwealth of Australia, Canberra. Use of the wage price index increase was

litigation in the Federal Court, Family Court and AAT were calculated using the same assumption legal costs have continued to increase in line with the WPI.

		\$ (1997 – 1998)		\$ (2012 – 2013) – extrapolated (a)	
		Costs (applicants)	Costs (respondents)	Costs (applicants)	Costs (respondents)
Federal Court (Professional Fees)					
		(n = 100)	(n = 103)		
	Mean	\$62,134	\$55,343	\$98,668	\$87,884
	Median	\$10,361	\$8,294	\$16,453	\$13,171
	Range	\$600 - \$1,000,042	\$300 - \$1,129,684	\$953 - \$1,588,056	\$476 - \$1,793,926
Federal Court (Disbursements)					
		(n = 102)	(n = 97)		
	Mean	\$20,456	\$18,831	\$32,484	\$29,903
	Median	\$4,500	\$2,150	\$7,146	\$3,414
	Range	\$20 - \$464,590	\$27 - \$625,135	\$32 - \$737,764	\$43 - \$992,707
Family Court (b)					
		(n = 363)	(n = 252)		
	Mean	\$4,830	\$6,545	\$7,670	\$10,393
	Median	\$2,209	\$2,090	\$3,508	\$3,319
	Range	\$40 - \$126,361	\$8 - \$160,532	\$64 - \$200,660	\$13 - \$254,923
AAT (b)					
		(n = 173)	(n = 117)		
	Mean	\$5,463	\$6,525	\$8,675	\$10,362
	Median	\$2,585	\$4,006	\$4,105	\$6,361
	Range	\$50 - \$131,696	\$375 - \$29,586	\$79 - \$209,132	\$595 - \$46,982

Figure 12: Private legal costs incurred in federal jurisdictions – 1997/98 and 2012/13 extrapolated¹²⁷

based on findings in Law Council of Australia (2004), *Erosion of Legal Representation in the Australian Justice System*, at p. 28. This survey found that the cost for an experienced lawyer had increased over the period by: Mid-CBD firm: \$134/hr – 155/hr; small CBD firm: \$128/hr – 155/hr; regional firm: \$135/hr - \$140/hr; and country firm: \$116/hr - \$132/hr. These increases were calculated as an average of about 15% which was similar to the WPI increase over the same period.
¹²⁷ Source: Original 1997 – 1998 data from Martruglio, T. (1999) *The costs of litigation in the Family Court of Australia, The costs of litigation in the Federal Court of Australia*, as cited in Attorney-General's Department (2009) *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, Commonwealth of Australia, Canberra. Extrapolation logic as per Attorney-General's Department (2009).

- (a) Costs figures represent an extrapolation of 1997 – 1998 data, based on WPI increase of 43% over the period 1997/1998 – 2012/2013. WPI index growth referenced to ABS Wage Price Index: Australia Cat 6345.0 Series - Private, Other Services.
- (b) Attorney-General's Department cites cost figures for Family Court and AAT as inclusive of the cost of legal representation and disbursements.

According to the data, the average costs of professional fees for a Federal Court action is \$98,668 for applicants and \$87,884 for respondents. The median¹²⁸ cost for professional fees is \$16,453 for applicants and \$13,171 for respondents. Including disbursement amounts, the average private cost of Federal Court litigation is \$124,469 and the median is \$20,092.

In 2009, 43% of all civil claims in the Local Court resulted in default judgment.¹²⁹ The 'overwhelming majority' of civil claims were withdrawn, settled or resolved uncontested.¹³⁰ This is in large part because of the barriers in participating in these proceedings for people who are self-represented.

What is the impact of self-representation on opposing parties, courts and tribunals and the parties themselves?

There is considerable evidence from both Australian and international studies of the impact of self representation.

Studies have shown:

Self-represented litigants struggle with the process and tend to: raise concerns in the courtroom that are irrelevant to the legal issues in question thereby causing frustration to judges; prolong the process; submit incomplete documentation; and rely on judges to an extent that raises concerns about the appearance of bias; and rely on opposing counsel to an extent that raises concerns about properly representing the interests of their own clients.¹³¹

A study found that cases in which both parties are self-represented had twice the median number of court appearances and a higher number of case conferences. In addition, these cases were more likely to have settlement conferences, trial management conferences and to proceed to trial.¹³²

The economic and social cost of self-represented hearings is not just borne by the self-represented individual and the community, but also the other party to the litigation. In a Nova Scotia study 87.5% of judges thought that self-represented litigants were generally

¹²⁸ The median is the value that divides a set of ordered numbers equally into a bottom half and a top half. Unlike means (averages), medians are not significantly affected by unusually high or low values.

¹²⁹ *ADR Blueprint for NSW Discussion Paper*, 2009, p.17

¹³⁰ *Ibid* p.6–7

¹³¹ *Middle Income Access to Civil Justice Steering Committee, Background Paper*, University of Toronto Faculty of Law, February 2011 p.2 citing Langan. A-M, *Threatening the balance of the Scales of Justice: unrepresented litigants in the Family Courts of Ontario* (2004-5) 30 Queen's L.J 825; Nova Scotia Self-represented Litigant Reports.

¹³² *Middle Income Access to Civil Justice Steering Committee, Background Paper*, University of Toronto Faculty of Law, February 2011 p.20

disadvantaged by a lack of representation, while 70% thought the other party was also disadvantaged.¹³³ A meta-study in the United States concludes that the need for representation is greatest in cases where a relatively powerless litigant opposes a powerful opponent. The study also highlights the need for a skilled advocate with relevant experience.¹³⁴

Studies in Canada and the United States have also shown that representation positively influences outcomes in contested hearings.¹³⁵ The impact of self representation and the difference legal representation and duty services can make in social security matters before the AAT and FWC conciliations are outlined below.

Civil

In social security matters before the AAT the impact of self representation is experienced by self-represented parties, Tribunal staff and government advocates. Self-represented parties express frustration with the unfamiliar process, reporting that their mental health impairments are exacerbated by going through the appeals process. For the Tribunal, some processes can take three times longer when the applicant is self-represented. For example, when the client is represented a preliminary conference generally lasts 10 minutes. When the applicant is self-represented, conferences can last for at least 30 minutes, often with little progress. Processes are more efficient and effective when all parties know the key issues in dispute and the process required to resolve those issues.

D came to the Parramatta Legal Aid office for advice. He was distraught and suicidal at that time due to his financial pressures and severe pain from osteoarthritis which meant he had to give up his full time work.

D had pursued his appeal against Centrelink's refusal to pay him Disability Support Pension through an Authorised Review Officer and to the SSAT. At each step the original decision was varied slightly in his favour but the end result on each occasion was that the original decision under review was affirmed.

The SSAT's decision recorded their impression of him as a truthful and reliable witness. They noted he had reported certain symptoms (such as difficulty hanging up washing overhead) that would normally place a client in the severe category on the relevant impairment table but that in his case was not mentioned in his supporting medical evidence. As a result, the Tribunal's hands were tied and they were unable to award him the relevant points on the impairment table because his self-reported symptoms were not supported by the clinical evidence.

D could not afford to pay a specialist \$300 for another supporting letter as he was reliant on Newstart. D applied for legal aid and was referred to mental health support as he had discussed suicide during the interview.

¹³³ *Middle Income Access to Civil Justice Steering Committee, Background Paper*, University of Toronto Faculty of Law, February 2011 p.21

¹³⁴ Engler, R. 'Connecting self-representation to civil Gideon: what existing data reveal about when counsel is most needed', *Fordham Urban Law Journal*, 2009 Vol 37 Issue 1

¹³⁵ *Middle Income Access to Civil Justice Steering Committee, Background Paper*, University of Toronto Faculty of Law, February 2011 p.21 citing pilot study in the Ontario Rental Housing Tribunal, Tax Court of Canada.

The Legal Aid NSW lawyer lodged D's AAT application two days before appeal period was to expire and made an appointment for him with an Occupational Physician for a medico-legal report. If the medical report is in D's favour then he will be in a position to win the AAT appeal and payment of his pension.

It is the experience of Legal Aid NSW that workers with lower education and literacy levels struggle when self-represented at FWC conciliations and FWO mediations. Very often self-represented workers do not fully understand the process or the settlement documents that may be used to record any settlement that is reached. The difficulties experienced by the self-represented are exacerbated by the fact that employers are usually represented by experienced lawyers and assisted by human resource professionals and conciliators/mediators desire for a quick settlement

Without representation for workers there is a significant power and knowledge imbalance. It is the experience of Legal Aid NSW that workers with meritorious cases can be pressured into settling and forgoing their rights. In many instances, self-represented workers settle for amounts less than their unpaid legal entitlements. Some workers even settle for nothing more than a statement of service. While it is rare for a worker to be ordered to pay legal costs if they lose their claim, it is not unknown for lawyers acting for employers to use the prospect of a costs order to pressure workers into a settlement.

There is a significant difference in outcomes when represented, with workers settling their claim for an amount more consistent with cases decided by the FWC at a full hearing. However, it is difficult for workers to obtain private practitioner representation at conciliation. The monetary outcomes are often similar to the fees that would be incurred, and this provides little incentive for private practitioners to represent a worker. That said, these monetary amounts can be significant to workers who have just lost their job and are facing immediate economic hardship and the vicious cycle of disadvantage.

Family

It is the experience of Legal Aid NSW that self-representation in Family Law jurisdictions impacts on the litigants, other parties and the court. In accordance with the research discussed above, the self-represented experience difficulty drafting court documents. Court delays arise due to their lack of familiarity with the many rules of evidence and procedures and difficulties expressing their position in oral submissions. For example, a simple court appearance that usually takes 30 minutes can take a whole day when a person self-represents, which escalates the costs for all parties and the court. Judges are obliged to ensure that self-representing parties are afforded procedural fairness, which can result in significant increases in the length of hearings.

At the most complex level, family law cases address allegations of abuse and violence. Parties who are self-representing may be required to lead evidence and cross examine the other party in relation to such allegations. They may be required to cross examine experts on technical matters subject to strict rules of evidence. Legal Aid NSW particularly holds concerns about cases where an alleged perpetrator of violence or abuse who is self-representing is allowed to cross examine the alleged victim or the converse. These practices have led to concern that self-representation can lead to further abuse through a court sanctioned process. These practices can result in the additional social and economic costs that arise from family violence.

How does the legal system accommodate SRLs and does this take into account the attributes of SRLs themselves? How can parties best be assisted to self-represent?

As discussed previously in this submission, Legal Aid NSW provides a broad range of services which assist self-represented litigants. These services include:

- Legal information and referral (including LawAccess NSW)
- Community Legal Education (CLE)¹³⁶
- Advice and minor assistance services
- Self help resources¹³⁷
- LawAssist¹³⁸ website www.lawaccess.nsw.gov.au/lawassist
- Duty lawyer services
- Duty advice services in courts and tribunals

Legal Aid NSW has highly efficient and effective duty services providing discrete, unbundled legal services, including advice and representation on the day but not ongoing representation. Further detail of these services is provided in section 12.

Legal Aid NSW cautions the extent parties can self-represent where they lack the capacity to self help because they are illiterate, have English as a second language or suffer from cognitive impairment, mental health impairment or low educational attainment. As noted in a recent Canadian study:

In addition to having a greater 'safety net', those in the middle class may have greater resources, for example in terms of education, literacy, health, to address legal problems that arise.¹³⁹ There may be greater potential for self-help strategies, however 'where a lawyer's skills and training are required those who are represented achieve better and fairer outcomes than those who are represented. Sometimes lawyers are essential for a just result'.¹⁴⁰

Civil

In recognition of the needs of self-represented litigants, Legal Aid NSW and the SSAT have commenced a pilot bi-weekly duty advice service at the SSAT. Most applicants before this tribunal are self-represented. The duty advice service is flexible in how it provides the advice, by phone or in person.

¹³⁶ Legal Aid NSW runs a series of regular community legal education sessions directed at self help including workshops on managing your divorce (divorce classes) and workshops to seniors on planning ahead (wills, powers of attorney, and appointments of enduring guardianship), elder abuse, how to protect your assets if you want to help your family financially, reverse mortgages and grandparents issues.

¹³⁷ The mix of Legal Aid NSW service delivery strategies includes the development and promotion of self help strategies. These range from factsheets available in hardcopy and on the Legal Aid NSW website and toolkits and guides such as the *Mortgage Stress Handbook* and *Discrimination Toolkit* to Community Legal Education workshops about the law and interactive websites such as *Best for Kids*

¹³⁸ LawAssist guides include: debt – small claims, car accidents, Apprehended violence orders, fines, fences, employment rights and recovery of goods. More detail is provided in section 4.

¹³⁹ The Canadian Bar Association *Underexplored alternatives for the middle class*, February 2013 p.5

¹⁴⁰ *Middle Income Access to Civil Justice Steering Committee, Background Paper*, University of Toronto Faculty of Law, February 2011 p.21

Access to advice and some minor assistance services at this stage of the appeals process resolves some matters that would otherwise go on to the AAT. By providing advice at the SSAT, the lawyer has access to the tribunal papers and therefore can identify the legal issues without relying on the applicant who often cannot explain what decision they are challenging and why.

Different types of minor assistance services are provided to self-represented applicants based on their needs. For example, some clients will need written submissions prepared on their behalf, others a letter to take to their GP, or a list of the evidence they need to collect before proceeding to a hearing.

It is the experience of Legal Aid NSW that tribunals generally promote their accessibility to self-represented litigants. This is in line with a tribunals' objective to provide quick and cost-effective review of decisions. However as the law is complex, litigants need access to advice services to resolve their legal matters.

Getting legal advice means clients are directed to focus on the issues in dispute that the tribunal can deal with, as opposed to the other issues that concern the self-represented litigant. Clients are also advised about what evidence they need to obtain to support their case. They are also given realistic expectations about their prospects of success and what can be achieved in that forum. Finally clients are given referrals if there is another alternative to resolving their problem.

Family

The Legal Aid NSW Family Law Early Intervention Unit (EIU) provides duty services at the principle Family Court registries in NSW. These services have become integral to assisting self-represented litigants navigate court processes. The EIU works closely with counter staff at the registries to ensure that self-representing parties are referred prior to filing documents. While many of the parties referred to the EIU may fall outside the Legal Aid NSW means test, the EIU proactively assists self-represented clients to draft documents to ensure that they are pursuing an appropriate action, seeking appropriate orders and providing the court with necessary information to progress their matters. Judges commonly refer self-represented litigants to the duty service when difficulties arise in cases. This service, and the impact it has had on self-represented litigants and the efficiencies that it has generated for courts, is discussed further in section 12.

Legal Aid NSW family lawyers also assist the court with self-represented litigants. In addition to duty lawyers explaining the court processes, drafting documents and making submissions for these litigants, Legal Aid NSW lawyers will often appear on an *amicus* basis (as a friend of the court).

Legal Aid NSW provides 'Divorce classes' in offices across NSW to assist self-represented litigants complete divorce applications and self represent.

Legal Aid NSW Independent Children's Lawyers (ICL) work proactively with all parties in a children's matter, explaining court processes and what constitutes the best interests of the child. In many matters the only lawyer appearing will be the ICL. In addition, Judges will ask ICLs to undertake case management tasks to assist in resolving the matter.

Legal Aid NSW has also developed a range of self help resources for self-represented litigants in the family law jurisdiction. These resources have been found to create efficiencies for courts as well as ensuring that self-represented litigants receive early advice and assistance with their family law problem.

6. Avenues for improving access to civil justice

What approaches to improving access to justice are not captured in the above taxonomy?

Consideration of legal problems as a social determinant of health is another approach to improving access to justice, not captured in the proposed taxonomy. The LAW Survey demonstrates the causal connection between legal problems and long term illness or disability.¹⁴¹ Other research has found:

Virtually all legal needs (ranging from housing issues to family violence) are directly or proximally connected to health status.¹⁴²

Law is one of the important social determinants of health. It helps establish the framework in which individuals and populations live, face disease and injury, and eventually die, ... law is one factor that helps determine other social determinants.¹⁴³

Considering legal problems as a social determinant of health can open up avenues to access the justice system. Locating legal services with health services not only enables early identification and resolution of legal problems but can also improve health outcomes. For example, resolving legal problems relating to housing can improve the client's stress related illness and may also improve underlying issues causing health conditions, such as substandard or no accommodation. Intervention in legal problems can break the vicious cycle of vulnerability discussed in section 2, which includes health problems. Family violence is another type of legal matter with significant causal connections with health outcomes.

Legal Aid NSW has a regular legal outreach at the Mt Druitt Aboriginal Medical Service and is exploring other medico-legal partnerships. Legal Aid NSW believes that if the Productivity Commission was to support legal problems as a social determinant of health as an approach to improving access to justice this would facilitate consideration of medico-legal partnerships by the health system.

Another approach to improving access to justice is consideration of legal assistance as an essential social service. Legal assistance should be part of the safety net of social services. For example, Legal Aid NSW is part of a number of integrated service projects for homeless people in partnership with health and housing services. The inclusion of legal services enables an integrated response to the problems faced by those with multiple and complex needs, such as family violence, debt, fines or lack of access to appropriate government benefits.

¹⁴¹ Law and disorders: illness/disability and the experience of everyday problems involving the law, Justice Issues, Paper 17 September 2013, Law and Justice Foundation of NSW [www.lawfoundation.net.au/ljf/site/templates/justiceissues/\\$file/JI17_LawAndDisorders_FINAL_web.pdf](http://www.lawfoundation.net.au/ljf/site/templates/justiceissues/$file/JI17_LawAndDisorders_FINAL_web.pdf)

¹⁴² Ibid p. 3 citing Zuckerman, Sandel, Lawton and Morton (2008) p.1616

¹⁴³ Ibid citing Parmet, Smith and Benedict (2012) p.21

Legal Aid NSW notes the importance of building capacity to identify legal problems as a component of preventing issues from evolving into bigger problems in improving access to justice.

What lessons can be learnt from the criminal justice system that could improve access to and outcomes from the civil justice system or interactions between the two?

Some restorative and diversionary programs in the criminal justice system have been highly successful and could improve outcomes from the civil justice system.

The Legal Aid NSW WDO service provides an example an effective diversionary program that can cross both civil and criminal law issues. WDOs issued by the SDRO enable people who are homeless, have a mental illness, intellectual disability or cognitive impairment, or who are experiencing acute economic hardship to satisfy their court fine or penalty notice debt by undertaking unpaid work, certain training courses or treatment with approved organisations and health practitioners.

The impact of fines on vulnerable people can be crippling. Almost two thirds of licence suspensions in NSW are for fine defaults as opposed to demerit points. Licence suspensions due to unpaid fines have a disproportionate impact on people in rural, remote and regional areas and their ability to find and keep work. The lack of available public transport increases the risk of people continuing to drive with a suspended licensed or car registration so they can attend work, classes, health appointments and Centrelink interviews. This in turn can lead to secondary offending and ultimately imprisonment.

Aboriginal people are particularly vulnerable to this cycle. The number of Aboriginal people sentenced to imprisonment where the principle offence was driving while their licence was disqualified or suspended has increased by 35% over the last 10 years. Other vulnerable groups commonly captured by the fine debt cycle include people who are homeless, people with a cognitive or mental health impairment, young people and prisoners.

Once someone signs up to a WDO their driver's licence is reinstated. Getting their licence back and being able drive is not only a powerful incentive to continue to participate in WDO program but is key to getting employment.

I think I was out of jail 12 months before I came here....and I was definitely heading back there if I didn't do something. I had accumulated \$15,000 worth of State Debt and I was a 50 year old man retired drug addict with absolutely no skills. Who was going to employ me, who was going to give me a chance of having a go at life?

I'm free today you know I'm free, I don't owe any money, I don't owe the government nothing and now I am a tax paying citizen. (WDO participant).

The WDO model has been found to reduce reoffending¹⁴⁴ and the costs to government of chasing debts that would never be recovered.¹⁴⁵ This type of model also has social and

¹⁴⁴ A Fairer Fine System for Disadvantaged People: An evaluation of time to pay, cautions, internal review and the work and development order scheme, Attorney General and Justice, 2011, p.41 www.lpcldr.lawlink.nsw.gov.au/agdbasev7wr/lpcldr/documents/pdf/a_fairer_fine_system.pdf
82.5% of pilot participants did not receive another fine or penalty notice enforcement order. About 40% of these had been repeat offenders previously.

economic benefits for both the individual participant and the wider communities. Participants enhance their skills and work readiness by participating in the scheme, while communities receive the benefits of increased volunteering. Sponsoring community organisations can achieve improved outcomes through improved compliance rates in mental health and drug and alcohol treatment programs. In turn, the government avoids the costs arising from reoffending and fine enforcement.

7. Preventing issues from evolving into bigger problems

The Commission invites comment on strategies for the avoidance and early resolution of civil disputes. What evidence is there of the benefits and costs of these approaches and strategies?

Legal Aid NSW prioritises strategies aimed at resolving legal problems as early as possible. A key aspect to avoiding or resolving issues early is access to advice. For example, Legal Aid NSW experience in veterans and social security matters is that early access to advice will achieve fairer outcomes and limit the number of matters that proceed to the AAT.

The Legal Aid NSW Veterans Advocacy Service assist veterans with their entitlements under the *Veterans' Entitlements Act 1986*. Veteran advocates provide advice on the merits of lodging a claim with the Department of Veterans' Affairs and appeal options. Advice and minor assistance includes assisting clients to: lodge claims; complete application forms and questionnaires for disability claims, pension assessments, service pensions and war widows' pension claims; and lodge appeals to the Veterans' Review Board and the Administrative Appeals Tribunal.

Veteran advocates are lay advocates with expertise in veterans' matters. By advocating for veterans at the Veteran Review Board (VRB), Legal Aid NSW assists in resolving legal problem at an earlier stage thus reducing the social and economic costs that arise if an appeal proceeds to the AAT. Legal Aid NSW clients are successful in approximately 60-70% of cases before the VRB.

The Legal Aid NSW SSAT duty advice service discussed in section 5, is another example that demonstrates the social and economic value of early assistance. Legal Aid NSW suggests that additional resources to provide advice and minor assistance at the first stage, when government departments are making administrative decisions about people's eligibility for benefits, would reduce the social and economic costs that arise in more formal and costly tribunals and courts.

However, it is worth noting research which observed that the types of people who present for assistance early in the onset of their legal problem differ from those who do not. People with entrenched disadvantage tend not to seek assistance until a crisis occurs.

It is important that assistance is also provided at crisis point. Indeed Australian and international research has consistently identified that the most vulnerable are less likely than others to have the skills and psychological readiness to achieve legal resolution on their

¹⁴⁵ Ibid p.46. At April 2011, the State Debt Recovery Office estimated that it costs \$12.49 to recover \$100 of revenue. For debts that are more difficult to recover, such as old debts and impecunious clients, the costs are higher.

own or with minimal assistance.¹⁴⁶ These clients will require more intensive support beyond information, education, advice and minor assistance. These clients require strategies that are specifically targetted to facilitate access to legal services, such as locating legal advice clinics in homeless services.

V was referred to the Homeless Outreach Lawyer at the Newcastle regarding tenancy issues. During his teenage and early adult years V had been homeless for substantial periods, incurring fines for sleeping on trains without tickets and at 27 had a fine debt of nearly \$23,000. V on his own initiative had obtained information about the WDO but had been unable to find an approved organisation to support his application. The Legal Aid NSW Homeless outreach lawyer had recently assisted a Newcastle based welfare organisation to become an approved organisation and V was placed in their 'home for good' program. V is addressing the underlying issues that he admits has lead to his homelessness, gaining work experience that will assist in seeking work and paying off his debt by completing a Smart Recovery (drug and alcohol) program and volunteer work.

Family law

The Legal Aid NSW Family Law Division has policies and procedures in place to intervene and divert clients from litigation at each stage of a family law issue. It is successful in achieving earlier resolution where appropriate for clients without being confined by the concept of 'early' intervention. For example, a critical feature of family law duty service is its availability at the times and site of the crisis. While it does reach some clients 'early', the EIU duty service provides timely assistance to high-need clients at whatever point the client is ready for assistance.¹⁴⁷

The Legal Aid NSW Family Law Division provides assistance at the hard end of cases, where there are often allegations of abuse, parental neglect, drug and alcohol dependencies and incidence of mental illness. Substantive family law matters are comparable with the care and protection matters in terms of the difficult and complex circumstances that need to be worked through. It is only with Legal Aid NSW intervention, including the funding on the Independent Children's Lawyers, that the courts can assist these clients.

Legal Aid NSW increasingly uses family dispute resolution (FDR) conferences as a litigation intervention strategy at all stages of the family law process, particularly prior to a final hearing. Reaching a full, partial or interim settlement rate of 88%, lawyer assisted conferences can involve clients with complex needs and difficult issues including drug and alcohol dependencies and family violence.¹⁴⁸ Where issues cannot be resolved at the conference stage, the decision whether to proceed to litigation is made based on the mediators' recommendation as to the merit of the client's case. The recommendations made by a mediator as to merit are sometimes a powerful incentive for parties to settle matters. It is also a most effective way for Legal Aid NSW to make informed decisions about the future funding of family law proceedings.

¹⁴⁶ *An evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts*, Law and Justice Foundation, 2012 p.iv

www.legalaid.nsw.gov.au/_data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf

¹⁴⁷ Ibid p.38

¹⁴⁸ 2012-2013 COMP Statistics are detailed in Annexure C.

The Family Law Act makes FDR a precondition to filing an application. It is the experience of Legal Aid NSW that many matters receive an exemption from this requirement, notwithstanding that the matter might be well suited to an ADR process with some safeguards. For this reason, Legal Aid NSW now provides a mediator at both the Parramatta and Sydney registries of the Family Courts.

The Legal Aid NSW Court Ordered Mediation Program (COMP) has been successful in reaching full, partial or interim agreement in approximately 88% of mediations. Significantly approximately 84% of cases referred to COMP are participating in mediation for the first time. Aside from the quality, efficiency and effectiveness of these litigation intervention strategies there is a flow on effect on court efficiency, with significant savings in hearing time.

Similarly, an evaluation of the EIU Duty Service at Parramatta Family Law Courts by the LJF found that the service successfully diverted family law matters that should not be in court, de-escalating proceedings between parties and saving court time. The introduction of the EIU Service at Parramatta Family Court resulted in a 160% increase in number of duty matters assisted by Legal Aid NSW. In nearly 40% of matters, clients who should not have been going to court were assisted to take a more appropriate action. Where matters did progress to court, the EIU service assisted clients to progress their matters more efficiently with 16% of matters finalised by the court on the day or finalised by consent.¹⁴⁹

The evaluation highlighted that the provision by the EIU of short, sharp and timely intervention for disadvantaged families can occur at any stage of the legal process. The assistance provided by EIU duty lawyers can finalise matters for people whose family law problems have remained unresolved for a number of for years.

Civil law

As discussed earlier, the Legal Aid NSW Civil Law Division has a number of early intervention programs and strategies which assist people to avoid or resolve legal problems early. A sample includes the WDO Service outlined in section 6, the Law for Everyday Life and Law Check-up tool outlined in response to the next question and the outreach services outlined in section 4.

The independent evaluation of the Mortgage Hardship Service demonstrates the value of an early intervention approach with 56% of the sample client group able to retain their home and 14.5% able to sell their home prior to the lender repossessing it.¹⁵⁰

The Legal Aid NSW Civil Law Division also makes extensive use of existing internal dispute resolution (IDR) and external dispute resolution (EDR) schemes to achieve early resolution

¹⁴⁹ *An evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts*, Law and Justice Foundation, 2012
www.legalaid.nsw.gov.au/__data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf

¹⁵⁰ Forell, S & Cain, M 2011, Managing mortgage stress: evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service, Law and Justice Foundation of NSW, Sydney p.xiii
[www.lawfoundation.net.au/ljf/site/articleIDs/A988378B45C49FB4CA25791000166960/\\$file/ManagingMortgageStress_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/A988378B45C49FB4CA25791000166960/$file/ManagingMortgageStress_web.pdf)

of legal problems. For example, the Legal Aid NSW Civil Law aid policy requires clients applying for a grant of legal aid for consumer protection court proceedings to have participated in an IDR and EDR process, if available and appropriate.¹⁵¹

Despite the success in utilising IDR and EDR schemes, Legal Aid NSW emphasises the importance of a potential litigation pathway to ensure a fair and just result in some circumstances, particularly where systemic issues are identified.

Commonwealth Bank of Australia v Wales [2012] NSWSC 407

When the bank served Ms Wales, who was in financial hardship, with a statement of claim seeking to repossess her home, she contacted the Financial Ombudsman Service (FOS) for help.

The bank contacted Ms Wales in order to resolve the dispute, and the parties made an agreement which reflected little concession to hardship. There was no reduction in the amount of payments (in fact, the repayment schedule increased) and seemingly there was no extension of the period of the contract.

The bank did not direct Ms Wales to its designated procedure for considering hardship variations, and did not even explain that there was a designated procedure. Legal Aid NSW took the matter to the Supreme Court. The Court found the bank did not appropriately invoke the mechanism for making a hardship variation, depriving our client of her opportunity to have the hardship application determined by the FOS or the Court. The Court set aside the default judgment entered against our client for possession of her home.

This precedent decision has implications at a national level for lenders who fail to adhere to their obligations to consider a customer's financial hardship. Also for the first time, external dispute resolution was acknowledged by the Court as a central forum for the resolution of financial hardship disputes.

What mechanisms help people deal directly with their own legal needs? How successful and cost-effective have these been in resolving disputes?

Legal Aid NSW believes there is an important role for legal information, community legal education and advice and minor assistance, as well as building capacity of community workers to assist with problems that do not necessarily need a lawyer to resolve them.

Legal Aid NSW works with tenants' advocates and financial counsellors to resolve their client's legal problems. For example, the Credit Law Toolkit¹⁵² is a resource for community workers and financial counsellors about consumer rights in relation to credit products. Community workers are also supported with legal advice from specialist lawyers.

¹⁵¹ Unless providing legal representation to the applicant for court proceedings would advance the public interest (for example, because there is a significant point of law to be determined). Grants of legal aid are also available for participating in external dispute resolution and lodging a complaint subject to means, merit and the availability of funds. www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.5.-consumer-protection-matters

¹⁵² laxextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/408.pdf

Legal Aid NSW has produced over 95 civil and family law plain language legal information resources¹⁵³ and distributed 731,526 hardcopy legal publications¹⁵⁴ in 2012-2013, with approximately 400,000 online downloads. Approximately 60% of publications are translated into over 30 community languages.¹⁵⁵ Aboriginal specific publications have been developed to address common family and civil law problems, fines, mental health, family breakdown, child support, stopping family violence and working out what's best for the kids.

CLE helps people anticipate and avoid legal problems, act more quickly when problems do occur and deal with legal problems more effectively through knowing when and where to get assistance. In 2012-2013, Legal Aid NSW lawyers provided 1,760 family and civil law Community Legal Education (CLE) sessions. While many of the legal education sessions target particular communities and legal issues,¹⁵⁶ Legal Aid NSW also provides CLE programs to community workers. For example, *Law for Community Workers*¹⁵⁷ encompasses 18 legal topics and is delivered across NSW.¹⁵⁸

The mix of Legal Aid NSW service delivery strategies includes the development and promotion of self help strategies. Resources range from factsheets, toolkits and guides¹⁵⁹ to Community Legal Education workshops about the law and interactive websites such as *Best for Kids*. In addition, as discussed in section 4, LawAccess NSW and LawAssist provide extensive information and advice to resolve legal problems.

However, the effectiveness of strategies and resources aimed at avoiding or achieving the resolution of legal problems without the need for a lawyer, are based on the capacity of the target audience to effectively use these resources. Self help resources require a certain level of literacy and comprehension, particularly in relation to the law which is highly complex. Even where a person does have capacity to self help, there is a natural tendency for people to seek advice to confirm their understanding and applicability of the legal information to their circumstances.

Legal Aid NSW cautions against strategies that assume widespread online legal resources will address the community's unmet legal need, without the need for additional advice and assistance where it is needed. It is the experience of Legal Aid NSW that as the number and

¹⁵³ Publications cover specialist services and a range of topics including family separation, child arrangements, debt, mortgages, disaster recovery and insurance, employment, family violence, traffic offences, social security, immigration and many others.

¹⁵⁴ Total publications includes Family, Civil and Criminal law.

¹⁵⁵ The most common translations are Chinese, Vietnamese & Arabic, followed by Turkish & Spanish but increasingly, new & emerging languages such as Farsi, Korean. The Welcome to Legal Aid CD-ROM is in key African, Middle Eastern & Burmese (3 Burmese dialects).

¹⁵⁶ *What is the Law?: Australian law for new arrivals* delivers information about the law through English for Speakers of Other Languages (ESOL) classes; *Back on track* and *Legal Literacy for Prisoners* programs for prisoners; Older Persons Legal and Education Program runs a series of legal education sessions on matters affecting older people; *Super Cuz: Adventures of a Koori superhero who fights for justice* radio plays targets primary school children; and *BURN* is a criminal law program for secondary school students; *Best for kids* is a multimedia website for separating families.

¹⁵⁷ www.legalaid.nsw.gov.au/what-we-do/workshops/law-for-community-workers

¹⁵⁸ The July – November 2013 program includes Bankstown, City, Parramatta, Gosford, Maitland, Newcastle, Nowra, Shellharbour, Wollongong, Albury, Bathurst, Coffs Harbour, Dubbo, Lismore, Orange, Port Macquarie, Tamworth, Tweed Heads, and Wagga Wagga.

¹⁵⁹ Examples include the *Mortgage Stress Handbook* and *Discrimination Toolkit*

complexity of legal problems increase, the capacity of the client to self help decreases and therefore more intensive legal assistance is required to avoid or resolve existing and consequential legal problems. Legal information for the general community cannot be delivered at the expense of legal assistance for disadvantaged people.

Legal Aid NSW provides extensive legal advice and minor assistance services through its 21 offices and 164 regular outreach locations. In 2012-2013 Legal Aid NSW provided over 62,435 civil and family law advice sessions and 31,048 minor assistance services. Advice and minor assistance services have been highly successful and cost effective in assisting people to address their legal problems.

While there are a number of mechanisms to effectively assist people to self help, a proportion of people, particularly disadvantaged people with complex needs, will require more than advice and minor assistance to resolve their legal problems. Part of the success of information, community legal education and advice services, including those provided by telephone and online, is that they sit within the continuum of Legal Aid NSW services with pathways to more intensive assistance where appropriate. For example, as outlined in the previous question, the EIU duty service has been highly successful in assisting people to deal with their own legal needs, while facilitating ongoing legal assistance and representation for clients eligible for legal aid.

Civil

The Legal Aid NSW Civil Law Division provides duty advice services in targeted courts and tribunals. During a duty advice service, Legal Aid NSW lawyers assess the merit, highlight the strengths and weaknesses of the case and provide guidance on how to best present it. The people seen at duty advice clinics tend not to have had any legal advice prior to the commencement of proceedings.

For example, many of the clients advised by the Social Security Duty Advice Service at the AAT are appealing the rejection of a disability support pension claim. Legal Aid NSW lawyers quickly identify those cases with merit. Those with merit are given clear advice about the key issues in dispute, what medical evidence needs to be collected and how to collect it.

In cases where an appeal has no merit but would have merit with a medical report, clients are encouraged to withdraw their appeal to the AAT. These clients are given clear advice on what they need to do next and are encouraged to reapply for the pension once they have the required documentation.

Legal Aid NSW also provides an advice service at the ADT. Advice is provided to applicants, and less regularly to respondents, in discrimination matters. Prior to providing the advice service, the Legal Aid NSW lawyers gain permission to access the client's ADT file to identify any significant issues. This practice is efficient and effective as it enables both the client and the lawyer to focus on the relevant issues rather than relying on the client's perception.

By providing the client with an assessment of the strengths and weaknesses of their case the client can make an informed decision about whether they wish to discontinue, proceed, or perhaps amend their pleadings. This in turn assists the ADT with unmeritorious matters being withdrawn and reduced hearing time.

What barriers and incentives do individuals face in attempting to avoid disputes or resolve them early, and which types of disputes are more or less amenable to avoidance or early action?

Legal Aid NSW notes that a barrier to people dealing directly with their own legal problems is the general lack of awareness that everyday life problems have a legal dimension. The Legal Aid NSW Civil Law Division have developed a DVD *Law for everyday life*.¹⁶⁰ Targeted at community workers or 'problem noticers' the DVD is used in conjunction with the extensive range of *Law for community workers* seminars.¹⁶¹

Legal Aid NSW is targeting community workers as a result of LJF research indicating that when faced with a legal problem people commonly seek advice from the non legal advisors they happen to be in contact with.¹⁶² Accordingly, the LAW Survey suggests that:

Non-legal professionals may require appropriate legal training to maximise their ability to identify problems that may benefit from legal referral... There may be particular value in non-legal professionals being trained to identify the types of legal problems that most commonly relate to their field.¹⁶³

The barriers people face in attempting to avoid legal problems or resolve them early are similar to the type of disadvantages people experience in accessing civil justice outlined in section 5.

General barriers faced by vulnerable groups in attempting to avoid or resolve legal problems include a lack of:¹⁶⁴

- Knowledge that their everyday problems have legal dimension and legal resolution
- Understanding of rights and responsibilities
- Awareness of avenues to pursue their legal issue including legal assistance services
- Capacity to take effective action or self help, including seeking advice
- a Stable address affecting the ability to receive correspondence
- Communication skills (including language and educational barriers) to navigate legal processes and complexities of the law
- Resources to pursue legal option if free legal assistance is unavailable.

Additional barriers include people:

- Having more basic priorities than resolving their legal problems¹⁶⁵
- Feeling overwhelmed by their legal problems
- Being reluctant to complicate issues

¹⁶⁰ www.legalaid.nsw.gov.au/what-we-do/civil-law/law-for-everyday-life

¹⁶¹ www.legalaid.nsw.gov.au/what-we-do/workshops/law-for-community-workers

¹⁶² Clarke, S & Forell, S 2007, *Pathways to justice: the role of non-legal services*, Justice Issues Paper 1, Law and Justice Foundation of NSW, Sydney Clarke, S & Forell, S 2007, *Pathways to justice: the role of non-legal services*, Justice Issues Paper 1, Law and Justice Foundation of NSW, Sydney

¹⁶³ LAW Survey Australia p.218

¹⁶⁴ Schetzer, L, Mullins, J & Buonamano, R 2003, *Access to justice & legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*. Background paper. Law and Justice Foundation of NSW, Sydney, 2002 p.16, www.lawfoundation.net.au/report/background

¹⁶⁵ For example people who are homeless or facing family violence where they are going to sleep is their primary concern.

- Feeling intimidated by the legal system
- Accepting of legal problems as the norm
- Having negative experiences and perceptions of legal processes.¹⁶⁶

The complexity of the law and legal processes is a general barrier to avoiding or resolving legal problems early. Research has consistently shown that people can feel intimidated or overwhelmed by legal problems.¹⁶⁷ The LAW Survey reveals that one of the key reasons for taking no action in response to a legal problem was a perception that taking action would make no difference (56.2%).¹⁶⁸ Behaviour becomes generational. People who do nothing when faced with a legal problem are far more likely to continue to do nothing when faced with a new legal problem, and their families are far more likely to do nothing when faced with a legal problem.¹⁶⁹

Legal Aid NSW also notes that the lack of willingness of the other party to negotiate can be a significant barrier to resolving legal problems early. It is the experience of Legal Aid NSW that the model litigant rules as embodied in the *Legal Services Directions 2005* are not always applied by the Commonwealth and State agencies, particularly the rule relating to negotiating a settlement and properly conceding liability at an early stage.

Legal Aid NSW further notes the variation in the way in which model litigant rules are applied by external legal providers. In particular, Legal Aid NSW has experienced protracted proceedings and unnecessary requests for particulars, practices which result in increased costs to both the applicants and the respondents.

Further complications arise in pre-litigation negotiations when the government agency's insurer does not appear to be bound by the model litigant rules and proceeds on a commercial basis.

The potential power imbalance is a further barrier to resolving disputes early. The power imbalance can be heightened in a no costs jurisdiction when the respondent is a corporation or agency. For example in discrimination matters, companies will engage lawyers to minimise their exposure to any damages claim and to maximise their position of power over an self-represented litigant. Applicants are unable to engage lawyers on a speculative basis because their costs will not be paid by the other side, even if they are successful. The power imbalance is used to intimidate, and encourage applicants to abandon their legal action.

Relationship breakdowns result in complex decisions about children and joint property. Limited communication between parties is a further barrier to the early resolution of family

¹⁶⁶ Forell, S, McCarron, E & Schetzer, L 2005, *No home, no justice? The legal needs of homeless people in NSW*, Law and Justice Foundation of NSW, Sydney p.114-135
[www.lawfoundation.net.au/ljf/site/articleIDs/46AFCFE76A8314F8CA25707500815B9F/\\$file/no_home_no_justice.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/46AFCFE76A8314F8CA25707500815B9F/$file/no_home_no_justice.pdf)

¹⁶⁷ Scott, S & Sage, C 2001, *Gateways to the law: an exploratory study of how non-profit agencies assist clients with legal problems*, Law and Justice Foundation of NSW, Sydney

¹⁶⁸ LAW Survey Australia p.98

¹⁶⁹ *Recent Developments in 'Legal Need' Research*, Pascoe Pleasence. Presentation DLA Philips Fox, Sydney 3 July 2008.
[xml.lawfoundation.net.au/ljf/site/templates/powerpoint/\\$file/Legal%20Needs%20Research%20-%20UK%20perspective.ppt](http://xml.lawfoundation.net.au/ljf/site/templates/powerpoint/$file/Legal%20Needs%20Research%20-%20UK%20perspective.ppt)

law issues. Matters involving family violence and Apprehended Domestic Violence Orders (ADVOs) will impose further restrictions on communication.

In terms of incentives, access to the courts as a last resort provides a powerful incentive for avoiding or resolving legal problems early. This overcomes what Landes and Posner (1979) describes as the 'submission' problem, namely that a 'defendant has little incentive to submit themselves to mediation, even if the procedure is highly effective, fair and efficient'.¹⁷⁰

Can indicators be used to predict disputes or the individuals more likely to experience them? How can early intervention programs be best targeted and delivered? How can the use of instruments, such as legal health checks, be used to best effect?

As discussed in section 5, Legal Aid NSW uses indicators of disadvantage to predict legal need and target legal services to particular communities. Legal Aid NSW notes the National Legal Need and Strategic Planning Project¹⁷¹ which provided a tool to identify disadvantage and predict legal need based on disadvantage indicators.

Early intervention programs are most effectively targeted when they are designed and implemented in response to empirical data on disadvantage. The design of these programs needs to take into account a number of factors such as the:

- Type of legal issue that is being targeted
- Circumstances in which this issue arises
- Capacity of the target group to seek assistance.

For example, Legal Aid NSW is implementing a strategy to assist remote Aboriginal communities in relation to consumer issues such as door to door sales and funeral funds that are misleading in their advertising. In preparing this strategy, Legal Aid NSW consulted various Aboriginal communities and the State and Commonwealth regulators to identify potential unlawful business practices that target vulnerable remote Aboriginal communities. Particular strategies were then developed in relation to those products and communities.

Legal Aid NSW has recently developed a legal problem checklist tool to assist community and health workers identify everyday problems that also have a legal dimension, especially for disadvantaged groups. *Law Check Up*, which includes a short preliminary training session, is designed to help workers 'diagnose' and assess the level of a client's legal need, and to make appropriate referrals. This tool will provide an effective pathway to legal assistance for clients with legal problems that are impacting on their lives.¹⁷²

¹⁷⁰ Innovation in the Justice Sector: What makes it happen?, M.Barendrecht, Tilburg University Working Paper Series on Civil Law and Conflict Resolution Systems p.9

¹⁷¹ www.nacli.org.au/resources/National_Legal_Needs_Report_Australia.pdf

¹⁷² The tool was user tested during June 2013 with non-legal staff at Gosford Juvenile Justice office. In developing *Law Check Up* Legal Aid NSW considered the *Legal Health Check* developed by Queensland Public Interest Law Clearing House Inc. for their Homeless Persons' Legal Clinic. And the *Legal and Financial Check List* had been developed by Legal Aid NSW Nowra office in partnership with Lifeline South Coast NSW Financial Counsellors as an intake tool for inmates in Nowra gaol.

The legal issues in the checklist have been selected based on prevalence in the target client group¹⁷³ and impact on homelessness and disadvantage. While *Law Check Up* primarily has a civil law focus, the legal needs of homeless people in family law (family breakdown and family violence) and crime (victim of crime)¹⁷⁴ have also been incorporated.

An evaluated trial of *Law Check Up* in the homelessness and juvenile justice sectors will be conducted during 2013.¹⁷⁵ The primary purpose is to test whether *Law Check Up* assists with early identification of legal issues and pathways to civil law assistance for two particular groups of clients with multiple and complex needs: young people in juvenile detention;¹⁷⁶ and homeless people.¹⁷⁷ The evaluation will also specifically test improved referrals for legal issues which may contribute to homelessness, in particular debt, income support, and housing.¹⁷⁸ Improved timely referral pathways for family and criminal law issues will also be assessed.

Legal Aid NSW is building a knowledge base about the application and results of using diagnostic tools such as *Law Check Up*.

8. Effective matching of disputes and processes

How easy is it for disputants to identify the most appropriate dispute resolution pathway, and how could improvements be made?

Civil

It is not easy for people with a legal problem to identify the most appropriate dispute resolution pathway. In part, this is due to the complexity of the law. Establishing a streamlined dispute resolution process in the Local Court (Small Claims Division) would greatly assist in improving the dispute resolution pathway. As outlined in the Legal Aid NSW response to the NSW inquiry into ADR processes, 'Credit & Debt lists' and 'Insurance/Motor vehicle lists' in the Local Court would result in specialised decision makers with expertise.

¹⁷³ Informally assessed against the Legal Australia-Wide Survey (LAW) with the assistance of Hugh McDonald and Suzie Forell of the Law and Justice Foundation of NSW

¹⁷⁴ Forell, S., McCarron, E. and Schetzer, L, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW 2005, Chapter 4

¹⁷⁵ The *Law Check Up* will also be trialled with general neighbourhood/ community centres, which will incorporate testing whether the tool increases access to legal assistance for people with disabilities.

¹⁷⁶ Legal Aid NSW's 2011 study of the most frequent users of legal aid services found that 80% are under 19 years of age, and that 82% had their first contact with Legal Aid NSW before they were 14 years of age. The study found that a strong indicator of high service user clients at Legal Aid NSW is a history of out-of-home care. There is a well-established pathway from out-of-home care into the juvenile justice system (van de Zandt, P. and Webb, T., *High Service Users at Legal Aid NSW: Profiling the 50 highest users of Legal Aid NSW services*, June 2011).

¹⁷⁷ Findings from the Legal Australia- Wide (LAW) Survey indicate that people who lived in disadvantaged housing were one of a group of respondents who had significantly higher rates of multiple legal problems (McDonald, H.M., and Wei, Z. 2013 *Concentrating disadvantage: a working paper on heightened vulnerability to multiple legal problems*, Updating Justice NO. 24, Law and Justice Foundation of NSW).

¹⁷⁸ Forell, S., McCarron, E. and Schetzer, L, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of NSW 2005, Chapter 4

Using a more inquisitorial model, especially in the document-gathering phase of dispute resolution, would assist applicants in resolving matters early and appropriately at relatively low cost.

Family law

Legal Aid NSW offers a lawyer assisted model of dispute resolution. It is the view of Legal Aid NSW that our clients have complex legal needs and vulnerabilities that can best be accommodated through a lawyer assisted model. In addition, a high proportion of our mediations take place via 'shuttle' due to allegations of violence, restrictions placed on parties coming into contact with each other in an ADVO or the need to cater for power imbalances.

It is difficult for people with a legal problem to identify the most appropriate dispute resolution pathway. Family law clients presenting with less complex matters, or who appear to have the capacity to participate in mediation processes without a legal representative are generally referred to Family Relationship Centres (FRCs) but there are no guidelines in place to assist a decision to refer a client to an FRC mediation process.

As discussed in section 7, Legal Aid NSW uses its FDR conferences as a strategy for ensuring that parties are given as many opportunities as possible to resolve their matters at all stages of the Family Law process. Legal Aid NSW also uses FDR to inform itself of the merits of providing ongoing litigation funding for parties via the reports prepared and submitted by mediators at the conclusion of each mediation process.

Which matters, given their nature, are best directed to superior or lower tier courts and to what extent is this already occurring?

Civil

Disputes that have a low monetary value are best suited to lower tier courts. However, Legal Aid NSW recommends the development of specialised court lists in lower courts where possible, to ensure most effective resolution of legal problems, especially those that require knowledge of a specialist jurisdiction, such as credit or insurance law.

Matters are best suited to the superior courts include those with significant issues or where there is a need to clarify the operation of a law or policy.

9. Using informal mechanisms to best effect

Alternative dispute resolution

The Commission seeks data on the number, proportion and types of disputes resolved through ADR and the relative satisfaction of disputants with the outcomes of using these mechanisms.

As discussed in the previous sections, Legal Aid NSW has policies and procedures in place to intervene and divert clients from litigation.

Family

The Legal Aid NSW Family Dispute Resolution conducted 2560 mediations in 2012-2013, achieving a full or partial settlement rate of 81%. In addition, the culturally and linguistically diverse (CALD) family dispute resolution panel members conducted 109 mediations where it was identified that a more culturally responsive model of dispute resolution would assist.

The Legal Aid NSW Court Ordered Mediation Program (COMP) currently operates in Parramatta, Sydney and occasionally Dubbo Family Court registries. In 2012-2013, 172 mediations were conducted with 44% achieving full agreement and thereby saving 129 days of hearing time. A further 44% of mediations achieved partial resolution, saving court time by narrowing the issues still in dispute.

Legal Aid NSW has been piloting external mediation for care matters referred from Bidura Children's Court. The pilot, which commenced in 2010, has been evaluated by the Australian Institute of Criminology. The evaluation found:

- High levels of satisfaction among parents and family members with the conference process.¹⁷⁹
- High levels of satisfaction with the process amongst legal representatives and Community Services staff.
- Matters referred to the Legal Aid NSW pilot required fewer days to finalise compared with matters finalised before the introduction of ADR.¹⁸⁰

Civil

Legal Aid NSW uses ADR (including EDR) rather than court processes as the forum of first choice for the resolution of consumer disputes (credit and insurance). Legal Aid NSW provides assistance in relation to consumer protection, especially for credit and insurance products, because of the impact of legal issues arising from these products on people's lives. For example, the refusal of a bank to allow a temporary hardship variation of mortgage repayments can lead to a home being repossessed. The refusal of an insurance claim to rebuild a home following a flood can lead to homelessness.

In 2009, a number of smaller financial services schemes were consolidated into the Financial Ombudsman Service (FOS). It was this consolidation and changes in the FOS Terms of Reference that led to the repositioning of EDR as the forum of first choice. Changes included an increase in the jurisdictional limits, the ability to seek EDR after a statement of claim has been lodged,¹⁸¹ and court proceedings being stayed pending an EDR outcome. Financial hardship disputes could be dealt with through EDR for the first time, as opposed to a court process.

Legal Aid NSW has embraced EDR and positioned itself as the leading community organisation with the largest number of complaints lodged with FOS. Legal Aid NSW provides assistance in lodging complaints through legal advice and minor assistance services

¹⁷⁹ A number of parents and family members said that it was the first time they felt that they had been given an opportunity to speak directly to the other parties and to express their view.

¹⁸⁰ www.aic.gov.au/media_library/publications/rpp/118/rpp118.pdf

¹⁸¹ This included mortgage matters in Supreme Court.

and under grants of legal aid.¹⁸² In 2012-2013, Legal Aid NSW provided 504 legal advice and 3,769 minor assistance services in EDR matters.

What evidence is there that ADR translates into quicker, more efficient and less costly dispute resolution without compromising fairness and equity (particularly where there is an imbalance of power between disputants)? What is the potential for resolving more disputes through ADR without compromising fairness or equity?

Family

Legal Aid NSW FDR and COMP programs have resulted in more efficient and less costly dispute resolution, while still retaining a litigation pathway where appropriate. The model of lawyer assisted FDR mediation conferences has enabled ADR without compromising fairness and equity.

With lawyer assisted mediations, agreements can be negotiated and court orders drafted and signed on the day of the mediation. The scope of agreements can be broader than a parenting plan. It is the experience of Legal Aid NSW that it is hard to gain consent to agreements post mediation, if parties are not encouraged to commit to an agreement at the mediation.

By using FDR as the first entry point for a client, Legal Aid NSW is able to deliver legal aid more efficiently and effectively. The mediation allows the mediator to form an opinion as to the merit of the case and whether legal aid for representation is an appropriate use of public money.

Lawyer assisted mediation has been highly effective in very complex cases including FDR conferences where there are allegations of abuse, parental neglect, drug and alcohol dependencies and incidence of mental illness. Mechanisms such as shuttle conferences have assisted in effective FDR where there is family violence.

Litigation intervention conference numbers have increased more than sixfold since 2009. Regularly used by the courts prior to a final hearing, Legal Aid NSW litigation intervention conferences can reduce the number of hearing days needed or resolve the matter altogether. As the mediator will assist both parties to talk through and narrow issues in dispute, litigation intervention conferences have also assisted the courts with the management of self-represented litigants.

The Legal Aid NSW Family Law Division has reshaped its service structure to focus on intervention and early resolution, rather than litigation services.

¹⁸² www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.5.-consumer-protection-matters

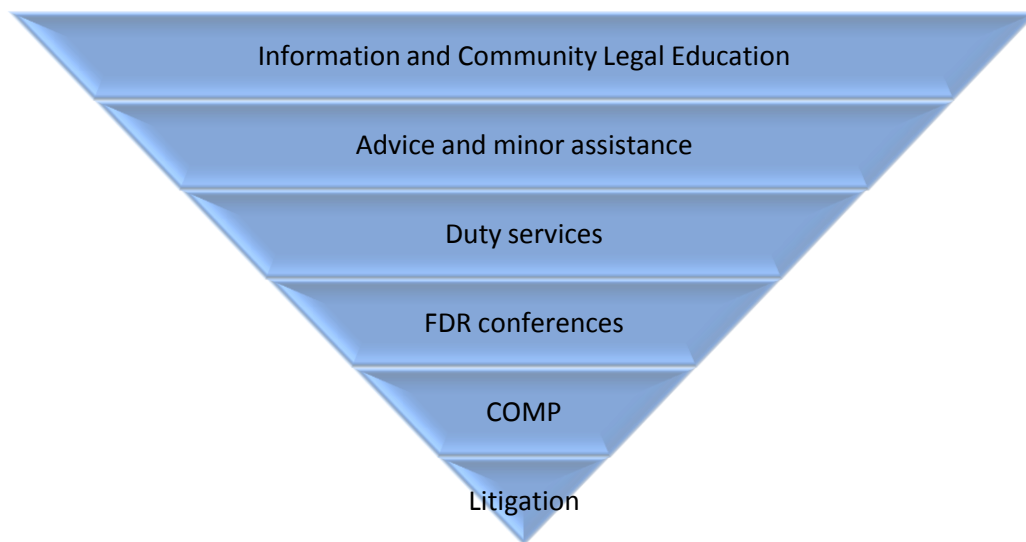


Figure 13: Legal Aid NSW Family Law Services model

The Family Law EIU has increased its community and legal education reach with the development of the Best for Kids website. Advice and minor assistance services have significantly increased, particularly in regional and rural areas, providing advice at the early stages of family law issues. Advice and minor assistance, along with duty services are creating entry points for people to be triaged, with the level of assistance dependent upon legal need and capacity. Part of the triage process is determining whether to aim for therapeutic intervention, mediation or litigation.

Where more intensive assistance is required, clients are diverted from filing in court and engaged in FDR. Where litigation assistance is provided, orders sought are carefully targeted and limited to the narrow issues unable to be resolved through prior processes.

Legal Aid NSW has initiated the COMP scheme where parties are diverted by order of a Judge to participate in a court ordered mediation before further decisions are made. This allows the areas of dispute to be determined and often narrowed. Many legal issues are resolved at these intervention conferences. The mediation can also include the child and provide a cost effective method of resolving the views of the child where an ICL has not been appointed.

By resolving issues at the most appropriate lowest level, Legal Aid NSW is providing effective, efficient and economical services and saving the court's time and resources and costs to the community.¹⁸³ There is potential to expand the COMP model into all Family Law court registries. Legal Aid NSW believes the cost of rolling out such a program is outweighed by the savings in court time.

¹⁸³ The *Family Dispute Resolution services in legal aid commissions: Evaluation Report*, prepared for Commonwealth Attorney-General's Department by KPMG, (2008) p.88 www.legalaid.nsw.gov.au/_data/assets/pdf_file/0016/5434/FDR-Evaluation-Report.pdf found Legal Aid NSW providing a highly cost effective model of FDR making it effective in avoiding the higher cost of litigation. The lawyer assisted model was found to enable FDR practitioners to use a range of clinical and legal strategies to manage complex legal and support needs. The model was also found to be effective in identifying family violence and child abuse at screening. Since this report was published Legal Aid NSW has significantly enhanced its family law service model with the introduction of the EIU, Duty services and COMP.

Civil

The use of EDR results in quicker, more efficient and less costly dispute resolution, without compromising fairness and equity. Benefits of EDR include early intervention, and effective and efficient use of resources.

EDR schemes are free, easy to use and do not require legal representation. Importantly, people retain their right to commence court proceedings if they are not satisfied with the outcome. Legal Aid NSW believes that EDR schemes should be the forum of first choice for resolution of consumer disputes and that the best aspects of EDR should be applied to the court system.

The advantages of EDR include:

- Expertise of decision makers. In EDR processes people do not need to be experts as the scheme's decision makers are specialists in the area of law.
- Flexibility and informality, with user-friendly modes of lodging and resolving complaints.
- Value for money. Schemes are designed for legal representation, except for the most vulnerable.
- Innovative resolution of systemic issues.

As EDR processes are informal and user friendly there is no need for lawyers, except for the most vulnerable clients. EDR can also save on the costs imposed by the opposing party, as the mortgagee lawyer cannot charge their legal fees as enforcement costs while the matter is at EDR. In addition, it is the experience of Legal Aid NSW that FOS is extremely effective in identifying and resolving consumer disputes at a systemic level.

How might ADR be strengthened to improve access to justice? In what circumstances or settings is it appropriate (or not) to facilitate greater use of ADR in resolving civil disputes? How successful has ADR mandated by courts and tribunals been in resolving disputes and lowering the cost of litigation?

Legal Aid NSW notes the power imbalance that arises for self-represented litigants in ADR processes, which do not have an inquisitorial function.

As discussed, the Legal Aid NSW Court Ordered Mediation Program (COMP) has been highly successful in resolving family law problems and lowering the costs of litigation. For example, in 2012-2013, 172 mediations were conducted with 44% achieving full agreement and thereby saving 129 days of hearing time. A further 44% of mediations achieved partial resolution, saving court time by narrowing the issues still in dispute.

Ombudsman

The Commission invites comments on the scope and operation of ombudsman services in Australia.

Legal Aid NSW applauds the use of ombudsman services in appropriate circumstance, but notes that these services are very different from legal assistance services. It is the

experience of Legal Aid NSW that disadvantaged clients will frequently lack the capacity to effectively utilise ombudsman services.

10. Improving accessibility of tribunals

What lessons can be learned from the various tribunal structures used across different jurisdictions in Australia? How and to what extent has the move towards consolidated tribunals impacted on access to justice and affected efficiency?

Legal Aid NSW urges caution in consolidating tribunals. Not only is there the risk of losing the tribunal's specialisation but also the user-friendliness which make tribunals effective. Larger tribunals are more process driven, reducing accessibility for self-represented litigants. While Legal Aid NSW understands the economies of scale achieved through consolidation of tribunals, there continues to be a need for ongoing assistance to ensure that self-represented litigants can effectively resolve their legal problems. As outlined in section 7, Legal Aid NSW provides a network of duty advice services at the AAT, SSAT and the ADT, which assist clients to understand the merits, strengths and weaknesses of their case and how best to present it.

Should scope for having legal representation within the context of tribunals be more or less limited and why? What mechanisms could be used to help ensure that the benefits of simplicity and informality of tribunals are not undermined by lawyers acting as if they are appearing before a court?

Legal Aid NSW submits that there must be scope for representation before tribunals of disadvantaged people who lack the capacity to self assist. Tribunal decisions in areas such as immigration, social security, child support and employment matters for example, will have a significant impact on an individual and their family.

Legal representation at tribunals for disadvantaged clients is critical, particularly in the light of literacy, language, educational attainment and disability barriers experienced by Legal Aid NSW clients. Vulnerable clients face further disadvantage when appearing against frequent applicants, such as landlords, who are familiar with the process and have a greater ability to represent themselves.

However, Legal Aid NSW also believes there is scope for lay advocates and draws the Productivity Commission's attention to the work of the Legal Aid NSW Veterans Advocacy Service which is discussed in section 7.

Legal Aid NSW submits that it is often not the lawyers making processes more complicated but the practices and procedures required by courts and tribunals.

11. Improving accessibility of the courts

Conduct of parties in civil disputes and vexatious litigants

How effective are model litigant rules and other existing legislative conduct obligations?

As discussed in section 7, it is the experience of Legal Aid NSW that the model litigant rules as embodied in the *Legal Services Directions 2005* are not always applied by the Commonwealth and State agencies, particularly the rules relating to negotiating a settlement and properly conceding liability at an early stage. There is also variation in the way in which model litigant rules are applied by external legal providers. In particular, Legal Aid NSW has experienced prolonged proceedings and unnecessary requests for particulars. These practices result in increased costs both to applicants and the respondents.

Legal Aid NSW notes the lack of ability to enforce the standard set by the model litigant rules.

Should existing obligations to encourage cooperation be strengthened or expanded?

Existing obligations to encourage cooperation should be strengthened with the aim of resolving legal problems as early as possible, especially those obligations relating to negotiating a settlement and properly conceding liability at an early stage.

Court processes

How are imbalances in the resources available to disputing parties best addressed so that outcomes are not based on one party being able to effectively exhaust the resources of another, rather than winning on merit? Should model litigant obligations be extended to circumstances where a private party is significantly better resourced than the other in proceedings?

Legal Aid NSW welcomes the recognition in the Productivity Commission's Issues Paper of the exploitation of processes by well resourced parties and agrees that threats of an adverse cost order will force people to abandon their case or settle on unfavourable terms. As discussed in section 7, the power imbalance between self-represented litigants and corporations and government agencies is such that applicants will not pursue their legal entitlements even in no cost jurisdictions.

Legal Aid NSW supports the idea of model litigant obligations being extended where a private party is significantly better resourced, but notes the issues outlined above in relation to failure to enforce compliance by government agencies with the model litigant rules

How should the costs of any inefficient or ineffective court processes be best assessed?

The cost of inefficient and ineffective court processes should include the cost of waiting times. In addition, the cost of the requirement to appear in person and not send an agent should be assessed. These costs affect clients who cannot travel or live in regional, rural and remote locations. For example, regional court registries are only available when a Judge is

present on circuit which increases the costs on the individual, legal services and the broader community.

Legal Aid NSW would welcome an increase in Family Law circuit courts and resourcing to increase the use of AVL facilities.

Witnesses and experts

How and to what extent do the current approaches to expert evidence impact on access to justice? In what areas do issues relating to experts particularly affect access to justice? How could they be reformed to improve access?

Expert reports are an important way in which Family Courts determine what outcome is in a child's best interest. These reports assess parenting capacity, a child's bonding and attachments and a range of other issues. Reports provided through the Child and Family Consultant services of the Family Courts are critical to the family law process and should be available through a court ordered approach from an independent pool of experts. Legal Aid NSW is concerned that a user pay approach to expert reports results in a significant access to justice barrier, with only wealthier litigants able to afford reports.

However, in complex family law matters, expert evidence is required on matters beyond the expertise of a Child and Family Consultant. In such cases, the parties are required to fund expert evidence. Arguably the shortage of child and family experts willing to practice in the family law jurisdiction (both psychologists and psychiatrists), has resulted in a market rate in excess of \$5,000 per report.

Legal Aid NSW will fund some reports for those who are legally aided and meet guidelines, but due to limitations on funding cannot approve all requests. Many self-represented litigants are unable to afford such reports. Expert reports are often an important tool in resolving matters as courts are persuaded by the recommendations that experts make. Matters that might resolve with the assistance of an expert report therefore require a judicial determination, or conversely parties are forced to withdraw from proceedings due to a lack of evidence.

The NSW Children's Court Clinic produces family assessment reports used by the Court. It is the experience of Legal Aid NSW that concerns with potential Court delays due to the limited supply of report writers results in a reluctance by the Court to order these reports. Family assessment reports can be critical to fair outcome in the best interest of the child.

Reforms in court procedures

Case management

How effective have the case management systems, processes and practices adopted in different jurisdictions been in reducing cost and delay? How has their effectiveness been evaluated?

Legal Aid NSW notes the parallel court system in family law, with the Family Court and Federal Circuit Court both ruling on the same legislation with different rules, procedures and

forms. The parallel system and resulting complexity creates administrative costs for legal services.

Pre-action requirements and procedures

How useful have pre-action requirements been in resolving disputes earlier? To which particular disputes are pre-action requirements most suited?

Pre-action requisites in family law are effective at screening matters prior to court. Legal Aid NSW Family Law service model makes an important contribution to resolving disputes earlier by filtering clients from advice clinics into mediation and where appropriate diverting clients from court.

Cost awards and court fees

Arrangements for awarding costs

What principles should apply in deciding how to award costs so that they create appropriate incentives for equity and efficiency in civil dispute resolution? In particular, what principles should apply to help ensure that the costs incurred are proportionate to the issues in dispute?

Legal Aid NSW funds court ordered Independent Children Lawyer (ICL) in family law proceedings. There is no means or merit test for this type of legal aid because the grant is to ensure the rights of the child are independently represented. However, Legal Aid NSW seeks to recover ICL costs where the litigant can afford to pay. Currently there are divergent views about whether public funds should be recovered in certain circumstances from parties who can afford to pay. Assistance in the retrieval of costs for ICL matters is a potential area of reform.

Court fees

The Commission invites comments on the appropriateness of court fees.

In the State civil law jurisdictions Legal Aid NSW clients are automatically exempt from court fees. This exemption has reduced red tape and inefficiency as legal aid clients meet the requirement for financial hardship.

Legal Aid NSW seeks a similar automatic fee exemption in Commonwealth jurisdictions. Currently legal aid clients are eligible for exemption but required to complete a form to receive the fee exemption. As legal aid clients are eligible for the fee exemption and generally receive the exemption, the application process appears to be unnecessary red tape and costly.

Use of technology

How can technology be best used to improve the efficiency and scope of service delivery? What opportunities exist to increase collaboration across the sector to further develop the use of technology?

As discussed in section 4, Legal Aid NSW supports a number of technological initiatives designed to improve the efficiency and scope of service delivery. These include LawAccess NSW, LawAssist website, desktop web conferencing law clinics and the array of community legal education resources, including interactive online resources, available on the Legal Aid NSW website. The success of these initiatives is due to being part of the network of legal aid services, which at its most complex includes legal representation.

Legal Aid NSW believes that there are opportunities to enhance the use of AVL and remote access to civil courts and tribunals but notes the resources required to effectively increase access to AVL.

What opportunities are there to use technology to cost-effectively expand services, particularly for regional and remote Australia? What other groups might benefit from the delivery of cost-effective outreach and online services? Do some groups face particular obstacles in using online services?

There are opportunities to use technology to expand access to justice for disadvantaged Australians, particularly those living in regional and rural NSW. However literacy, language, educational attainment and disability barriers will significantly impact on the ability to effectively use online services. Research in this area describes a continuum of capacity, where online services and telephone are most appropriate for people with the ability to self-help while those with less capacity require face-to-face assistance.¹⁸⁴

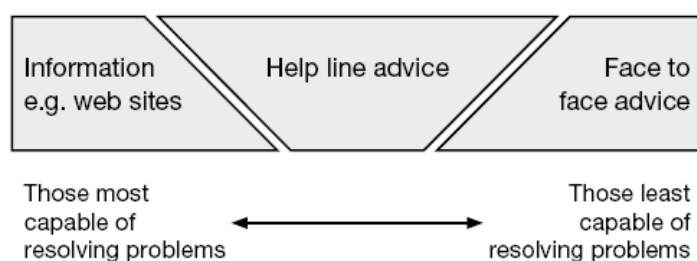


Figure 14: Forms of assistance

Studies have noted that:

Obtaining information from the Internet requires a certain level of literacy, comprehension and computer skills. Vulnerable people need a greater level of help, and good telephone or face-to-face advice is vitally important.¹⁸⁵

It is for this reason that Legal Aid NSW is using a mediated model in its desktop web conferencing with clients supported at the host agency during and after a legal advice

¹⁸⁴ *Getting earlier, better advice to vulnerable people*, Department of Constitutional Affairs, March 2006

¹⁸⁵ *Ibid*

session. Internet speed and access are significant barriers to utilising online services. In addition, there are logistical difficulties with providing remote IT and project support.

12. Effective and responsive legal service

Legal assistance services

Do legal assistance service providers deliver the right mix of services (in terms of forms of assistance and across the various areas of law)? Do they complement each other or are there areas of overlap? Is the current model of legal assistance service delivery efficient, effective and appropriately focused on specific legal needs?

Right mix of services

Legal Aid NSW submits that it delivers the right mix of services to address family, civil and criminal law issues, within its available resources. Due to resource constraints the provision of civil law services needs to be highly targeted to those communities most in need and to the legal issues that impact most on their lives. These services have been developed on the basis that they would not be available if Legal Aid NSW did not provide them. In other words, these services are specifically designed to meet a market failure.

As outlined in the introduction, Legal Aid NSW provides a comprehensive network of services through responsive and innovative methods of service delivery. Legal Aid NSW has a mix of service types including legal information, community education, advice and minor assistance, duty services and alternative dispute resolution and complex litigation services. The network of legal aid services ensures that people who would not be able to access legal services are able to receive some form of assistance.

Legal Aid NSW also uses its state-wide reach to assess the need for the right mix of services to particular communities in relation to different emerging legal issues. Depending on the complexity of the issue, the target group and the desired outcomes, Legal Aid NSW develops strategies that vary in the mix of services being provided, whether it be CLE, advice, minor assistance and litigation. It is important to maintain the highest level of cost effective responses in targeting particular issues.

The locations in which these services are delivered have expanded over the last three years, particularly under the NPA. In addition to services delivered from 21 Legal Aid NSW offices the Family Law and Civil Law Divisions have developed a regional focus that goes beyond the confines of an office,¹⁸⁶ with mobile lawyers, operating from regional hubs. Legal Aid NSW now has 164 outreach locations with approximately 80% in regional locations. A recent evaluation of Legal Aid NSW outreach by the LJF provides a statistical overview of outreach services, including the reach of this service model into disadvantaged groups.¹⁸⁷

¹⁸⁶ This has arisen in part due to the Legal Aid NSW office locations determined by criminal law needs with Family and Civil services added on as resources became available.

¹⁸⁷ Review of Legal Aid NSW outreach legal services - Stage 1 report Statistical overview of services 2010-2012, Law and Justice Foundation of NSW, 2013
[www.lawfoundation.net.au/ljf/site/articleIDs/3495F5A93BBB91BDCA257BD000143795/\\$file/Review_of_LegalAidNSW_outreach_Stage1_FINAL_Web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/3495F5A93BBB91BDCA257BD000143795/$file/Review_of_LegalAidNSW_outreach_Stage1_FINAL_Web.pdf) The Evaluation found high rates of assistance

Outreach locations and host agencies are selected based on legal need, existing use by target client groups and accessibility. Outreach service locations include homeless services, Aboriginal medical services, Aboriginal community organisations, Migrant Resource Centres, Neighbourhood Centres, Settlement Services, Centrelink, courts and correctional facilities.¹⁸⁸ These services would not be available if Legal Aid NSW did not prioritise the allocation of resources in order to establish them.

Apart from service type and location, Legal Aid NSW submits that the right mix of services also relates to the breath of the legal problems being addressed, particularly where there is market failure. The Legal Aid NSW service mix includes a number of specialist services targeting particular legal problems and disadvantaged groups.¹⁸⁹ For example, services include participation in disaster recovery centres, fines days and assistance with workplace closures. Targeted civil law projects include the resolution of debt through bulk negotiations for people in long term financial hardship, assisting people who are struggling to pay off a pay day loan, and establishing partnerships with health services.

The Legal Aid NSW Civil Law Division has expertise in legal problems that impact on people's everyday lives. The Division specialises in areas such as consumer law, employment, government law, access to services, insurance, mental health and issues affecting homeless people, older persons, prisoners and veterans. These areas of law are not commercially viable for private practitioners because they are:

- Often in no cost jurisdictions
- Do not involve a dispute (and therefore costs from an opposing party)
- Impact on people who cannot afford to pay a private solicitor to assist them.

Similarly the Family Law Division specialise in care and protection, child support, family dispute resolution and complex family law litigation.

The mix of services also compliments the services provided by other publicly funded agencies such as CLCs, pro bono legal services and services able to be purchased from private practitioners.

provided in the Far West and Orana, Riverina, Coffs-Harbour/Grafton and Richmond Tweed regions, in particular to clients living in Wilcannia, Walgett, Menindee, Lightning Ridge, Urana, Brewarrina, Myall Park and Yenda.

¹⁸⁸ One third of Legal Aid NSW outreach clinics are in community centres, 16% in Aboriginal services and 25% in courts and tribunals.

¹⁸⁹ Specialist services include: Adult Drug Court Service; Care and Protection Legal Service; Child Representation; Child Support Service; Children's Legal Service and Youth Hotline; Client Assessment and Referral Unit; Compulsory Schooling Orders duty service; Coronial Inquest Unit; Domestic Violence Practitioner Service; Employment Law Services; Family Dispute Resolution Conferencing; Family Law Early Intervention Service; Homeless Legal Outreach Clinics; Immigration Service; Mental Health Advocacy Service; Mortgage Hardship Legal Service; Older People's Legal and Education Program; Long term financial hardship; Prisoners Legal Service; Sexual Assault Communications Privilege Service; Social Security Service; Standard Non-Parole Period Review Team; Veterans' Advocacy Service; Work and Development Order Service and Youth Drug and Alcohol Court Service.

Collaborative and cooperative partnerships

Legal Aid NSW has a legislative duty to ensure co-ordination of legal aid services and the state wide provision of legal assistance services to disadvantaged people.¹⁹⁰ Within NSW, Legal Aid NSW works cooperatively with other legal assistance services, particularly the ALS and CLCs. Legal Aid NSW and the ALS signed a Memorandum of Understanding in 2006 and a Statement of Commitment in 2011 and 2013, under which both organisations agree to work together to:

- Deliver high quality, culturally sensitive and innovative legal services to Aboriginal people.
- Improve the justice system for Aboriginal people.
- Share information and resources, and support the professional development of each other's staff.

As part of this collaborative approach, Legal Aid NSW has undertaken a number of initiatives to increase access to legal assistance for Aboriginal people.¹⁹¹

Legal Aid NSW administers CLCs funding agreements on behalf of the Commonwealth and NSW Governments and the Public Purpose Fund (PPF) and also works closely with CLCs through partnership projects and joint initiatives. The recently evaluated Legal Aid NSW/CLC Partnership Program funds innovative projects aimed at fostering new ideas and approaches to service delivery and improving access to justice for vulnerable and disadvantaged clients.¹⁹² Legal Aid NSW and CLCs also regularly communicate through local networks and issues-based forums.

Legal Aid NSW submits there is a high a level of cooperation, collaboration and integration amongst NSW legal assistance services. Examples include¹⁹³:

- New South Wales legal Assistance Forum (NLAF) including working groups on particular issues such as prisoners and housing)
- CLSD Program¹⁹⁴

¹⁹⁰ *Legal Aid Commission Act 1979 (NSW)* section 12(h) and (b)

¹⁹¹ Initiatives include funding two ALS Aboriginal Field Officers for civil and family law matters at Coffs Harbour and Walgett, funding two ALS Field Officers at Bathurst and Nowra under the Work and Development Order Service, providing salary support for 3.5 ALS care and protection Legal Officer positions and providing civil law advice clinics at ALS offices in Griffith, Lismore, Nowra, Redfern, Walgett and Wollongong, and family law advice clinics at ALS offices in Parramatta and Redfern.

¹⁹² 2012-2013 funded projects include: Linked in - addressing young people's civil law needs an initiative of Marrickville Legal Centre and the Legal Aid NSW Children's Legal Service; Income Management Information and Advice Project, Welfare Rights Centre and the Legal Aid NSW Government Law team; Working with Aboriginal men in the Shoalhaven regarding family law Shoalcoast CLC and Nowra Legal Aid NSW office; Legal literacy in prisons project Hawkesbury Nepean CLC, Public Interest Advocacy Centre, Wirringa Baiya Aboriginal Women's Legal Centre, Community Education Unit Legal Aid NSW and Corrective Services NSW.

¹⁹³ Previous initiatives include: National Insurance Law Service (Legal Aid NSW and Consumer Credit Legal Centre); Mortgage Hardship Service (Legal Aid NSW and Consumer Credit Legal Centre); and Intellectual Disability Service Improvement Project (Legal Aid NSW and Intellectual Disability Rights Service).

- LawAccess NSW (training and referral pathways)
- Partnerships between Legal Aid NSW and the ALS
- Older Persons Legal Service (Legal Aid NSW and The Aged Care Rights Service)
- CLC Partnership Program
- WDO Service (Legal Aid NSW and ALS)
- Pay day loans (Legal Aid NSW and Consumer Credit Legal Centre)

These initiatives are long term and go far beyond co-operation. They are examples of integrated service delivery and the sharing of expertise and resources to achieve the best outcomes for disadvantaged clients. This cooperation extends to planning services in order to compliment rather than unnecessarily duplicate services.

Efficient and effective

Legal Aid NSW submits the delivery of legal aid is efficient, effective and appropriately focused on specific legal need. A legislative duty of Legal Aid NSW is to 'ensure that legal aid is provided in the most effective, efficient and economical manner'.¹⁹⁵ In delivering value for money, the right mix of services and innovative services, Legal Aid NSW demonstrates productive, allocative and dynamic efficiency.

Legal Aid NSW uses the mixed model of service delivery to ensure efficiency and effectiveness. By delivering duty and litigation services in partnership with the private profession, Legal Aid NSW is able to make the best use of its resources.

In 2012-2013, 79.6% of grants for legal aid in family law matters were assigned to private practitioners and 21.3% of duty services. For civil law matters, 42.7% of grants were assigned to private practitioners and 79.6% of duty matters.

The mixed model of service delivery enables the supply of legal aid services well below the market rate, while supporting quality control mechanisms to oversee the effective delivery of those services. The *Legal Aid NSW Act 1979 (NSW)* requires fees for legal aid services to be less than the ordinary professional costs of a service.¹⁹⁶ Legal Aid NSW uses a number of strategies to ensure both value for money and quality. More detail of these strategies including the use of service agreements with private practitioner on Legal Aid NSW panels is provided under the mixed model question in the next subsection.

In addition to the economies of scale obtained through high volume service delivery, Legal Aid NSW demonstrates allocative efficiency through the delivery of easily accessible legal assistance available through 21 Legal Aid NSW offices, 164 outreach locations across the State, and telephone and internet services. Legal Aid NSW inhouse practice has particular expertise in legal problems experienced by disadvantaged people. Legal Aid NSW services are specifically designed to facilitate access to legal services by these disadvantaged groups.

¹⁹⁴ The CLSD model is discussed in detail in section 4.

¹⁹⁵ *Legal Aid Commission Act 1979 (NSW)* section 12(a)

¹⁹⁶ Section 39(4).

The delivery of these services is based on research and evaluation (for example the recent *Legal Need in New South Wales* report),¹⁹⁷ and the identified barriers experienced by disadvantaged groups in accessing services.

Dynamic efficiency is demonstrated in Legal Aid NSW's cooperation and collaboration with CLCs, the ALS and other legal assistance services. The innovative work of NLAF, the 11 CLSD regions and partnership projects with legal service providers all lead to better products and better ways of delivering services within existing resources.¹⁹⁸

The Legal Aid NSW Civil Law Division has developed a number of innovative approaches to deal with issues that impact on large groups of people. These approaches are particularly efficient and effective because of the large numbers assisted and the economic and social impact of the assistance on the individual and their community. Examples of these approaches include the bulk negotiation of debts for people in long term financial hardship, and representing 'groups' of insurance claims following disasters. A further example is assisting a group of people in Western Sydney who were victims of internal regulatory failures in one of the Big Four banks. These examples are described in more detail below.

In conjunction with Victoria Legal Aid and West Heidelberg Community Legal Centre, Legal Aid NSW has been assisting people on Centrelink benefits who are in long term financial hardship and have no prospect of repaying their debts. To date, over \$15 million in debt has been waived. As a result of this project, Legal Aid NSW has been working with banks, debt collectors and credit providers to develop a sustainable solution for people in long term financial hardship who are unable to repay their debts.

Legal Aid NSW is the lead legal agency in NSW disaster recovery assistance. It is also taking a leading role in identifying and addressing systemic issues in insurer practices through casework and policy responses. This has long term effects on future victims of disasters.

In late 2007, within a short period of time, 20 people approached the Penrith office of Legal Aid NSW, seeking assistance in relation to home loan contracts with a major bank. Most were in default and were facing repossession proceedings. A systemic issue relating to the processing of loan applications at a number of branches of the bank was identified. Legal Aid NSW determined that the conduct in relation to these loans was misleading, deceptive, unjust and/or unconscionable.

Joint representations were made to the Bank by Legal Aid NSW and ASIC. The bank subsequently advised that there were about 120 loans affected by this conduct. The bank agreed to send each of these borrowers a letter, asking them to contact the bank and suggesting that they seek advice from Legal Aid NSW.

Legal Aid NSW was able to negotiate an appropriate resolution for most of these customers without needing to commence any proceedings in court.

¹⁹⁷ Law and Justice Foundation of NSW, *Legal Australia-Wide Survey Legal Need in NSW*, a joint initiative between Legal Aid Commissions and the Law and Justice Foundation of NSW.

¹⁹⁸ For example Legal Aid NSW is currently piloting use of web conferencing to provide advice legal advice in remote locations in conjunction with Aboriginal Legal Service Field Officers in Walgett and Grafton and Mission Australia in south east NSW.

Legal Aid NSW regularly evaluates its programs,¹⁹⁹ and has a biannual customer satisfaction survey.²⁰⁰ As a statutory authority, Legal Aid NSW is subject to public sector accountability mechanisms including audit and risk. Like all legal aid commissions it produces annual reports, financial statements, and budget papers and is subject to the budget estimates process and audit by the Auditor General. In addition, the performance of legal aid commissions against the NPA objectives and benchmarks is being evaluated through the NPA Review due to report in 2013.

Appropriately focused

Evidence of legal need drives Legal Aid NSW service models.²⁰¹ In addition, Legal Aid NSW regularly evaluates its services to ensure they are appropriately targeted. More detail on Legal Aid NSW effective, efficient and appropriately targeted services for disadvantaged people with complex needs is outlined later in section 12.

As discussed previously, Legal Aid NSW's mix of services includes a number of specialist services targeting particular legal problems and disadvantaged groups. For example the review of Legal Aid NSW outreach legal services found:

Disadvantaged clients are a priority for Legal Aid NSW generally, and for outreach specifically, because the research has indicated this group have heightened vulnerability to legal problems and lower capability to successfully resolve their problems. Interviewees noted that these are clients who, due to their circumstances as well as gaps in existing services, may have high and often clustered legal need. The particular needs and capabilities of these client groups are central to the way that outreach services are structured and delivered.²⁰²

The Settlement Services International (SSI) outreach model is another example of how Legal Aid NSW services are appropriately targeted. Under the partnership between Legal Aid NSW and SSI, family and civil lawyers provide regular legal advice clinics at Migrant Resource Centres. Community legal education sessions about the Australian legal system have been popular. The partnership was a response to the Law Council of Australia's report which

¹⁹⁹ Recent evaluations include the Cooperative Legal Service Delivery Program (2012) and the Women's Domestic Violence Court Advocacy Program (2011)

²⁰⁰ The 2013 Legal Aid NSW Client Satisfaction Survey www.legalaid.nsw.gov.au/_data/assets/pdf_file/0006/16539/Legal-Aid-NSW-Client-Satisfaction-Survey-2013.pdf Legal Aid NSW achieved an overall satisfaction rate of 91.5%. The main causes of dissatisfaction were around the limitations on the services Legal Aid NSW can provide due to resource constraints.

²⁰¹ In response to the LJF reports on legal need of: Older people (2004); Homeless people (2005); People with a mental illness (2006); Prisoners (2008) and Outreach programs for people with complex needs (2009) Legal Aid NSW developed a number of programs including the Older Persons' Legal and Education Program, Homeless Outreach Clinic, NLAf legal needs of prisoners working group, 'Back on Track' Community Legal Education for prisoners and the NLAf Prisoners Forum and the Legal Aid NSW Outreach program. The *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas (2006)* underpinned the expansion of the Cooperative Legal Service Delivery (CLSD) Program and the coordination of legal and non-legal services in CLSD regions.

²⁰² Forthcoming publication Forell, S. McDonald, H. Ramsey, S and Scott, S, *Review of Legal Aid NSW outreach legal services Stage 2 report: Evolving best practice in outreach, insights from experience*, Law and Justice Foundation of NSW

found that failure to address legal problems increases the likelihood of family breakdown, intergenerational conflict and mental health problems in CALD communities.²⁰³ The SSI outreach service is currently being evaluated by LJF.

While Legal Aid NSW provides a range of legal services available to everyone, it prioritises disadvantaged people for its more intensive services. The overlay of grants of legal aid and SEIFA²⁰⁴ indicators of disadvantage in figure 14 demonstrates the spread of legal aid grants across disadvantaged areas in NSW. Additional maps for Sydney, Newcastle and Wollongong are included in Annexure B.

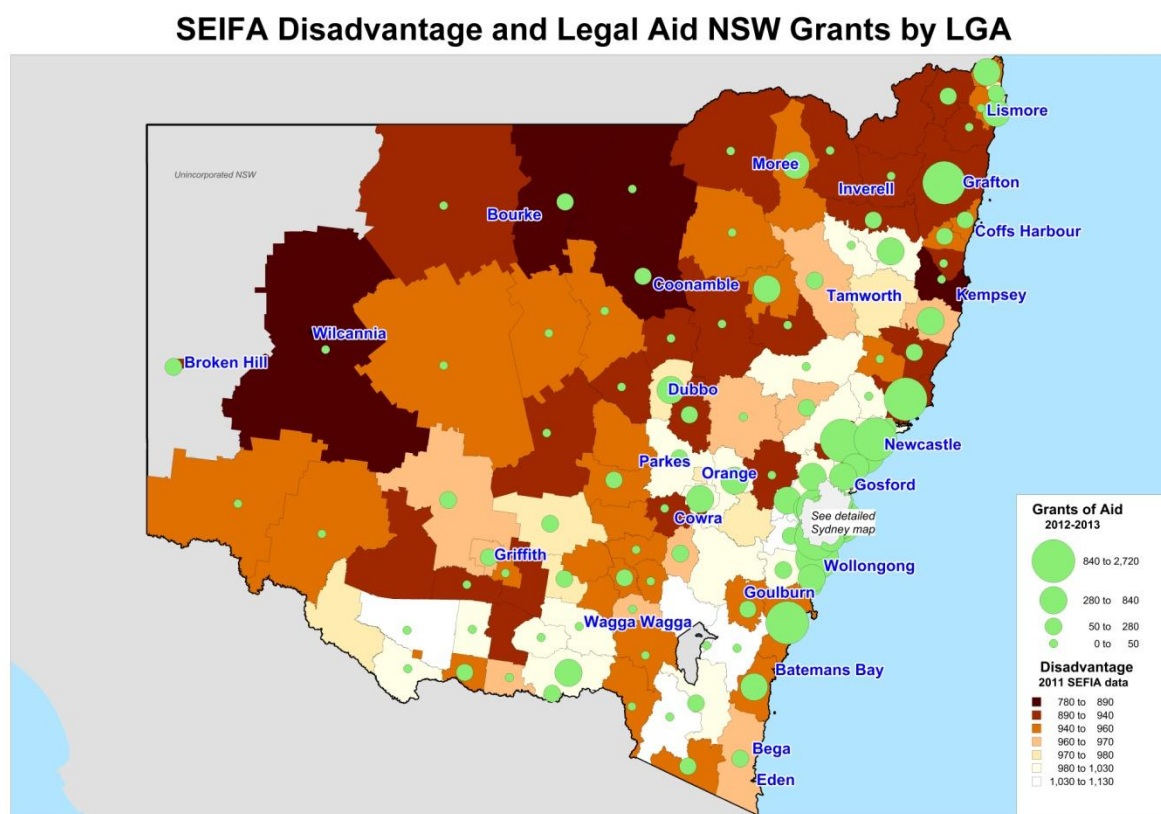


Figure 15: Correlation between Legal Aid NSW grants and SEIFA disadvantage 2012-2013²⁰⁵

²⁰³ Improving the family law system for clients from culturally and linguistically diverse backgrounds, Family Law Council, February 2012 p.7
www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Clients%20from%20Culturally%20and%20Linguistically%20Diverse%20Backgrounds.pdf

²⁰⁴ ABS Socio-Economic Indexes for Areas

²⁰⁵ Home address postcodes are collected by Legal Aid NSW for case grant recipients except for: some children in family law matters, including care and protection; homeless clients; and clients whose recorded address is 'care of' their lawyer's office. Grants where the recorded postcode is 1238 (part of the address of 'Legal Aid NSW Head Office') have been excluded from these maps. However other postcodes for lawyers' offices have not been excluded as they are problematic to identify in aggregate. A relatively large group of these is in the Sydney LGA, which accounts for part of the large number of grants attributed to this area. Where clients are imprisoned, their postcodes are those of the relevant correctional centres. The ABS publishes SEIFA data on relative disadvantage levels for different geographic areas, which is derived from Census data. The ABS recommends that SEIFA data be considered at a very detailed geographic level, but since that is not feasible for the

SEIFA data is shown in these maps as shading from white to dark brown, with the darker shades corresponding to higher levels of disadvantage. Grants of aid are represented by green dots within LGAs, the larger dots representing more grants. Population density is not shown in these maps, but it should be kept in mind that some of the more disadvantaged parts of the State have small numbers of grants because of low population numbers.

How effective and appropriate are the current eligibility criteria for legal aid at targeting service provision? Which Australians are not eligible for legal assistance but also not in a financial position to pursue a legal problem? What course of action do these individuals take after being denied assistance? What options (including private sector involvement) are there for improving their ability to access the legal system?

Targeted service provision – eligibility criteria

Eligibility criteria for legal aid predominately apply to case work services. Grants of legal aid for legal representation are subject to a means and merit test. They are therefore targeted to people who are most in need, unable to pay for private representation, and who come within Legal Aid NSW policies, which target particular areas of law on the basis of market failure and other factors.

Difficult decisions about the availability of grants for casework for dispute resolution and litigation are based on the legal need, capacity of the client and the consequences of the legal problem. For example legal aid is generally available for care and protection proceedings, subject to a means and availability of funds test.²⁰⁶ Legal aid is also generally available for a child representative appointed by the court. These types of proceeding are a priority because of the social and economic consequences on the child, parents and larger community of a child been removed from their parents.

In contrast, a grant of legal aid for a court application relating to a divorce is only available subject to means, merit, availability of funds, special circumstances, the court application being imperative, the applicants suffering special hardship and the court application being of such complexity that is not reasonable to expect the applicant to conduct the proceedings. For the majority of people who will not satisfy the eligibility criteria, Legal Aid NSW runs regular community education sessions on how to fill out a divorce application.²⁰⁷

purposes of this report we have used SEIFA data for Local Government Areas (LGAs). While postcodes often do not fit neatly into LGAs, the ABS publishes tables which enable the allocation of postcode data to LGAs; this method is an approximation whose accuracy, according to the ABS, ranges from good to poor across LGAs. Legal Aid NSW has used these tables to translate client postcode data for grants made during the 2012-2013 financial year into Local Government Areas, for presentation in these maps alongside SEIFA data. Legal Aid NSW grants made to clients with home addresses outside NSW are not shown on the maps (738).

²⁰⁶ www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available/5.16.-care-and-protection-matters

²⁰⁷ Classes are run at Haymarket (Sydney), Bankstown, Blacktown, Campbelltown, Dubbo, Fairfield, Gosford, Newcastle, Parramatta, Penrith and Tamworth to assist people to manage their own application for divorce. The two-hour classes cover: how to complete and lodge divorce application forms; step-by-step explanations of the divorce process; and information about service of documents and the hearing.

Legal Aid NSW adjusts its eligibility policies in response to the opposing forces of legal need and resource constraints. While Legal Aid NSW has not been able to adjust the means test since 2008, it has been investigating other indicators to better target social disadvantage. To this end, Legal Aid NSW is currently piloting a new eligibility test in employment law matters based on indicators of social disadvantage which incorporates the work of Professor Saunders and the Social Policy Research Centre (SPRC).

The research undertaken by the SPRC examined how social exclusion indicators could be used to target services provided by Legal Aid NSW. This research was underpinned by a survey of legal aid applicants from June 2010 to December 2011 which examined the extent of social exclusion they experienced.

The social disadvantage test addresses the issue of linked problems such as under-employment, poor skills, low incomes, poor housing, high crime, bad health and family breakdown. Indicators of social exclusion include, for example, the fact that a person does not have access to a local doctor, hospital or other essential services; has no regular social contact with other people; and lacks employment opportunities.

Employment law was selected for the pilot because of the dramatic impact an employment problem can have on a person's level of social and economic disadvantage. A person who receives assistance to resolve an employment problem may be reinstated or receive compensation, may be successful in negotiating a new and more favourable contract or may receive monies due to them. Assistance with employment law problems can break the vicious cycle of vulnerability discussed in section 2.

Legal Aid NSW submits that its current means test is 'mean', with the means test income limit being 52.4% of the minimum weekly wage. Legal aid has become increasingly welfarised with 88.2% of people applying for aid in 2012-2013 on a Centrelink benefit. Legal Aid NSW was last able to increase the means test in 2008 with funding from the Public Purpose Fund.²⁰⁸

The National Pro Bono Resource Centre has concluded that the means tests of legal aid commissions in Australia create a justice gap:

In practical terms, applying the relevant tests means that only those experiencing poverty or significant disadvantage will qualify for legal aid. Depending on the State or Territory, in order to satisfy the means test, an applicant's net assessable income has to fall between \$255 and \$380 a week. Additionally an applicant's assets cannot exceed between \$740 and \$1500, depending on the jurisdiction. This means that a growing number of Australians are falling into the 'justice gap', not qualifying for legal aid but being unable to afford to pay for legal advice or representation.²⁰⁹

An applicant was seeking legal aid for parenting proceedings in order that he and his wife could spend time with their grandson, aged two. After their daughter had been killed by her de-facto partner, the Department of Family and Community Services had placed their grandson with the

²⁰⁸ The Public Purpose Fund (PPF) provided an increase in recurrent funding to enable change to the means test in 2008-2009 building on additional recurrent funding for means test adjustments in 2006-2007 and 2007-2008.

²⁰⁹ National Pro Bono Resource Centre, *Pro bono legal services in family law and family violence Final Report*, October 2013, p.47

paternal grandparents. The applicant and his wife do not have a strong relationship with the child as the daughter's de-facto had been controlling and would not allow their daughter to visit them. The applicant's wife worked in a nursing home and the applicant was refused on means as their combined income was over the income test.

Justice gap

Legal Aid NSW submits that a 'justice gap' exists for a large section of the community, including the so called 'working poor'. Specifically, while they are not eligible for legal aid due to means, they cannot afford to pay for private legal advice and representation. This can result in people not pursuing their legal options or if they do being self-represented.

...many self-represented litigants are in that situation because they do not satisfy the Legal Aid means criteria but are also unable to afford private legal representation.²¹⁰

Increasing numbers of self-represented litigants has cost implications and will also result in a loss of confidence in the justice system and the rule of law.

While the extent of justice gap has not yet been determined, Legal Aid NSW submits that indicators of the justice gap include the extent of self representation,²¹¹ private legal costs²¹² (detailed in section 5), percentage of the means test income limit compared with the minimum weekly wage and the extent of unmet legal need.

Options to improve access for people experiencing the justice gap

There is a strong case for additional legal aid funding to ensure the working poor have access to appropriate legal services particularly in complex litigation matters. This argument is based on the fact that the working poor are unable to pay for legal services through the private sector and have access to no other form of assistance.

Further, there are large sections of disadvantaged communities that do not have access to appropriate forms of legal assistance. Funding across legal assistance providers is needed to ensure access to those groups.

There is also a strong case for expanding family and civil law duty lawyer services provided by legal aid commissions. These services limit the number of non-meritorious matters proceeding and where matters have merit, assist parties to reach a resolution.

²¹⁰ Federal Magistrates Court of Australia, Review Submission

²¹¹ 2003 study found that around half of self-represented litigants had applied for legal aid and of these 25% had been rejected on the basis of means assessment. Of those that did not apply for legal aid, 75% had been told or had considered that they were ineligible on the basis of means – Hunter R., Giddings, J. Chranowski, A. (2003) Legal aid and self-representation in the Family Court of Australia, Socio-Legal Research Centre, Griffith University

²¹² According to the data, the average costs of professional fees for a Federal Court action is \$98,668 for applicants and \$87,884 for respondents. The median²¹² cost for professional fees is \$16,453 for applicants and \$13,171 for respondents. Including disbursement amounts, the average private cost of Federal Court litigation is \$124,469 and the median is \$20,092 This includes professional costs and disbursements. Extrapolated Strategic Framework for Access to Justice in the Federal Justice System, 2009 p.41 with Wage Price Index (WPI) applied to extrapolate to 2012-2013. Table outlined in section 5.

For example, the evaluation of the EIU Duty Service at Parramatta Family Law Courts found that the early intervention services successfully divert family law matters that should not be in court, de-escalating proceedings between parties and saving court time. In nearly 40% of matters, clients who should not have been going to court were assisted to take a more appropriate action. Where matters did progress to court, the EIU service assisted clients to progress their matters more efficiently with 16% of matters finalised by the court on the day or finalised by consent.²¹³

The evaluation highlighted that the provision by the EIU Service of short, sharp and timely intervention for disadvantaged families at the Sydney, Parramatta and Newcastle Family Court registries, can occur at any stage of the legal process. The assistance provided by EIU duty lawyers can finalise matters for people whose family law problems had remained unresolved a number of years.

A father had orders for three children to reside with him. As agreed, the children went to stay with their mother interstate in the school holidays. However, only one of the three children was returned after this first contact visit. The father's income put him just over the legal aid means test threshold. The father came into the Family Court, representing himself, with contravention orders drafted, and was referred to the Legal Aid NSW EIU Duty Service by counter staff at the court.

The duty lawyer advised the father not to proceed with the contravention order, which would re-open all children's proceedings. She re-drafted the application and applied for orders for recovery instead. The father was provided with legal advice about how to run the recovery proceedings himself. The duty lawyer assisted with filing documents and sought urgent short service. The father had the documents served and represented himself in the urgent hearing. At the hearing, orders were made for the children to be returned.

Legal Aid NSW also refers the Productivity Commission to the benefits of civil law duty advice services outlined in section 5.

Pro Bono

Through NLAF and its working parties and the CLSD program, Legal Aid NSW works closely with the NSW Pro Bono Schemes and pro bono partners. The Pro Bono Schemes and practitioners who provide pro bono assistance provide a valuable service. However, National Pro Bono Centre research indicates that pro bono services for individuals equated to less than 3% of the capacity of legal assistance services,²¹⁴ and Legal Aid NSW notes that these schemes are operating at full capacity. Legal Aid NSW cautions against any access to justice initiatives that rely on an increase in pro bono assistance.

²¹³ *An evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts*, Law and Justice Foundation, 2012
www.legalaid.nsw.gov.au/__data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf

²¹⁴ John Corker, National Pro Bono Centre *Pro Bono partnerships, the state of pro bono service delivery in Australia*, speech for National Law Week May 2013 p. 2 wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20-%20The%20State%20of%20Pro%20Bono%20Service%20Delivery%20in%20Australia%20-%20Brisbane%20May%202013.pdf

Legal Aid NSW submits that pro bono services are most effective when they are responsive to unmet legal need and delivered in the context of services provided throughout the sector. The legal assistance sector has no control over the allocation of pro bono services. It is therefore important that pro bono providers tailor their services towards gaps rather than areas of interest for a particular firm.

How well do legal assistance services assist those with complex needs? What is the evidence on the relative merits and success of targeted strategies to increase access to justice for particular groups? What are the costs and benefits of these strategies?

Clients with complex needs

Legal Aid NSW has a long history of effectively and efficiently assisting people with complex needs.²¹⁵ Essentially, people with complex needs are core legal aid clients. Often these clients are not able to be serviced by the private sector, because of their complex needs.

Strategies to assist those with complex needs are underpinned by specialist services targeting particular disadvantaged groups; the expertise of legal aid lawyers assisting those with complex needs; and research and law reform work which identifies and addresses issues affecting people with complex needs.

Legal Aid NSW has a number of services specifically targeting people with complex needs. These include the Mental Health Advocacy Service,²¹⁶ Veterans Advocacy Service, Homeless Legal Outreach services, WDO Service,²¹⁷ Prisoners Legal Service, Care and Protection Unit and Family Law services generally. Legal Aid NSW family lawyers are often dealing with the hard end cases, where there are often allegations of abuse, parental neglect, drug and alcohol dependencies and incidence of mental illness.

²¹⁵ Legal Aid NSW notes that the Law and Justice Foundation has defined 'disadvantaged people with complex needs' as: People who have multiple problems, including legal problems, but for whatever reason, are not able to access the range of social services/institutions that can be accessed by the majority of the population' (Schetzer et al, 2002, p. 15, based on a 1996 ABS definition). These disadvantaged people may also be described in the literature as 'socially excluded' or 'hard-to-reach'. Such groups often include Indigenous people, CALD communities, people with disability, homeless people, prisoners and those in very remote locations. Forell, S & Gray, A 2009, Outreach legal services to people with complex needs: what works? Justice Issues Paper 12, Law and Justice Foundation of NSW, Sydney p.3

²¹⁶ The MHAS is a state-wide specialist service of Legal Aid NSW, providing legal information, advice and assistance about mental health law to people who have been involuntarily admitted to a hospital and people appearing before the Guardianship Tribunal. MHAS lawyers represent people detained in a hospital under the Mental Health Act and brought before the Mental Health Review Tribunal and people appearing before the Guardianship Tribunal. This can include assistance with financial affairs, applications or revocations of financial management orders, community treatment orders, and appealing against a refusal by the doctor to discharge. Legal Aid NSW lawyers from MHAS and private practitioners funded by Legal Aid NSW attend each hospital in NSW that has involuntary patients. A social worker and lay advocate assist with a wide range of related social issues.

²¹⁷ The Work and Development Order (WDO) Service assists clients to clear fine debt through participation in treatment, unpaid work or educational courses. In addition to aligning clients with the services they need, the WDO Service has expanded the number of approved sponsor organisations providing treatment, volunteering and courses to 1161.

Effective legal assistance to disadvantaged people with complex needs requires an approach that takes into account the overall needs of the clients. In order to deal effectively with a legal issue, legal aid lawyers may need to assist people to access help for other problems impacting on their lives.

J approached a homeless service in the Riverina for financial assistance and was referred to a Legal Aid NSW lawyer who provided regular outreach services at the Centre. J had outstanding debts with a payday lender, a large utility account that she was unable to pay, and a number of other debts. J sought assistance to pay these debts so that she could afford to pay her rent and therefore remain in her tenancy.

The Outreach Lawyer obtained documentation from the payday lender and sought to challenge the loan on the basis of maladministration, as it appeared that the client was unable to service the loan at the time of her application. The lawyer negotiated a repayment of \$900 to the client and a release from further obligations under the loan. The Outreach Lawyer liaised with the utility provider and had the client accepted under their hardship program. The Outreach lawyer also discovered that although the client had been paying some money to the utility company through Centrepay, it was insufficient to cover her usage, which would have resulted in the client incurring another large utility bill. This was adjusted. In relation to her debt for past energy use, the lawyer was negotiating with the utility provider to seek a reduction.

In the meantime the client was advised to seek energy financial assistance vouchers from her local charity provider. The client's case worker at the homeless service also arranged for the client's home to be assessed under the Home Saving Program to reduce future energy expenditure. The client was also referred to a financial counsellor for advice and support on budgeting. The outcome for this client was substantially reduced overall debt and an improved awareness of how to appropriately budget in the future.

Legal Aid NSW provides legal services for people with complex and multiple needs in a variety of settings such as a service specifically designed for young people.

Legal Aid NSW identified the 50 highest users of legal aid services. Eighty percent of high users of legal aid service were children and young people 19 years and younger.²¹⁸ These young people were interacting with both the care and protection and criminal jurisdiction.²¹⁹ The critical feature of these clients is that they were living in out of home care settings or at risk of homelessness. They also had a history of being excluded from education settings and did not have access to appropriate support services such as mental health services.

A specialist team of civil lawyers has been established to provide assistance to young people in these circumstances. In addition to addressing civil law problems such as debt and

²¹⁸ *High service users at Legal Aid NSW: Profiling the 50 highest users of legal aid services*, P van de Zandt and W. Webb, Legal Aid NSW June 2013
www.legalaid.nsw.gov.au/__data/assets/pdf_file/0004/16537/Legal-Aid-NSW-Study-on-high-service-users-June-2013.pdf

²¹⁹ The client with the highest number of dealings with Legal Aid NSW over the period of the study was a 16 year old young woman who had 142 contacts with Legal Aid NSW services. These contacts ranged from services provided by legal aid in relation to care and protection matters through to legal aid criminal law services for a wide range of offences including offences relating to behaviour whilst in out of home care, assault and theft of a motor vehicle. The client in the cohort of the 50 highest users with the lowest number of dealings with Legal Aid NSW was a 17 year old woman who had 63 contacts with legal aid services.

being excluded from school, solicitors will work with out of home care providers and other parts of the social service system to ensure their needs are being appropriately met. The civil law solicitors are working closely with criminal law solicitors to advocate for more flexible and therapeutic or diversionary outcomes from the court process. The service will also liaise with the care and protection lawyers to identify failing care plans. The service will be evaluated after 8 months.

Another example of assisting clients with complex needs is the Legal Aid NSW Compulsory Schooling Orders Duty Service. Young people are assisted when they appear in the Children's Court for failing to attend school. It is the experience of Legal Aid NSW that many of these clients have complex needs. For example, they may have been victimised at school, suffer homelessness or have carer responsibilities. There is also a high incidence of cognitive and mental health impairments within this client group. The duty service provides discrete and unbundled services by representing the client on the day at Court. This can involve negotiating with Community Services and the Education Department. Without this assistance, young people can accumulate significant fines which can lead to the vicious cycle of vulnerability.

More generally, Legal Aid NSW lawyers are supported in their work with complex needs clients by the Legal Aid NSW Client Assessment Referral Service (CARS) team. This team of social work consultants work collaboratively with legal aid lawyers, providing expertise in child protection, family violence, substance misuse, sexual assault, parenting, trauma, child development and mental health, including S32 case plans. The service identifies how client's psychosocial difficulties impact on their legal problems. In 2012-2013 CARS assisted 577 clients, completing 362 assessments and providing 238 psychosocial reports for court.

In addition, the Aboriginal Field Officer positions funded by Legal Aid NSW enable a flexible and culturally appropriate response for Aboriginal clients. Field officers are located at the ALS offices in Walgett and Coffs Harbour and at Legal Aid Campbelltown. Work and Development Order ALS Aboriginal field officers located at Bathurst and Nowra support Aboriginal clients experiencing problems with debt, fines, violence and family law issues.

Legal Aid NSW also provides extensive training and support to both its inhouse lawyers and private practitioners undertaking legal aid work in relation to working with people who have complex and multiple needs.²²⁰ Regular practice area conferences in civil, family and care and protection, which are also open to CLC lawyers and private practitioners, include topics addressing complex needs.

Evidence on relative merits and successes

Legal Aid NSW has a culture of evaluation and evidence based decision making which drives review and assessment of service delivery models.²²¹ Evaluations of its services provide

²²⁰ Current workshops include Insight mental health awareness and suicide prevention training, Demystifying drugs and alcohol and Aboriginal cultural competency training. Legal Aid NSW has also developed a series of resources on working with specific new and emerging communities.

²²¹ The research alliance between Legal Aid NSW and the Law and Justice Foundation was noted as an example of best practice in the recently released NSW Government Evaluation Framework. In 2013 the Foundation has completed two master classes with nearly 40 legal aid staff – helping staff to design 4 in-house simple evaluations of new services and projects. Past internal and external evaluations of Legal Aid NSW services include: Care and Protection Review (2006); Children's Legal

evidence of the relative merits and successes of Legal Aid NSW services and programs in improving legal outcomes for targeted groups. Recent independent evaluations include the *Evaluation of the legal component of the Riverina Homelessness Interagency Project and Reaching Home Newcastle*²²² and the *Evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts*.²²³

Other recent evaluations of the value of Legal Aid NSW services include the evaluation of the Legal Aid NSW/Consumer Credit Legal Service Mortgage Hardship Service.²²⁴ Legal Aid NSW is currently working with the NSW Bureau of Crime Statistics and Research to evaluate the effectiveness of the Apprehended Domestic Violence Order Defendant Pilot at Burwood Local Court.

The evaluation of Legal Aid NSW participation in interagency homelessness projects specifically assessed the effectiveness of the integrated legal service provided by Legal Aid NSW. The evaluation found:

Legal services provided by Legal Aid NSW were extremely effective, not only in improving outcomes for individual clients of the Homelessness project, but also in increasing the access of legal services to the broader community of homeless and disadvantaged people in each region.²²⁵

Costs and benefits

Legal Aid NSW provides legal information, advice, and minor assistance, duty, family dispute resolution and casework services aimed at preventing the escalation of legal disputes. In line with the NPA, Legal Aid NSW aims to avoid the need for litigation where appropriate, thereby contributing to the effective, efficient and economical running of the justice system. Formal independent evaluations of early intervention services have demonstrated the

Service Review (2007); Civil Law Aboriginal Legal Service Outreach Review (2008); Civil Law Policy Review (2008); Client Assessment and Referral Review (2008); Community Legal Services Program Review Final Report (Commonwealth) (2008); Domestic violence - Report on Legal Aid NSW services to people in domestic violence situations (2008); Evaluation of the CLSD Program Final Report (2012); Evaluation of Legal Aid NSW's Family Law Early Intervention Unit Duty Lawyer Service (2013); Family Dispute Resolution Services in legal aid commissions-Evaluation report (2008); Family Dispute Resolution Service in Legal Aid NSW review (2010); Managing mortgage stress: an evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service; Mental Health Advocacy Service review (2006); Older Persons Legal and Education Program review (2009); Prisoners Legal Service review (2006); Regional Outreach Clinic Program (ROCP) Review Report (2013); Sydney Central Civil Advice Review (2010); and Women's Domestic Violence Court Advocacy Program Review (2009)

²²² www.legalaid.nsw.gov.au/__data/assets/pdf_file/0006/15828/Legal-Aid-NSW-Homelessness-Projects-Final-Dec2012.pdf

²²³ www.legalaid.nsw.gov.au/__data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf

²²⁴ *Managing mortgage stress: an evaluation of the Legal Aid NSW and Consumer Credit Legal Centre Mortgage Hardship Service*, Suzie Forell and Michael Cain, Law and Justice Foundation of NSW, 2011

²²⁵ *Evaluation of the legal component of the Riverina Homelessness Interagency Project and Reaching Home Newcastle*, Matrix on Board (2012) p.6

www.legalaid.nsw.gov.au/__data/assets/pdf_file/0006/15828/Legal-Aid-NSW-Homelessness-Projects-Final-Dec2012.pdf

tangible benefits and value provided by these services to both individuals and the broader community.

The evaluation of the Legal Aid NSW Family Law EIU Duty Service at Parramatta Local Court by the LJF identified a number of ways in which the program had contributed to the effectiveness and efficiency of the court process. These included:

- Diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action.
- Contributing to the resolution of matters on the day, through the drafting of documents, reality check with clients – while explaining the processes and implications and negotiating with other parties for clients.²²⁶

In relation to the Homelessness projects discussed above the evaluation found:

Legal assistance was thought by stakeholders to save both time and money, with the lawyer suggesting ideas and strategies that the non-legal case worker would either never of thought of or would have had to spend a great deal of time researching. Stakeholders also praised each lawyer's compassion, flexibility and understanding of this incredibly disadvantaged group.²²⁷

As outlined in the previous questions the Legal Aid NSW Civil Law Division has a number of innovative bulk resolution projects. These approaches have particularly high benefit compared to cost because of the large numbers of people assisted and the positive economic and social impact of the assistance on the individual and their community.

The Riverina Homeless Outreach Lawyer assisted a client who was originally seen by Legal Aid NSW through the Disaster Recovery Centre in Wagga Wagga during the floods of March 2012. His property was damaged as a result of flooding in the area. He had made a claim with his insurer which was denied on the basis that his policy had an exclusion clause in relation to flooding. The client was an elderly man living in the property with his wife, daughter, son-in-law and teenage grandson. As a result of the property damage, they were all evacuated from the property and initially resided in temporary accommodation, then returned to live in their shed on the property. The client was hospitalised with pneumonia as a result of the shed's poor conditions.

The client's son-in-law advised the Riverina Homeless Outreach Lawyer that he phoned the insurer prior to the flood, and recalls being told by a customer service officer that he would be covered for floods. The Riverina Homeless Outreach Lawyer requested a copy of this telephone conversation and sought a review of the decision of the insurer based upon representations made to the client's son-in-law. The insurer agreed to pay the client under the policy, which means the family was able to commence rebuilding their house.

²²⁶ In nearly 40% of matters, clients who should not have been going to court were assisted to take a more appropriate action. Where matters did progress to Court, the EI service assisted client to progress their matters more efficiently with 16% of matters finalised by the Court on the day or finalised by consent

²²⁷ *Evaluation of the legal component of the Riverina Homelessness Interagency Project and Reaching Home Newcastle*, Matrix on Board (2012) p.8

How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff? How well does the 'mixed' service delivery model work for the successful delivery of legal aid services? To what extent are the fees paid to private lawyers/law firms to undertake legal aid work sufficient to attract adequately qualified lawyers/law firms? What other approaches (such as the use of vouchers) could be more effective?

Attraction and retention of staff

On occasion, Legal Aid NSW experiences difficulty attracting staff to the more remote regional offices.

Mixed service delivery model

Legal Aid NSW submits that the mixed service delivery model, which uses in-house lawyers and the private practitioners to deliver legal aid services has been key to the success of the Australian legal aid model. The judicare²²⁸ model used in the United Kingdom and other overseas jurisdictions has proved unsustainable, leading to widespread cuts in the delivery of legal assistance to disadvantaged people. Legal Aid NSW notes that New Zealand has moved towards a more mixed service delivery model as one of its strategies to make legal aid financially sustainable.

The mixed service delivery model provides all the benefits of an inhouse practice, while uses the expertise and spread of private practitioners across NSW who have an interest and willingness to undertake legal aid work. The mixed service delivery model also assists with conflict situations. In a family law matter one party may be assisted by an inhouse practitioner, while other parties are assigned to private practitioners.

In 2012-2013, 79.6% of grants for legal aid in family law matters were assigned to private practitioners and 21.3% of duty services. In civil law matters, 42.7% of grants were assigned to private practitioners and 79.6% of duty matters.

Legal Aid NSW will deliver services through its in-house practice where:

- Specialist expertise is required to work with particularly disadvantaged groups, such as the homeless or people with complex needs, such as people with a mental illness.
- The private profession does not practice in an area of law because it is not commercially viable. Examples include tenancy, some consumer protection, social security, relationship debts and splitting of superannuation where there are no other assets.
- Legal Aid NSW fees are not sufficient to attract private practitioners to an area of law.

Numerous reports and reviews have examined the value of the mixed model of service delivery and the public value provided by an inhouse legal aid practice.²²⁹ Legal Aid NSW

²²⁸ Under the Judicare model legal aid is provided solely by private practitioners.

²²⁹ 'Ministerial Statement on the establishment of the Australian Legal Aid Office', *Parliament Debates* 13 December 1973; R Sackville Commissioner Law and Poverty, *Legal Aid in Australia Discussion Paper* November 1974; GG Meredith, *Legal Aid: Cost comparison –Salaried and Private*

refers the Productivity Commission to the Salaried Legal Aid Services discussion paper (1994).²³⁰ However, Legal Aid NSW notes that its range of services is underpinned by inhouse practitioners' expertise in the distinctive legal problems experienced by disadvantaged people. Furthermore, the daily experience of legal aid lawyers assisting high volumes of disadvantaged clients is harnessed to identify systemic issues and provide input into law reform processes.

The mixed model of service delivery enables the supply of legal assistance services well below the market rate for the purposes of legal aid, while supporting quality control mechanisms to oversee the effective delivery of legal aid services. The *Legal Aid NSW Act 1979 NSW* requires fees for legal aid services to be less than the ordinary professional costs of a service.²³¹

Legal Aid NSW uses a number of strategies to ensure both value for money and quality. For example, some types of legal matters have private practitioner fees set on a lump sum or fixed fee basis. This applies to most family law and care and protection stages, Veterans matters and some aspects of criminal law.²³²

The use of private practitioner panels is another strategy used to support the delivery of legal aid. Unless there are exceptional circumstances, private practitioners undertaking direct access legal aid duty and casework must be on a panel. There are 13 panels²³³ covering all areas of legal aid work. As at 30 June 2013, there were 4,290 appointments of practitioners to Legal Aid NSW panels.

With the inhouse practice providing a normative value, panel practitioners must:

Lawyers, Commonwealth Legal Aid Council 1983; and National Legal Aid Advisory Committee, *Legal Aid for the Australian Community* July 1980.

²³⁰ Salaried Legal Aid Services discussion paper 1994, Legal Aid Victoria – A Crockett. The attributes of a legal aid inhouse practice included: A unique role in investigating, discerning and addressing through innovation the needs of the vulnerable and disadvantaged; Competitive stimulus to private practice which assists in the containment of costs and promotes continuous improvement in service quality; Increased accessibility by disadvantaged persons to legal services; Provision of high quality duty lawyer services; Provision of a range of integrated and complementary services matched to the needs of individual clients and groups; Provision of free legal information and advice; Provision of advice in relation to the development of legal aid policy; Provision of legal services where the nature of the work makes it impractical or uneconomic to use private lawyers; Provision of expert and broadly informed input to community legal education programs; and Provision of independent, disinterested and broadly informed input to debate on law reform issues.

²³¹ Section 39(4)

²³² In addition, the Legal Aid NSW ATLAS grants management system controls claims via pro forma invoices. The grants officer/lawyer must issue one or more pro forma invoice for every approved extension. Each pro forma invoice will cover one or more work items (fees or disbursements). The items which may be included on the pro forma invoices are chosen from a fixed list which is set up in accordance with relevant fee scales and delegations. Practitioners therefore may only claim fees or disbursements that have been specifically approved in advance and all claims must be in accordance with relevant fee scales.

²³³ Children's Criminal Law, Care and Protection – specialist Children's Courts and Local/Children's Courts throughout regional NSW, Veterans', Independent Children's Lawyer (Family Court), General Criminal Law, General Family Law, General Civil Law, Mental Health Advocacy, Prisoners Legal Service, Serious Criminal Law and Specialist Domestic Violence Practitioners, Specialist Barrister Panel (Complex Criminal Law) and Specialist Barrister Panel (Criminal Appellate Matters).

- Meet the selection criteria developed by Legal Aid NSW inhouse practice, Grants and the Professional Practice Branch, in consultation with the Law Society of NSW and the NSW Bar Association.
- Conform to practice standards developed for each jurisdiction. These standards have been drafted by Legal Aid NSW inhouse practice experts in consultation with Grants, the Professional Practice Branch, Law Society of NSW and NSW Bar Association. The practice standards apply to both inhouse and private practitioners.

Panel practitioners are encouraged to attend Legal Aid NSW training sessions, annual practice conferences and have access to Legal Aid NSW online learning modules.

In addition, panel practitioners execute a service agreement which require the practitioner to comply with practice standards and submit to audits. Section 52B of the Act allows Legal Aid NSW to audit practitioners against the practice standards, the service agreement and in relation to complaints. Legal Aid NSW has an Audit Strategy to monitor adherence. Breaches of the service agreement may be referred to the monitoring committee which may result in removal from a panel.

Legal aid fees

While legal aid services are delivered at well below market rates, Legal Aid NSW recognises that the gap between legal aid fees and the market rate is at a level where the delivery of legal aid services by the private profession is at risk. Fees paid to private practitioners have been falling in real terms since the 1990s and are inadequate. Private practitioners with a commitment to legal aid work advise that it is not economically feasible for experienced practitioners to accept legal aid matters.

Legal Aid NSW submits that without an increase in fees paid to private practitioners, there is a substantial risk that Legal Aid NSW will not be able to maintain quality service delivery for disadvantaged people because they will not be able to attract private practitioners of sufficient skill and experience to undertake this work, particularly in rural areas. Legal aid matters will be accepted by less experienced and skilled private practitioners, inevitably affecting the efficiency of the court process.

The level of remuneration for private practitioners must be sufficient to ensure that appropriately skilled and experienced legal practitioners continue to undertake all legal aid matters. Legal Aid NSW is unable to support fee increases within available funding and maintain existing services. Legal Aid NSW refers the Productivity Commission to the research reports prepared for the Commonwealth Attorney General's Department reviewing private practitioner participation in legal aid service delivery and remuneration for legal aid work.²³⁴

²³⁴ *Study of the participation of private legal practitioners in the provision of legal aid services in Australia*, prepared for Commonwealth Attorney-General's Department by tns social research (Dec 2006) and *Legal Aid Remuneration Review: Final Report*, prepared for Commonwealth Attorney-General's Department by tns social research (Oct 2007)

Alternative approaches

Legal Aid NSW notes the Productivity Commission is interested in alternative approaches to the delivery of legal aid services. Approaches such as the use of vouchers assume a perfectly competitive market where goods are supplied to buyers under conditions of full information and therefore the price will equal marginal cost. For a voucher system to be effective there also needs to be an available supply of private practitioners who are prepared to provide legal services at a prescribed level of fee.

However, the legal services market suffers from market failures including information asymmetries. Due to the complexity of the law, buyers lack the knowledge to determine whether the service was delivered or the quality of the service. Legal services have been described as credence goods, with the supplier determining the buyer's needs and buyers unable to determine how much of the service they need. In addition, the amount of the service required will often depend on the supplier for the other party in the dispute. Sunk costs will effect buyers' willingness to move to another supplier,²³⁵ even if they are of the view that the service is not of sufficient quality. For these reasons normal competitive forces are limited.

Legal Aid NSW submits that introduction of a voucher system would actually decrease access to legal assistance. Purchaser support schemes, such as vouchers, would create greater disadvantage. Many Legal Aid NSW clients lack the capacity to resolve their legal problems because they are illiterate, have English as a second language or suffer from cognitive impairment, mental health impairment or low educational attainment. This lack of capacity will affect their ability to successfully navigate a purchase support scheme, even if they have overcome the first barrier and have identified that their everyday problem as having a legal dimension and resolution.

In addition, purchaser support schemes provide no assurance in relation to the quality of the services being provided and the efficient and effective use of government funds. Legal Aid NSW questions how such a purchaser support scheme would be administered and at what social and economic cost.

The nature of legal problems experienced by disadvantaged people often require specialist expertise and a trusted relationship that is not provided by a purchase support scheme. There is also a need for legal assistance to intersect with other support services, with some cases requiring an integrated cross jurisdiction approach. In addition, a purchaser support scheme does not enable identification and resolution of systemic legal issues affecting disadvantaged people, nor does it support law reform.

Legal Aid NSW notes that the amount of legal assistance needed by disadvantaged clients is not readily quantified because of the complex nature of the legal problems faced by these clients.

Finally, Legal Aid NSW submits that the scale of required legal services makes it difficult to use purchaser support schemes in a targeted manner.

²³⁵ Hadfield, G (1999) 'The price of the law; how the market for lawyers distorts the justice system', *Michigan Law Review* Vol. 98, No.4 February 2000, p. 24

Legal Aid NSW submits that the mixed service delivery model provides disadvantaged people with the benefits of a purchaser support scheme while having systems in place to ensure clients receive a cost effective and quality service and legal services are purchased in the most efficient, effective and economical manner.

The Legal Aid NSW grants system has been developed in consultation with the private profession. For example, Legal Aid NSW private practitioner panels are developed following extensive consultation with the profession. Applications for appointment to a panel are assessed by a selection committee comprising nominees of the NSW Bar Association, Law Society of NSW and Legal Aid NSW. Panel practitioners enter into a service agreement, agreeing to comply with practice standards when undertaking legal aid work and to be audited against those standards. The Legal Aid NSW Audit Strategy²³⁶ takes a risk management approach, with serious breaches, non-compliance or irregularities referred to the Monitoring Committee, which includes representatives from the Law Society of NSW and the NSW Bar Association.

The fees paid to private practitioners are well below market rate. Legal Aid NSW uses a number of payment mechanisms such as the fixed fee and stage of matter billing to ensure both the delivery of the service and the widest use of available resources.

The above practices provide a layer of protection for disadvantaged clients and tax payers which Legal Aid NSW does not believe could be replicated in a purchaser support scheme without significant administrative costs and the creation of a sizable bureaucracy.

How effective has the NPA for legal assistance services been in addressing its objectives?

The objective of the NPA is a national system of legal assistance that is integrated, efficient and cost-effective and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness.

Legal Aid NSW has performed strongly against the NPA objectives and has exceeded the performance benchmarks under the NPA. Legal Aid NSW has increased its early intervention services by 55.6% compared with the 2009-2010 benchmark year, exceeding the NPA target of 30%. The NPA benchmark of a 25% increase for total services has also been exceeded with total Legal Aid NSW services increasing by 30.5%.²³⁷

Legal Aid NSW submits that the NPA has been most effective in the expansion of intervention services, including advice, minor assistance and duty services. The inclusion of all preventative and early intervention services as a Commonwealth legal aid service priority, regardless of whether the matter is a Commonwealth or State or Territory law matter was a significant reform for the legal assistance sector.²³⁸ These reforms recognised

²³⁶ www.legalaid.nsw.gov.au/for-lawyers/panels,-audit-and-practice-standards/audit-information

²³⁷ Legal Aid NSW has not included website page views in its total services count.

²³⁸ The Commonwealth Service Priorities outlined in Schedule A of the NPA were developed in accordance with the Government's Social Inclusion Agenda and the principles outlined in the Strategic Framework for Access to Justice in the Federal Civil Justice System Report. In addition the priorities enable Commonwealth funds to be used for State law child welfare or family violence matters where there are connected family law priorities.

that many of the legal problems which can lead to a cycle of disadvantage are State or Territory law matters.

To give effect to preventative and early intervention strategies, NPA funding should be available regardless of whether the legal problem is based on Commonwealth or State or Territory law.

The NPA funding Legal Aid NSW receives has enabled the development of innovative service delivery models including the Family Law EIU. As discussed earlier, the view of the judiciary and registry staff is that the EIU duty service has improved the quality of outcomes for clients and the contributed to improved efficiency for the Court.²³⁹

The concept of early resolution is used by the Legal Aid NSW Family Law Division at all stages of the family law system to prevent disputes from escalating, preliminary FDR and the COMP being key examples. The COMP scheme has a high success rate at settling both interim and final matters, demonstrating the effectiveness of intervention services at even a late stage of a dispute.

The NPA funding has enabled Legal Aid NSW to further enhance the availability of legal advice and minor assistance through outreach services. There are now 164 locations with a regular outreach service, an increase of 67% from 2009-2010.

There a number of factors that have reduced the effectiveness of the NPA and limited its ability to achieve its objectives. These factors include the lack of joint commitment between the Commonwealth and the States, inadequate Indexation levels, the temporary nature of funding, and the continuing Commonwealth/State divide.

The NPA is not a true 'National Partnership' between the Commonwealth and the States and Territories as the States and Territory governments do not both contribute to the partnership. For example, the NPA does not include a commitment from the States and Territories to maintain their level of funding for legal aid services. Furthermore, the service priorities detailed in the NPA are Commonwealth priorities as opposed to priorities agreed to by both the Commonwealth and the States and Territories, which would expected in a true partnership agreement.

The indexation applied by the Commonwealth has not kept pace with CPI or State or Territory indexation.²⁴⁰ As a result Commonwealth funding continues to decrease in real terms over the life of the NPA.

The temporary nature of the funding under the NPA affects service delivery and staffing. The uncertainty of funding for NPA projects means that service delivery arrangements, including the employment of staff providing those services, are temporary. Each NPA service is essentially a pilot as there is no guarantee of funding after 2013-2014. Uncertainty around

²³⁹ *An evaluation of Legal Aid NSW's Early Intervention Unit Duty Service at Parramatta Family Law Courts*, Law and Justice Foundation, 2012
www.legalaid.nsw.gov.au/__data/assets/pdf_file/0003/15969/Evaluation-of-Family-Law-Early-Intervention-Duty-Service.pdf

²⁴⁰ The indexation adjustment factor applied under the NPA as outline by section 31 is based on the Wage Cost Index Number 1. The indexation factors of 1.7% for 2012-2013 and 1.78% for 2013-2014 have not and will not cover CPI cost increases or wage increases.

ongoing funding has a negative effect on the recruitment of the best available candidates and the retention of highly skilled staff. Turn-over of staff can affect service output and quality.

Continuation of the Commonwealth/State divide in grants of aid undermines the NPA objective of a national system of legal assistance that is integrated, efficient and cost effective. In contrast to the Commonwealth funded projects, state funding for established core services is shrinking in some jurisdictions. The Commonwealth/State divide leads to additional administrative costs and complexities. For example different fees are paid to private practitioners depending on whether it is a Commonwealth or State matter.

Legal assistance service funding

What factors determine the volume and distribution of current funding for legal assistance at both the Commonwealth and state and territory level?

The factors determining the volume of current funding for legal assistance are largely historical and based on a fixed pool of funding rather than assessed legal need. The NPA funding distribution is outlined in Schedule C of the NPA.²⁴¹

Legal Aid NSW supports the use of socio-demographic variables and weightings but submits that the volume of funding needs to reflect the level of legal need in the community, particularly the unmet legal need experienced by disadvantaged groups.

The percentage of the Commonwealth's contribution to the funding of Legal Aid NSW has dropped from over 50% in 1996 to 31% in 2013-2014.²⁴² As the level of Commonwealth funding declined, the NSW State Government has increased its contribution. Legal Aid NSW increasingly relied on the PPF, a fund from interest on the solicitors' trust account, to make up the shortfall in order to maintain its services to disadvantaged clients. Reliance on this source of funding is unsustainable due to the trust fund's exposure to falling interest rates. Legal Aid NSW has already experienced a 10% decrease in the level of PPF recurrent funding in 2013-2014.

In recent years, like many other public sector agencies, Legal Aid NSW is absorbing State budget savings including efficiency dividends, labour expenses cap, and procurement, contract and program prioritisation savings. These savings affect the ability of Legal Aid NSW to maintain State legal services.

How should the total volume of funding and distribution of funds for legal assistance in Australia be determined and how should it be managed over time?

Legal Aid NSW submits that the total volume of funding for legal assistance should reflect the level of legal need, both express and unmet, if the community are to have full access to

²⁴¹ The model distributes the fixed pool according to population size, demographic characteristics, socio-economic variables and disadvantage risk factors. ABS data and Commonwealth Grants Commission (CGC) weightings are applied.

²⁴² Not included is the additional Commonwealth temporary funding of \$4.58 million per annum over two years.

the civil justice system. The volume of legal assistance funding should also aim to narrow the justice gap, particularly for the working poor.

As discussed, Legal Aid NSW supports the use of socio-demographic variables and weightings. Legal Aid NSW notes the high incidence of disadvantage in NSW, which affects both the level of legal need and increased cost and complexity in service delivery. For example, NSW has the largest population of any State, with 32% of Australians (7.272 million people) living in NSW. An estimated 208,364 Aboriginal and Torres Strait Islanders live in NSW, representing 31% of all Aboriginal and Torres Strait Islander people in Australia, the highest percentage of all states and territories. In addition, NSW has the largest number of migrants, with 35% of recent migrants living in NSW. Migrants arriving after 1996 have been responsible for an 11% growth in the population of Sydney.

18.6% of people living in NSW are reported to have a disability.²⁴³ The incidence of disability rises in regional and rural locations. The National Disability Strategy Implementation Plan considers there to be 1.3 million people in NSW with disability, of which 420,000 have a severe or profound disability that affects their ability to communicate, get around and care for themselves.

Just over one-third of NSW residents (2.61 million) lived outside of Greater Sydney as at June 2011. Within NSW, 442,387 people live in outer regional areas, 32,194 in remote areas and 4,417 in what is classified by the ABS as very remote areas of Australia. The spread of the population across NSW and the distances between remote areas, towns and regional centres makes the delivery of face-to-face services resource intensive.

Most Commonwealth prosecutions are brought in NSW. This is due to the nature of Sydney as the largest capital city in Australia and a common entry point for illegal drug importation. In addition, a significant share of Commonwealth Director of Public Prosecutions' resources are located in Sydney. The incidence of prosecutions leads to higher crime duty volumes per capita in NSW compared with other states.

What principles should determine the relative contribution of Commonwealth and state governments to that funding? How should it be apportioned in terms of responsibility for funding particular types of matters and for specialist services?

Legal Aid NSW submits that in light of the results of the LAW Survey and the extent of substantial legal need which result in acute consequences, there needs to be a new paradigm for legal assistance arrangements and a true partnership between the Commonwealth and the States. In particular, Legal Aid NSW submits that the Commonwealth and the States need to agree on and commit to:

- Priority areas of law and legal problems
- Priority clients
- Eligibility for legal aid – means test
- Level and division of funding
- How services will be delivered and by whom

²⁴³ Survey of Disability, Ageing and Carers (SDAC) 2009

How does the funding of legal assistance for criminal matters affect the funding available for civil (including family law) matters? Other than direct competition for resources, how does the funding of civil and criminal matters interact, especially in relation to people with complex legal issues?

It is the experience of Legal Aid NSW that funding of criminal law matters has a significant impact on the availability of funding for civil and family law matters, particularly for State matters. Crime is the largest area of Legal Aid NSW expenditure, representing 73.5% of the State funding appropriation. Criminal law costs have risen significantly over the last five years. As a downstream agency Legal Aid NSW is limited in its ability to control the level of demand for its services, particularly in criminal law matters. Criminal law expenditure cost drivers include increased length of trials, incidence of co-accused and complexity.

Legal Aid NSW notes the high degree of unpredictability in the costs of delivering complex legal aid services. For example in family, criminal and civil litigation, the length of trial process and opportunities for a negotiated outcome are subject to a number of variables including law matter, nature of client, complexity of the law or evidence and number of witnesses.

While Legal Aid NSW has retained the most comprehensive civil law practice in Australia, resource constraints and budgetary pressures have resulted in further restrictions of civil law policies.

Legal Aid NSW notes that family violence offences and ADVO applications occur simultaneously with decisions about child arrangements. Family law issues often result in civil law problems including debt, mortgage stress and homelessness.

There is a fundamental interaction between civil, family and criminal law problems, particularly for people with complex issues. Examples include the drift from the care system to the juvenile justice and adult criminal justice system and the cycle of fine debt, loss of a driver's license and secondary offending leading to imprisonment. Legal assistance can break this vicious cycle of vulnerability.

As discussed previously, the Legal Aid NSW High User Study found that 80% of high service users were children and young people 19 years and younger. Almost all the high service users (94%) had spent time in a juvenile detention, 58% had experienced homelessness and 46% had spent time in out of home care. The study supports the anecdotal experience of legal aid lawyers and the findings of the Special Commission of Inquiry into Child Protection Services in NSW.²⁴⁴

²⁴⁴ The 2008 Wood Report found that approximately one third of young people in juvenile detention had a history of out of home care: see The Hon J Wood (2008), Report of the Special Commission of Inquiry into Child Protection Service in NSW, p.55. One reason for this 'drift' from care to crime may be that criminal sanctions are increasingly used to manage challenging behaviour of children and young people living in out of home care; see McFarlane K (2012) 'From Care to Custody: Young women in out-of-home care in the criminal justice system' *Current Issues in Criminal Justice*, volume 22.

John²⁴⁵ – a Legal Aid NSW High Service User

John is a young man twenty years old. He had his first contact with Legal Aid NSW when he was twelve and is a high user of legal aid services with 96 service contacts over a five year period.

John's childhood was characterised by physical health problems. He suffered from chronic ear infections, his speech was slow to develop and he had periodic bouts of asthma. He had early corrective surgery for a congenital abnormality.

John's mother suffered from obsessive-compulsive disorder and other anxiety problems. John's father was violent to his mother. At age two, John's parents separated and he lived with his mother in refuges for a period of time. He has subsequently had periods of living with his mother, his father, his grandparents and in various foster placements.

At age four John was diagnosed with attention-deficit hyperactivity disorder. Over the subsequent years clinicians have diagnosed him with conduct disorder, oppositional defiant disorder, and various other psychiatric diagnoses. He has had episodes where he has self-harmed and has attempted suicide. On intelligence tests, John returned scores in the range of moderate intellectual disability.

Community Services became involved with John when he was seven years old. Over subsequent years John had many short and difficult out-of-home-care placements as well as numerous periods where he lived with friends or on the street.

John attended four primary schools and his early learning difficulties were initially addressed by teachers' aides. As John transitioned to high school he was frequently excluded and expelled. Placements in special schools were unsuccessful and he stopped attending school in Year nine.

John started smoking cannabis and drinking alcohol when he was about thirteen years old. By age fifteen he was using amphetamines. He has had periods of residential drug and alcohol treatment and was recommended for the Youth Drug and Alcohol Court but did not proceed with an application.

John's criminal justice offending profile involves offences such as stalk/intimidate, breach of bail, assault, and theft offences. Often his offences involve family members as victims.

The work of the WDO Service is another example of how civil and criminal law problems can interrelate. The WDO Service is detailed in section 6.

Are there examples of 'work arounds' in response to resource constraints, and what impacts have these 'work arounds' had on system-wide costs?

Legal Aid NSW highly efficient and effective duty services are an example of a 'work around' in response to resource constraints. As discussed earlier, duty services involve the provision of advice and representation on the day in court but not ongoing representation. In providing discrete and unbundled legal services, Legal Aid NSW has been able to extend the

²⁴⁵ Names have been changed

number of people receiving one-off litigation assistance. In 2012-2013, Legal Aid NSW provided 22,655 duty services in the civil and family jurisdictions.²⁴⁶

The evaluation of the Early Intervention Duty Service at Parramatta identified a number of ways in which the program had contributed to the effectiveness and efficiency of the court process. These included:

- Diverting matters that should not have been in court and advising and assisting clients to take the most appropriate course of action.
- Contributing to the resolution of matters on the day, through the drafting of documents, reality check with clients – while explaining the processes and implications and negotiating with other parties for clients.²⁴⁷

Other examples of Legal Aid NSW 'work arounds' include the provision of divorce classes as discussed earlier, and minor assistance services. Where a person is not eligible for a grant of legal aid, minor assistance by drafting letters, completing court forms and advocating for a client can assist in overcoming the complex hurdles that exist in legal processes.

Z had been directed to attend the Children's Court in Parramatta to answer why her three children had been missing school. The Legal Aid NSW duty service assists all self-represented litigants in the Court's Compulsory Schooling Order Education list each week (subject to conflict of interest). Z was in tears, felt she had no options and did not know what to tell the Court. She had also been informed the children had been reported to Community Services due to the absenteeism. Community Services were asking Z to attend a meeting to discuss whether the children should be placed in temporary care.

Z required assistance to deal with unpaid fines, Housing NSW, the Education Department, Department of Community Services and advice to apply for an AVO to protect her family. Legal Aid NSW was able to have discussions with the Education Department at Court to reconsider other alternative schools and also an application for special transport given Z's child's special-needs considerations. The Education Department agreed to notify Community Services that the mother was co operating with them and Z's matter was adjourned for an opportunity to mediate the issues. Resolving the cause of the children's school absenteeism through legal representation meant that further escalating legal complications could be averted for this family.

²⁴⁶ Duty and Duty advice services include matters before the Mental Health Review Tribunal, Social Security Appeals Tribunal, Administrative Appeals Tribunal, Consumer, Traders and Tenancy Tribunal, Supreme Court repossessions list, Parramatta, Sydney and Newcastle Family Law.

²⁴⁷ In nearly 40% of matters, clients who should not have been going to court were assisted to take a more appropriate action. Where matters did progress to Court, the EI service assisted client to progress their matters more efficiently with 16% of matters finalised by the Court on the day or finalised by consent

13. Funding for litigation

Contingent Billing

How has the use of contingent billing improved access to civil justice in Australia, and could it be improved? What regulatory constraints should be used in relation to contingent billing and why?

Subject to there being adequate consumer safeguards, Legal Aid NSW has no objection to relaxing the restrictions on private practitioners charging contingency fees. Use of contingency fees would provide a market mechanism to enable private practitioners to undertake matters that they are currently unwilling to take on a conditional fee basis, because the risk of conducting complex litigation is not adequately rewarded by the chance to recover their ordinary fees. Contingency fees being a percentage of the damages recovered will make it worth taking the risk in some cases.

Litigation funding

Litigation insurance

Legal Aid NSW understands that the Law Council of Australia is of the view that litigation insurance products could significantly improve access to justice and equitable resolution of legal problems in Australia. There have been significant changes to Australia's civil litigation system since the Australian Law Reform Commission considered this issue of litigation insurance in 2000, and there may have been significant further developments in the structure and risk management profile of the international insurance industry. Accordingly, it may again be appropriate to give this issue further consideration.

14. Better measurement of performance and cost

How can the costs of data collection be minimised? What is the value of the data currently being collected?

Legal Aid NSW supports the principle of collecting appropriate and relevant data to assess the performance of the civil justice system and recognises that additional data could be collected which would assist in measurement and evaluation of civil justice cost drivers. Legal Aid NSW currently provides data and reporting to Commonwealth Attorney-General's Department under the NPA. In addition, Legal Aid NSW has provided data as part of the NPA Review Evaluation Framework.

However, the value of data must be weighed against the cost and opportunity cost of data collection. For example, data must be practical and cost effective to collect, and the data collection effort should be proportionate to the usefulness and accuracy of the data and level of intrusiveness on the client. It is the experience of Legal Aid NSW and LawAccess NSW that there is a limit to the amount of data that can be collected across the services that will be accurate, consistent and comprehensive.

The scale of legal aid services are such that every additional data requirement represents a reduction in the time available for frontline service delivery and a reduction in Commonwealth and State program outputs and outcomes. Legal Aid NSW provided 633,743 information sessions, 92,854 advice sessions, 172,188 duty sessions and 38,000 grants of legal aid in 2012-2013.

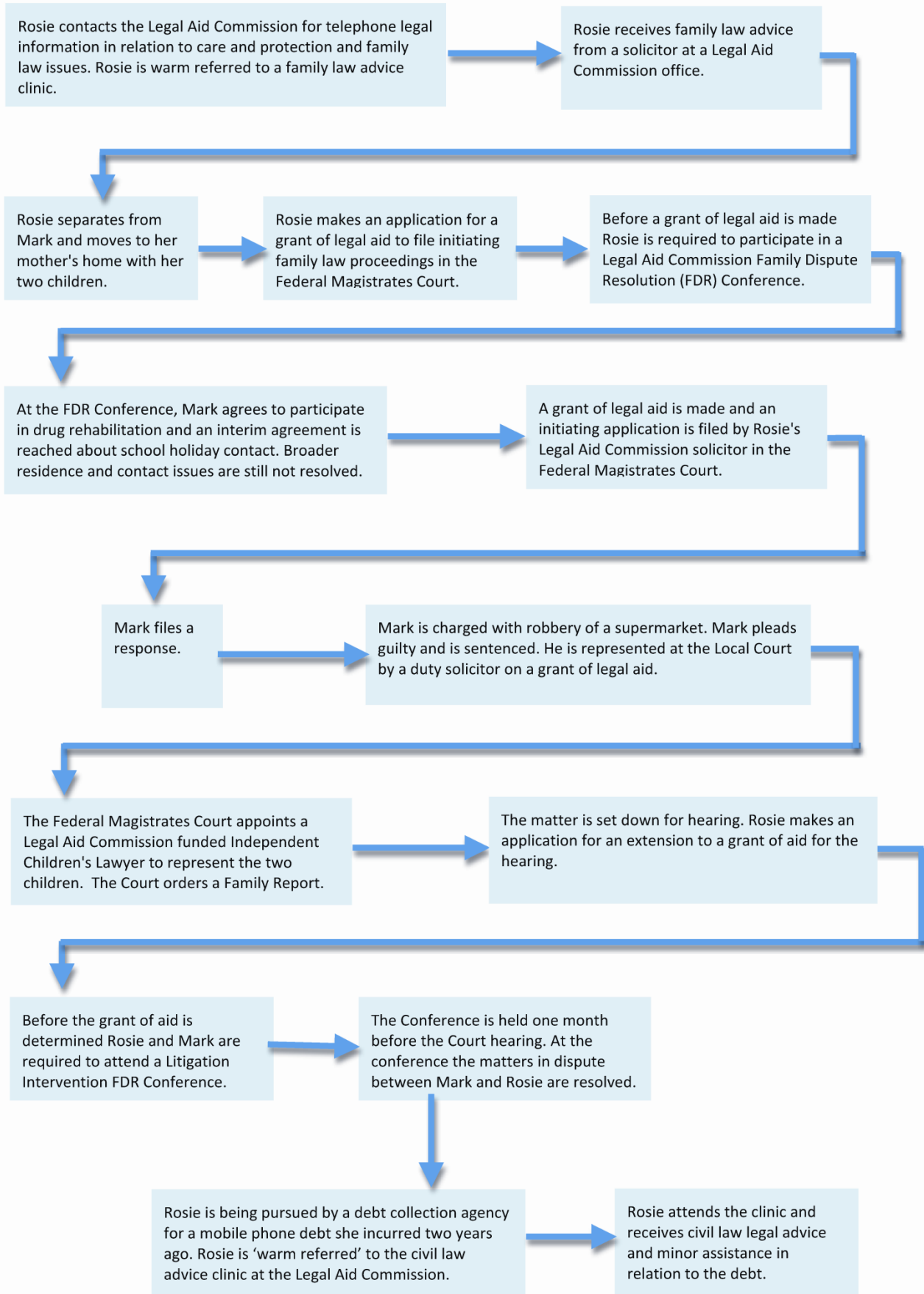
In addition to the opportunity cost on service delivery, additional data requirements have significant resource implications due to the cost of system changes, and costs of capturing, updating and verifying data currently not collected.

Legal Aid NSW suggests that sampling and snapshots are a way to minimise the cost of data collection. In addition, a cost/benefit analysis which assesses the value of the data compared with the opportunity costs on service delivery and resource requirements for collecting the data would also minimise data collection costs.

What administrative data are currently collected, at the Commonwealth and state/territory level, that may be useful in early identification of individuals at high risk of substantial legal need? What can be done to access such information and how can it best be coordinated and used?

Legal Aid NSW collects significant amounts of demographic and administrative data. Forms of de-identified data are provided annually to the LJF for the Data Digest. As discussed previously the Data Digest provides a picture of express legal need across NSW. When data on express legal need is used in conjunction with the LAW Survey and indicators of disadvantage, communities at high risk of legal need can be identified and services targeted to meet those needs.

Annexure A – Legal assistance pathways



Annexure B – Mapping of SEIFA disadvantage and Legal Aid NSW grants

SEIFA data is shown in these maps as shading from white to dark brown, with the darker shades corresponding to higher levels of disadvantage. Grants of aid are represented by green dots within LGAs, the larger dots representing more grants. Population density is not shown in these maps, but it should be kept in mind that some of the more disadvantaged parts of the State have small numbers of grants because of low population numbers.

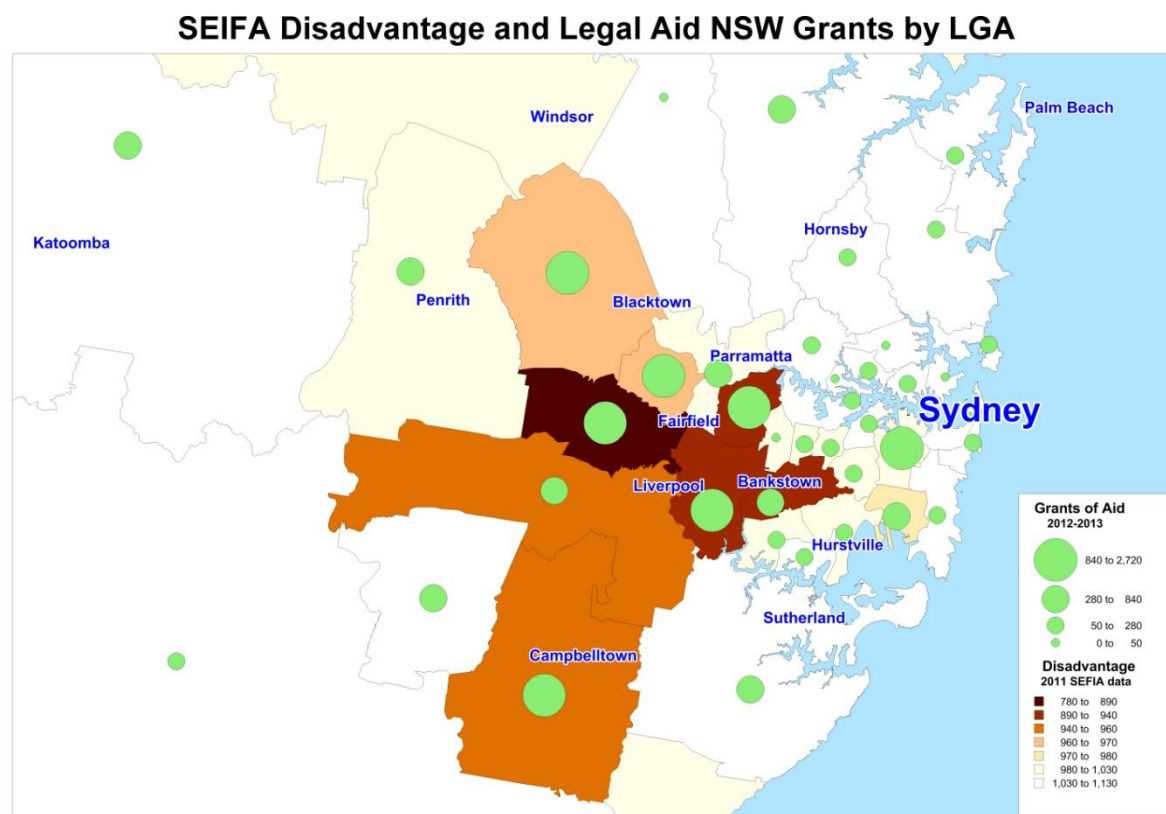


Figure 1: Correlation between Legal Aid NSW grants and SEIFA disadvantage 2012-2013 Sydney²⁴⁸

²⁴⁸ Home address postcodes are collected by Legal Aid NSW for case grant recipients except for: some children in family law matters, including care and protection; homeless clients; and clients whose recorded address is 'care of' their lawyer's office. Grants where the recorded postcode is 1238 (part of the address of 'Legal Aid NSW Head Office') have been excluded from these maps. However other postcodes for lawyers' offices have not been excluded as they are problematic to identify in aggregate. A relatively large group of these is in the Sydney LGA, which accounts for part of the large number of grants attributed to this area. Where clients are imprisoned, their postcodes are those of the relevant correctional centres. The ABS publishes SEIFA data on relative disadvantage levels for different geographic areas, which is derived from Census data. The ABS recommends that SEIFA data be considered at a very detailed geographic level, but since that is not feasible for the purposes of this report we have used SEIFA data for Local Government Areas (LGAs). While postcodes often do not fit neatly into LGAs, the ABS publishes tables which enable the allocation of postcode data to LGAs; this method is an approximation whose accuracy, according to the ABS, ranges from good to poor across LGAs. Legal Aid NSW has used these tables to translate client postcode data for grants made during the 2012-2013 financial year into Local Government Areas, for presentation in these maps alongside SEIFA data. Legal Aid NSW grants made to clients with home addresses outside NSW are not shown on the maps (738).

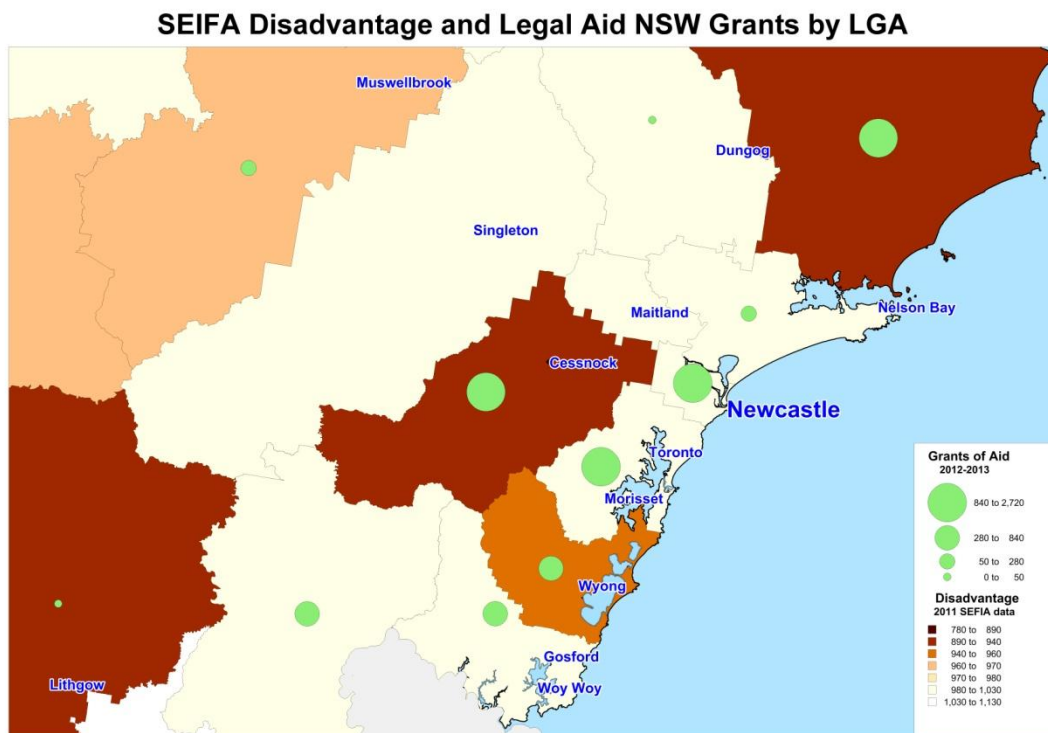


Figure 2: Correlation between Legal Aid NSW grants and SEIFA disadvantage 2012-2013 Newcastle

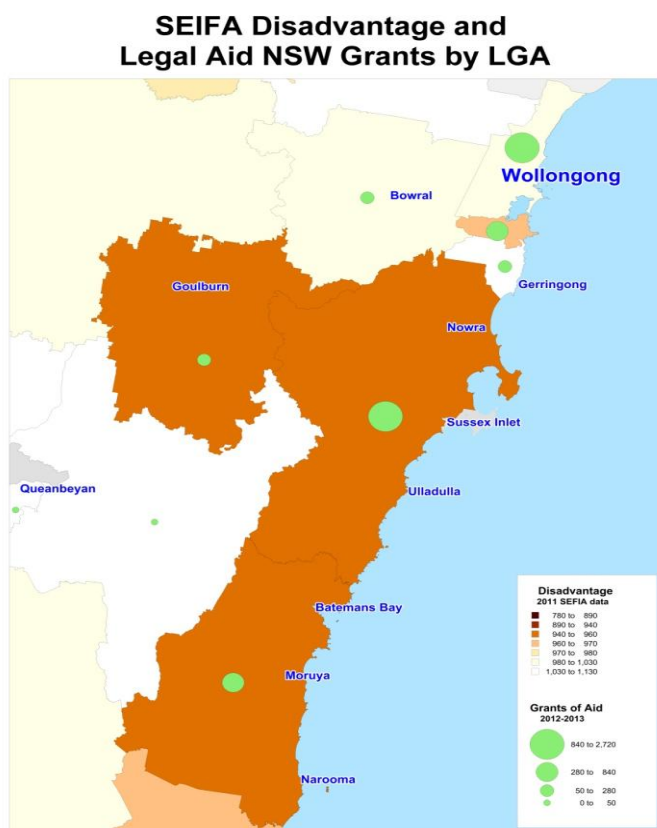


Figure 3: Correlation between Legal Aid NSW grants and SEIFA disadvantage 2012-2013 Wollongong

Annexure C – Profile of Legal Aid NSW's Family Law Early Intervention Unit

Background

In 2011 Legal Aid NSW established the Early Intervention Unit (EIU) to assist people resolve family law legal issues as early as possible and to keep disputes out of the court system.

Family law encompasses separation, divorce, child related matters, parenting arrangements, family conflict, family violence, property and financial issues such as payments for children post separation (child support) and former partners (spouse maintenance).

The EIU is funded under the National Partnership Agreement on Legal Assistance Services.

The EIU has introduced a range of innovative early intervention legal services ranging from court-based crisis duty services which are well integrated with a network of outreach services provided at targeted stakeholder organisations across NSW, telephone advice for clients in regional and rural areas unable to access other services, targeted minor assistance clinics and an extensive and planned Community Legal Education (CLE) program focussed on key areas of need.

The objective of the EIU is to reach the most disadvantaged clients with complex legal needs in the places where the client is already connected. The services provided include advocacy, minor assistance, advice, legal information and CLE. To maintain the focus on early intervention work, case representation services are not provided by the EIU. However the Information and Referral Officer based in the EIU will arrange on-going representation for clients eligible for legal aid from an in-house family lawyer, a partner agency such as the Aboriginal Legal Service or Community Legal Centre or a private practitioner on the Legal Aid NSW panel of family law solicitors.

Structural Issues

One of the objectives in establishing the EIU was to increase the number of people assisted by Legal Aid NSW. With this objective in mind, a firewall separates the EIU from the litigation practice in the electronic case management system. The EIU is located away from Legal Aid offices delivering casework and other family law services. This increases service delivery provided by Legal Aid NSW by allowing services to be provided by the EIU to party B in matters where the litigation practice was in the past assisting party A or was appointed as Independent Children's Lawyer. This is particularly helpful where a party has had a breakdown in their relationship with a private practitioner and the EIU, via its information and referral officer is able to arrange an alternative legal representative by making representations to the Grants Division that has responsibility for legal aid grants. However, in a court based situation, the EIU is restricted from providing an advocacy service to Party B in all but the most exceptional circumstances.

A young Aboriginal mother was seen by an EIU solicitor at an outreach location. The client had a current matter before the Family Court. The client's three year old child had been removed from the care of our client by the father and the client was determined to re-establish a meaningful relationship with her child. Legal Aid in-house practice

acted for the child in the matter, meaning that prior to the establishment of the EIU no services could have been provided to this Aboriginal woman.

The recent history in this matter was that the client had been assigned a private practitioner, but relations had broken down between our client and the practitioner and legal aid had been terminated. The client had a court deadline fast approaching.

The EIU solicitor determined that the client still had merit in her case before the court. The EIU solicitor assisted the client to make representations to the Grants Division of Legal Aid NSW and the client's grant of legal aid was reinstated. The EIU Information and Referral Officer then found an appropriate private solicitor client experienced in assisting Aboriginal clients and the client was able to pursue her case before the court of having her daughter reinstated to her care.

Within the EIU, 15 FTE solicitors provide integrated legal services in three full-time duty services and across 38 outreach locations. The work of the legal officers is supported by two Information and Referral Offices and 3.5 Legal Support Officers responsible for a range of activities including making appointments with solicitors. Solicitors are responsible for particular outreach locations that link with a duty service and in a number of instances clients seen in a duty context are referred from an outreach setting, to an urgent duty service and then referred on to the in-house practice or a partner agency for on-going assistance as the following case studies demonstrate.

An EIU lawyer spoke informally to an Aboriginal worker whilst she was providing an outreach advice service. The worker told the lawyer that she would like to refer a client who was having family law problems. The EIU lawyer ascertained that the client's children had been removed from her care by the father and that there were concerns about their safety. The EIU lawyer asked for the client's details and telephoned her immediately. The client was asked to urgently attend on the duty court service.

A recovery application was drafted and filed. Before the court appearance the duty lawyer telephoned the father and negotiated with him for the return of the children – they were voluntarily returned later that day before the matter had been heard.

The client was then referred to our partner agency, the Aboriginal Legal Service who provided ongoing case representation.

Information and Referrals Officer

The EIU is heavily reliant on panel solicitors and partners in CLCs and the ALS. The role of the Information & Referrals Officer (IRO) within the EIU is integral to the effective referral of clients with the in house practice or panel solicitors. The IRO is required to determine which matters are urgent and require immediate, ongoing assistance such as a recovery application. Arranging representation with a solicitor who can appropriately meet the needs of a client is integral to the role.

The EIU put into place protocols with the Grants Division of Legal Aid NSW for referrals. These protocols allow the EIU to assist a private solicitor to obtain a grant of aid urgently so that the matter can proceed. The IRO also follows up with matters where clients might not

ordinarily engage with the solicitor to ensure that they have been referred to the appropriate service.

The vital role played by the IRO is demonstrated by the following case studies:

A Legal Aid NSW regional office referred a mother to the EIU at 1pm on Tuesday. She reported that on the previous night her 7 month old baby had been taken by the father. The office was unable to assist due to a conflict. The EIU arranged for the client to see a private practitioner at 3:30pm on the same day. The client attended the appointment, documents were prepared and filed and the matter listed the next day at 11:30am (Wednesday). An ex parte order for recovery of the child was made on Wednesday when the matter was listed and the baby reunited with the mother shortly after.

An EIU outreach solicitor met with a client in Broken Hill. The client had difficulties spending time with his infant as the mother had relocated to Tasmania with her father. There are few lawyers in the Broken Hill area who will undertake Legal Aid work.

The outreach solicitor assisted the client to complete his Legal Aid application and the IRO arranged representation. The client was very grateful that the EIU were able to assist him to find representation. As this client is in a remote location the EIU followed up with him two weeks later to ensure that he was engaging with his lawyer. He confirmed that he had received correspondence advising aid was granted. He is currently instructing the lawyer in relation to an ADVO which has been recently served on him.

Duty Services

One of the functions of the EIU is to deliver enhanced family duty lawyer services. Two duty lawyers are rostered to provide services from 9 am-1pm and 2-4 pm Monday-Friday at the Sydney, Parramatta and Newcastle Family Law Courts. A solicitor is also rostered to provide a service to the Federal Circuit Court at Dubbo in the four weeks of the year when it lists matters on the first occasion.

Duty solicitors will provide advice and assistance to self-represented people with a matter listed in court that day, assist in the drafting of urgent applications and then appear as necessary and, where time permits, advise people who attend seeking advice when a matter is not already in court. The broad aims of the duty service are to:

- Increase access to earlier, expert legal assistance for self-represented individuals seeking legal help,
- Assist those clients to take timely and appropriate action to progress or resolve their family law matters efficiently and effectively
- Help reduce the impact of self-represented litigants on the workload of the Family Law Courts

A recent report by the Law and Justice Foundation of NSW (the Foundation) examined the role and impact of the EIU duty services at the Parramatta Family Law Courts. The following observations were made in that report about the service:

- That it is fully integrated with court – duty lawyers are in attendance at all court registries during opening hours, attend some court circuits and rostered around court lists.
- It is a diversionary service particularly for clients who arrive at court thinking that they "must" get orders.
- Placement of the services in the court are an acknowledgement that courts are another entry point to family law system – first time services are proactively offered to self-represented litigants.
- Before self-represented litigants file documents at court duty lawyers will:
 - refer them away from court if its not appropriate;
 - refer them to a litigation service if they do need to go to court but are eligible for legal aid;
 - refer them to a litigation service if they do need to go to court but are not eligible for aid;
 - if they "fall through the gap" not eligible but can't pay – EIU might redraft their application and affidavit so that the court has a clear idea of what the parameters of the dispute is and that has the advantage of saving court time in not having to deal with misguided applications; and
 - provide the client with a clearer understanding of both the litigation and non litigation pathways that are available to them.
- The duty service is also a critical crisis intervention service for clients who would otherwise have no access to the court in emergency matters, i.e. where children's safety is at risk.
- Much of the work is not dealing with matters in court – it is critical pre filing advice and assistance with a heavy focus on providing access to non litigation pathways.
- It is strengthened by the integration of the Court Ordered Mediation Pilot (COMP) program in Parramatta and Sydney

The Foundation's report of the EIU duty scheme shows that the new service delivered a 160% increase in the number of duty matters dealt with by Legal Aid NSW at Parramatta Family Law Courts compared to the previous year.

The duty service delivered significant early intervention outcomes: in one-third of matters clients had been seeking to commence an action which was not appropriate to progress their family law matter. The EIU successfully redirected these people to alternative pathways – de-escalating proceedings between parties and saving court time.

The evaluation found that the EIU duty lawyer service successfully contributed to the effectiveness and efficiency of court processes. The service successfully diverted matters that should not be in the court, at the point when documents are being filed and advised and assisted clients to take the most appropriate course of action.

The evaluation found that in 17% of all matters they negated the need for a new court application, or the application which was before the court, was discontinued with their assistance.

The EIU duty service also assisted clients to progress their matters through the court, when it was appropriate. In 16% of matters the matter was finalised by the court or by the Court with consent, following the assistance of the EIU duty lawyers that day.

The evaluation found that a key feature which contributed to the outcomes of the duty service was the 'High calibre staff, in terms of legal skills and experience, maturity and common sense and the capacity to communicate with and support high needs clients'. The EIU duty scheme was found to have shifted the focus of duty services from being responsive to what was before the court to ensuring that clients received assistance early in the life of a court matter.

An example of the work undertaken by duty lawyers is highlighted by the following case study:

S had attempted to fly to Serbia to see his gravely ill sister in hospital. He had not left Australia in 41 years. When he was passing through Customs, he was referred to the Australian Federal Police, who told him there was a family law order prohibiting his departure from Australia.

The client travelled from the airport to the Sydney Family Court. Whilst he did have family law proceedings in 2000, he was not aware of any order prohibiting his travel. He instructed that the outcome of those proceedings was that the child would live with the mother.

The duty service liaised with the Registry to retrieve the old file from archives, but that would take a few days. They made inquiries with the Child Support Agency about the existence of a Departure Prohibition Order in place. The Agency disclosed the client was only in arrears of some 80 cents, and there was no Departure Prohibition Order in place.

A day later, the Registry informed the duty service they had located an interim order made in 2000 restraining the travel of both parents and the child, and requesting that the parties and the child be placed on the Airport Watch List.

S spoke to the mother, who consented to his travel, and the duty service prepared an application for consent orders and our client took them to the mother for her to sign. He returned the next morning and signed the orders for himself, before filing them in the Registry under a cover letter from the duty service explaining the urgency of the situation. A Registrar made the orders that day, and the duty service faxed them to the Australian Federal Police. S was free to visit his ill sister.

COMP pilot

A number of different mediation models operate across the family law system. Legal Aid NSW identified that a form of mediation missing from the system is a court-based process that allows parties to reach a solution to their dispute in the court environment at the point where a matter is listed for hearing and a judge-ordered solution is imminent.

The COMP program was established in recognition that a court referred mediation process would reduce administration and delay, and provide timely intervention for matters capable of resolution.

For a matter to be referred to the program, at least one party must have a grant of legal aid.

The key elements of the COMP program include:

- location at the court
- judicial officer direction or order that parties participate allows fuller integration with court process
- immediacy of the court process leads to an easier resolution of family law problems
- ease with which settlements can be finalized by court order

Table 1 sets out the results of the program for the 2012-13 financial year. 172 mediations were provided by the COMP program in the Parramatta Family Court registry achieving a settlement rate of 88%. The program achieved savings for both the court and Legal Aid. Those settlements resulted in savings of 134 court days and 253 legal aid funded days. Legal Aid NSW estimates that it would have expended approximately \$460,460 had these matters proceeded to final hearing.

Also of interest is that in 84% of the matters referred to the scheme, the parties had not previously participated in a dispute resolution conference.

An example of a successful outcome is highlighted by the following case study:

A matter involving four parties (the father, mother, paternal aunt and an Independent Children's Lawyer) was referred to the COMP scheme. Both parents had significant disabilities as there were profoundly deaf and mute and required Auslan interpreters. The Aunt, who had been responsible for the day to day care for the two children, required an Arabic Interpreter. All parties were in receipt of legal aid funding.

The mother had no contact with the boys, following allegations of an assault. A Court Ordered Mediation was held between the parties to resolve the contact issues. By the end of the conference an Interim Agreement was reached whereby the mother gained increasing contact with the boys.

The matter was listed for a final four days of Court hearing but on the first day of the hearing the judicial officer requested that the parties participate in a mediation arranged through the Legal Aid NSW COMP program. As a result of the mediation the Aunt indicated that she was confident that both parents were capable of looking after the boys. The ICL had obtained an Experts Report recommending a shared parenting arrangement. After a five hour mediation agreement was reached, saving 4 days of judicial hearing time and considerable cost to Legal Aid NSW and the court (the interpreter fees alone were estimated to be \$15,000).

The ability for participants to have private meetings with the mediator and the ICL assisted each of the express their concerns.

In recognition of the impact of the scheme in Parramatta, Legal Aid NSW expanded the COMP program to the Sydney registry in April 2013.

Targeted outreach services in key stakeholder agencies

In 2010, a partnership was established between Legal Aid NSW and the Family Relationship Centres (FRCs) at Coffs Harbour, Dee Why and Wagga Wagga. As part of this partnership (which has since expanded to the Wollongong FRC), Legal Aid NSW provides legal advice and assistance, including in legally assisted mediations.

When the EIU was established in 2011, these three FRC outreaches formed the core of what has now become an extensive network of EIU outreach services to 36 locations across NSW.

These outreach services are strategically focussed on four groups in the community identified as of special disadvantage: Aboriginal people, CALD communities, people living in regional and rural areas and women. Table 2 shows the network of outreach services provided by the EIU divided into these categories.

The key stakeholder agencies assist the EIU by working to support clients who use the EIU legal services by providing therapeutic services and by acting as 'case-spotters' to assist in the appropriate identification and referral of clients to our outreach services.

Over the last three years Legal Aid NSW has seen an 84% increase in the advice and minor assistance services provided via outreach services. The additional focus on taking proactive steps to assist a client seamlessly transfer to the next service provider has also led to an 8 fold increase in the minor assistance delivered. A recent review of Legal Aid NSW outreach legal services by the LJF demonstrates that outreach has been an effective way for Legal Aid NSW to increase reach to disadvantaged communities.

In May 2012 Legal Aid NSW formed a collaborative partnership with Settlement Services International (SSI) to connect members of CALD communities with accessible outreach legal services. The partnership was in part a response to recent report released by the Family Law Council of Australia which found that the failure to address the issues faced by CALD clients at an early stage is having detrimental effects on the long-term welfare of immigrants and entrants and has the potential to increase domestic and child abuse, intergenerational conflict and mental health issues which in turns serves to marginalise already displaced migrants.

Migrant Resource Centre clients often present with an immigration problem that also has a family law component and vice versa. By providing a holistic service clients receive a significant advantage from a linked-in civil and family law service.

The experience of EIU is that providing access to Legal Aid lawyers on site at a migrant service:

- provides a safe and culturally appropriate space for clients to seek legal assistance remembering that for many clients, the legal system in their own countries has created distrust and a fear of legal processes, and

- assist clients to navigate the legal service sector in a joined-up, seamless way including referral to private lawyers on our panels and into our own litigation practice.

The following case study highlights some of the difficulties that emerge for newly arrived migrants without legal assistance

A father and child left Iran in October 2012 and travelled to Indonesia by plane. From Indonesia they travelled to Australia by boat. The Australian Navy intercepted the boat on route to Australia and the father and child were detained in detention. In January 2013 they were then released into Community Detention with a Residential Determination made by the Department of Immigration that they are to live at a specified address.

The mother alleges that she travelled to Australia, via Indonesia, by boat after the child complained that the father was being violent towards her and leaving her unsupervised during the day and at home alone at night. The mother was placed in detention in Darwin and released on a Bridging Visa E after 50 days in detention. The mother travelled to Sydney to be re-united with the child and spent time in the Father's house caring for the child.

Following the incident of family violence the mother removed the child from the father's care. The father approached his Red Cross caseworker about the situation and subsequently sought advice from a civil law clinic provided under the SSI partnership. The civil lawyer referred the father to the EIU duty scheme. He was assisted to file documents and the Information and Referral Officer then arranged for a legal aid application to be lodged and his representation was arranged.

With the assistance of Red Cross and SSI the documents were served on the Mother who was then referred by the EIU to Legal Aid's in-house litigation service.

The court ordered that the Department of Immigration be made aware of the issue before the court. One of the difficulties on a practical basis is that as the father and child are in community detention they have Department of Immigration housing whilst the mother, on a bridging visa, does not. The father receives additional payments to care for the child – these payments are not transferrable to the mother whilst the child is staying in her care and away from the address specified in the residential determination order. Both the situation and the potential outcome had the potential to impact on the visa conditions of each party.

Due to the speed with which the parties were able to access legal services, the matter was heard (including an appeal to the Full Court of the Family Court) within 3 weeks of filing. The child was returned to the father's care and spends 6 nights each fortnight with the mother. The Red Cross are working with the Department of Immigration to give effect to the Orders on an ongoing basis and ensure that the needs of the child are properly considered whilst the parents go through the court processes.

Some of the matters dealt with at migrant services are not as complex but demonstrate a lack of understanding about the Australian legal system and process, as this case study highlights:

M made an appointment to see an EIU solicitor at the Migrant Resource Centre. M was born in Iraq and is a devout Muslim who has had been married for over 20 years with seven children ranging from 8-21 years of age. Her husband moved out of the matrimonial home in late 2011 with his brother – he told M that he wanted his own space but wanted to maintain the

relationship. M's husband would come over on a daily basis, have dinner together, maintained an intimate relationship and shared in the finances. M's husband told her in March 2013 that he was applying for an Australian divorce because he wanted to marry another woman from overseas, however wanted to continue and maintain his relationship with her.

M was served with an Application for Divorce from the husband's lawyers. The EIU assisted M in responding to the divorce application on the basis that no legal separation has taken place. The Application for divorce was dismissed.

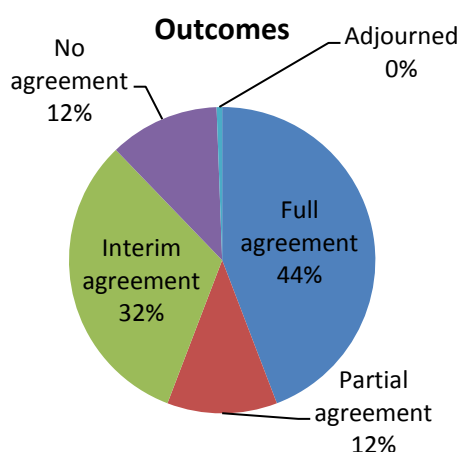
In addition to improving access to services for clients from CALD backgrounds, our targeted outreach services have also seen an increase in services provided to Aboriginal clients.

Over the next 12 months the EIU has expanded its focus and will commence providing new services targeted towards vulnerable children and families who have come into contact with the child protection system.

Table 1: COMP scheme 2012-2013 Parramatta Registry

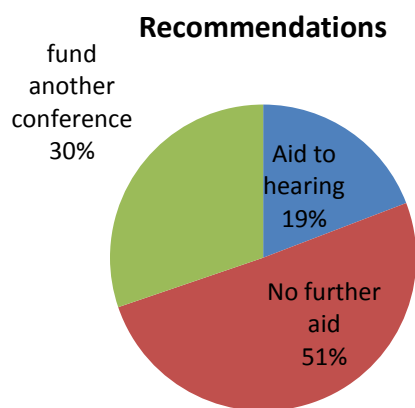
Outcome

Full agreement	76
Partial agreement	20
Interim agreement	55
No agreement	20
Adjourned	1
Total	172



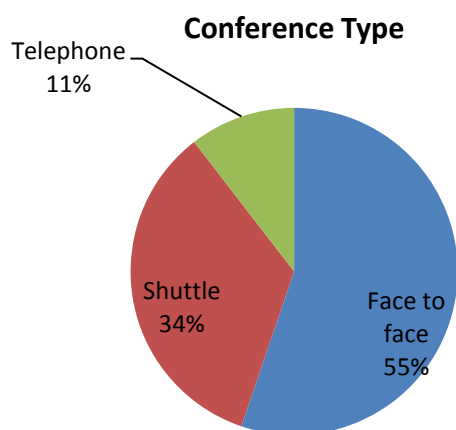
Recommendations

Aid to hearing	33
No further aid	87
fund another conference	52
Total	172



Conference Type

Face to face	95
Shuttle	59
Telephone	18
TOTAL	172



Matters with full agreement/no further aid - 77

Saved time

134 court days and 253 days of legal aid funding²⁴⁹

²⁴⁹ Includes multiple legally aided parties in one matter and multiple hearing dates

Table 2: Family Law Early Intervention Unit Outreach Locations

Family Relationship Centres

Coffs Harbour, Family Relationship Centre

- 24 Park Avenue, Coffs Harbour
- Once a week on a Monday
- Telephone Coffs Harbour Legal Aid for an appointment on 6651 7899

Dee Why, Northern Beaches Family Relationship Centre

- Level 1, 651 Pittwater Rd, Dee Why
- Weekly on a Monday
- Telephone the EIU for an appointment 1800 551 589

Wagga Wagga, Family Relationship Centre

- 36-40 Gurwood Street, Wagga Wagga
- Twice a month on a Wednesday
- Telephone the EIU for appointment on 1800 551 589

Wollongong, Family Relationships Centre,

- 336 Keira Street, Wollongong
- Once a week on a Wednesday
- Telephone the EIU for an appointment 1800 551 589

Aboriginal Services

Blackett (Mt Druitt), Marrin Weejali Aboriginal Cultural & Spiritual Healing Centre

- 79-81 Jersey Road Blackett
- Twice a month on a Tuesday morning
- Telephone the EIU for an appointment 1800 551 589

Emerton (Mt Druitt), The Shed

- Holy Family Centre, 9 Emert Parade, Emerton
- Twice a month on a Tuesday afternoon
- Telephone the EIU for an appointment 1800 551 589

La Perouse, La Perouse Aboriginal Community Health Centre

- Elaroo Avenue, La Perouse
- Twice a month on a Tuesday
- Telephone the EIU for an appointment 1800 551 589

CALD Communities

Bateau Bay, Northern Settlement Services

- 1 Bay Village Road, Bateau Bay
- Once a month on a Wednesday
- Telephone the service for an appointment 4969 3399

Cabramatta, Fairfield Migrant Resource Centre

- Corner Railway Parade and McBurney Road, Cabramatta
- Twice a month on a Thursday
- Telephone the service for an appointment 9727 0477

Daceyville, Sydney Multicultural Services

- 3 General Bridges Crescent Daceyville
- Twice a month on a Monday and Thursday
- Telephone the service for an appointment 9663 3922

Fairfield, Fairfield Migrant Resource Centre

- 50 Harris Street, Fairfield
- Twice a month on a Thursday
- Telephone the service for an appointment 9726 9505

Liverpool, Migrant Resource Centre

- 108 Moore St, Liverpool
- Once a week on a Monday afternoon
- Telephone the service for an appointment 9601 3788

Metro Campsie Migrant Resource Centre

- Level 2, 59-63 Evaline Street, Campsie
- Twice a month on a Tuesday morning
- Telephone the service for an appointment 9789 3744

Metro Marrickville Metro Migrant Resource Centre

- 136 Marrickville Road, Marrickville
- Twice a month on a Tuesday afternoon
- Telephone the service for an appointment 8594 0300

Wollongong, Illawarra Multicultural Services

- 17 Auburn Street, Wollongong
- Once a month on a Wednesday
- Telephone the service for an appointment 4229 6855

Regional and Rural Services

Albion Park, Local Court,

- 96 Tongarra Road, Albion Park
- Once a month on a Wednesday morning
- Telephone the EIU for an appointment 1800 551 589

Bowral, Highlands Community Centre

- Stafford Cottage, 22 Bendooley St, Bowral
- Twice a month on a Tuesday afternoon
- Telephone the EIU for an appointment 1800 551 589

Broken Hill, Lifeline

- 194 Argent Street, Broken Hill
- Once a month on the fourth week of the month
- Telephone the EIU for an appointment 1800 551 589

Cessnock, Centrelink Office

- 186 Vincent Street, Cessnock
- Once a month on a Thursday afternoon
- Telephone the EIU for an appointment on 1800 551 589

Forbes, Local Court

- Victoria Lane, Forbes
- Once a month on a Tuesday afternoon
- Telephone the EIU for an appointment on 1800 551 589

Goulburn, Local Court

- Montague Street, Goulburn
- Once a month on a Thursday
- Telephone the EIU for an appointment on 1800 551 589

Grafton, Community and Function Centre

- 59 Duke Street Grafton
- Twice a month on a Tuesday morning
- Telephone Coffs Harbour Legal Aid for an appointment on 6651 7899

Kiama, Local Court

- 34-36 Terralong Street, Kiama
- Once a month on a Wednesday morning
- Telephone the EIU for an appointment 1800 551 589

Lithgow, Lithgow Information and Neighbourhood Centre

- 1 Padley Street, Lithgow
- Once a month in the last week of the month
- Telephone LINC on 6352 2077

Moss Vale, Local Court

- Argyle Street, Moss Vale
- Twice a month on a Tuesday morning
- Telephone the EIU for an appointment on 1800 551 589

Muswellbrook, Local Court

- Bridge Street Muswellbrook
- Once a month on a Wednesday
- Telephone the EIU for an appointment on 1800 551 589

Orange, Legal Aid Office

- Suite 4, 95 Byng St, Orange
- Once a month on a Monday
- Telephone Orange Legal Aid for an appointment on 6362 8022

Parkes, Parkes & District Neighbourhood and Community Information Centre

- 80 Currajong Street, Parkes
- Once a month on a Wednesday morning
- Telephone the EIU for an appointment 1800 551 589

Queanbeyan, Local Court

- 2 Farrer Place, Queanbeyan
- Once a month on a Wednesday
- Telephone the EIU for an appointment 1800 551 589

Singleton, The Youth Venue

- 7 Pitt Street, Singleton
- Once a month on a Thursday
- Telephone the EIU for an appointment 1800 551 589

Wyang, Neighbourhood Centre

- Old Primary School, Cnr Rankins Court & Allison St, Wyong
- Twice a month on a Wednesday
- Telephone the service for an appointment on 4353 1750

Women's Services

Lakemba, Muslim Womens Association (women only)

- 47 Wangee Road Lakemba
- Twice a month on a Friday morning
- Telephone the service for an appointment 9750 6916

Mascot, The Deli Women and Children's Centre

- Maloney Street, Eastlakes
- Twice a month on a Tuesday
- Telephone the service for an appointment 9667 4664

Waterloo, Weave Women & Children's Centre (women only)

- 133 Morehead St, Waterloo
- Fortnightly on a Thursday afternoon
- Telephone the EIU for an appointment 1800 551 589

Wyang, Rose Cottage (women only)

- 7 Rose Street Wyong
- Twice a month on a Monday
- Telephone the service for an appointment on 4351 1152

Metropolitan Services

Auburn, Salvation Army Hall

- 166-170 South Parade, Auburn
- Twice a month on a Friday afternoon
- Telephone the EIU for an appointment 1800 551 589

Campbelltown, Community Justice Centre

- Community Justice Centre, Railway Street Campbelltown
- Once a week on a Friday
- Telephone Campbelltown Legal Aid for an appointment 4628 2922

Sutherland, Legal Aid Office

- 3-5 Stapleton Avenue, Sutherland
- Once a month on a Thursday
- Telephone Sutherland Legal Aid on 9521 3733