Law Council
OF AUSTRALIA

13 November 2013

Presiding Commissioner Warren Mundy
and
Commissioner Angela MacRae
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

By email: access.justice@pc.gov.au

Dear Commissioner

INQUIRY INTO ACCESS TO JUSTICE ARRANGEMENTS

Please find **attached** the submission from the Law Council of Australia in response to the Inquiry into Access to Justice Arrangements 'Issues Paper'.

Please contact Nick Parmeter on if you have any questions.

Yours sincerely

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President

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Inquiry into Access to Justice Arrangements

Productivity Commission

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Executive Summary

The following paper outlines the Law Council of Australia's submission in response to the Productivity Commission's Inquiry into Access to Justice Arrangements "Issues Paper".

True access to justice is a hallmark and aspiration of a developed society. In order to achieve access to justice, citizens and other legal entities must have not only the formal right to access legal institutions to enforce their rights and defend their interests, but the practical ability to do so, regardless of geographic location, economic capacity, health, education, race, sex, social status or any other factor.

The key institutions which constitute Australia's civil justice and criminal justice systems include the Federal, State and Territory courts and tribunals, government-funded legal assistance bodies, the independent legal profession, the private coordinators of pro bono legal services, and the various private and statutory bodies which assist Australians to identify and resolve their legal problems.

This Inquiry follows in the wake of numerous previous inquiries into access to justice. Fair and equal access to the justice system is a key priority for all Australians and their elected governments. The Law Council considers that a key outcome from this Inquiry must be to demonstrate the economic value of achieving access to justice and the importance of investing in the institutions it comprises.

The Law Council's key submissions are as follows:

- Australia's legal assistance service providers, including the Legal Aid Commissions (LACs), Aboriginal and Torres Strait Islander Legal Services (ATSILS), Community Legal Centres (CLCs) and Family Violence Prevention Legal Services (FVPLS) are chronically underfunded. Due to increasingly restrictive means-testing applied by LACs throughout the country, many people living below the Henderson Poverty Line are ineligible for legal aid. Moreover, there are many categories of legal problems for which legal assistance is not available, regardless of means.

- Australia's court system is also seriously underfunded and is experiencing diminishing capacity to deliver timely justice in the face of increasing demand for services. As a result of reduced capacity of legal assistance bodies to provide assistance and representation to a growing number of Australians with legal need, the courts are being forced to deal with ever-increasing numbers of unrepresented litigants. This has created significant additional challenges for the courts and tribunals.

- In an environment of reducing government funding for legal and justice services, the legal profession has (at an increasing rate) sought to meet the demand with pro bono or reduced-rate legal services and the acceptance of legal aid briefs at unreasonably low rates. This situation is unsustainable, as demonstrated by the withdrawal of law practices from legal aid work and the increasing levels of unmet legal need in the community.

- Unmet legal need in Australia is a significant problem, with increasingly serious social consequences. Failure to address unmet legal need, or legal problems which are resolved unsatisfactorily, has downstream economic consequences. The Law Council provides actuarial evidence in this submission that investment in legal assistance services has the potential to significantly ameliorate those costs and return a net benefit to society.

- Those seeking solutions to this crisis must start with the funding model for the legal assistance sector. The current National Partnership Agreement on Legal Assistance Services is a broken model, which has failed to provide a proper basis for legal assistance sector funding in Australia. A new intergovernmental agreement is vital to restoring the funding position of legal aid and other legal assistance providers. The new model should begin with nationally agreed objectives for the delivery of government funded legal services, result in equally-shared funding arrangements between different levels of government and move beyond the destructive demarcation between federal and state funding responsibilities.

The Law Council makes the following additional submissions:

Legal cost

1. The cost of delivering justice is high and the cost of entering the civil justice system is beyond the capacity of many people. This barrier is obvious and increasingly impenetrable, but there are other significant barriers to access to justice, as identified in Chapter 4 of the Issues Paper, including the obscurity and complexity of legal principles and procedures and geographic isolation. Overcoming those barriers will require investment in the courts and legal assistance services, as well as investment in new technology, community legal education and referral services, and measures to slow the attrition of lawyers in rural, regional and remote (RRR) areas.

Legal need

2. Legal need is particularly concentrated among certain groups in the community, including the disabled, unemployed, single parents, Indigenous Australians, those on welfare and those living in RRR areas. However, the Law Council considers the broadest group affected are those on low or lower middle incomes. These citizens are not sufficiently wealthy to engage in a protracted legal process and are usually ineligible for government-funded legal assistance or waiver of fees and charges.

Unrepresented litigants

3. The number of unrepresented litigants in Australian courts and tribunals has grown significantly over the last 20 years. This has placed significantly greater pressure on court resources, has contributed to delays and the need for costly further hearings and appeals, and may have led to miscarriages of justice. Many programs have been established and funded by courts or governments recognising this, which aim to provide information and support to unrepresented litigants. It is essential that governments re-invest in these programs, and establish them in jurisdictions and courts where they do not currently exist.

Improving access to justice

4. The most important avenue for improving access to justice is to restore adequate funding for the legal assistance sector and the courts and tribunals. Other measures might also be considered, including investment in community legal education, self-representation programs, technology for courts and tribunals, training and use of interpreters, cultural competency training for lawyers and judicial officers, referral services and reduced court filing fees.

5. Early access to legal advice and assistance results in quantifiable benefits to the lives of many Australians and provides significant downstream savings to tax payer funded legal services, the justice system and other government services. Community legal education and legal 'health' checks provide a useful mechanism by which to identify, prevent and address existing legal problems early on.

Alternative dispute resolution (ADR)

6. ADR is an important tool in the dispute resolution armoury. However, not all forms of ADR will be effective in all disputes. Mandating ADR in all cases is likely to increase the cost of the dispute resolution process without perceivable benefits, in terms of the timeliness of dispute resolution. There is a lack of reliable, consistent, and comparable data about referral to and use of ADR. A starting point may be to provide the courts and tribunals with resources sufficient to collect additional information on ADR referrals and outcomes.

7. The Law Council's constituent bodies are very active in promoting the private provision of ADR. Both public and private ADR are widely used, although there is limited data on whether one or the other is more effective. The Law Council considers it may be appropriate to collect data on outcomes from public and private ADR processes.

8. The Law Council can see a greater role for industry ombudsmen in areas where there are a high volume of disputes and small claims. However, the appointment of ombudsmen should not limit or replace the right to pursue other avenues, including determination by a court or tribunal.

Access to courts and tribunals

9. Tribunals can be an effective and cheap forum for resolving smaller claims and disputes. However, it is not appropriate to adopt a one-size-fits-all approach to tribunals – there are strengths and weaknesses in both generalist and specialist tribunals.

10. Those who approach tribunals should retain the right to be legally represented, if they so choose. Restricting the right to legal representation can place one party in the proceedings at a distinct disadvantage, especially where the other party is a repeat-player.

11. High filing fees impose a significant burden on litigants and create an unreasonable and inequitable barrier to accessing the justice system. Reduction of filing fees would particularly assist those litigants on low incomes and reduce inequity in matters involving small players attempting to assert and enforce their rights against larger corporations and governments.

12. The Law Council is wary of some reforms in court procedures such as pre-action protocols. While such protocols bring their own costs, there is little evidence suggesting pre-action requirements result in faster or earlier settlement of disputes.

13. The Law Council strongly supports the greater use of technology in proceedings to improve access to justice and efficiency of court processes.

Effective and responsive legal services

14. The Law Council opposes any relaxation of restrictions on provision of legal services by non-lawyers. Significant risks and problems arise from proposals to allow people who are not legally trained and regulated to undertake legal work, in any area of practice. The Law Council considers that consumer protection and professional standards will be diminished if non-lawyers are permitted to undertake legal work.

15. Law practices in recent years have begun to adopt new, or "alternative", business structures, following changes to the regulatory environment. The Law Council supports further deregulation in this area, subject to the primary consideration that professional and ethical standards are maintained.

16. The legal profession's pro bono contribution is substantial. However, the efforts made by the profession to provide free legal services, or services at reduced rates, can never replace the responsibility of government to provide access to legal assistance for those who cannot afford it. Further, mandating pro bono targets under legislation or to qualify for government legal work will disadvantage smaller firms and ultimately undermine the charitable culture within the legal profession.

Funding for litigation

17. The Law Council is currently engaged in a national consultation process with its constituent bodies as to whether the legal profession will support lifting the prohibition on contingency fees. The Law Council expects to be in a position to provide a more comprehensive submission on this point at a later stage of the inquiry.

18. Conditional costs agreements, commercial litigation funding, representative proceedings and class actions can contribute substantially to the capacity of the legal profession to facilitate access to justice for a significant number of Australians. However, the Law Council acknowledges the competing considerations which divide community views and those of the profession in this area.

19. Litigation insurance products have had strong success in overseas jurisdictions and have the potential to significantly improve access to justice in Australia. It is recommended that governments engage with the peak insurance bodies to consider the establishment of appropriate and affordable litigation insurance products in Australia.

Better measurement of performance and outcomes

20. The Law Council supports, in principle, the collection of data and other information to support policy development in relation to access to justice. This is subject to the provision of sufficient funding to legal assistance bodies and the courts to collect new data, as required.

21. The Law Council also supports collection of data in relation to the legal profession. However, the capacity of law practices to collect data and provide information will be limited by a number of factors, including cost, obligations of confidentiality to clients and concerns about the way in which the data may be used or compared.

Introduction

1. The Law Council of Australia welcomes the opportunity to contribute to the Productivity Commission's Inquiry into Access to Justice Arrangements.

2. As outlined at **Attachment A**, the Law Council is the peak body for the Australian legal profession. Through the law societies and bar associations of the Law Council, plus the large law firm group limited, the Law Council effectively speaks on behalf of 60,000 lawyers in Australia and internationally.

3. This submission responds to the Access to Justice Arrangements Issues Paper issued by the Productivity Commission on 16 September 2013 (the Issues Paper). The submission draws on the experiences of the private legal profession, including solicitors and barristers, as well as from publicly funded legal assistance bodies, courts and tribunals, pro bono providers, mediators and others.

4. In preparing this submission, the Law Council has been greatly assisted by a number of its constituent bodies, which provided extensive material derived from independent research, anecdotal information provided by their members and information held across their organisations, including the Law Society of NSW, Law Institute of Victoria, Law Society of South Australia, Bar Association of NSW, the Law Society of Western Australia, the Victorian Bar, Queensland Law Society and Law Society of the Northern Territory.

5. The Law Council has also liaised with and drawn upon the expertise of members of its expert Advisory Committees, Sections and Divisions, including the Access to Justice Committee, Indigenous Legal Issues Committee, Criminal Law and Human Rights Division and Civil Justice Division; the Family Law Section; the Legal Practice Section's Personal Injuries and Compensation Committee, Administrative Law Committee and Industrial Law Committee; the Federal Litigation Section's Alternative Dispute Resolution (ADR) Committee, Class Actions Committee and Litigation Funding Sub-Committee; and the Business Law Section's Tax Law Committee and Corporations Law Committee.

6. This Inquiry follows in the wake of numerous other inquiries into access to justice and related matters. To name just a few in recent history:

   (a) the 2012-13 Review of Legal Assistance Services by the Allen Consulting Group (yet to be publicly released);

   (b) the 2013 Senate Legal and Constitutional Affairs Reference Committee Inquiry into the Impact of Changes to Court Filing Fees since 2010 on Access to Justice;

   (c) the 2009 Senate Legal and Constitutional Affairs References Committee Inquiry into Access to Justice; and

   (d) the 2008 Victorian Law Reform Commission Review of the Victorian Civil Justice System.

7. The Law Council believes this Inquiry is a long-overdue opportunity for the Commonwealth's chief independent economic and regulatory advisory body to recognise and analyse the economic value of access to justice - and the cost of its denial. The opportunity cost to society of failure to make the justice system

accessible to the majority of Australians is very high, and outweighs the cost of establishing an equitable and progressive funding model for the courts, legal assistance services and other elements of the justice system.

8. The Law Council believes Australia has passed the stage where further 'economies' and 'efficiencies' can be expected of courts and legal service providers. In terms of 'civil justice', there is virtually no legal aid available in most jurisdictions and, where it is available, it is limited to the most disadvantaged Australians. Civil law assistance is largely unavailable for the 'working poor' and lower-middle income earners, who do not satisfy the means test and cannot afford private legal representation.

9. The thrust of the Law Council's submission is that a decision not to invest in courts, legal assistance services and the justice system as a whole, by all levels of government, is a false economy. The Law Council, legal assistance providers and the courts have built a strong body of evidence demonstrating that significant downstream costs emerge as a result of a failure to provide people with the means to access and enforce their legal rights on an equitable basis, or to address their legal problems at an early stage.

10. Ultimately, it is the right of all members of the community to have their disputes adjudicated and determined according to law. Informal justice mechanisms should be – and, in the Law Council's submission, *are* – used to the fullest extent possible. It is incumbent on all legal practitioners, under law and in compliance with ethical and professional obligations, to find the most cost-effective and fastest means of achieving the best outcome for their client.

11. This submission carefully considers the matters raised by the Productivity Commission in the Issues Paper, as well as issues arising under its terms of reference, and respectfully recommends an appropriate position.

12. The Law Council is grateful to all members of the Working Group established by the Law Council Executive to coordinate the Law Council's response to this inquiry. The Working Group comprises leading practitioners from the Law Council Board and Executive, and a number of representatives of the Law Council's constituent bodies (including the Victorian Bar, Law Institute of Victoria, Law Society of NSW, Law Society of South Australia, Queensland Law Society and ACT Law Society) and the legal assistance sector. The Working Group members practise in a wide range of areas of substantive law and have contributed greatly to the development of this submission.

Background

13. Australia's system of parliamentary democracy is comprised of three branches – the legislature, the executive government and the judiciary.

14. The primary institution forming the judicial branch of government is the High Court of Australia, established under Chapter III of the Australian Constitution. Section 71 of the Constitution provides that:

> "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

15. As noted in the Commonwealth Attorney-General's Department's *A Strategic Framework for Access to Justice Under the Federal Civil Justice System*,[1] the civil justice system is comprised of a range of different frameworks and institutions, including not only the courts, tribunals and legal service providers, but also primary administrative decision-makers, public advocates, relationship services, complaints handling bodies, commissions of inquiry and ombudsmen.

16. Similarly, the criminal justice system extends beyond the courts and legal service providers to prosecuting authorities, law enforcement bodies, corrections services, rehabilitation providers, government regulatory agencies, social workers and health services.

17. These systems are each characterised by both formal and informal justice mechanisms. For example, in the criminal justice system, diversionary programs are an important 'informal' justice mechanism, which have been implemented in recognition that harm minimisation and rehabilitation can often be best achieved without a trial, hearing or formal legal process. Similarly, in the civil justice context, informal justice and alternative dispute resolution (ADR) mechanisms are widely used – in fact, it is only a very small proportion of matters which are ultimately heard and determined by a court.

18. The extent to which the civil and criminal justice systems are intertwined is explored further below. However, as an overarching comment, for a number of years government policy has been consistently and overtly directed toward encouraging use of informal justice mechanisms and discouraging use of formal justice mechanisms. The Law Council submits that the fundamental concern must be the swift and fair dispensation of justice, under both the civil and criminal justice systems. It is not necessarily the case that ADR will be more cost effective and efficient than a determination by a court. There are a many factors which will influence the effectiveness and success of informal justice mechanisms and these should be considered in each and every case.

19. For this reason, the Law Council does not accept the characterisation by the Attorney-General's Department that the courts are a measure of 'last resort'. The justice system is not a 'flow chart', with 'information and support' at one end and 'the Court' at the other. The courts themselves have a role to play in determining the best mechanisms for resolving disputes. Moreover, Australians have a fundamental right to approach the courts to seek resolution of disputes or legal problems; and it must be recognised that there are many legal problems which simply cannot be resolved without the intervention of the courts.

Courts and tribunals

Courts

20. The Federal courts, including the Federal Court, Family Court of Australia and the Federal Circuit Court) formerly the Federal Magistrates Court are also established under Chapter III.

[1] Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System,* September 2009, Commonwealth Attorney-General's Department, page 1. See http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf

21. State and Territory superior and lower courts derive their judicial power from state and territory Constitution Acts.

22. The jurisdiction of Federal, State and Territory courts includes both criminal and civil law, and it is generally for the courts themselves to prioritise, schedule and manage cases in either jurisdiction, under the direction of the Chief Justice, Chief Judge or Chief Magistrate for the relevant court.

23. In broad terms, the jurisdiction of each court is determined by applicable law - for example, matters arising under Federal laws or regulations will be handled by the Federal courts, whereas matters arising under Western Australian law will come within the jurisdiction of the Western Australian courts. However, cross-vesting of jurisdiction may occur where a matter raises issues affecting two or more jurisdictions.[2]

24. Access to the courts is generally subject to legislative thresholds and the discretion of the Court. In theory, anyone can apply to a court and does not require representation by a legal practitioner. Access may be subject to completion of various pre-action procedures. Hearings, filing of documents and processes with the courts are generally subject to court fees (discussed further below).

Tribunals

25. Tribunals are established under the executive power of government. Tribunals are intended to be a less formal, faster mechanism for dispute resolution. Civil tribunals are generally concerned with smaller disputes, appeals against administrative decisions and specialist areas of the law (including social security, employment, small consumer or contractual matters, etc). Tribunal decisions are binding and reviewable by a court on matters of law (and, in some cases, on the merits).

26. There are many generalist and specialist tribunals in Australia, established by Commonwealth and State/Territory Parliaments. Most jurisdictions operate a central, generalist tribunal (e.g. the Administrative Appeals Tribunal, the Victorian Civil and Administrative Tribunal, etc.). All jurisdictions also have established smaller, specialist tribunals in particular areas, often where specialist expertise is required (e.g. the Social Security Appeals Tribunal, National Native Title Tribunal).[3]

Legal assistance service providers

Legal Aid Commissions (LACs)

27. The modern legal aid system in Australia was founded on the premise of ensuring access to justice for all Australians as an essential aspect of promoting the rule of law. In establishing the Australian Legal Aid Office (ALAO) in 1973, the then Attorney-General, the Hon Senator Lionel Murphy QC, stated:

> "The Government has taken this action because it believes that one of the basic causes of inequality of citizens before the law is the absence of adequate and comprehensive legal aid arrangements throughout Australia. This is a problem that will be within the knowledge of every honourable Senator who will on many occasions have had to inform citizens seeking assistance with their legal

[2] *Re Wakim; ex parte McNally* (1999) 198 CLR 511.
[3] See the following link for a list of tribunals in NSW, for example: http://en.wikipedia.org/wiki/List_of_New_South_Wales_courts_and_tribunals

problems that there is nothing he can do for them; that they will need to go and see a private solicitor… The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as for litigation in all legal categories and in all courts."[14]

28. 2013 marks the 40th anniversary of the establishment of the Australian Legal Aid Office (ALAO). Following its establishment in 1973, the ALAO had subsequently evolved into independent legal aid commissions (LACs) in each State and Territory by the late-1970s, jointly funded by the Commonwealth and State/Territory Governments.

29. LACs are the central pillar of the legal assistance sector and a primary mechanism through which disadvantaged Australians are likely to obtain legal assistance.

30. The Australian legal aid system operates under a 'mixed-model' of service delivery, enabling LACs to draw on both in-house expertise and the experience and acumen of the private profession. The Law Council considers the mixed model offers greater efficiency, by harnessing the expertise of the private profession, particularly in matters requiring court representation. In this regard, the Law Council notes the Australian legal aid system is heavily reliant on the private profession for delivery of services. For example, the majority of legal aid grants to private practitioners relate to matters involving court representation. In 2010-11, 70% of the 42,097 grants of legal assistance approved by Victoria Legal Aid in that year were undertaken by private practitioners.[4]

31. LACs provide a range of services in both criminal and civil law matters, as well as policy development and community outreach. The direction and source of funding for LACs is determined under the National Partnership Agreement on Legal Assistance Services (the NPA), which sets out the matters for which Commonwealth funding will be applied.

32. Each LAC has promulgated its own 'guidelines' for legal aid funding grants, which set down restrictions on eligibility for legal assistance based on area of law, financial means, severity of outcomes and other matters prescribed from time to time. In recent years, progressive restrictions to funding guidelines, driven by ever-deepening budgetary constraints on LACs, have begun to seriously inhibit access to justice in both civil and criminal law matters.

33. It is important to recognise at this point, as is discussed further below, that funding restrictions on LACs directly impact on access to justice in both criminal and civil law matters. LACs are required to prioritise limited funding. The overarching imperative of ensuring that those subject to criminal charges are afforded reasonable and adequate representation generally means that the deepest restrictions have had to be applied to civil law matters. However, it has been clear for a long period of time that significant cuts to legal aid funding by the Commonwealth over the last 16 years have also seriously limited the capacity of LACs to provide legal representation in criminal matters.

[4] Victoria Legal Aid, Sixteenth Statutory Annual Report 2010-2011, August 2011. Available at: http://www.legalaid.vic.gov.au/rc_ar_2011_narrative.pdf.

Community Legal Centres (CLCs)

34. CLCs are not-for-profit legal service providers, which generally derive the majority of their income from Commonwealth Government grants (with some notable exceptions). There are around 200 CLCs operating across Australia, in metropolitan, regional and rural areas. As described by the National Association of Community Legal Centres:

> "CLCs are not-for-profit organisations that provide legal information, advice, casework, education and law reform services, particularly targeted at those who are disadvantaged or with special needs. There are a range of generalist CLCs that provide services across a range of law types for a particular geographic catchment, and many specialist CLCs that focus on particular groups or issues, such as people with disabilities faced with discrimination, refugees seeking asylum in Australia, or that assist individuals and community groups on environmental matters."[5]

35. CLCs often rely heavily on lawyers who offer their assistance pro bono, as well as students and retired lawyers who no longer hold a practising certificate.

Aboriginal and Torres Strait Islander Legal Services (ATSILS)

36. ATSILS provide culturally sensitive legal representation and advice services to Aboriginal and Torres Strait Islander people. ATSILS derive the majority of their funding from the Commonwealth Government, under various legal assistance programs.

37. The lack of funding provided to ATSILS, combined with an enormous increase in demand for legal services among Aboriginal and Torres Strait Islander peoples has meant that the vast majority of ATSILS' funding is allocated to casework and duty lawyer services in criminal law matters.

38. For example, as the Productivity Commission is well aware through its important reporting on 'Overcoming Indigenous Disadvantage', the rate of Indigenous offending and imprisonment has increased rapidly in recent years. Between 2000 and 2010, the Indigenous imprisonment rate increased by 51.5 per cent (from 1248.4 per 100,000 population to 1891.5 per 100,000 population) while the non-Indigenous rate only changed slightly (from 129.5 per 100,000 population to 133.5 per 100 000 population).[6] This has obviously impacted significantly on the level of demand for ATSILS services.

39. ATSILS can face specific challenges in service delivery, including due to the geographical isolation of many clients and the cost of providing services in regional or remote areas.

40. As the primary providers of legal services to Aboriginal communities over wide geographic areas, many ATSILS also report problems with conflicts in applications for assistance from prospective clients, who may be involved in a dispute or criminal matter involving an existing client. For example, it is not uncommon for ATSILS to

[5] Judith Stubbs & Associates, *Economic Cost-Benefit Analysis of Community Legal Centres*, June 2012, National Association of Community Legal Centres. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload0463.pdf.

[6] SCRGSP (Steering Committee for the Review of Government Service Provision) 2011, Overcoming Indigenous Disadvantage: Key Indicators 2011, Productivity Commission, Canberra, page 4.132.

receive applications for assistance from a client charged with assault against a domestic partner, who is a client of the same service in relation to family matters, property or children protection matters.

41. The Law Council is also advised that ATSILS, due to their low funding, are unable to offer the same pay or conditions to their staff as LACs can offer to their staff, let alone prosecutors working for Commonwealth, State or Territory Offices of the Director of Public Prosecutions; and the ATSILS face significant challenges attracting and retaining legal practitioners as a result.

Family Violence Prevention Legal Services (FVPLS)

42. The Attorney-General's Department states that the FVPLS program provides culturally sensitive assistance to Indigenous victim-survivors of family violence and sexual assault.

43. Generally, FVPLS provide free legal advice, referrals, ongoing casework and court representation, and assist with intervention orders, family law, child protection, victims' compensation and other legal problems arising from family violence.[7]

The private profession

44. There are approximately 60,000 Australian lawyers, who hold a legal practising certificate in Australia.

45. There were 8,234 private solicitors firms operating in Australia in October 2011, with the vast majority of these operating as sole practitioner firms (83.4 per cent).[8] From the remainder:

    (a) 1,060 firms were comprised of 2-4 partners (12.9 per cent);

    (b) 163 firms were comprised of 5-10 partners (2 per cent);

    (c) 50 firms were comprised of 11-20 partners (0.6 per cent);

    (d) 28 firms were comprised of 21-39 partners (0.3 per cent); and

    (e) 14 firms were comprised of 40 or more partners (0.2 per cent).

46. In addition to solicitor firms, there are approximately 5,600 barristers practising in Australia.

47. The proportion of practising solicitors working in different categories of firms was collectively:

    (a) 21.4 per cent in large firms – that is, firms with 21 or more partners;

    (b) 19.9 per cent in firms with 5-20 partners;

    (c) 20.7 per cent in small firms – that is, firms with 2-4 partners; and

[7] See http://www.fvpls.org/About-Us.php.
[8] 2011 NSW Law Society National Solicitors Profile - Final Report, May 2012, pages 14-15. Note that this figure excludes private firms in Victoria (data not available).

(d) 37.5 per cent working as sole practitioners.

Pro-bono legal services

48. The legal profession contributes a significant amount of its professional expertise through pro bono work, but a substantial amount of this pro bono contribution is not measured.

49. The National Pro Bono Aspirational Target is an ongoing initiative of the National Pro Bono Resource Centre (NPBRC). Individual solicitors or barristers, law firms and chambers of barristers can become signatories to the voluntary target by agreeing to provide at least 35 hours of pro bono legal services per lawyer per year.

50. According to the Sixth Annual National Pro-Bono Aspirational Target Performance Report,[9] many more lawyers and firms have joined as signatories. However, most lawyers have not even heard of the pro bono target, let alone signed up to it. There are very few lawyers, if any, who do not perform some pro bono work and a significant number spend a considerable part of their time providing fee or subsidised legal services.

51. In reviewing NPBRC data, it must be recognised that the NPBRC reports only what it measures from the work of those who have signed up and does not purport to give a representation of the extent of pro bono work performed by the profession. The NPBRC does not survey pro bono work being undertaken by major firms and Bars, corporate lawyers, government lawyers and small firms, which don't record their contribution. For example:

    (a) most major firms have pro bono departments which coordinate the contributions of legal practitioners employed by the firms;

    (b) a number of barristers and firms, of all sizes, have established relationships with Indigenous communities and provide pro bono assistance with business development, contracts, land claims, native title and a range of other services;

    (c) many courts maintain a 'duty program', drawing from a list of practitioners who are willing to assist and advise unrepresented litigants;

    (d) many CLCs' business models rely substantially on pro bono assistance offered by practitioners (including very experienced or retired practitioners) – for example, in relation to immigration and asylum applications, welfare rights, family law, elder law, etc; and

    (e) many practitioners undertake "every day", discounted or pro bono legal work for clients of limited means (who do not qualify for legal aid) or by continuing to act for clients after their grant of legal aid has run out,[10] particularly smaller firms and those in regional areas.

[9] Sixth Annual Performance Report on the National Pro Bono Aspirational Target October 2013.
[10] For example, see National Pro Bono Resource Centre, *Pro Bono Legal Services in Family Law and Family Violence: understanding the limitations and opportunities – Final Report*, October 2013. See https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Family%20Law%20Report%20FINAL.pdf

52. The Law Council submits that the size of the unreported pro bono contribution is very large indeed and should never be underestimated. Without the pro bono contribution by the private profession, the civil and criminal justice systems would be in a much deeper crisis than is presently the case.

Cross subsidisation

53. In addition to the pro bono contribution that is not recorded, the Law Council notes that firms tend to cross-subsidise unprofitable legal work such as legal aid work with other areas of their business. Cross subsidisation is occurring less frequently now, as certain transactional work has generated diminished returns, including wills and probate and conveyancing. Cross subsidisation is particularly important in RRR areas, in ensuring that certain legal services are available, particularly legal aid, as discussed below at paragraphs 235-237.

Law Council and its constituent bodies

54. The Australian legal profession is represented by the Law Council of Australia at the national level and by the state and territory Law Societies and Bar Associations at the local level.

55. An outline of the Law Council is appended to this submission at **Attachment A.**

Regulation of the legal profession in Australia

56. The legal profession performs a unique and important role in Australia's democratic society. Legal practitioners serve the interests of their clients and are often required to uphold the rule of law and challenge executive power, which necessitates the legal profession remaining independent from executive control or direction. At the same time, legal practitioners are officers of the Court and have a paramount duty to uphold the administration of justice, which prevails to the extent of inconsistency with any other duty. There is a significant (and inevitable) information asymmetry between legal practitioners and the majority of consumers of legal services that justifies legislative responses to provide for consumer protection, decision-making and avenues of redress.

57. As a consequence of the above, legal profession regulation in Australia is based on a co-regulatory model involving the courts, the legal profession and Government - the courts exercise an inherent power of control over admission to, and discipline of, the legal profession; the profession conducts itself within an ethical framework founded upon common law principles and articulated in rules of professional conduct; and governments, often in partnership with professional associations, exercise regulatory control under legislation.

58. The Federal Parliament does not have plenary legislative power to regulate the legal profession. Regulation therefore occurs at the State and Territory level. Each State and Territory – with the exception of South Australia, where an amendment Act has been passed and is about to be implemented[11] – has in place a *Legal Profession Act* based on model legislation developed between 2002 and 2006, under the policy

[11] Although South Australia did not adopt the then uniform *Legal Profession Act* in 2006-2007, it did then adopt the relevant national profession provisions. In 2013, South Australian Parliament enacted amendments to the *Legal Practitioners Act* which had the effect of adopting regulatory and other provisions which are consistent with the national model, including a Legal Profession Conduct Commissioner, consistent costs disclosures, consistent trust account regulation, and equivalent practice structure provisions.

guidance of the Standing Committee of Attorneys-General, to provide consistent standards for legal practice and the provision of legal services across the States and Territories.

59. The present *Legal Profession Acts* provide a comprehensive regulatory framework covering matters which include:

- Admission to the legal profession;
- Practising entitlements, restrictions and conditions;
- Control and management of trust money;
- Cost disclosure and assessment;
- Professional indemnity insurance and fidelity cover;
- Complaints handling, remedies and discipline;
- External intervention and investigations;
- Regulatory authorities;
- Legal profession rules; and
- Mutual recognition of admission and practising entitlements and inter-jurisdictional regulatory cooperation and enforcement.

60. The recent COAG National Legal Profession Reform Project proposed a Legal Profession National Law to introduce uniform regulation of the legal profession across the States and Territories. While a number of States and Territories have not committed to the proposals at this stage, New South Wales and Victoria are progressing the Legal Profession Uniform Law to apply in those jurisdictions, which will bring around 70 per cent of Australian legal practitioners under a uniform regulatory scheme.

Training requirements

61. Legal practitioners are subject to extensive training requirements both prior to becoming eligible for admission and as an ongoing requirement to hold a legal practising certificate.

62. For admission to the legal profession, a person must obtain academic qualifications that involve the equivalent of at least three-years full-time study of law. This academic study must include 11 prescribed areas of academic knowledge. These are: Criminal Law and Procedure; Torts; Contracts; Property; Equity (including the law of Trusts); Company Law; Administrative Law; Federal and State Constitutional Law; Civil Procedure; Evidence; and Ethics and Professional Responsibility. In addition to the academic study of law, a person intending to seek admission to the legal profession must also complete a program of practical legal training, demonstrating competency across 10 prescribed areas of knowledge, skills and values.

63. The relevant State or Territory Supreme Court, as part of its inherent jurisdiction, ultimately determines whether or not a person who comes before it should be

admitted to the legal profession. In addition to the applicant's academic qualifications and satisfactory completion of practical legal training, the applicant must satisfy the Court that he or she is a fit and proper person to be admitted to the legal profession. This can involve lodgement of affidavits as to, for example, the applicant's character, as well the provision of information and assessment by an Admissions Board or similar authority established to provide advice or recommendations to the Court on an applicant's suitability for admission. In *Frugtniet v Board of Examiners* [2002] VSC 140 (1 May 2002) Pagone J stated, at [10]:

> "The requirement for admission to practice law that the applicant be a fit and proper person, means that the applicant must have the personal qualities of character which are necessary to discharge the important and grave responsibilities of being a barrister and solicitor. A legal practitioner, upon being admitted to practice, assumes duties to the courts, to fellow practitioners as well as to clients. At the heart of all of those duties is a commitment to honesty and, in those circumstances when it is required, to open candour and frankness, irrespective of self-interest or embarrassment. The entire administration of justice in any community which is governed by law depends upon the honest working of legal practitioners who can be relied upon to meet high standards of honesty and ethical behaviour. It is the legal practitioner who is effectively the daily minister and executor in the administration of justice when advising clients, acting for clients, certifying documents, and making presentations to courts, governments, other professionals, and so on. The level and extent of trust placed in what legal practitioners say or do is necessarily high and the need for honesty is self-evident and essential."

64. Once admitted, the legal practitioner can apply to the law society, bar association or statutory issuing authority in their jurisdiction for a practising certificate. Each candidate is considered and must be approved by the council or committee appointed for that purpose. Once issued, the practising certificate must be renewed annually and it is a requirement in all jurisdictions that renewal applicants must demonstrate that they have completed at least 10 hours of recognised continuing legal education, with mandatory core requirements in the areas of skills for practice and ethics. In addition, practitioners are required to annually certify their fitness for practice and that they meet a number of mandatory regulatory requirements.

The adversarial legal system

65. In a recent Working Paper by experienced comparative researcher Annette Marfording,[12] the definition of 'adversarial system' is explored. Marfording notes that the Law Council has previously stated that an adversarial type of proceeding is one where:

> "The dispute is 'party controlled', that is, the parties define the dispute, define the issues that are to be determined, and each has the opportunity to present his or her side of the argument."[13]

66. In addition, Dr Andrew Cannon, South Australia's Deputy Chief Magistrate, has said:

[12] Annette Marfording, 'Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany' (Working Paper No 28, University of New South Wales Faculty of Law Research, 2010).
[13] Australian Law Reform Commission, Managing Justice; A Review of the Federal Justice System, Report No 89, paragraph 1.118 quoted in Ibid, page 11.

> "The essential protection of the adversary system is that the parties define the boundaries of the dispute, that all stages of the process occur in the presence of the parties and that the parties each have a reasonable opportunity to contribute to and test all matters upon which the decision will be based."[14]

67. Similarly, the Australian Law Reform Commission ('ALRC') has previously stated that the adversarial system is different to the inquisitorial system:

> "An adversarial system refers to the common law system of conducting proceedings in which the parties, and not the Judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the case."[15]

[14] Andrew Cannon, 'Courts using their own experts' (2004) 13 *Journal of Judicial Administration* 182 quoted in Ibid.
[15] Ibid, *op cit* 13.

(1) General comments

Summary

- The Productivity Commission can add significant value by examining the structure and funding of the legal assistance sector and the economic value of properly funding the legal assistance sector and the courts.
- The Inquiry should also focus on the inherent inequity in the justice system, whereby financially weaker parties are at a disadvantage, in both the civil and criminal matters.
- The Law Council considers it is not possible to conduct an effective inquiry into access to justice under the civil justice system in isolation of the criminal justice system.

Areas the Productivity Commission can best add value

68. The Issues Paper asks, "How can the Commission best add value?" The Commission goes on to observe that, in light of the extensive work already done, there ought to be a sharp focus on issues which are likely to provide the greatest benefit to the wider community.

69. There has indeed been a vast amount of work done by a number of high level agencies on access to justice, a number of which are referenced throughout this submission. The Law Council has prepared a table (see **Attachment B**) which cross-references the topics identified in the Issues Paper with major recent reports which have canvassed the relevant literature, examined local and overseas initiatives, consulted widely with stakeholders and made well-targeted recommendations for improvements.

Legal assistance sector funding

70. The Law Council believes that the structure and funding of the legal assistance sector is the area of most acute need. The Law Council considers - in light of the economic perspective that the Commission can bring to bear on these issues and the fifteen month time frame for the Commission's work – that this is where the Commission can make the greatest contribution.

71. The Law Council places particular importance on the funding of LACs which service this sector. While the evolution of alternative dispute resolution techniques from the late 1970s onward has brought very significant benefits, the formal justice system is integral to the health of the legal system overall. In that system, from the 1990s on, contractions in eligibility for grants of legal aid have reached a point a point where aid for civil cases is very low and aid in family law and criminal cases severely limited. The concern is that the contraction is driven by short-term cost cutting at the expense of justice and the long-term economic burden of the resulting increase in social dysfunction (as outlined below).

The funding structure

72. State and Territory Legal Aid Commissions were established in the late 1970s. Funding has come from the Federal Government, the State Governments and

interest on solicitors statutory guarantee funds. These funding sources have been variable.

73. The funding formula sees the Commonwealth fund State and Territory LACs to provide aid in cases involving Commonwealth Law (for example family law, some criminal law, etc.) and until 1997, cases involving people for whom the Commonwealth has special responsibility (i.e. Indigenous Australians, pensioners and beneficiaries, recent immigrants, etc.). The Commonwealth cut back this commitment in 1997 by discontinuing the funding for the special responsibility category.

74. The Federal Government's contribution to funding sat at about 55 per cent from the 1980s until 1997; since then it has sat at around 35 per cent of the total. Funding in 1997 was $10.59 per capita and is now $8.97. Interest on solicitors' guarantee funds is used to supply some 33 per cent of the total, however computerisation of banking and other economic factors have made that an unreliable source of funding. Funding from State Governments and interest on solicitors' guarantee funds sources has increased to offset part of the Commonwealth reduction.

75. The present situation is that grants of legal aid are restricted to people who can satisfy increasingly severe means tests (Henderson Poverty Level or below), merits tests and quotas. The effects of this are stark. For example, in all jurisdictions (except New South Wales, which is likely to change), people facing criminal charges in Magistrates' Courts will not be granted legal aid unless they are likely to go to jail.

76. For the reasons set out in PWC Report, *Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism* (see, in particular, chapter 8),[16] there is a real question about whether this funding model best addresses access to justice and whether it is the most efficient way to achieve that policy objective. The Law Council advocates a co-operative federalism National Partnership Agreement which would set out national policy objectives and then determine the best ways to deliver and fund those objectives.

77. It is noted, in particular, that another report done by PWC, commissioned by National Legal Aid, has estimated that each dollar spent on legal aid returns between $1.60 and $2.25 in downstream savings to the justice system.[17]

78. The Law Council submits that the Productivity Commission could most immediately add value in this Inquiry by focussing strongly on the level and structure of funding for the legal assistance sector, to ensure that all Australians are able to obtain some reasonable access to the justice system.

Equality of arms – inequity inherent in the justice system

79. The Law Council submits that the Productivity Commission should recognise the difficulty of providing practical equality where individuals and small businesses are in dispute with large corporations and governments, without any effective mechanism to level the playing field.

[16] PricewaterhouseCoopers, 2009, PWC Report, *Legal Aid Funding: Current Challenges and the Opportunities for Cooperative Federalism*, Report prepared for National Legal Aid. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf

[17] PricewaterhouseCoopers, 2009, The Economic Value of Legal Aid: Analysis in relation to Commonwealth funded matters with a focus on family law, report prepared for National Legal Aid, page 39. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload15a6.pdf

80. The Courts do, of course, enforce a level playing field by the procedures and rules developed to ensure fairness in adversarial litigation, but in practical terms the cost of accessing justice, which is outlined in detail below, places individuals at a significant disadvantage, both in criminal prosecutions and civil litigation.

81. This 'David versus Goliath' situation is not uncommon in civil disputes, but its features of apparent unfairness are not assisted by restricting the involvement of legal practitioners in certain matters (such as small claims). In tribunals and lower courts, some of which do not allow the parties to be legally represented, a better resourced party will often be a repeat player and will usually be represented by a lay-advocate, who is experienced, well-paid, possesses well-practised advocacy skills and is unencumbered by ethical and legal responsibilities to Court, their client and other parties to the proceedings, which are imposed on legal practitioners by law.

82. The party with fewer resources will typically be a one-off player, seeking recompense or defending a claim, without the benefit of an experienced lay-advocate to stand in their shoes. By way of illustration:

> "In 1974, one of the most percipient students of legal culture wrote a seminal article called 'Why the "haves" come out ahead: speculation on the limits of legal change'.[18] He shot some pretty large holes in the equality before the law story. Most likely, if you get caught in the law net, you are a one-shot player. On the other end of the net, you might well find a repeat player (a finance company, an insurance company, the social security department). Repeat players have resources, the ability to weave the net by carefully structured contracts or legislation, and to pick and choose the cases that they run to maximise their position. They are also in it for the long run so it makes economic sense for them to invest their resources weaving and repairing the nets and keeping a good supply of sharks on hand."[19]

83. The Commonwealth Government and most State/Territory Governments subject their departments and agencies to 'model litigant guidelines'. These are quite onerous and of course add to cost. It has been suggested that in some instances guidelines are not always followed and allegations of breaches are not effectively policed or reviewed.[20] Moreover, large corporations are not subject to the guidelines.

84. Regardless of the guidelines, parties with fewer resources are disadvantaged by substantial court filing fees (as discussed below), have limited or no access to legal aid and must rely on judicial processes which have been hampered by years of underfunding.

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[18] Marc Galanter, 'Why the "Haves" come out ahead: speculations on the limits of legal change', (1974) 9 *Law and Society Review* 95. Legal aid budget cutters seem to prefer Galanter's later article 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law', (1981), 19 *Journal of Law and Legal Pluralism* 1. They wrongly read this article as justifying cut backs in litigation funding on the basis that forcing poor people to settle their grievances outside court is (a) an option and (b) does not give an advantage to the party which can afford to litigate.

[19] Dr David Neal SC, *Law and Power: Livin' in the '70s,* (2013) 29(2) *Law in Context* 99-136.

[20] For example, see http://www.theaustralian.com.au/archive/business/gillard-government-lashed-for-ignoring-breaches-of-model-litigant-rules/story-e6frg97x-1226325228917#

Interrelationship between civil and criminal jurisdictions

85. The Law Council is concerned that the Terms of Reference for this Inquiry seem to delineate between access to justice issues affecting the civil dispute resolution system and the criminal justice system.

86. The Law Council submits that the issues affecting the criminal and civil justice systems are inextricably linked. It would be a virtually meaningless exercise to attempt an economic or systemic appraisal of access to justice arrangements under the civil justice system in isolation of the criminal justice system.

87. The Law Council notes the assurances by the Productivity Commission that it will "also explore the interactions between the criminal and civil justice systems where appropriate."[21] However, despite this reference in the introductory sections on the scope of the inquiry, the remainder of the Issues Paper does not refer to the criminal justice system or its interaction with the civil justice system in any detail.

88. At every level, legal service resources for the civil and criminal justice systems are inextricably entwined. Merely by way of example:

    (a) The capacity of the courts to hear civil law matters is restricted by the need to ensure prompt hearing of criminal matters;

    (b) Property, consumer and family law disputes can often take on a different dimension, particularly where criminal behaviour or violence is alleged;

    (c) Changes to court processes, including altered listing systems, immediately impact on the availability of judicial resources for criminal matters and vice versa;

    (d) LACs, CLCs and ATSILS allocate their finite resources between the jurisdictions; and

    (e) Many lawyers, especially those in regional areas, work in both the civil and criminal spheres – possible changes to work practices, including staffing, business and administrative structures, cannot be assessed without recognising the impact on criminal law practices.

89. Other illustrations can be found in whatever perspective one takes in respect of access to justice, because the interaction is ubiquitous and unavoidable. To analyse problems in one area without taking account of the needs of the other is a vastly diminished if not utterly futile undertaking.

90. Accordingly, the Law Council recommends that the Productivity Commission examine the issues arising concurrently in the criminal justice system, to the very limits that would be permitted by the Terms of Reference and the Commission's very broad statutory mandate to inquire into relevant matters.

[21] PC Issues Paper, page 1-2.

(2) The importance of access to justice

Summary

- A key purpose of a properly functioning justice system is to enable the fair and efficient resolution of legal disputes and problems.
- Significant personal and social consequences can arise where disputes and legal problems are left unresolved, resulting in flow-on effects for families, support services and workplace productivity. Similarly, legal problems can be exacerbated by the failure to ensure timely resolution of legal issues.
- While the Productivity Commission has invited comment on the strengths and weaknesses of the civil dispute resolution system exclusively, the Law Council provides comments in this Chapter on the strengths and weaknesses of both the civil and criminal justice systems, as this is an important consideration in defining the concept of access to justice.

91. The ability of individuals, businesses and other entities to resolve legal problems and disputes quickly, fairly and efficiently is a primary objective of a properly functioning justice system.

92. There are significant personal and social consequences which can arise if disputes and legal problems are left unresolved. For example, the 2012 Legal Australia-Wide (LAW) Survey[22] highlights the serious consequences of legal problems for those affected. 55 per cent of legal problems have a substantial impact on everyday life, leading to income loss or financial strain, stress-related illness, physical ill health and relationship breakdowns. This has flow-on effects for families, support services and workplace productivity.

93. Legal problems also affect business productivity and viability. Costly legal disputes can disproportionately affect parties to litigation with fewer resources. This has clear consequences for parties to litigation who are forced to abandon proceedings or to settle on less-than-favourable terms for financial reasons.

What is "access to justice"?

94. The Hon Justice Ron Sackville observed that:

> "…like other catchphrases, such as 'fairness' and 'accountability' (if not 'democracy' itself), the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people."[23]

95. The Law Council submits that, despite different approaches and definitions of 'access to justice' which have been reached over time, the concept is most clearly articulated as concerning the link between a person's formal right to seek justice and the person's effective access to the legal system or legal remedies.[24]

[22] (2012), *Report of the Legal-Australia-Wide Survey*, NSW Law and Justice Foundation. See http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html
[23] Justice Ron Sackville, 2002, *Access to Justice: assumptions and reality checks*, keynote address to the NSW Law and Justice Foundation's Access to Justice Workshop, NSW Parliament House, July 2002.
[24] Ibid.

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

97. It is also recognised that the concept of what constitutes access to justice has evolved over time. In Australia, this concept has expanded in accordance with developments in the justice system, including the proliferation of state and territory legal aid commissions in the 1970s, the subsequent emergence of ATSILS and the community legal sector, changes to the funding model for legal assistance providers in the mid-1990s, the growth of a range of dispute resolution and mediation services and mechanisms, increased cultural and linguistic diversity (and recognition by society that this must be accommodated), increasing complexity and volume of laws and regulations, increasingly punitive government 'law and order' policies and the increasing cost of service provision.

98. Realising or guaranteeing access to justice means fair and equitable access to legal assistance, as well as access to both formal and informal justice mechanisms[25] without economic, geographic, social, cultural, linguistic or other barriers.

Avenues of dispute resolution

99. The Productivity Commission has invited comment on the strengths and weaknesses of the civil dispute resolution system.

100. It is noted that the Productivity Commission has, by this question, expressly excluded consideration of the relative strengths and weaknesses of the criminal justice system. Notwithstanding this apparent exclusion, the Law Council provides comments on the strengths, weaknesses and objectives of both the civil and criminal justice systems below.

Civil justice system

101. The Law Council considers that a key objective of the Australian civil justice system must be the timely, fair and final resolution of disputes and legal problems.

102. The Victorian Law Reform Commission in its 2008 Report into the Civil Justice System,[26] divided a list of objectives of the civil justice system into 'desirable goals' and 'fundamental goals':

    (a) **Desirable goals:** accessibility, affordability, equality of arms, proportionality, timeliness, getting to the truth and consistency and predictability

    (b) **Fundamental goals:** fairness, openness, transparency, proper application of the substantive law, independence, impartiality, accountability

103. The Law Council agrees with the various objectives identified by the Commission, although reasonable minds may differ as to the order of priority. It is sufficient for present purposes to say that a system of justice which is not accessible fails the threshold test for a stable democratic society and that there is much truth in the

[25] LAW Survey, Ibid, *op cit* 22, page 3.
[26] Victorian Law Reform Commission, *Civil Justice System Review: Report,* 2008, Victorian Government. See http://www.lawreform.vic.gov.au/sites/default/files/VLRC%2BCivil%2BJustice%2BReview%2B-%2BReport.pdf

maxim "Justice delayed is justice denied." Timeliness is, as the Law Council argues below, a very important issue for a properly functioning justice system.

104. In seeking to achieve the various objectives, the civil justice system relies upon a range of tools and mechanisms, including:

    (a) courts and tribunals;

    (b) advice from private lawyers and legal assistance providers;

    (c) advisory and therapeutic services, including relationship centres and government health and education programs;

    (d) dispute management and dispute resolution services;

    (e) mediation services;

    (f) arbitration under contractual agreements; and

    (g) ombudsmen, consumer advocates and other government investigatory authorities.

105. As noted above, the appropriateness of any particular dispute resolution mechanism will depend on the parties and the nature of the dispute. The sometimes-expressed view that Courts should be seen as the forum of last-resort is fundamentally mistaken and betrays the responsibility of policy makers and the profession to provide an effective system of justice to support and sustain the community.

Criminal justice system

106. The primary objective of the criminal justice system is to uphold the rule of law and deliver justice fairly, independently and consistently. This is achieved by trying and punishing criminal behaviour and protecting the innocent from further harm.

107. Unlike the civil justice system, most participants in the criminal justice system are subject to a formal judicial or administrative process. In all circumstances, the Court is required to uphold the rights of accused persons, victims, witnesses and other participants in the proceedings (including the right to due process, right to silence, legal privilege and the presumption of innocence).

Consequences of not ensuring timely resolution

108. The likely consequences of a failure to ensure timely resolution of legal problems can be identified as follows:

    (a) **Legal problems may exacerbate and grow into multiple or larger problems**. For example, a failure to resolve a debt problem can lead to bankruptcy proceedings, loss of credit rating, larger debt, stress and additional complications such as relationship strain or breakdown, loss of home, and a range of other social consequences. These create costs to society which are rarely measured by those who examine the benefits of delivering justice (or the opportunity-cost of not doing so). Similarly, unresolved family law issues can lead to further issues around separation, parenting arrangements, property division, child support and spousal maintenance.

(b) **The system of commerce and contractual relationships may be undermined**. Timely resolution of legal problems is essential to supporting productivity and commercial enterprise. It promotes stronger corporate governance standards, ethical conduct and discourages corruption and criminal behaviour. The Law Council considers productivity is undermined by delayed judicial processes. If contracting parties lack faith in the capacity of the justice system to, for example, enforce a debt or breach of contract, Australia's system of commerce will be undermined, both domestically and internationally.

(c) **Injustice is likely to be perpetuated**. In a civil society governed by robust legal frameworks, it is essential not only to recognise and acknowledge the responsibilities and rights of citizens. All people must have free and equitable access to the means by which those rights and responsibilities are enforced. If a person suffers a civil wrong or is subject to government decisions affecting their rights, they are entitled to enforce their rights through litigation or a fair and transparent review process. If citizens cannot enforce their legal rights, those rights are effectively taken away, leading to wrongful transfer of assets, money and other property. Furthermore, delays may impede the delivery of justice, as the quality of evidence diminishes over time, including the capacity of witnesses to reliably recall critical details.

(d) **Public confidence in the justice system may be undermined**. "Justice delayed is justice denied" and, in accordance with this maxim, the level of public confidence in the justice system to uphold the law and determine disputes fairly is affected by the failure or incapacity of the justice system to provide an accessible and transparent legal process. This includes access to legal advice and assistance at an early stage, access to comprehensible information about rights and responsibilities, access to a fair hearing process and swift determination of the issues by a court or other independent arbiter.

(3) Legal need in Australia

Summary

- The important recent "LAW Survey" developed by the NSW Law and Justice Foundation demonstrates that a significant number of disadvantaged Australians continue to experience unmet legal need. Unmet legal need is particularly concentrated among the disabled, unemployed, single parents, Indigenous people, and those living in regional Australia.
- Recent reports have found that there are significant unmet legal needs among Aboriginal and Torres Strait Islander people, including in family law, housing, discrimination, employment law, and credit and debt problems.
- Cuts to government legal assistance schemes and the failure to adequately fund legal assistance for people wishing to access or review their rights under new or existing schemes contributes further to unmet need within the community.

109. The Law Council notes that the questions posed in this Chapter invite comments and information on a topic which has been comprehensively inquired into by the NSW Law and Justice Foundation, in its 2012 *Legal Australia-Wide Survey* (LAW Survey) Report.[27]

110. The LAW Survey Report is one of the most significant bodies of work on legal need ever produced.

111. The Law Council therefore recommends that the Productivity Commission not spend its limited time and resources inquiring further into this topic, but instead rely on the findings of this comprehensive Report.

112. If the Productivity Commission is seeking information on particular aspects of legal need in Australia which is not covered, or not adequately covered, by the LAW Survey Report, the Law Council would be pleased to discuss and assist where possible.

113. Further, the Law Council suggests that the Productivity Commission have regard to the Postcode Justice report on rural and regional disadvantage in Victoria,[28] which is illustrative of a national problem with rural and regional legal need and access to justice services. As discussed at length below in relation to 'geographical constraints', people living in RRR areas of Australia have significant limitations on access to justice and legal services. This is in large part due to the attrition of the private profession in those areas, which is substantially reducing the availability of legal aid and other legal services. RRR law practices regularly cross-subsidise regional services in order to facilitate the provision of work offering low remuneration and legal aid, as discussed above at paragraph 53 and below at paragraphs 235-237.

[27] Ibid, LAW Survey, *op cit 22.*
[28] Richard Coverdale, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria,* July 2011, Centre for Rural and Regional Law and Justice, Deakin University.

Key findings of the LAW Survey

114. The report found that:

(a) each year an estimated 8,513,000 people aged 15 years and over in Australia experience a legal problem. 31 per cent of legal problems are handled without legal advice and 18 per cent of those who are faced with legal problems do nothing.

(b) 55 per cent of legal problems have a substantial impact on everyday life, leading to income loss or financial strain, stress-related illness, physical ill-health and relationship breakdown. This has flow-on effects for families, support services and workplace productivity.

(c) Most legal problems are experienced by the most vulnerable and disadvantaged people in the community, including the disabled, unemployed, single parents, Indigenous Australians and those on welfare.

(d) Legal problems often occur in clusters, usually in three different combinations: (1) consumer, crime, government and housing; (2) credit/debt, family and money; and (3) employment, health, personal injury and human rights. Regardless of how problems arise, the findings demonstrate that people are often confronted with multiple legal problems at the same time.

(e) The majority of legal problems are concentrated among a minority of respondents. 8.8 per cent of respondents accounted for 64.5 per cent of the legal problems reported.

(f) A large number of people simply ignore legal problems due to factors such as poor legal knowledge, personal constraints (such as disability, mental ill-health, or language or cultural barriers) or possible systemic constraints (such as ineligibility for legal assistance, or the perceived cost or time involved). Respondents sought advice for 51 per cent of legal problems, handled 31 per cent of legal problems without advice and took no action for 18 per cent of legal problems.

(g) The overwhelming majority of matters are "resolved" outside the courts. More commonly, legal problems were finalised via agreement with the other side (30 per cent), the affected person simply not pursuing the matter further (30 per cent) or the decisions or actions of other agencies, such as government bodies, insurance companies or the police (15 per cent). Only 3 per cent of legal problems were finalised via formal legal proceedings in a court or tribunal, and a further 3 per cent were finalised via formal dispute resolution or complaint-handling processes.

115. The Law Council considers that it is appropriate to query whether "not pursuing a matter" is really a form of resolution. Rather, the Law Council suggests it may be symptomatic of the difficulties faced by many citizens in finding a way to assert and enforce their rights. The frustration this may induce is part of the social danger of barriers to access to the system of justice.

116. When substantial filing fee increases (and new fees) were introduced in the federal courts in 2013, these included $265 fee for ‘hardship’ divorce applications (the ordinary fee was increased to $800), the Law Council was advised of many cases in which parties (usually a separating mother on welfare) simply had to forget about

finalising their divorce because the application fee consumed the substantial majority of their fortnightly pension, which they needed to spend on essentials for their children.[29] Clearly, this is not 'resolution' from the perspective of those individuals.

Aboriginal and Torres Strait Islander peoples

117. The Law Council notes the comprehensive report prepared by the Family Law Council for the Attorney-General entitled "Improving the Family Law System for Aboriginal and Torres Strait Islander Clients" ("the Report").[30] The Report addresses many of the questions raised in the Issues Paper relevant to Indigenous peoples and access to the family law system.

118. The Law Council is advised that Indigenous peoples are generally not accessing family law services in a timely way. This is supported by the research of the Family Law Council which found that between 2007 and 2011, there were only 12 judgments found on the Australian Legal Information Institute (AustLII) database where both parties identified as Indigenous peoples and 43 judgments where one party identified as Indigenous.[31] The effect of this unmet legal need is that matters that could be efficiently handled in the family law system are left unaddressed until a point of crisis and then subsequently fall to be dealt with in the care and/or crime jurisdictions.

119. The Family Law Council concluded that the prevalence of sole-parent families in Indigenous communities, coupled with the young age profile of Indigenous peoples (the median age of Aboriginal and Torres Strait Islander peoples is 21 years, compared to 37 years for the non-Indigenous population) creates particular urgency to improve access to, and the responsiveness of, the family law system for Indigenous peoples.[32]

120. The National Congress of Australia's First Peoples released its National Justice Policy in February 2013, which states:

> "Research on the legal needs of Aboriginal and Torres Strait Islander people has identified that there are a number of areas of family and civil law, in particular, where Aboriginal and Torres Strait Islander people have high needs that are not met by the current system. High priority issues that have been identified include:
>
> - family law (in particular child protection issues);
> - housing (in particular tenancy issues);
> - discrimination;

[29] See case studies outlined in the Law Council's submission to the Senate Legal and Constitutional Affairs References Committee *Review of the impact of changes to court filing fees since 2010 on access to justice*, available here: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2758%20-%20Inquiry%20into%20the%20impact%20of%20filing%20fee%20increases%20since%202010%20on%20access%20to%20justice.pdf

[30] Family Law Council, "Improving the Family Law System for Aboriginal and Torres Strait Islander Clients", February 2012, available online from: http://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf

[31] Ibid, page 7.

[32] Ibid, page 8.

- employment law; and
- credit and debt problems."[33]

121. The Law Council recommends that the Productivity Commission consult with National Aboriginal and Torres Strait Islander Legal Services and its seven constituent members concerning areas of unmet need and challenges associated in providing services to Aboriginal and Torres Strait Islander communities and people.[34]

Cuts or inadequate funding for legal assistance under other schemes

122. The Law Council outlines later in the submission the significant shortfalls in funding to the legal assistance sector and the courts. However, it is important to emphasise the impact on the extent of unmet legal need that will be created by the failure to provide assistance under new or existing Commonwealth Government schemes, and the consequences this will have on demand for legal assistance services.

123. By way of example, the Law Council refers to the Immigration Advice and Application Assistance Scheme (IAAAS) and the National Disability Insurance Scheme (NDIS).

Immigration Advice and Application Assistance Scheme

124. The IAAAS provides free professional migration advice and application assistance to eligible immigration clients, including people seeking protection in Australia. IAAAS services are provided by registered migration agents and legal practitioners.

125. The Law Council considers that the provision of such advice and assistance is critical to an effective and efficient system of processing protection claims. It is critical to ensuring that Australia's visa determination system operates fairly and without unnecessary cost and delay. It is also critical to ensuring that unsubstantiated protection claims are abandoned at an early stage.

126. Without access to some form of assistance, such as that currently provided under the IAAAS, asylum seekers are likely to struggle to understand the relevant legal framework and to present their claims in the appropriate written form. Without such assistance, it would fall to Immigration Department officials to distribute information and assist in the preparation of such claims. The Law Council understands that the Government is proposing that written information in a number of languages will be provided to asylum seekers but there is a concern that they will not be able to act on this information without external assistance.

127. While the legal profession has always demonstrated considerable generosity in providing assistance to those most in need on a pro bono basis, it is unlikely that it will be able to provide sufficient services to thousands of asylum seekers without the financial assistance provided under the IAAAS.

[33] National Congress of Australia's First Peoples, *National Justice Policy*, February 2013, page 20. See http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf.
[34] See http://www.natsils.org.au/MembersPartners.aspx.

National Disability Insurance Scheme

128. The Law Council notes that the NDIS is one of the most significant administrative schemes established by the Commonwealth since Medicare. It is expected to create new rights to individualised care and support packages for around 411,250 Australians, when fully operational.[35]

129. This means that approximately 411,250 severely disabled and many disadvantaged Australians will soon be subject to an administrative framework, which includes rights of review in relation to decisions by DisabilityCare Australia with respect to their eligibility and entitlements under the scheme.

130. However, at this stage the Government has not made any announcement regarding any legal assistance which will be afforded to those people who seek review of their rights. The Law Council has been simply advised that modest additional funding may be offered to legal aid commissions, in order to run 'test cases'.

131. As noted previously, disabled people are identified by the LAW Survey as already being among those with the highest legal need. The Government's failure to account for the additional legal need that will be created by the NDIS will have the following effect:

    (a) LACs and other legal service providers, including disability advocacy bodies, will be subject to even higher demand, which they will not have the capacity to meet;

    (b) Disabled people will still apply to the AAT unrepresented, placing significant additional strain on the resources of the AAT as it attempts to deal with much less efficient proceedings (problems created by unrepresented litigants are outlined in detail below); and

    (c) This additional demand for justice services is likely to flow on to the Federal Court, again with the additional problem of managing unrepresented parties.

[35] Productivity Commission, *Disability Care and Support*, July 2011, Commonwealth of Australia, page 754-5.

(4) The cost of accessing civil justice

Summary

- The cost of accessing the civil justice system significantly limits the capacity of many Australians to initiate and respond to legal proceedings and to access the civil justice system on an equal and equitable basis.
- Years of underfunding has meant that Legal Aid Commissions (LACs) have been required to severely restrict eligibility for legal aid. The restrictive means test now applied in all jurisdictions denies legal aid to many people who fall below the Henderson Poverty Index. Those on low or lower-middle incomes are highly unlikely to be eligible for legal aid, but are unlikely to be able to afford a lawyer or withstand a protracted legal dispute.
- Significant increases in court fees have increased financial pressures on litigants and legal service providers, and have further limited access to justice.
- Legal practitioners are subject to extensive regulation and oversight by the Court in relation to legal cost and costs disclosure, and further regulation is unnecessary. Evidence suggests that legal costs are generally proportionate to the matters in dispute. For example, applications for costs assessments by the Court represent a very small proportion of bills issued annually.
- The failure by Commonwealth, State and Territory Government to adequately fund the courts and tribunals has significantly contributed to delays in the delivery of justice.
- Failure to invest in legal assistance services has contributed significantly to costs and delays, as significantly more people now enter the justice system unrepresented. Actuarial advice indicates that the economic costs of delay in justice can be ameliorated by ensuring adequate funding to legal assistance services, courts and tribunals.
- The most effective means of dealing with complexity in the legal system is to enable greater access to community legal education and legal assistance services, to assist people in better understanding their options for resolving their legal problems. Other mechanisms include implementation of justice impact assessments in relation to new regulations and laws, funding bodies (such as LACs) to produce plain English legal guides for the public, improving access to legal materials, and a greater investment in new technologies.
- Geographic isolation remains a very significant factor inhibiting access to justice for those in rural, regional and remote areas. This has been contributed to by underfunding of the courts and legal assistance services and exacerbated by the attrition of lawyers in regional areas. While technology and new models of service delivery may assist in some cases, equitable access to the justice system cannot be achieved without government investment.

132. Costs associated with accessing the civil justice system arise from a range of sources, including court filing fees, hearing fees, mediation fees, interpreters' fees (in some matters), technology (including video-link and other matters), transcripts, the cost of reports and witnesses, the cost of experts (who often provide necessary, specialised services to disputants), process servers and investigators and costs

associated with accessing information from government departments. All of these expenses are often conflated in discussions about 'legal costs', giving the potentially misleading impression that the cost of justice is driven entirely by lawyers' fees.

133. In considering the cost to a citizen or business entity of accessing justice, it is very important to also recognise that there are indirect costs which can be very onerous. These include the disruption and distraction to the lives of individuals, the stress placed on those engaged with the system as well as other costs such as health services and family relationship services. The need to provide a system that enables timely, fair and final dispute resolution is underscored by these indirect but severe personal and social costs

134. As noted above, only a very small proportion of legal disputes which are ultimately resolved through formal legal proceedings in Courts and Tribunals. That said, the cost involved in resolving those matters can be very high.

135. The complexity of factual and legal issues, and the responsibilities of legal practitioners to fully advise clients and diligently pursue their claims, creates an imperative in civil litigation for painstaking preparation, and often detailed pre-trial activity. Although this is strictly a matter of reform of the law and its processes, in some cases at least access to justice could be assisted by rationalization of the preparatory or 'interlocutory' processes of the civil justice system, such as 'fencing in' referred to in paragraph 218 below. Courts keep their procedures under regular review, and there are a number of initiatives directed to efficiency of their processes.

Financial costs

Access or equity?

136. It is clear that the cost of accessing the justice system impacts significantly on the capacity of many people to seek justice on equal terms. This is true in relation to both civil and criminal law matters. It is evident that there are a significant number of people who simply choose not to do anything because of perceptions about cost. However, for those who do proceed, a central concern affecting key decisions in the claim is managing the cost. The Law Council suggests that there are two aspects that need to be considered:

    (a) **access** – to the courts and legal assistance; and

    (b) **equity** – once the dispute resolution process is commenced.

137. There is limited empirical data on the actual cost of accessing the civil justice system. The Issues Paper commences with the overarching assumption that financial cost is a significant factor inhibiting or dissuading people from accessing the justice system, and the Law Council is aware of anecdotal reports corroborating this assumption. Moreover, there is extensive information demonstrating that the cost of living for most people may seriously impact their ability to meet the cost of legal proceedings. For example, a recent survey found that 1 in 5 Australians would struggle to find $1000 to deal with an emergency or other unanticipated expense and 1 in 3 spend everything they earn.[36]

[36] http://www.theaustralian.com.au/business/latest-news/one-in-five-aussies-struggle-to-find-1000/story-e6frg90f-1226579770066

138. The Law Council notes that the level of concern about the cost of taking legal action is likely to depend on the assistance being sought. For example, many personal injuries, product liability and work accident claims are pursued on a conditional costs, or 'no-win, no-fee', basis. Under these arrangements, the client is rarely concerned with the costs of the proceedings until the claim settles or reaches judgment.

139. Other categories of civil disputes, including disputes about government rental issues, small business and commercial disputes are unlikely to be maintained under these kinds of agreements. There is no financial structure which supports this sort of litigation and often in disputes, involving a consumer and corporation, the consumer is on their own and under-resourced.

140. In jurisdictions and in cases where 'costs follow the event', litigants may choose to proceed in the hope that their costs (or a significant proportion) will be paid by the opposing side in the event that they are successful (notwithstanding the disparity between actual and recoverable costs).

141. Often people have no choice about it but are necessarily brought into the system of dispute resolution.

142. In relation to other matters, including family law, while it is unlikely that most people will choose not to resolve their issues due to cost, such concerns may impact on their decision to retain a lawyer if they are not eligible for legal aid. This can often add to the difficulty and cost of resolving disputes, as discussed further below.

143. It is important to recognise that restrictions on legal aid are now so severe that, in many jurisdictions, a substantial proportion of those living below the Henderson poverty line (which is a reasonable yard-stick for economic disadvantage) will not satisfy the means test for legal aid eligibility. The restriction on legal aid comes in two ways:

    (a) **the means test**, which effectively limits legal aid that is available to the most economically disadvantaged and excludes the working-poor and those on lower-middle incomes, who cannot afford legal representation. In most jurisdictions, the means test is set at 50-70 per cent of the Henderson poverty line; and

    (b) **the policy restrictions**, under which legal aid is not available at all for certain matters, regardless of means (such as most employment law cases, workers compensation and personal injury).

144. However, many of those people who are ineligible will proceed unrepresented, without (or with limited) advice about any of their options, prospects of success, merits of their opponent's claim, or best avenues to resolve their dispute. Those people may then become caught in the system, costing significant public resources and potentially undermining their own rights in the process. They may have 'accessed' the justice system, but their access is inequitable because they lack guidance and assistance necessary to ensure a better outcome. The hidden cost to the justice system of this inefficient access must not be under-estimated. Daily examples of the disruption and delays caused by unrepresented litigants can be found in all courts across Australia.

145. The growth in the number of unrepresented litigants[37] reflects the decline in available funding and emphasises that cost factors may not inhibit people from pursuing their rights or defending their position, but that they are forced to do so without the benefit of a lawyer, at much greater cost in the long run to the resources of the justice system, let alone at the increased personal cost of time and stress to the litigant.

146. For all of these reasons, it may be that the most significant negative impact of financial cost on access to the justice system is experienced by litigants once they have commenced proceedings rather than in terms of the number of people who access the system or at least get caught up in it. This impact is seen in terms of capacity to afford ongoing legal assistance or court fees, capacity to understand the relevant processes and law if unrepresented and capacity to engage effectively with expensive interlocutory processes, including mediation, negotiations, preparation of court documents and identifying and preparing witnesses.

147. Legal costs are a factor influencing litigants' decision to discontinue a matter or to settle on unfavourable terms.

148. It is of very real concern that many people – who are not necessarily dissuaded by perceptions about cost from pursuing their rights or defending themselves – may find themselves under significant financial pressure after they have taken action. This may leave them in an invidious position, where they may be forced to give up or compromise their legal rights in any event, after they have exhausted their funds (potentially leading to further legal problems in the future).

Legal Aid – the shrinking coverage

149. The vast majority of Australians are not eligible for legal aid because of increasingly severe means tests.

150. As funding for the legal assistance sector has continued to contract and has failed to keep pace with increasing demands for legal services. The number of those disadvantaged under the civil and criminal justice systems has continued to grow.

151. The impact of the funding crisis in legal aid must be carefully considered. PricewaterhouseCoopers stated in its 2009 report into "*Legal Aid: Current challenges and the opportunities of cooperative federalism*":

> "There is now evidence that the means test for legal aid services in most states falls below the level of the Henderson Poverty Index. In addition, fees paid to legal practitioners appear to have fallen in real terms, resulting in a reduction in the number of practitioners offering legal aid services."[38]

152. Since that report was prepared, there have been substantial further restrictions to legal aid in a number of jurisdictions due to financial pressures, and a further withdrawal of legal practitioners from legal aid work.

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[37] E. Richardson, T. Sourdin, N. Wallace, *Self-Represented Litigants – literature review,* May 2012, Australian Centre for Court and Justice System Innovation, Monash University, page 7. See also Law Council of Australia, *Erosion of legal representation in the Australian Justice System*, a research project undertaken with the Australian Institute for Judicial Administration, National Legal Aid, Aboriginal and Torres Strait Islander Legal Services - http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload079a.pdf

[38] PWC, Ibid, *op cit* 16, page 5. See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload099f.pdf

153. Even those who satisfy the means test may be subject to category exclusions. For example, in criminal cases in the magistrates' courts in all jurisdictions, legal aid will not be granted unless the person is likely to go to prison. In civil cases, the State and Territory schemes (with the exception of NSW which runs a comparatively broad civil scheme) legal aid is only available for a limited range of civil disputes. The major exception in civil matters is family law, but there too, legal aid will be limited to cases of family violence or parental custody/access cases.

154. Anyone who is ineligible for legal aid is effectively on their own. Their choices are to surrender their legal rights, proceed without representation, or engage a lawyer. The income band, starting from those just above the means test, up to the lower reaches of the middle class incomes, are priced out of the market. Those just above these income levels have the capacity to fund limited legal assistance, but the financial capacity to fund significant litigation is well beyond individuals on middle incomes.

155. The Law Council maintains the position that the Federal Government's share of LAC funding should return to 50 per cent, with the States and Territories. That is required to ensure a basic level of safety net coverage.

156. However, there is also a need to develop measures to support Australians who encounter legal problems and may suffer financial hardship. Such measures (which are discussed in more detail later in this submission) might include litigation insurance and government assistance.

Evidence of changing financial costs

157. The Issues Paper inquires about evidence of changing financial costs. By way of example, the *Civil Procedure Regulation 2012* (NSW) sets out the fees payable in civil courts. These have increased drastically in recent years and represent a significant part of the cost of litigation in NSW. Any additional increases will have the effect of restricting access to justice and run counter to the objectives of the civil justice system, being that 'just, quick and cheap' dispute resolution should be available for all. Certainly, this is the view expressed by many practitioners, both from city areas and throughout the country. The Law Council's constituent bodies regularly receive correspondence and anecdotal statements confirming that consistent increases in court fees significantly impair the ability of clients to pursue their matter. The Law Council considers that any increase in court fees should be limited to CPI 'catch-up' increases and should result in a corresponding increase in the service level provided by the courts.

158. The level of Court fees also places a burden on practitioners who are personally liable for the fees. This can present practical difficulties in terms of securing funds for litigation and weakens the ability of solicitors, especially from small firms, to take on work because of security of costs issues. For example, a solicitor seeking to have hearing days allocated for a case expected to run for twelve days in the NSW Supreme Court would now have to obtain at least $18,500 before the dates are allocated in order to protect him or herself from personal liability under Parts 2 and 3 of the *Civil Procedure Regulation 2012* (NSW). Prior to October 2010, the same fee was $4,600.

159. According to section 9(5) of the *Civil Procedure Regulation 2012* (NSW), a hearing allocation fee becomes payable (a) immediately after a date is allocated for hearing the proceedings, or (b) when the court or a registrar notifies the parties in writing of the court's intention to allocate a date for hearing the proceedings, whichever occurs

first. The hearing fee is not refunded by the court if the matter is settled before the hearing or if all of the allocated days are not required, despite the fact that the judge will be proceeding with another matter or matters on these days.

160. The Law Council discusses the impact of increases in court filing fees later in this submission, in response to Chapter 11.

Are legal costs proportionate to the matters in dispute?

161. The Law Society of New South Wales has advised, by way of example, that the NSW Costs Assessment Scheme, under Part 3.2 of the *Legal Profession Act 2004* (NSW) and administered by the Supreme Court of NSW, provides an efficient mechanism for determining what are fair and reasonable costs if an issue arises between the client and solicitor.

162. Also of note is section 98(4)(c) of the *Civil Procedure Act 2005* (NSW) which provides:

> *98 Court's power as to costs*
> *…*
> *(4) In particular, at any time before costs are referred for assessment, the court may make an order to the effect that the party to whom costs are to be paid is to be entitled to:*
> *(c) a specified gross sum instead of assessed costs.*

163. Scale rates, even if they are not strictly binding, can present problems where the nature of the proceedings and the legal representation of the parties vary widely. Experience shows that scale rates are inevitably set too low and the process for review and increase of those rates is too slow.

164. The number of applications made by clients against a practitioner for costs assessments in the Supreme Court of NSW each year since 2006 is as follows[39]:

- 2006 – 224
- 2007 – 259
- 2008 – 169
- 2009 – 253
- 2010 – 209
- 2011 – 192
- 2012 – 240

165. This represents a very small proportion of bills issued in civil cases every year, estimated to be less than 0.013 per cent of invoices issued by legal practitioners in New South Wales in 2012.[40]

[39] Note this is an unpublished figure provided by the Supreme Court of NSW.

[40] From the 2012 LAW Survey, it is estimated that 8,513,000 people experienced a legal problem. 51 per cent (i.e. 4,341,630 people) sought advice for their legal problems. This amounts to an average of 73 matters per practitioner, based on 59,280 Australian legal practitioners at 30 June 2012 reported in the 2012 Annual Report of the Law Society of New South Wales (at page 8). Based on these figures, it is estimated that 1,795,435 invoices were issued in 2012 by the 24,585 registered practitioners in New South Wales (see page 8 of the 2012 Annual Report of the Law Society), assuming only one invoice per matter (which is the minimum, and therefore a conservative estimate). This means that the 240 cost assessments in the NSW Supreme Court represent approximately 0.013% of the estimated number of invoices issued in 2012 by NSW legal practitioners. An alternative (worst-case) estimate can be made taking into account the findings of the

166. Further, the total number of complaints against solicitors, including cost complaints, appears to be stable or decreasing over recent years, even though practitioner numbers have been growing strongly at the same time. The total number of complaints in New South Wales, Victoria and Queensland, which together represent over 80 per cent of all Australian legal practitioners, decreased 9.6 per cent, from 6057 in 2009-10 to 5476 in 2011-12.

167. In respect of complaints from clients, it appears that the rate of complaints in these jurisdictions is similar and is very low – on average there are around 1-3 complaints per thousand clients, as shown below. The estimates below use the complaint data reported by Legal Services Commissioners and estimates of the number of clients, using the results reported from the 2012 LAW Survey of the number of persons seeking legal advice and the number of registered legal practitioners under the Legal Profession Acts in each of these jurisdictions.

168. The Office of the Legal Services Commissioner of New South Wales reported in its 2011-12 Annual Report[41] that a total of 2758 written complaints against practitioners had been received, compared to 2661 reported in its 2009-10 Annual Report.[42] Complaints from both current and former clients, had decreased from 1360 to 1341 over the same period. This is estimated to represent between 0.075 per cent and 0.246 per cent of all clients.[43]

169. The Legal Services Commissioner in Victoria reported in its 2011-12 Annual Report [44] that total complaints, including both civil and disciplinary, had decreased, from 2211 in 2009-10 to 1982 in 2011-12. Whilst separate figures were not given for cost complaints, the number of civil complaints, which would include cost complaints, decreased in the same period from 1117 in 2009-10 to 988 in 2011-12. Similar to the estimate for New South Wales, the number of civil complaints in Victoria is estimated to represent between 0.078 per cent and 0.225 per cent of all clients.

170. The Queensland Legal Services Commission's 2011-12 Annual Report[45] noted that the number of complaints received from the public had fallen from 1185 in 2009-10 to 736 in 2011-12, representing between 0.11 per cent and 0.35 per cent of clients. The number of complaints/investigation matters on hand at the end of the 2011-12 financial year had fallen to 475 from 558 as at 30 June 2010.

2012 LAW Survey that advice was sought from 1 or more legal practitioners in 30.3% of legal problems reported (page 111 of the Survey Report), which would indicate that the 240 cost assessments represent up to 0.044% of invoices. Both estimates indicate that the rate of disputed costs, between 0.013% and 0.044%, is very low.

[41] http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/2011_2012_annrep.pdf , page 45.

[42] http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/olsc_2009_2010_annrep.pdf , page 38.

[43] Based on the estimate of 1,794,705 clients of the reported 24,585 New South Wales practitioners in 2012 as calculated in footnote (41) above, the 1341 complaints represent 0.0747% of clients in that year. The rate of complaints estimated for Victoria and Queensland in the following paragraphs were calculated in a similar manner, based on the respective number of registered legal practitioners in 2012 (17,453 in Victoria and 9,732 in Queensland). The estimate at the higher end of the range is an alternative estimate based on the 2012 LAW Survey's finding (page 111) that in only 30.3% of legal problems encountered did represent seek advice from a legal adviser, although more than 1 legal adviser may have provided advice. The actual rate of complaints per client in each jurisdiction is therefore likely to fall somewhere within the estimated range shown.

[44] http://www.lsc.vic.gov.au/documents/LSC_Annual_Report_Final_Version_LSC1877_2012AR.pdf, page 8.

[45] http://www.lsc.qld,.gov.au/__data/assets/pdf_file/0005/167135/Legal-Services-Commission-Queensland-Annual-Report-2011-12.pdf, page 52.

171. On the basis of these data, there does not appear to be much evidence to suggest that legal costs are disproportionate to matters in dispute. As outlined earlier, there is no doubt costs involved with accessing justice are high. However, the data suggest that clients are reacting adversely to costs in only a very small proportion of cases.

Are legal costs transparent?

172. In the legal profession, the term 'costs' generally refers to the fees a solicitor charges a client for the time spent on their matter and other payments and disbursements that arise out of the provision of legal services, such as court fees.

173. Costs are one of the most heavily regulated aspects of practising law. The laws with which solicitors must comply are not only complex, but have been frequently amended over the past decade. Solicitors owe many duties to their clients, such as the duty to disclose information to the client about how they are going to charge. Failure to comply with these obligations carries serious consequences, including disciplinary action. Solicitors must inform their clients in writing about the costs of the work (if estimated to be over certain thresholds[46]) and the expenses that they have to pay. In most cases, disclosure must be made before the solicitor begins to act for the client. If it is not practical for disclosure to be made before work begins, it should be done as soon as the solicitor has the opportunity to do so.

174. Disclosure may be set out in a costs agreement or a letter. Using NSW as an example (and noting that disclosure requirements are the same or similar in other jurisdictions[47]), the agreement or letter must tell the client:

- The amount they will be charged or how they will be charged;
- That they are entitled to:
  - negotiate the costs agreement;
  - receive a bill for work done and an itemised bill on request after receiving a lump sum bill;
  - receive an estimate of costs;
  - receive progress reports about their case and their costs;
  - have the bill assessed;
  - ask a costs assessor to set aside the costs agreement if it is not fair, just or reasonable; and
  - have any dispute about the costs mediated;
- The billing arrangements;
- The rate of any interest that they will be charged for overdue costs payment;
- If it is a court matter, the costs they will get back if they win and the costs they will have to pay if they lose and the gap between what the solicitor will charge them and what they will be reimbursed;
- Who they can contact about costs;
- The applicable time limits when disputing costs;
- Whether any other law applies to legal costs in their matter;
- How a barrister or other lawyers would charge them if one is retained; and
- If the work is done on a 'no win, no pay' basis, the additional cost of working for them on this basis and why this additional cost is warranted.

[46] In NSW and Victoria, $750; in Queensland and Tasmania, $1500.
[47] South Australian provisions are shortly to come into effect.

175. If the solicitor is unable to tell their client exactly what the costs will be, they must be told the basis for calculating the costs (for example, $350 per hour) and be given an estimate of the total costs or a range of costs. Practitioners may find it difficult to provide an accurate estimate of costs at the start of a matter as there are often many unknowns, including the approach to be taken by the client, the other parties and the court. However, the obligation to disclose is ongoing, and the practitioner is required to notify the client in writing of any substantial change to anything included in a disclosure (there are exceptions for 'sophisticated clients').

176. In some jurisdictions, if a solicitor has failed to provide their client with disclosure, the client need not pay the costs until the bill has been assessed by a costs assessor appointed by the Court.[48] The solicitor would then have to make an application to the Supreme Court for assessment and also pay for the costs of the assessment.

177. Further, the Law Council notes that costs disclosure obligations arise under legislation, other than the Legal Profession Acts in each jurisdiction. For example, cost disclosure is required separately under court Practice Directions,[49] Civil Wrongs Legislation, in the family law rules[50] and elsewhere.

178. Most law societies and bar associations have an educational and regulatory role in assisting solicitors to comply with the laws relating to costs. Under the *Legal Profession Act 2004* (NSW), the Law Society of New South Wales is also required to provide the public with accessible information about their rights with regard to solicitors' fees and challenging legal costs. The Law Society of NSW has produced two client fact sheets in consultation with the Attorney-General's Department, the Bar Association of NSW and the NSW Legal Services Commissioner, namely:

- Legal costs – your right to know
- Your right to challenge legal costs

179. Once enacted in NSW and Victoria (which will affect around 70 per cent of the Australian legal profession), the Legal Profession Uniform Law will make a number of changes to regulatory requirements for legal costs including the following:

- The rule underlying the provisions is that costs must be fair and reasonable in all the circumstances. In particular, they must be proportionately and reasonably incurred and proportionate and reasonable in amount. There is a further list of criteria to which regard must be had in considering whether the requirement to charge no more than fair and reasonable costs has been met. These include the retainer and the instructions, the skill and experience of the lawyers, the level of complexity or difficulty of the issues, the extent to which the matter involved a matter of public interest, the urgency of and time spent on the matter and the quality of the work done.

- A costs agreement will be prima facie evidence that the costs disclosed are fair and reasonable, provided that there has been compliance with disclosure requirements and the provisions related to making costs agreements.

- A law practice will be required to take all reasonable steps to satisfy itself that the client has understood and given consent to the proposed course of

[48] For example, under the NSW and Victoria *Legal Profession Acts.*
[49] For example, see http://www.courts.qld.gov.au/__data/assets/pdf_file/0007/86371/sc-pd-8of2001.pdf.
[50] See *Family Law Rules 2004,* regulation 19.03 and 19.04.

action for the conduct of the matter and the proposed costs. Uniform Rules may provide additional guidance for practitioners on what constitutes "reasonable steps".

- Costs disputes would be dealt with by the Legal Services Commissioner where the total bill of costs is less than $100,000 or the amount in dispute is less than $10,000. The power to resolve a costs dispute would include the power to make a binding determination of up to $10,000. There is now no power for the Commissioner to require lodgement of the disputed costs.

- A costs assessor must refer a matter to the Legal Services Commissioner if the assessor considers that the legal costs charged, or any other matter raised in the assessment, may amount to unsatisfactory professional conduct or professional misconduct. There is a presumption that a law practice will pay the costs of the assessment if there has been a failure in disclosure or if the law practice's costs have been reduced by 15 per cent or more.

- The threshold for full costs disclosure is expected to be raised by way of Uniform Rules to be developed once new regulatory authorities are established.

180. The Law Council notes that costs disclosure obligations imposed by legislation since the late 1990s have operated effectively and that there is no material known to it to suggest that there is a need for further regulation especially as such further requirements would bring additional compliance costs.

Timeliness and delays

181. The Law Council submits that timeliness of court and tribunal decisions and delays in the litigation process are endemic problems within the civil and criminal justice systems.

182. Delays are significantly attributable to underfunding of the courts and legal assistance sector. The Law Council is in the process of gathering examples of delays in the litigation and prosecution process and will provide further information to the Commission but can at this point report the following:

    (a) There can be delays of 12 months or more in some cases between the final hearing of the matter and the delivery of a reserved judgment. This can be particularly frustrating for clients when case management has been used effectively up to the hearing of the matter.

    (b) At the time this submission was prepared, Federal Court matters in August 2013 were being listed as late as April 2014, as this is the earliest available date. This seems to be a result of a current shortage of Federal Court judges. Lengthy delays in matters being heard are particularly problematic for general protection matters under the *Fair Work Act 2009* (Cth).

    (c) The Law Institute of Victoria (LIV) has advised that there are increasing number of Supreme Court of Appeal decisions regarding the inadequacy of reasons given by lower courts in both criminal and civil matters, which results in long drawn out litigation. The LIV recognises that if a matter is sent for rehearing, the disadvantaged party may sometimes be partially

compensated, however they will still incur a huge financial and emotional cost. For example, in *Grace v Elmasri & Anor*[51] the matter went to trial twice, was appealed and went onto a third hearing; and in *Gui v Weston*[52], after the matter went on appeal, a retrial was ordered and, following the second trial, a second appeal was commenced in the Court of Appeal.

Court resourcing

183. Fundamental issues also arise where the courts are not provided with sufficient funding to provide effective access to justice through efficient processing. Adequate funding for courts is essential to ensure that they work effectively and provide satisfactory service to litigants. At the very minimum, courts must be adequately staffed to allow efficient processing. In recent years, courts have been subject to reductions in staff in a number of registries, which have led to significant delays in processing. There has also been a decline in the level of staffing in Local Courts in regional and rural areas, resulting in delays for both hearing and filing of matters. While demand for court services, and therefore on court staff, is subject to peaks and troughs, it is incumbent on governments to ensure that unreasonable delay is eliminated.

184. The Law Council submits that funding to Federal, State and Territory courts has failed to keep pace with demand and the growing cost of service provision. Many Australian court registries are operating using antiquated filing and computer systems and have been required to cut registry and other staff. This has diminished the capacity of the courts and tribunals to deliver justice in a timely manner.

185. For example:

(a) the Federal Magistrates Court (now Federal Circuit Court) annual report notes that the largest number of complaints received by the Court in 2011-12 related to delays in delivery of reserved judgments.[53] The report also indicates an increase in matters filed with the Court and counter inquiries at Court registries,[54] as well as a reduction in staff.[55] The Chief Federal Magistrate (as he then was) stated in the report:

> "Further administrative rationalisation, as proposed, is unlikely to relieve any of the financial pressures facing the Court. Budget constraints will make it more difficult for the Court to meet the needs of the public with resources being reduced in the next financial year."[56]

(b) In its Annual Report, the Family Court of Australia indicates that, since 2007, the total number of judges has declined from 40 to 30, while the case-load has remained roughly the same.[57] Similarly, the Federal Court of Australia reports that since 2007 the number of appointed judges fell from 48 to 44, while the Court's caseload increased.[58]

[51] [2009] VSCA 111 (22 May 2009).
[52] [2011] VSCA 265 (2 September 2011).
[53] Federal Magistrates Court Annual Report 2011-12, page 77.
[54] Ibid, part 3.
[55] Ibid, page 97.
[56] Ibid, page 3.
[57] Family Court of Australia, Annual Report 2011-12.
[58] Federal Court of Australia, Annual Report 2011-12.

(c) The Federal Coalition's election policy commitments issued on 5 September 2013, asserted that savings of $30 million over four years would be achieved by 'streamlining Family Court processes'. The courts have already made significant savings in a number of areas and (given the high proportion of court expenditure which is fixed in nature), if this pre-election commitment is implemented by the Government, it is not easy to see how additional savings can be achieved otherwise than through a reduction of services. This will adversely impact upon the access of the community to these courts for the just and timely resolution of their disputes – and, in this field, the social cost of delay in the delivery of justice can be very significant considering the impact on families already under great stress.

(d) The Law Council notes the reductions in funding to the NSW Magistrates Court which will result in a loss of eight Magistrates. This will correspondingly diminish the capacity of that court to deliver justice in a timely manner. It is noted that this affects both the criminal and civil law jurisdictions of the court.

(e) The Law Council is advised that in South Australia there have been no new appointments of magistrates and judges in the recent State budget, notwithstanding significant changes to the jurisdictional limits of the courts. The Law Society of South Australia estimates that the effect of the 2013 State Budget was approximately an 8 per cent reduction in the real budget of the Courts Administration Authority. Regardless of the exact amount of the reduction, the effect of reduced funding has included:

- Discontinuance of the Supreme Court circuits to country areas. This is particularly relevant in the case of serious crime;
- Reduction of District Court circuits in country areas;
- Failure to replace at least two retiring Supreme Court Judges;
- Failure to replace at least two retiring District Court Judges;
- Separately, South Australia has enacted legislation varying the jurisdiction of the Magistrates Court. The effect of that variation has been to:
  - increase the "minor civil" (elsewhere known as "small claims") jurisdiction from $6,000 to $25,000. In South Australia, lawyers are effectively prohibited from appearing in minor civil actions;
  - increase the general jurisdiction of the Magistrates Court from $40,000 ($80,000 in road accident claims) to $100,000 generally; and
  - expand the range of criminal offences that may be dealt with in the Magistrates Court.

186. The Law Council submits that these are merely examples, which illustrate challenges affecting courts and tribunals throughout the country.

187. Notwithstanding these strong concerns about court resourcing, there appears to be a disconnect between the characterisation of the courts' funding position by government and the facts reported by the courts. For example, the Steering Committee for the Review of Government Service Provision, in its 2012 report, quotes the Victorian Government as stating:

> "The 2011-12 year has seen the Supreme Court of Victoria continue its dual directions of reform and innovation. Special highlights were the criminal appeal reforms in the Court of Appeal, the expansion of the Commercial Court, the

management of significant class actions, especially the bushfire litigation and significant reduction in delays in criminal trials. The year saw significant demand growth matched by outstanding clearance rates. While the court had an increase in applications to the Court of Appeal and the Trial Division, finalisations also increased significantly leading to a clearance rate greater than 100 per cent. As a result of this performance the number of pending cases fell."[59]

188. However, in its 2011-12 Annual Report, the Supreme Court of Victoria paints a starkly different picture:

> "The Court of Appeals pending caseload [in relation to criminal appeals] reached as high as 679 in January 2010. But at the end of 2010 an intensification of listings and a focus on reviewing and finalising old cases was undertaken in order to begin reducing the backlog of pending appeals. **However, this highly intensive listing practice could only be maintained for a short period, as it placed extreme pressure not only on the Court, but also on the Crown, Victoria Legal Aid and the Victorian Bar**."[60] [emphasis added]

189. The Law Council submits that failure by governments to properly resource the courts and tribunals is a false economy, which results in a slower, less efficient and (in some cases) unsatisfactory dispute resolution processes and leads to expensive societal problems over the longer term.

Legal assistance

190. The Law Council is advised that the vast majority of matters are resolved following the first meeting by a client with a lawyer, without any legal process being issued.[61] This indicates the importance of early legal advice and assistance in promoting early resolution.

191. The Law Council submits that legal practitioners, both in legal assistance services and private practise, play a critical role in *keeping people out* of litigation and saving them from the cost and strain that litigation involves. As noted above, a key finding of the LAW Survey was that:

> "Across jurisdictions, the results demonstrated that there was no 'rush to law'. In Australia as a whole, three per cent of legal problems were finalised via formal legal proceedings in a court or tribunal, and a further three per cent were finalised via formal dispute resolution or complaint-handling processes. More commonly, legal problems were finalised via agreement with the other side (30%), the respondent not pursuing the matter further (30%) or the decisions or actions of other agencies, such as government bodies, insurance companies or the police (15%)."[62]

192. The expectation within government appears to be that LACs and other legal service providers can continue to find new efficiencies and areas to cut spending, without significantly affecting services to those who seek assistance. The Law Council

[59] Steering Committee for the Review of Government Service Provision, *Report on Government Services 2012*, Productivity Commission, page 7.64.
[60] Supreme Court of Victoria Annual Report 2011-12 page 58. See https://assets.justice.vic.gov.au/scv/resources/cb734c31-5a31-4b6b-81bc-bb1c78cbc838/2011-12_scv_ar_web.pdf
[61] These anecdotal reports are corroborated by the findings of the LAW Survey, which found only 3 per cent of matters reached formal court resolution. See Ibid, *op cit* 22.
[62] LAW Survey, Ibid, *op cit* 22, page xix.

suggests that the experience over the past 15 years strongly refutes this presumption.

193. Reductions in legal assistance sector funding has significantly reduced the number of those eligible for government funded legal assistance sector and is likely to have contributed significantly to the increase in unrepresented litigants coming before the courts. As discussed further below, unrepresented litigants have a significant impact on court resources and create inefficiency and delay in the dispute resolution process.

Conduct of disputants

194. The Law Council is advised that in some cases, the conduct of disputants can impede the dispute resolution process and increase the time it takes to settle a claim or application. Often, delays can arise due to intransigence on the part of an unrepresented party, who has not had the benefit of legal advice or assistance.

195. The conduct of disputants is discussed further below, however it is noted that the courts have broad powers under legislation to order compulsory mediation, refer matters our to arbitration, and to deal with vexatious litigants, strike out frivolous or vexatious proceedings or to make orders in relation to abuse of process, including the power to order costs against a party.

Economic cost of delays

196. The Issues Paper inquires as to how the economic cost of delays in justice should be measured.

197. The Law Council considers that the economic cost of delays in delivering justice is more significant than financial impacts on courts and court-users. Time consuming legal disputes are costly to the parties concerned and may impact on productivity. They can lead to insolvency, bankruptcy and other financial problems and can have personal consequences, including poor health, unemployment and other problems, with associated economic costs for society as a whole.

198. PricewaterhouseCoopers (PWC) has estimated that the economic return on investment in legal aid is approximately $1.60-$2.25 for every dollar invested.[63] This refers to savings in the justice system and does not refer to significant downstream savings in terms of improved efficiency in the dispute resolution process and diminished societal impacts.

199. These findings are supported by a more recent report, which found that the return on investment in CLCs is around $18 for every dollar spent.[64]

Mechanisms available to reduce delays

200. Courts in various jurisdictions have various powers to expedite matters or to penalise parties for undue delays in the litigation process. For example, the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) emphasise the importance of case management. Section 56(1) of the Act states:

[63] Ibid, *op cit* 17.
[64] Judith Stubbs & Assoc., Ibid, *op cit* 5.

"The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings."

201. The Law Council notes the experience of case management in different jurisdictions varies. For example:

(a) the Law Society of NSW advises that courts have taken an increasingly active role in the management of cases and in introducing case management systems tailored to the specific needs of particular jurisdictions. While case management procedures may impose an additional workload on the judiciary and administration systems, effective case management procedures will ultimately assist in reducing the workload and provide opportunities to control the work of the court. The Law Society of NSW supports the application of case management practices and, in particular, the involvement of the court in narrowing the issues which will ultimately be decided by hearing;[65] however,

(b) The Law Society of South Australia has suggested there are differing views as to whether recent changes to case flow management procedures have in fact increased efficiency.

202. The Law Council considers that there may be a need for more empirical research into the effectiveness of case management processes in improving the efficiency of the litigation process. It is important to recognise that the disputes coming before the Courts are individual and based on unique facts. While they may fall broadly into categories of dispute or give rise to common legal issues, their individual circumstances make novel standard pre-action protocols often counter productive. The Law Council considers that the most effective form of case management allows broad discretion to the Court, in consultation with the parties and their legal representatives, to determine the most effective avenues for resolution in all the circumstances.

Simplicity and usability

203. The Law Council notes that the complexity of the substantive law in Australia has increased over time. Since the 1950s, the average number of Bills enacted by the Australian Parliament has doubled.[66] There are likely to be similar increases in the volume of legislation enacted by State and Territory parliaments. Jurists of the highest stature and experience are crystal clear in identifying the growth of legislative and regulatory complexity. The Hon. Chief Justice Robert French AC as stated:

"The primary complaint is that our statute laws are becoming increasingly complex. They are therefore less accessible to the public and even to non-

[65] Practitioners are required to comply with the case management principles of the courts and to actively prepare their clients' cases for hearing. For example, the *Civil Procedure Act 2005* (NSW) and associated rules set out the sanctions available to the court for a party's failure to comply with case management directions, including the ability to penalise a party in costs. Similar sanctions are available in other jurisdictions. However, the Law Council is advised of anecdotal evidence that courts are reluctant to use these powers. For example, where parties are not meeting deadlines, a Registrar might only occasionally make a costs order.

[66] For example, in 1950s, on average, 92 bills were enacted each year. Over the period 2000-2012, Federal Parliament enacted on average 166 bills each year. See http://www.aph.gov.au/Parliamentary_Business/Statistics/~/media/889A1A19021743AB84B9F39180031A72.ashx

specialist readers within the profession. It is correspondingly more difficult for people who are bound by them or their advisors to discern their purpose. The law to that extent loses moral clarity — it is harder to know what it is good for. Acceptance tends to rest upon other foundations, respect for the democratic process and concern about the consequences of non-compliance with the law."[67]

204. Sources of Australian law include statute, regulations, statutory rules, guidelines, common law precedent and council by-laws. The justice system itself contains many procedural rules governing the litigation and dispute resolution processes, rules of evidence, rules surrounding discovery, privilege and use of witnesses, as well as preparation of complex court documents.

205. This complexity and the sheer breadth of knowledge required about the law and how it is applied presents significant challenges to those who seek to navigate the system. Most legal practitioners specialise their practices in order to build expertise in a specific area of law and practice, rather than attempting to cover the field.

206. Chief Justice French has noted the extraordinary challenges associated with reducing complexity, by reference to the example of taxation law and the difficulty of interpreting (prima facie) simple concepts, such as 'income', across the array of circumstances in which they must be applied:

> "The case illustrates the two ways in which complexity arises in statute law. A simple broadly expressed provision on the one hand attracts a plethora of judicial exposition such that some would say the true meaning of the statute, if it has one, is buried in the cases. On the other hand, a provision which aspires to precision by using technical and detailed language may be a good deal harder to read and still requires interpretation.
>
> "In the end, a degree of complexity is an inescapable aspect of the law. Although simply stated laws use ordinary English words assembled in a readable way, their simplicity cannot reduce the diversity of circumstances to which they may have to be applied. The judiciary is not relieved of the task of interpretation and application across unimagined cases."[68]

Scrutinising legislative standards

207. Legislation and exercises of legislative power must be principled, clear and proportionate. Law reform should be conducted on the basis of considered debate and scrutiny, and be based on evidence rather than political or media expediencies. Commenting on the accessibility, workability and coherency of proposed or draft legislation forms part of the Law Council's (and its constituent bodies') core legislative scrutiny activity. The Law Council commonly assesses the adequacy of the period between enactment and commencement, the clarity of drafting and any potential difficulties with compliance. Wherever appropriate, the Law Council also supports comprehensive rather than piecemeal reform which can reduce certainty, stability and coherence.

208. In practical terms, part of securing accessibility of laws is to ensure that legislation is not out-dated, unnecessary, burdensome or potentially enabling an imbalance

[67] The Hon Chief Justice Robert French AC, *Law – Complexity and Moral Clarity*, 19 May 2013, speech to the North West Law Association and Murray Mallee Community Legal Service, Mildura. See http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj19may13.pdf
[68] Ibid.

between judicial and executive powers. The economy and the community would benefit from a rationalisation of statutes in all jurisdictions, and amalgamation and consolidation where possible. There would also be great benefit in identifying and reviewing laws to which improvements could be made to ensure fairness, proportionality and balance between judicial and executive functions.

Drafting complexity

209. The Law Council notes that an over-arching concern with respect to all legal drafting is ensuring its clarity and simplicity. Notwithstanding this, those unfamiliar with the source of jurisprudence concerning the application of certain legislation and common law principles are likely to face significant difficulty understanding the rules or laws which apply to their circumstances.

210. The Law Council considers the existing process for development of law is appropriate and effective. A level of complexity is obviously unavoidable given the requirement of legislating in relation to the complex forms of commercial and personal relationships, and the extent and limitations of executive powers.

211. The Law Council submits that the most appropriate means of ensuring the legal system is accessible to those without legal training is to provide community legal education and appropriate access to legal advice and assistance. These are functions traditionally performed by legal assistance services, including LACs, CLCs and ATSILS. Failure by governments to appropriately fund these bodies has seriously restricted their capacity to provide community legal education, representation and advice in civil law matters to the majority of Australians.

The role of legal practitioners

212. The Issues Paper queries whether legal practitioners contribute to complexity and what incentives lawyers have to contribute to a more user-friendly system.

213. The role of legal practitioners is to assist clients through the legal system. Legal practitioners undertake years of legal training and practical legal experience prior to being eligible for admission. They are also required to undertake mandatory continuing legal education each year as a condition of renewal of their practising certificate. Many legal practitioners attain specialist accreditation in their area of expertise and, increasingly, legal practitioners also obtain post-graduate university qualifications in order to further their knowledge of the law and its application.

214. Legal practitioners are trained to cut through the complexity and offer solutions to their clients. It is for legislature to draft and enact laws and for the judiciary to interpret the law, drawing on a range of sources, including existing precedent, explanatory memoranda and statements, and other relevant materials.

215. The Law Council submits that the most effective means of ensuring the legal system is more accessible to those without legal training is community legal education and a properly funded legal assistance sector. The legal system is inherently complex and many people may not be aware that they even have a legal problem. Where they do, research has found that the most common means by which they will seek to resolve their problem is through the advice or assistance of a friend, where the problem is relatively straight forward[69] – which is appropriate. However, it remains

[69] LAW Survey, Ibid, *op cit* 22.

important for people to have the means to seek advice from someone who is professionally trained to advise and assist them in relation to more significant issues. In those circumstances, the lawyer's role is overwhelmingly performed by advice and negotiation.

216. A relatively small number of disputes and issues require recourse to the Court and, of these, the majority are resolved by negotiation or ADR during the course of the proceedings. Nonetheless, the Courts provide the critical backstop by which the law is declared and disputes are determined. Both tasks are essential to the principled resolution of disputes out of court, as they provide the basis for rights-based negotiation and the enforcement of those rights when they are not honoured.

Suggestions for reducing complexity

Justice impact assessments

217. The Law Council submits, as a first step, that the existing regulatory impact assessment process, which government agencies are encouraged to comply with in accordance with the Office of Best Practice Regulation Guidelines, should be augmented to include a specific requirement for government agencies to consider the impact of legislative changes on the justice system.

218. This would include assessment of impacts on:

(a) the nature and extent of legal inquiries and disputes;

(b) access to legal assistance services including ATSILS, CLCs, FVPLS, LACs and alternative dispute resolution processes;

(c) the resources or workload of the federal courts and tribunals; and

(d) the cost of or access to the criminal or civil justice systems.

219. In support of this proposal, the Law Council commends its "Justice Impact Assessment Policy Statement" to the Productivity Commission for consideration.[70]

Plain English drafting and access to legal materials

220. The Law Council notes there has been a significant amount written on plain-English drafting, including by the Victorian Law Foundation.[71] It is suggested that plain English drafting principles adhered to by legislative drafters and those preparing ordinary contracts and other legal documents could be reviewed to ensure they are appropriate and achieving the objective of ensuring they are accessible by those with limited legal training.

221. LACs and other bodies should also be given sufficient funding to produce plain-English materials and community legal education programs, to promote better public understanding of the law.

222. The Law Council also notes that access to hard-copy legislation for members of the public is very limited. It is submitted that legislation should be available from government shopfronts and that governments could also improve accessibility of

[70] Available here: http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines
[71] See http://www.victorialawfoundation.org.au/plain-language/resources

legal resources by providing more funding to organisations such as the Australian Legal Information Institute (AustLII), to further improve and upgrade their capacity to provide free and accessible legal information to the public.

Review jurisdiction of lower courts

223. There has been a national tendency to increase the jurisdiction of courts dealing with "small claims", intending to facilitate a quicker and cheaper method of resolving civil monetary disputes. These initiatives often, or usually, involve excluding legal practitioners. Whilst the idea of facilitating speed and inexpensiveness is appealing, in practice these initiatives carry risks and costs. They can, or do:

    (a) give a disproportionate advantage to professional litigants such as government, insurance companies, finance companies, debt collection agencies and the like, who understand the processes and who can utilise "lay" representatives, who have a significant advantage over ordinary litigants; and

    (b) place a substantial burden on the presiding magistrate, who is obliged to compensate for the lack of skill and understanding of the unrepresented litigants.

224. Greater use of small claims jurisdictions should not be at the expense of a person's right to legal review by a superior court, where the ground of review is error of law or denial of procedural fairness. Whenever a right to superior court review is lost or diluted, there is always the risk that the adjudicators in those divisions who manage the small claims lists may give greater importance to time and cost efficiency than to ensuring that the right decision is arrived at.

225. Other matters which may warrant further consideration include 'fencing in', for example, by the introduction of pre-determined set times for the running of certain categories of matters, the introduction of limits in appropriate matters to the number of affidavits each party to the proceedings could prepare or restricting the number of interlocutory processes, which is one area where the Law Council is advised that costs accumulate quickly, often for little benefit. However, the Law Council cautions that 'fencing in' carries with it the potential to deny justice, if not carefully managed by the Court. Subject to consultation, consideration could also be given to the introduction, in appropriate matters, of written submissions only. This approach would particularly suit appeals.

Greater investment in new technologies

226. The Law Council is advised that, where courts have embraced technology, it has improved the 'user-friendliness' of the legal system. The websites of courts are informative and accessible, e-filing is assisting with efficiency as is the ability to communicate with a judge's associate by email. Increased reliance on technology could reduce litigation costs, eliminate unnecessary (and expensive) formal correspondence and save time through the electronic lodgement of various case material. Other telecommunications vehicles such as greater use of the telephone, video and email for direct communication between parties and the courts, will simplify procedures in routine applications, which can be dealt with without the need for parties to attend the court.

Geographic constraints

227. The Law Council considers geographic isolation is a significant access to justice issue, which is worsening due to failure by governments to properly fund courts, tribunals and legal assistance services to provide services in regional areas. It is also impacted by the failure of governments to invest in regional communities and strategies for retaining the dwindling number of law practices in RRR areas.

Importance of direct contact

228. Generally, taking instructions from a client face to face is important in order to facilitate proper communication and understanding by the client particularly at the beginning of the relationship when building rapport and trust with the client. There are also practical issues with the availability and reliability of audio-visual communications, particularly in regional areas. Solicitors often have to attend court to use an audio-visual suite and not all courts currently use this technology. Most private practitioners do not have appropriate equipment in their offices. In a large number of regional towns there is no access to audio-visual facilities at all, either in the courts or in the township. For example, the Law Council is advised that in Gunnedah, solicitors have to travel to Tamworth to utlilise the Legal Aid Commission's regional office if they are to have access to video-conferencing facilities (a round trip of two hours).

229. Notwithstanding this, the Law Society of South Australia's Country Practitioners Committee advises that face to face contact, while important and desirable, may not be essential. Lack of physical proximity can be a barrier especially where documents need to be shown to, signed, and witnessed by a person, such as affidavits. The barriers are felt in any region not adequately serviced by a court, and any region not having sufficient resident lawyers, and not having access to technology. Having to wait inordinately long times for trials affects consumers in RRR areas and this perhaps impact more upon Indigenous consumers of legal services . The use of Skype, videoconferencing, email and telephone can help to overcome geographical barriers, both in facilitating more regular contact between a solicitor and client, and in facilitating access to the courts (where the court has appropriate facilities in place.

230. The Law Council is advised that improved access is dependent, in significant part, on individuals and families in remote areas having ready access to such technology.

Diminishing justice services in regional areas

231. The Law Council is advised that the capacity of courts to provide services in regional areas has diminished significantly in recent years due to funding concerns. By way of example, the Law Council notes the following:

    (a) Notwithstanding the re-branding of the Federal Magistrates Court as the Federal Circuit Court, the Law Council is advised that the Federal Circuit Court has been provided very limited funding to sit outside the capital cities where its registries are located. The Law Council suggests that the Productivity Commission consult with the CEO of the Federal Circuit Court to gain a clearer understanding of the extent to which regional services have been restricted as a result of funding pressures.

    (b) Inadequate funding not only restricts the capacity of courts to provide regional services; it has also restricted the capacity of many courts to

upgrade their registry systems, to enable practitioners and members of the public to make full use of internet-based technology, including e-lodgement facilities, videoconferencing, 'virtual courtrooms' and other services which would significantly alleviate the tyranny of distance afflicting those who reside outside major metropolitan areas.

(c) The Deakin University published a report in 2011, entitled "Postcode Justice", [72] which examines the serious shortfalls in justice services in regional Victoria. The report found that:

> "Despite improvements to technologies and transportation over the last half century, distance from courts and related services continues to raise a 'natural barrier' for many justice system service users and prospective users in Victoria, causing both financial cost and personal hardship"[73]

(d) The Law Council has been advised that the hearing and sentencing of offenders in South Australia has been delayed, particularly in Aboriginal communities, because the courts do not have sufficient funds to hold hearings or sentencing proceedings outside metropolitan areas.

(e) The number of circuit court hearings conducted by the District Court of NSW in rural areas has reduced and the circuits have been limited to regional centres. The number of circuit court hearings conducted by the Supreme Court of NSW has also been reduced. The Law Society of NSW has called on the NSW government to identify RRR areas poorly served by court house facilities and to reopen court houses in those areas and/or increase the frequency and locations of circuit court hearings.

(f) The NSW Attorney-General recently announced a 4.5 per cent cut in the NSW Local Court's budget over the next three years, which will result in the number of full time magistrates in NSW being cut by eight during that period. The Chief Magistrate has stated that sittings at a number of suburban and regional courts will have to be suspended as a result of these cuts which will reduce access to justice in those areas and lead to major delays.

(g) There are ongoing concerns about underfunding and increasing workload in the Family Court system. In the lead up to the federal election earlier this year, the Coalition announced its intention to save $30 million by "streamlining" processes in the Family Court over the next four years. While the detail of how these savings will be made is not known at this stage, there are concerns that this could mean fewer judges, fewer court staff and cuts to regional services. Proposed cuts to Indigenous legal services and the abolition of legal help for asylum seekers have also been foreshadowed.

Challenges with providing regional legal services and attrition of lawyers in regional areas

232. Geographic remoteness also creates additional challenges and costs for legal assistance providers. Lawyers briefed or employed by LACs and ATSILS generally have to travel large distances to RRR areas in order to see clients, which is more costly. However, often the client will also have to travel the same distances to the city to see either a legal assistance provider or private lawyer.

[72] Ibid, *op cit* 28.
[73] Ibid, page 9.

233. It is noted that geographic remoteness also has a number of broader impacts. The Postcode Justice Report states that:

> "Disadvantage is experienced as a result of the limited availability of senior barristers and senior Crown Counsel at circuit County Courts. A declining ratio of private law firms to regional populations and demands on Legal Aid services is resulting in an increasing frequency of 'conflict of interest' issues. A growing complexity of laws is requiring a greater level of expertise from regional practitioners, who traditionally offer generalist practice services and therefore, are not always able to provide the requisite level of competence to appropriately respond to the specialised assistance required."[74]

234. This problem is exacerbated by the ongoing attrition of private practitioners in rural regional and remote areas. In 2009, the Law Council and Law Institute of Victoria commissioned a survey into Rural, Regional and Remote Areas Lawyers.[75] The survey found that:

(a) a large number of legal practices in country Australia do not have enough lawyers to service the legal needs of their communities. Overall, 43 per cent of principals surveyed indicated that their practice currently does not have enough lawyers to serve their client base.

(b) a large number of legal practitioners, many of whom are sole practitioners, will retire in the next five to ten years. Sole practitioners made up 46 per cent of all responses to the survey. Of this group, 30 per cent have been practising in country areas for more than 21 years and almost 36 per cent of these practitioners do not intend to be practising law in the next five years. Overall, 42 per cent of the legal practitioners who responded to the survey do not intend to practise law in five years time. It is necessary to find skilled practitioners to fill these gaps, or else many legal businesses may close for want of successors.

(c) principals of country firms are extremely worried about the future of the profession in their regions. In particular, the principals who responded to the survey cited succession planning as their biggest concern (71 per cent), followed by concerns about attracting additional lawyers to the firm (58 per cent) and about attracting lawyers to replace departures (51 per cent).

(d) many young lawyers are intending to leave their work in RRR areas to seek better remuneration or work in the city. Of the younger lawyers surveyed (20-29 years), 30 per cent indicated that they only intended to practise in their area for less than two years. For this group, remuneration is also extremely important, with 25 per cent indicating that they would leave the country for better pay. Further, 28 per cent of this younger age group would leave their current firms to join a city based firm and 15 per cent would leave to start a new career.

(e) country practitioners undertake a significant amount of legal aid work, with 51 per cent of respondents indicating that their firm accepted legally aided

[74] Ibid, page 10.
[75] *Report into the Rural, Regional and Remote Areas Lawyers Survey*, July 2009, Law Council of Australia and Law Institute of Victoria. See: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RRR_report_090709.pdf

matters. Of those firms, the majority (50 per cent) dealt with more than 30 cases per year. These findings support the 2006 TNS Report, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, which found that law firms in regional and remote areas provide larger quantities of legal aid work than do their city counterparts. A reduction in the numbers of RRR lawyers undertaking legal aid work is making it difficult for country people to access legal aid and place increasing pressure on the remaining services.

(f) lawyers are integral to country communities providing significant pro bono assistance and undertaking voluntary work within their communities. More than 64 per cent of respondents indicated that their firm undertakes pro bono work, and 71 per cent of respondents undertake other unpaid voluntary work within their area.

(g) overall, the survey results indicate that there is a significant problem for access to justice in regional Australia. Action is required to ensure that viable practices are retained and country Australians are able to access legal services within their communities. The loss of legal practices will impact negatively on rural and regional commercial infrastructure and also on the community life of country towns.

Cross- subsidisation of work in RRR areas

235. As noted above, the Law Council is advised that law practices in RRR areas "cross-subsidise" legal work, which contributes to both the availability of certain services and the availability of legal aid in those areas.

236. For example, many transactional services, such as conveyancing which provide firms with more predictable cash flows, cross-subsidise other legal services that are less remunerative, such as legal aid work and civil litigation. Without such cross subsidisation, a range of legal services could not be provided, to the significant detriment of people living in RRR areas.

237. Further, RRR lawyers provide the effective back-bone for the provision of legal aid in those areas, under the mixed-model referred to earlier. Current legal aid rates generally mean that law practices in RRR areas must cross-subsidise legal aid work with funds from other areas of their practice in order to accept legal aid briefs. Without this,, LACs would have a significant additional problems in terms of the cost of service delivery in those areas.

Strategies underway to address access to justice in RRR areas

238. The Law Council notes that there has been an extensive amount of work done by the Law Council and its constituent bodies in seeking to address attrition of law practices and legal services available in rural, regional and remote areas. For example:

(a) In 2010, the Law Council received $250,000 from the Federal Attorney-General's Department to develop a campaign to promote legal careers in regional areas and to link graduates with rural and regional law firms.[76] The Law Council has also repeatedly called on the Federal Government to

[76] See information about the Law Council's RRRLaw campaign at http://rrrlaw.com.au/.

provide incentives for graduates and experienced practitioners to relocate to a regional or rural area, including HECS/HELP relief, relocation assistance, etc.

(b) The Law Society of NSW is committed to strengthening professional support for practitioners working in rural, regional and remote areas of NSW and has a network of 29 regional law societies which are active in promoting networking and CLE opportunities and raising local justice issues. As part of that commitment the Law Society is working with NSW legal agencies through the NSW Legal Assistance Forum and is Chair of its Working Group on the availability of lawyers in rural, regional and remote areas of NSW. The Law Society's Rural Issues Committee also considers rural legal and policy issues.

(c) The NSW Legal Aid Cooperative Legal Services Delivery Program is a regionally based approach to legal services delivery in NSW. The Program aims to improve outcomes for economically and socially disadvantaged people by building cooperative and strategic networks of key legal services and community organisations.

(d) The LIV advises that its members have indicated that many court applications are already considered via email and in hard copy. The LIV notes that this prevents the need for practitioners to attend the Court in person to make applications. The experience of LIV members is that the Victorian County Court is particularly good at doing this. It is suggested that in appropriate circumstances, technology could be better used to enable hearings, interlocutory matters and directions hearings to proceed.

(e) Over the last 4 years the Law Society of Tasmania and the Tasmanian LAC have developed a scheme, initially with Commonwealth funds and subsequently using funds from interest on solicitors' trust accounts, to provide salary supplementation to firms who employ young graduates in RRR areas. Each year between 4 and 8 new solicitors have been employed in these areas, who ordinarily would not have been engaged. The small financial incentive (approximately $20,000 per annum) was critical to encouraging and allowing firms to employ these solicitors, who would almost certainly not been employed without the subsidy. The new practitioners provide legal services and the prospect for succession planning for the profession in RRR areas. One condition attached to the funding was that the firm had to be prepared to undertake legal aid work.

Other factors affecting access to justice

239. There are a range of other factors which may affect the capacity or propensity of people to resolve their legal problems. For example, the LAW survey found that legal problems were more likely to be experienced by people with poor mental or physical health, disability, drug or alcohol addiction, the unemployed and Aboriginal and Torres Strait Islander people. Among these groups there was a lower incidence of resolution of legal problems and a higher prevalence of multiple legal problems.

(5) Is unmet need concentrated among particular groups?

Summary

- As demonstrated by various recent reports, unmet legal need is concentrated among the most vulnerable and disadvantaged people in the community, including the disabled, unemployed, single parents, Indigenous Australians, those on welfare and those living in RRR areas.
- Those on low or lower middle incomes are also disadvantaged in accessing the justice system, as they are usually ineligible for government-funded legal assistance or waiver of fees and charges, and are not sufficiently wealthy to engage in a protracted legal process.
- Indigenous peoples face particular barriers and impediments in accessing the family law system due to a range of factors, including lack of awareness about available services, limited availability of culturally appropriate services, linguistic, cultural and geographic barriers and limited capacity to engage with the family law system.
- The number of unrepresented litigants in Australian courts and tribunals has grown significantly over the last 20 years. This has placed significantly greater pressure on court resources, has contributed to delays and the need for costly further hearings and appeals and may have led to miscarriages of justice.
- In recognition of this, many programs have been established and funded by the courts or the government, which aim to provide information and support to unrepresented litigants. It is essential that governments re-invest in these programs, or establish them in jurisdictions and courts where they do not currently exist.

240. As referred to previously, with reference to the LAW Survey, Postcode Justice report, RRR Survey and VLRC report:

(a) Unmet legal need is concentrated among people in the community who are subject to economic and/or social disadvantage, including the disabled, unemployed, single parents, Indigenous Australians and those on welfare.

(b) Those living in RRR areas face significant and increasing challenges in accessing justice and legal services.

(c) Those on low or lower-middle incomes are disadvantaged in accessing the justice system, as they are usually ineligible for government-funded legal assistance and are not sufficiently wealthy to engage a lawyer or avoid paying court fees.

(d) Most people on middle incomes could afford a lawyer for certain matters, but would be unable to afford legal representation over a protracted legal process. This group faces legal fees, court filing fees, costs involved with preparing their case and the threat of costs if they are unsuccessful.

241. The Law Council suggests that the reports referred to above contain significant data and information on those groups which may be of considerable assistance to the Commission.

Legal Australia-Wide Survey

242. The Legal Needs Survey[77] published by the Law and Justice Foundation in August 2012 examined the ability of disadvantaged people to:

- obtain legal assistance;
- participate effectively in the legal system;
- obtain assistance from non-legal advocacy and support services; and
- participate effectively in the law reform process.

Indigenous Australians

243. The Law Council agrees with the view expressed by the Family Law Council in its report entitled "Improving the Family Law System for Aboriginal and Torres Strait Islander Clients".[78] That is, that the interaction of Indigenous peoples and the family law system is a complex one that requires an understanding of the effect of past policies relating to "the forced removal of children and forced resettlement of communities and contemporary patterns of engagement with criminal justice and child protection systems."[79] The historical and contemporary context has resulted in particular barriers and impediments to accessing the family law system for Indigenous peoples.

244. The Report identifies the following barriers and impediments:

(a) Resistance to engagement, lack of knowledge about the system and limited capacity for outreach;

The Family Law Council notes that two of the most significant reasons why the family law system is under-utilised by Indigenous peoples are: (1) a lack of understanding about the family law system; and (2) a resistance to engagement with, and a fear of, family law system services.[80]

(b) Availability of services that are culturally responsive and culturally safe;

The Family Law Council found that there is a need for Indigenous peoples to have access to both Indigenous-specific services and culturally appropriate mainstream services. The overarching issue in this context is the need for services to be culturally safe, that is, to operate in a way that supports and affirms Indigenous culture and identity.[81]

The Law Council notes that the availability of Indigenous Liaison Officers in the Family Court would greatly assist the Court to meet the needs of Indigenous clients. The Family Law Council notes that prior to 2006, the

[77] Ibid, *op cit* 22, see: http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html.
[78] Ibid, *op cit* 30, page 1.
[79] Ibid.
[80] Ibid, page 4.
[81] Ibid.

Family Court did employ Indigenous Family Liaison Officers. However, these positions no longer exist after changes in 2006.[82]

One of the greatest barriers to access to the family law system identified by the Family Law Council is the relatively low number of Indigenous-background professionals working in the family law system.[83]

(c) Literacy, language and geography; and

The relatively low levels of educational attainment, the fact that English is often not the first language for Indigenous peoples (coupled with limited access to interpreters) and that many Indigenous peoples reside in regional and remote communities present further barriers to access.[84]

(d) Family Dispute Resolution and Courts.

The Report also noted that the drawn out and multi-step nature of family dispute resolution and court services can present barriers for Indigenous peoples. Many Indigenous peoples face difficulties on multiple fronts (health, housing, family violence, finance) and this may affect their ability to attend multiple appointments and hearings. There may also be logistical challenges. The Family Law Council was also told that there were difficulties arising from the approaches in these settings based on Western conceptions of child-rearing, kinship and family.[85]

245. The Report makes nine recommendations (pages 9-12 of the Report).

Unrepresented litigants (URLs)

246. A review of the existing literature demonstrates that the number of URLs in Australian courts and tribunals has grown significantly over the last 20 years:

> "Overall the literature reports that the pervasiveness of URLs is reportedly greater than in previous decades in all Commonwealth Courts and Tribunals with proportions ranging between 17 and 93 per cent, depending on a number of factors which include, but are not limited by, the nature of the case, the informality of the forum and the availability of funded legal resources."[86]

247. There has been an increasing trend of URLs applying to the court or commencing action, in most cases with little or no understanding of legal processes or the applicable law or legislation, and with limited guidance throughout the process. PricewaterhouseCoopers has described the problem in the following terms:

> "Legal professionals spend years studying, training and gaining the essential experience that allows them to deal with complex legal processes and to present cases for their clients in the required and effective manner. Lawyers also have professional duties: of disclosure to the court; to avoid the abuse of court process; to not corrupt the administration of justice; and to conduct cases efficiently and expeditiously. Self-representing litigants lack this experience and

[82] Ibid, page 3.
[83] Ibid, page 4.
[84] Ibid, page 5.
[85] Ibid.
[86] Richardson, Sourdin and Wallace, Ibid, *op cit* 37.

do not have these professional responsibilities. They are therefore generally acknowledged to be less efficient than legally represented parties in the running and presentation of their matter.

"Self-representing litigants place more pressure on the court's resources and time as they are generally inexperienced and under-resourced to follow procedures efficiently and present their case effectively. This increases the time and resources that the court requires to explain the court procedures and to wait for self-representing litigants to move through processes or to present their case. This also increases the likelihood of errors and in turn increases delays and the need for costly further hearings and appeals.

"A study by Dewar et all [sic] in 2000 found that self-representation often led to more protracted and more frequent appearances and greater delays, resulting in more days off work and increased legal fees for the represented party who was often unable to recover costs against a self-representing party. Significantly the study found that self-representing parties were less likely to settle and therefore more likely to go to a hearing. The inefficiency of self-representing litigants also impacts on other litigants in court by increasing waiting times in court and placing additional stress on court resources."[87]

248. The Bench Book entitled "Equity Before the Law" published by the Judicial Commission of NSW ("the Bench Book")[88] notes the following difficulties faced by unrepresented parties:

"People who represent themselves - whether in potentially winnable cases or in cases that were hopeless from the start - come from all types of socio-economic and educational backgrounds. Whatever their literacy or educational level, whatever the type of matter, and to some extent however informal the court is supposed to be, they are likely to face considerable barriers in presenting their case - particularly if they are the accused or the other party is represented. For example, they:

(i) may not understand the complexities of relevant legislation and case law;

(ii) may not fully understand legal language;

(iii) may not be able to accurately assess the merits of their case;

(iv) may not fully understand the purpose of the proceedings and/or the interlocutory steps in the proceedings;

(v) may not fully understand and/or be able to properly apply the court rules for example, what they must file when, the rules of evidence and cross-examination;

(vi) may not have emotional objectivity or distance, and be overly passionate about their case;

[87] PWC, Ibid, *op cit* 17, page 27.
[88] Judicial Commission of NSW, "Equity Before the Law", June 2006, available online from: http://jirs.judcom.nsw.gov.au/public/wservice/benchbooks/docs/Equality_before_the_Law_Bench_Book-Update_7-June_2013.pdf.

(vii) may not be skilled in advocacy and able to adequately test an opponent's evidence, or cross-examine effectively; or

(viii) may, as a result of many or all of these issues, be feeling anxious, frightened, frustrated, and/or bewildered. The case may also be impacting, or starting to impact, on their emotional and/or physical health."[89]

249. The Bench Book also notes:

"The difficulties faced by self-represented parties in turn lead to difficulties for the court. For example:

(i) the proper processes are unlikely to have been followed;

(ii) it may be much harder (and might take longer than usual) to get to the essence of what the case is about;

(iii) the required evidence may not be presented at all, or may be presented inadequately;

(iv) it will almost always be necessary for the judicial officer to intervene much more than usual;

(v) finding the appropriate balance between intervention and neutrality can be difficult; and

(vi) it is more difficult for the other party and/or the prosecution to deal with an unrepresented party than a represented party."

250. There is anecdotal evidence that there is an increase in the number of persons who resort to dispute resolution by courts and tribunals for matters with little or no prospect of success. These developments have numerous adverse consequences, including the waste of public and private resources, the delay imposed on other matters, and the creation of dissatisfaction by all involved in the process, including the unmeritorious.

Unrepresented people in family violence matters

251. Practitioners in the field have informed the Law Council that the increasing prevalence of unrepresented litigants in family law matters involving domestic violence is particularly concerning. Due to restrictions to legal aid guidelines, in most jurisdictions a party in family law proceedings, who is unrepresented, faces the real prospect of being subject to cross-examination by their abusive partner.

252. In Victoria, following recent changes to the legal aid guidelines, those who would otherwise be eligible for legal assistance in a family law matter will lose that entitlement if the other side is unrepresented. In many cases, this may be because the other side is wealthier and therefore ineligible for legal assistance, but chooses to proceed unrepresented. This resulted recently in a case where a client of Victoria Legal Aid, who had been subject to violent abuse by her former domestic partner and suffered from post-traumatic stress disorder, became ineligible for ongoing legal assistance because her partner was unrepresented. In that case, the victim was

[89] Ibid, page 302.

compelled to be questioned by her former abuser in open court. Clearly, the potential for an unsatisfactory outcome in these circumstances is reasonably high and it is unlikely that this case (which is unlikely to be an isolated occurrence) would accord with the community's expectation of the protection the justice system is intended to provide.

Why do people choose to self-represent?

253. The Bench Book[90] notes that:

> "There are many reasons why people choose to represent themselves. For example, they:
>
> - may have been refused legal aid or presume they are ineligible;
> - may not be able to afford legal representation;
> - may have been told by lawyers that their case has no merit, but believe that it does have merit;
> - may have been perceived by lawyers as in some way too "difficult" (for example, they are unable to speak English or to communicate well or sufficiently logically);
> - may not trust lawyers;
> - may believe they are the best person to put their case across;
> - may have withdrawn instructions from their lawyer relatively recently and not had time to find alternative representation; and
> - may represent themselves for part of the court proceeding and engage a lawyer only for the part they consider (or have been advised) is the most important or critical."[91]

Recent trends reported by the courts

254. The Law Council has examined the annual reports of federal, state and territory courts and provides the following information concerning recent trends. The following data are derived from the 2011-12 annual reports of the relevant courts.

255. The key findings are as follows:

(a) The High Court and Federal Courts report high rates of appeal applications being made by unrepresented litigants.

(b) Those State Supreme Courts which reported on unrepresented litigants noted the significant scale of both civil and criminal matters involving unrepresented litigants, requiring the use of extensive court resources to support unrepresented litigants.

(c) It was noted that the support of unrepresented litigants was provided to the detriment of the other operations of the courts.

(d) The statistics indicated that a significant number of appeals brought by unrepresented litigants were actually successful – overall 22 per cent of appeals in the Supreme Court in Queensland succeeded, indicating the need for increased funding of legal representation, particularly in criminal appeals.

[90] Ibid.
[91] Ibid, page 301.

(e) Many courts reported steps and programs undertaken to provide information and support to unrepresented litigants, reflecting the significance of the incidence of unrepresented litigants in their courts generally.

Federal Courts

High Court of Australia

256. A significant proportion of special leave applications in the High Court are filed by unrepresented litigants: in the latest Annual Report, it was disclosed that 41 per cent of leave applications in 2011-12 were filed by unrepresented litigants.[92]

Federal Court of Australia

257. In 2011-12, a significant proportion of appeals in the Federal Court were commenced by unrepresented litigants (27 per cent, or 165 of 614 appeals commenced), although the proportion of all actions commenced in the Federal Court (i.e. both appellate and non-appellate) which were commenced by unrepresented litigants was much lower (6 per cent, or 314 of 5277 actions commenced in 2011-12).[93]

258. Approximately 76 per cent of appeals commenced by unrepresented litigants in the Federal Court were migration appeals.

Family Court of Australia

259. In its 2011-12 Annual Report,[94] the Family Court noted the increased complexity of the Court's caseload resulting from the significant numbers of litigants who are not represented in its jurisdiction. It said:

> "...Self-represented litigants add a layer of complexity because they need more assistance to navigate the court system and require additional help and guidance to abide by the Family Court Rules and procedures".

260. Approximately 27 per cent of cases had either one or both parties appearing unrepresented in 2011-12. The proportion of litigants who were unrepresented in the appellate jurisdiction was even higher: in 2011-12, 38 per cent of appellants were unrepresented.

Family Court of Western Australia

261. In its 2010-11 Annual Report, the Court reported that applications made by unrepresented parties constituted 45.2 per cent of parenting order applications, 70.2 per cent of contravention/contempt applications and 81.7 per cent of divorce applications.[95]

[92] http://www.hcourt.gov.au/assets/corporate/annual-reports/2012annual.pdf, page 13.
[93] http://www.fedcourt.gov.au/publications/annual-reports/2011-12/ar2012.pdf.
[94] http://www.familycourt.gov.au/wps/wcm/resources/file/ebd4d80901c31bd/AR2012_FINAL(280pp_cov).pdf.
[95] http://www.familycourt.wa.gov.au/_files/FCWA_AR2010-11.pdf, page 15.

Federal Magistrates Court of Australia (now Federal Circuit Court)

262. In its 2011-12 Annual Report, the Court reported that its "...Jurisdiction is such that a significant number of parties present as self-represented litigants, particularly in the areas of family law, child support, bankruptcy and migration."[96]

263. In 31 per cent of family law final applications in 2011-12, either one or both parties were unrepresented.

State/Territory Supreme Courts

Supreme Court of New South Wales

264. No statistics on unrepresented litigants were reported in either the 2010-11 or 2011-12 Annual Report.[97]

Supreme Court of Victoria

265. In its 2011-12 Annual Report, the Supreme Court noted that its Registry had assisted and/or referred 1316 unrepresented litigants, although this number was 36 per cent lower than in the previous year.

266. The Court noted that:

> "...while support for self-represented litigants is an important aspect of the Court's commitment to access to justice, the support of this group is increasingly consuming limited resources to the detriment of the Court's other operational areas".[98]

Supreme Court of Queensland

267. The Supreme Court of Queensland noted in its 2011-12 Annual Report that in 20 per cent of civil matters and in 27 per cent of criminal matters in which judgement was delivered in the Court of Appeal, one party was unrepresented.[99]

268. It also noted that 24.7 per cent of unrepresented criminal appellants and 17.4 per cent of unrepresented civil litigants were successful in their appeals in 2011-12. Overall, 22 per cent of unrepresented litigants were successful. The Court noted:

> "... These figures continue to suggest a need for increased legal aid funding at appellate levels in criminal matters."[100]

269. The Annual Report also noted the impact of the number of unrepresented litigants in regional circuits of the Supreme Court. For example, it was noted in respect of the Central Queensland circuit that:

[96] http://www.federalcircuitcourt.gov.au/pubs/docs/11-12 Tagged.pdf, page 69.
[97] http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/2010.11_annual_review.pdf.
[98] https://assets.justice.vic.gov.au/scv/resources/cb734c31-5a31-4b6b-81bc-bb1c78cbc838/2011-12_scv_ar_web.pdf, page 4.
[99] http://www.courts.qld.gov.au/__data/assets/pdf_file/0006/167928/sc-ar-2011-2012.pdf, page 14.
[100] Ibid, page 16.

"Applications days were held on an approximately six weekly basis. Self-represented litigants took up a larger, and disproportionate, amount of sitting time in applications."[101]

Supreme Court of Western Australia

270. No statistics on unrepresented litigants were reported in the latest Annual Report for the 2011 calendar year.[102]

Supreme Court of South Australia

271. No statistics on unrepresented litigants were reported in the latest Report of the Judges of the Supreme Court of South Australia for the 2011 calendar year.

272. However, the report notes that:

"... although the Court does not have reliable statistics, it appears that the number of unrepresented litigants in civil cases and magistrates appeals may be increasing. The impact of this is to increase the workload of Registry staff (because of the time spent giving assistance to unrepresented litigants). There is also a tendency for the length of hearings to increase. This is a matter which the Court will have to watch."[103]

Supreme Court of Tasmania

273. No statistics on unrepresented litigants were reported in the 2011-12 Annual Report.[104]

Supreme Court of the Australian Capital Territory

274. No statistics on unrepresented litigants were reported in the 2011-12 Annual Report.[105]

Supreme Court of the Northern Territory

275. The 2011-12 Annual Report refers to the release in March 2012 of both a criminal and civil handbook for the assistance of unrepresented litigants, but does not provide any statistics on unrepresented litigants.[106]

State District Courts

District Court of New South Wales

276. The District Court does not provide statistics in its 2012 Annual Report for the 2012 calendar year.[107]

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[101] Ibid, page 30.
[102] http://www.supremecourt.wa.gov.au/_files/Annual_Review_2011.pdf.
[103] http://www.courts.sa.gov.au/OurCourts/SupremeCourt/Lists/Judges Annual Reports/Attachments/1/2011_Judges_Annual_Report_SC.pdf. See page 16.
[104] http://www.supremecourt.tas.gov.au/__data/assets/pdf_file/0008/227375/Supreme_Court_of_Tasmania_Annual_report_2012.pdf.
[105] http://cdn.justice.act.gov.au/resources/uploads/48149_ACT_JACS_AR_2011-12_INT_FA2-web_final.pdf.
[106] http://www.supremecourt.nt.gov.au/media/documents/annual_reports/2011-2012_annual_report.pdf.
[107] http://www.districtcourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/districtcourt/m417151l2/districtcourt2012annreview.pdf.

County Court of Victoria

277. The 2011-12 Annual Report refers to the County Court's recently released "Guide for Self-represented Litigants in the Civil Jurisdiction", and to other protocols being developed to assist unrepresented litigants, but provides no statistics on unrepresented litigants.[108]

District Court of Queensland

278. Although services available to unrepresented litigants were referred to in the Court's 2011-12 Annual Report, there are no statistics provided on unrepresented litigants.[109]

District Court of Western Australia

279. In its 2011 Annual Report, the Court refers to services provided by the Court to unrepresented litigants, but no statistics on unrepresented litigants are provided.[110]

District Court of South Australia

280. No statistics on unrepresented litigants in the District Court were provided in the 2011-12 Annual Report of the Courts Administration Authority of South Australia.[111]

State/Territory Local/Magistrates Courts

281. None of the Local/Magistrates Courts appear to provide statistics on unrepresented litigants.

282. Although the Queensland Magistrates Court's 2011-12 Annual Report did not include any statistical data on unrepresented litigants, the Court noted that the domestic and family violence "... Is a demanding area for the courts as the parties often appear unrepresented and unfamiliar with court proceedings, and additionally may be distraught, emotional, anxious and in fear of their personal safety."[112]

283. It is noted that cuts to duty lawyer services have been introduced by Victoria Legal Aid since 2010, when they sat at 84,569 services provided for 2009-10. By the year ending 2012-13, such services had dropped to 65,303. This occurred at a time when grants of legal aid in Victoria dropped from 44,045 in 2009-10 to 39,782 in 2012-13.[113]

Relevant programs

284. The Law Council notes that some programs have been established and funded by the courts or the government which aim to provide advice and assistance to unrepresented litigants. A case study on the Queensland Public Interest Law

[108] http://www.countycourt.vic.gov.au/sites/default/files/County Court Annual Report_2011-2012.pdf. See page 23.
[109] http://www.courts.qld.gov.au/__data/assets/pdf_file/0011/168194/dc-ar-2011-2012.pdf. See pages 7-8.
[110] http://www.districtcourt.wa.gov.au/_files/DC Annual Review 2011.pdf. See page 18-19.
[111] http://www.courts.sa.gov.au/OurCourts/CourtsAdministrationAuthority/Lists/CAA Annual Reports/Attachments/14/CAA_Annual_ Report_2011-12.pdf
[112] http://www.courts.qld.gov.au/__data/assets/pdf_file/0003/167934/mc-ar-2011-2012.pdf. See page 28.
[113] VLA Annual Report 2012-13.

Clearing House (QPILCH) self-representation pilot is outlined below. The Law Council notes there are also examples of similar trials in other jurisdictions.[114]

QPILCH "self-representation" pilot

285. The QPILCH pilot was run in the Federal Courts' Building in Brisbane. Under the pilot program, QPILCH received referrals of unrepresented litigants from the courts' registries. QPILCH's volunteer lawyers provided an initial assessment and advised the unrepresented litigants of their prospects of success and the risks of proceeding. If their case was considered to be meritorious, the client was matched with a pro bono lawyer through QPILCH's networks. If QPILCH was unable to locate a lawyer to act pro bono, then QPILCH would provide guidance, but would not represent the litigant.

286. The pilot was based on a similar service at the Queensland Supreme Court and Queensland District Court, which commenced in 2007.[115] This in turn was modelled on the Royal Courts of Justice Advice Bureau in London that has been operating for more than 30 years.[116]

287. An evaluation of the QPILCH pilot was released in June 2012, titled "Evaluation of Effectiveness of Queensland Public Interest Law Clearing House: Self-Representation Service in the Federal Court and Federal Magistrates Court Brisbane."[117] The Report concluded that:

> "…the service provides an extremely important opportunity to divert clients away from the court process altogether, saving the court an enormous amount of resource[s] and relieving clients of an unenviable burden of running an unmeritorious matter which may often end in dire financial and social outcomes."

288. The pilot operated with a one-off budget of $35,000 from the Commonwealth Attorney-General's Department and $23,000 from the Federal Court. During a nine month period the pilot had a significant impact on potentially costly, unnecessary litigation instituted by unrepresented litigants. Dr Banks' report identifies substantial financial savings, well above the $35,000 provided by the Commonwealth.

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[114] For example, the Law Council is advised that JusticeNet in South Australia is a similar program being run on a trial basis; the Principal Registry in the Supreme Court of Victoria includes a Co-Ordinator who assists self-represented litigants by acting as a legal advice service referral point for these litigants. The Co-Ordinator provided assistance to over 1300 unrepresented litigants in 2011/12 (see https://assets.justice.vic.gov.au/scv/resources/cb734c31-5a31-4b6b-81bc-bb1c78cbc838/2011-12_scv_ar_web.pdf, at p 21); the Court of Appeal of the Supreme Court of Victoria has issued a detailed "Self-Represented Litigants Information Pack" to assist and guide unrepresented litigants (see http://www.supremecourt.vic.gov.au/resources/eb96eefb-0b4f-447f-8519-0fce810d154f/selfrepinfocoa.pdf); and the County Court of Victoria has issued a 64-page publication to assist unrepresented litigants, titled "A Guide for Self-Represented Litigants in the Civil Jurisdiction of the County Court" (see http://www.countycourt.vic.gov.au/files/SRL_w_24Oct2011.pdf). On 11 September 2013, the Court also launched a video guide to assist unrepresented litigants.

[115] Iain McCowie, "Unique service helps self-represented in civil matters", Queensland Law Society, Proctor, February 2011.

[116] For further details on the success of this service in the United Kingdom and the benefit of self-representation services, see Civil Justice Council, "Access to Justice for Litigants in Person (or self-represented litigants): A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice", November 2011. The Royal Courts of Justice Advice Bureau's website is: www.rcjadvice.org.uk.

[117] Dr Cate Banks, "Evaluation of Effectiveness of Queensland Public Interest Law Clearing House: Self-Representation Service in Federal Court and Federal Magistrates Court Brisbane", June 2012.

289. After receiving legal advice from the service, three matters were diverted away from a hearing in the Federal Court and nine matters were settled or discontinued in the Federal Magistrates Court.[118]

290. Publicly funded access to legal advice, and in some instances representation, saved significant public money. Again this shows the often seen economic benefit of funding legal assistance services.

291. On 31 August 2012, funding from the Commonwealth Attorney-General's Department for the QPILCH pilot expired. QPILCH requested further Commonwealth Government funding in order to continue the program, but this was denied by the Attorney-General's Department. The Law Council subsequently wrote to the Attorney-General to express support for the program and request ongoing funding, which was again refused.

292. Services of the kind provided by QPILCH are closely aligned with the principles outlined in the Commonwealth Government's Strategic Framework for Access to Justice in the Federal Civil Justice System'.[119]

293. The Law Council recommends that the initial success of the QPILCH program justifies ongoing funding and expansion of the program into other jurisdictions and strongly suggests that this could assist in creating both immediate and longer term cost-savings for the Federal Courts.

[118] According to figures from the Access to Justice Taskforce Report 'A Strategic Framework for Access to Justice in the Federal Civil Justice System', the net cost per service in the Federal Court in 2007-2008 was $17,590 and in the Federal Magistrates Court it was $1,484. Assuming that these matters would otherwise have been litigated, the Pilot may well have led to at least $66,126 in savings.
[119] Ibid, *op cit* 1.

(6) Avenues for improving access to justice

Summary

- The most important avenue for improving access to justice is to restore adequate funding for the legal assistance sector and the courts.
- Other measures might also be considered, including investment in community legal education, self-representation programs, technology for courts and tribunals, training and use of interpreters, cultural competency training for lawyers and judicial officers, referral services and reduced court filing fees.
- There are demand and supply-side 'shocks' which impact across both the civil and criminal justice systems due to changes in funding for the courts and legal assistance services; punitive legislation affecting rights, responsibilities and consequences for criminal behaviour; and prioritisation of matters for political purposes.

294. The Law Council submits that the most urgent and far reaching issue to be addressed in improving access to justice is the provision of adequate funding to both the legal assistance sector and the courts. A detailed outline of the level of funding required for the legal assistance sector, as a starting point, is outlined in response to Chapter 12, below, with reference to actuarial advice obtained by the Law Council.

295. Other measures which could be considered, subject to further consultation, might include:

    (a) Encouragement of triage processes by legal practitioners at an early stage, to assist parties in identifying the most appropriate pre-action processes for their circumstances (discussed further below at paragraphs 325-327);

    (b) A review of case management powers available to the courts and the extent to which the powers are being utilised and their effectiveness in reducing delay and cost;[120]

    (c) Encouragement of active consideration of whether, in certain cases, issues of liability and quantum (of damages) should be heard separately (often parties are more likely to agree on quantum after liability has been determined or agreed) - the risks of interlocutory appeals and consequent delays must of course be recognised;

    (d) Increased funding for training of interpreters to assist in legal proceedings and at other stages, including contact with police and legal professionals, to improve access for Aboriginal and Torres Strait Islander people and those from culturally and linguistically diverse communities;

    (e) Professional training for legal practitioners and court officers in assisting, advising and deposing Aboriginal and Torres Strait Islander peoples and people from culturally and linguistically diverse communities;

[120] For example, the LIV has advised that under Chapter 4 of the Civil Procedure Act 2010 (Vic), judges have various powers with respect to case management, however the experience of LIV members is that judges are reluctant to use such powers despite the possibility that their use could assist in the early resolution of disputes.

(f) Substantial investment in court and tribunal infrastructure and technology, to create capacity to overcome challenges associated with geographic isolation, improve court registry administration and speed up filing, including e-lodgement;

(g) Investment in community legal education, to increase awareness of the law and legal problems, and the options available to those who have a legal problem;

(h) Reduced court filing fees, which in some courts (including the federal courts) are prohibitively expensive and a serious burden on those who simply need a court to resolve their legal problems (this is discussed further below);

(i) Frameworks for early intervention and referral to other services, including legal advice and health services; and

(j) Re-investment in programs, such as the QPILCH pilot outlined above, and establishment of similar models in courts which do not currently have them.

Lessons from the criminal justice system

296. The Issues Paper queries whether there are lessons to be learned from the criminal justice system to improve access to and outcomes from the civil justice system.

297. As outlined earlier in this submission, the criminal and civil justice systems are inextricably linked – shocks affecting one system will inevitably also impact upon the other. Examples of impacts which will affect both systems, even if ostensibly directed at one side include:

Supply-side

(a) **Changes to funding in the legal assistance sector:** In practice, LACs determine their own funding guidelines and the amount which will be allocated to criminal or civil matters. The importance of representation in criminal matters is paramount, given a person's liberty may be at stake and victims and their families are deserving of swift justice. This means that restrictions on legal aid grants generally fall most heavily on civil law matters. In addition, as demonstrated recently in Victoria[121] and South Australia,[122] courts may feel compelled to stay proceedings in criminal matters until an appropriate level of legal assistance can be afforded to an accused, or the court can convene in an appropriate place.

(b) **The level of funding to the legal assistance sector also impacts on the capacity of the private profession to accept legal aid briefs:** At current funding levels it would be virtually impossible for a private firm to remain solvent while accepting a substantial number of legal aid briefs.

[121] *R v Chaouk* [2013] VSC 48; *The Queen v Chaok & Ors* [2013] VSCA 99 (2 May 2013); *MK v Legal Aid* [2013] VSC 49 (18 February 2013).

[122] Anecdotal advice from South Australian legal practitioners. Following recent State budget, courts have had to cease circuits in regional areas, including on APY lands. This has led to significant delays in hearings and sentencing, due to court policy of ensuring sentencing and hearing of offences concerning Aboriginal offenders are held on-country, in the relevant community.

(c) **Changes to funding for the courts:** Broadly, courts will allocate their limited resources toward both civil and criminal law cases. Different courts adopt different listing and case management approaches. The capacity of the court to engage in appropriate case management in a civil matter will be affected by the number of cases they receive.

Demand-side

(d) **Changes to laws affecting responsibilities, rights and entitlements:** For example, tough-on-crime policies and new public schemes creating rights and responsibilities ultimately impact on demand for legal services. Further examples include punitive asylum seeker laws, recent developments in serious organised crime legislation, mandatory sentencing, as well as new schemes such as the NDIS, as referred to above.

(e) **The justice system is often impacted by prioritisation of cases for political or special interest reasons without associated resourcing:** For example, in most jurisdictions historical sex cases and 'organized crime' offences are often given priority due to public interest concerns, to the disadvantage of other types of crime, and ultimately civil litigation.

(7) Preventing issues from evolving into bigger problems

Summary

- Early intervention and access to legal advice results in quantifiable benefits to the lives of many Australians and provides significant downstream savings to tax payer funded legal services, the justice system and other government services.
- Community legal education and legal 'health' checks provide a useful mechanism in which to identify, prevent and address existing legal problems early on.

Early intervention and access to legal advice

298. The Law Council submits that early intervention and access to legal advice are the most important means of preventing issues from evolving into bigger problems. They are also the surest way to reduce costs.

299. Failure to intervene early and provide access to legal assistance can result in a high cost, both to the individual concerned and the justice system as a whole. Further, additional costs will be borne by the tax-payer; through: costs involved with resolving the larger problems which have eventuated, often through the court system: social and health problems, which will be dealt with by government referral and health services; unemployment: relationship breakdown, and other consequences.

300. As noted previously, these costs are real and able to be quantified. For example:

    (a) PricewaterhouseCoopers (PWC) has estimated that the economic return on investment in legal aid is approximately $1.60-$2.25 for every dollar invested.[123] In the report, PWC notes that "…[t]he modelled benefits only relate to the efficiency of the court and its processes, and do not include the benefits that flow to individuals and the community from quality justice outcomes and resolutions of disputes."[124] It therefore understates the cost-benefit ratio because it measures only the reduction in the Court's workload from spending on legal aid; and does not include the benefits accruing to the actual parties to the dispute and other significant downstream savings in terms of improved efficiency in the dispute resolution process and diminished societal impacts. The report concludes:

        "Therefore the benefits reported in this analysis under-represent the full extent of the efficiency benefits available from the services that legal aid commissions provide."[125]

    (b) A recent report commissioned by the National Association of Community Legal Centres and the Australian Council on Social Services estimates that every $1 invested in the community legal sector yields an $18 return.[126]

[123] PWC, ibid, *op cit* 17.
[124] Ibid, page 28.
[125] Ibid, page 42.
[126] Judith Stubbs & Assoc., ibid, *op cit* 5.

301. The absence of adequately funded legal aid services precludes the vast majority of people from accessing early intervention services. A system of legal assistance which includes improved support for those who need a lawyer to assess their matter would allow clients to make an informed decision on the merits of proceeding to court or exploring other dispute resolution avenues. In turn, they would not be taking up valuable court resources on matters which have little prospect of success.

302. The Law Council submits that the legal profession does a great deal to improve access to initial advice. For example, many law practices offer their first consultation free, usually up to one hour, to enable the lawyer to carry out an initial assessment of the problem and whether the prospective client would benefit from further legal assistance. As noted earlier in the submission, this particularly unique pro bono service offered by many firms, particularly smaller, suburban ones, is not recorded or reported on in relation to pro bono targets. However its value, in terms of free legal services provided and diversion of unmeritorious matters away from litigation should not be underestimated. It is further noted that most jurisdictions have a free legal assistance and referral service, either operated by the law society or another body (for example, this is run in Queensland by QPILCH). Examples are provided below, in response to Chapter 12.

Community legal education

303. As noted earlier, the LAW Survey found that a large number of people simply ignore legal problems due to factors such as poor legal knowledge and other personal or possible systemic constraints (such as disability, mental ill-health, language or cultural barriers, ineligibility for legal assistance, or the perceived cost or time involved with taking action).

304. Community legal education is a powerful mechanism enabling people to identify and confront their legal problems at an early stage, before they become overwhelming.

Legal health checks

305. It is noted that a number of legal aid commissions and firms offer complimentary or low-cost 'legal health checks'. Access to these services can be through online questionnaires, surveys or checklists for individuals and businesses.

306. However, notwithstanding the availability of these tools, their efficacy is significantly limited by the lack of availability of legal assistance funding and the reluctance on the part of many in the community to retain a lawyer to resolve any issues which are identified. This reluctance may have multiple causes, but if the community is to enjoy access to justice at reasonable cost, those causes must be identified and addressed by the profession.

(8) Effective matching of disputes and processes

Summary

- Lawyers play an important role in advising disputants on the most appropriate avenues to resolve their legal problems.
- Legal professionals have obligations to advise clients about alternatives to contested dispute resolution. It is clear that the majority of legal problems are resolved by people without recourse to a lawyer. The vast majority of people who do seek legal advice resolve their dispute without recourse to formal dispute resolution mechanisms.
- Early intervention and legal assistance ensures that disputes which can be resolved via ADR are promptly referred to ADR services. Early intervention also helps to identify those disputes which are inappropriate for ADR, saving time, money and resources.
- The concept of 'triage' in dispute resolution has in fact been a role carried out by legal practitioners for many years. The Law Council considers there would be little additional benefit, and a high likelihood of problems that would result from, appointing a separate body to carry out 'triage'.
- Specialist courts and tribunals and the use of court lists ensures judges with specialist knowledge are hearing and determining complex and highly specialised cases. However, efficiency and cost-effectiveness should not be the primary driver of policy in this area. The primary objective must be the just and fair resolution of legal problems and disputes.
- Administrative dispute resolution mechanisms are effective in some areas. However, this should not prevent people seeking court or tribunal determination of disputes about rights, property and commercial interests.
- The existing model of service coordination, which relies in significant part on volunteers and underfunded court registries, is unsustainable. The Law Council supports increased funding for court registry, legal and referral services within courts to assist unrepresented litigants and other court users.

307. The Law Council submits that the high cost of litigation, including informal dispute resolution processes, necessitates a flexible and needs-based approach to matching of disputes and processes.

308. Most jurisdictions already have extensive pre-action procedural requirements in civil law matters, requiring parties to take 'genuine' or 'reasonable' steps to resolve their dispute before reaching the court. For example, the *Civil Dispute Resolution Act 2010* (Cth) requires persons litigating in federal courts to certify that they have undertaken 'genuine steps' to resolve their disputes.

309. The Law Council has previously raised concerns about such requirements due to the potential for unnecessary increased expense arising from engagement with certain forms of ADR, which are unlikely to be successful or appropriate in the circumstances. The Law Council notes that the Commonwealth Attorney-General's Department has recently reviewed the operation of the *Civil Dispute Resolution Act*

2010 (Cth), but that the findings of that review are yet to be released. The Law Council also notes that similar requirements were either repealed or never implemented in Victoria and NSW, due to concerns about the potential increased front-end litigation costs.[127]

Identifying disputes and processes

310. It is difficult for disputants to identify the most appropriate dispute resolution pathway without access to experienced professional assistance. The area of ADR and the process options now available for the resolution of disputes in Australia is complex. The array of ADR processes is extensive and the development of hybrid processes in different substantive areas has made it difficult for individuals to select an appropriate dispute resolution option.[128]

Pathways for dispute resolution

311. Pathways for appropriate access to dispute resolution processes are not well known and public funding options for the provision of dispute resolution processes are not well-developed, except in the family law context.

312. It is important to identify pathways which allow the consumers of legal services to access information about appropriate or suitable dispute resolution processes through lawyers or legal institutions. There are two main methods which are partially developed in the Australian context:

    (a) Obligations for legal practitioners to advise clients about the alternatives to a contested adjudication of a case have been promulgated in some jurisdictions. For example, NSW Bar Association Rule 38: "A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation."[129] Consideration needs to be given to the further promulgation of similar obligations for legal practitioners in jurisdictions throughout Australia; and

    (b) Access through dispute resolution institutions such as courts and tribunals to individuals with expertise in referral mechanisms to appropriate ADR processes is essential [130] and can be further developed through the implementation of triage and specific case management procedures [131] (discussed further below).

[127] The reasons for repeal have not been stated but included in Government Press Releases. Concerns about front-end litigation costs were voiced during the review by lawyers and commentators.
[128] F. Sander & S. Goldberg, "Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure", January 1994.
[129] Rule 38, New South Wales NSW Barristers' Rules, 8 August 2011 and for example NSW Law Society Advocacy Rule 17A.
[130] LCA Expert Standing Committee on ADR, Symposium on the Multi-door Court House, 2009, Canberra; R. Nickless, Australian Financial Review, Legal Affairs, "Triage for disputes mooted", 31 July 2009.
[131] Ibid, *op cit* 128 page 98; see also the outcomes of the Multi-door Court House Symposium held by the Law Council of Australia, Expert Standing Committee on Alternative Dispute Resolution, 2009; M. Walker, "Review of the Integration of ADR into Courts and Tribunals in Australia and Key Emerging Issues", 20 August 2013.

313. The Australian Solicitors' Conduct Rules 2011 define "Court" to mean any tribunal exercising judicial, or quasi-judicial, functions; an industrial, administrative or professional disciplinary tribunal; an investigation or inquiry established or conducted under statute or by a Parliament; a Royal Commission; an arbitration or mediation or any other form of dispute resolution. The Australian Bar Rules define "Court" broadly to include "any body described as such and all other judicial tribunals, and all statutory tribunals and all investigations and inquiries (established by statute or by a Parliament), Royal Commissions (the Criminal Justice Commission/ICAC or equivalent), arbitrations and mediations". This move to define "Court" processes more broadly than traditional court adjudication has an impact on the perception of the role of lawyers as the predominant "gate keepers of disputes".

314. The LAW Survey notes:

> "…there is considerable diversity in how people experience, handle and try to resolve legal problems".

315. The research concludes that no single strategy will successfully achieve justice for all people. It calls for a 'holistic' approach to justice, comprising multiple, integrated strategies, to cater for the different needs within the community, and suggests tailored, targeted intensive assistance for people with complex legal and non-legal needs.[132]

Early intervention and legal assistance

316. The Law Council reiterates that most disputes are resolved quickly with early intervention and advice from a legal practitioner. The fastest and most efficient way for disputants to identify legal problems and the most effective path for resolving disputes is to provide access to legal advice and assistance at an early stage.

317. As noted above, it is difficult for disputants to identify and access the best method of dispute resolution. Often dispute resolution systems are disparate and specific to particular areas of business (for example, consumer complaints), government activity (for example, disputes with local government) and other confined generic areas.

318. With a system of legal assistance, which includes improved support for those who need a lawyer to assess their matter, clients will be better equipped to make an informed decision on the merits of proceeding to court or exploring other dispute resolution avenues. In turn, the same disputants will be less likely to consume valuable court resource on matters which have little prospect of success.

319. In general, identification of the most appropriate mechanism for dispute resolution will depend on a range of considerations, including the behaviour of the parties concerned, whether they are likely to require or desire an ongoing relationship (whether personal or commercial), the circumstances of the dispute (including whether there has been a history of violence), whether the parties are required to or elect to proceed to arbitration, and whether the parties are willing to forego any of their rights in order to reach a settlement.

[132] LAW Survey, ibid, *op cit* 22. See: http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html

Improving access and referral mechanisms

320. It is suggested that the Attorney-General Department's current Access to Justice webpage needs to be developed further to note pathways to access appropriate government departments, courts and other government agencies providing dispute resolution processes and schemes for the resolution of disputes.[133] Development of telephone and internet referral mechanisms provided by government agencies to competent and well defined referral systems requires attention. In this regard, the *Law Access NSW* model is a single point of contact for legal referral services and is worth consideration in other jurisdictions.[134] Law Access provides free legal information, referrals and in some cases advice for people who have legal problems in NSW. Queries directed initially to other organisations, including legal professional associations, are re-directed to Law Access.

321. The Issues Paper enquires as to which matters, given their nature, are best directed to superior or lower tier courts and to what extent is this already occurring. The same enquiry should be directed to tribunals. This is an area which requires further investigation.

322. Recent commentaries have attempted to analyse different approaches to the allocation of cases to different levels of the Court structure.[135] As a result of the lack of comparable statistical data, Australian ADR and civil litigation reform policy does not have a strong evidence base, and it is difficult to construct criteria or benchmarks to initiate or evaluate effective programs. There is anecdotal evidence that courts and tribunals are experiencing an increasing number of matters going to hearings with little or no prospect of success. Plainly such disparate anecdotal communications are not sufficient as a basis for the development of programs or innovation in the area of civil justice reform. The Law Council considers there would be benefit in testing the anecdotal information to better identify which disputes should be resolved formally bearing in mind the need for precedents to guide individuals, organisations and governments so as to avoid the need for formal litigation in the future.

323. "Super-tribunals" such as the Victorian Civil and Administrative Tribunal (VCAT) and the New South Wales Civil and Administrative Tribunal (NCAT) may create opportunities for a less formal and alienating environment. The relaxation of rules of evidence and formalities of court interlocutory processes may constrain costs to some extent. However, a careful watch needs to be kept on the quality of justice dispensed in this way. The lack of practical accountability is one of a number of distinguishing features of Tribunal work. Many of the fundamental objectives identified by the Victorian Law Reform Commission (see paragraph 102) are challenged by the Tribunal model. The Law Council considers that in order to safeguard against these risks, it is essential that those who seek to access tribunals and other less formal dispute resolution forums retain the right to legal advice and representation, if that is their preference. It is also important that the expertise of the individual tribunals making up the "super-tribunal" should be maintained.

324. The emergence of 'collaborative practice groups' in all Australian jurisdictions, predominantly in the family law area, is an example of a mechanism for resolution of disputes by multiple service providers. Disputing parties or separating families who

[133] http://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Pages/default.aspx
[134] http://info.lawaccess.nsw.gov.au/
[135] For example, J Doyle, "Commercial Litigation and the Adversarial System – Time to move on", 9 September 2013.

engage a collaborative practitioner are required to agree at the outset that they will not go to court. The practice group then manages the process of settling other matters: including financial matters; property division and settlement; parenting arrangements; and child and spousal maintenance. The efficacy and cost of these novel approaches has yet to be verified.

Use of 'triage' in dispute resolution

325. The use of 'triage' in the early stages of dispute resolution has been mooted as a process which could greatly assist in matching disputes with the appropriate resolution process.[136] This is, the Law Council suggests, exactly what is done by legal practitioners approached at the beginning of a problem. No one is better positioned to provide triage than a knowledgeable professional experienced in the relevant field. The challenge is to ensure that this can be done at reasonable cost and that the needful client can easily identify and approach a suitable lawyer.

326. When presented with a legal problem by a client, the lawyer's functions include assisting parties to:

    (a) evaluate a dispute's suitability for ADR;

    (b) canvass and consider the various types of ADR and decide which one or ones will best suit their dispute (including possible hybrids);

    (c) determine the best timing for applying one or more ADR options;

    (d) work out a comprehensive blueprint/roadmap for use of ADR to avoid costs and stress of litigation;

    (e) weigh up and balance "potential legal rights" against "other interests" such as commercial interests, family interests, time interests, financial and investment interests, relationship interests and so on;

    (f) fully understand and comprehend the risks and uncertainties of litigation when weighing it up and considering its pros and cons along-side the various ADR options;

    (g) apply a dispute management/dispute resolution cost benefit analysis to ADR options *vis a vis* litigation;

    (h) consider the efficacy of entertaining and implementing appropriate ADR options first, before turning to litigation; and

    (i) where there are strong reasons that support early filing in a court/tribunal (e.g in order to protect vital legal rights and/or proprietary or equitable interests that might otherwise be lost or compromised due to delay) and consider ADR options later.

327. The Law Council doubts the wisdom of establishing a new cadre of "middlemen" to carry out triage. Legal practitioners are obliged to advise clients about all of their options and to facilitate their client's engagement in appropriate forms of ADR. It is likely that appointing an external legal triage 'nurse' to direct parties to one form of

[136] LAW Survey, ibid, *op cit* 22, page 11. See also the outcomes of the Multi-door Court House Symposium held by the Law Council of Australia Expert Standing Committee on Alternative Dispute Resolution, 2009.

dispute resolution or another will simply add to the cost of the dispute resolution process.

Impact of specialist courts and tribunals

328. The Law Council accepts that specialist courts and tribunals have generally had a positive impact on the efficiency of dispute resolution. For example:

    (a) Specialisation within courts is common. For example, most supreme courts have separate lists, commercial lists and property lists. Equity courts and other lists have been established in most jurisdictions to enable judicial specialisation, which in turn enables the Court to deal with complex matters efficiently.

    (b) In most jurisdictions there are specialist courts and tribunals, such as the NSW Industrial Court, the Federal Social Security Appeals Tribunal; the National Native Title Tribunal; youth/children's courts; land, planning and environment courts; to name only a few. The Law Council is advised that specialist courts are effective and efficient due to the capacity to specialise and appoint judges or members with extensive practising experience in the relevant areas of law.

    (c) The Federal Circuit Court was originally established (previously as the Federal Magistrates Court) as a cheaper, more efficient court of federal jurisdiction, to deal with certain general federal law and family law matters. However, this Court has developed (in family law matters at least, which represents approximately 90 per cent of its workload) into the principal trial court in family law matters. The Family Court is now reserved only for complex property disputes, child abuse, abduction and relocation disputes and appeal matters. As the work of the Federal Circuit Court has developed into the principal trial court, its processes and procedures have become more akin to the operation of 'normal courts', so that its original ethos of 'cheaper, faster, more informal' now applies to a lesser extent. Further, the Federal Circuit Court was rebranded to emphasise its capacity to sit in various regional areas across the country (i.e. to go on 'circuit'). However, as noted earlier, the Court has been limited in its capacity to perform this important function due to funding restraints.

<u>Efficiency should not be the only objective</u>

329. The 'efficient' and cost effective delivery of justice is an important objective, provided it is remembered that it is access to "justice" that is required. It is also worth considering that efficiency and cost effectiveness is not always the objective held in mind by those establishing specialist courts:

    (a) Indigenous courts

    The Law Council notes that in the establishment of Koori Courts in the Victoria, in circle sentencing in NSW, in the Nunga Courts in South Australia and in other Indigenous court constructs, the overt objective was to ensure greater participation of the Aboriginal community in court processes and provide a culturally appropriate context in which to sentence Aboriginal offenders. These courts are inherently more expensive to operate than 'mainstream' courts, as they often sit in regional or remote communities and

require longer sittings in order to facilitate the involvement of community members.

(b) Drug and alcohol courts

The Law Council understands the primary objective of drug and alcohol courts is to treat the underlying health issues which influenced an offenders decision to offend, thereby reducing the likelihood of reoffending and, correspondingly, the cost to society of imprisoning the person for the same result.

(c) Special circumstances courts

These exist under various names in different jurisdictions, with the objective of dealing with disadvantaged people who encounter legal problems, including homeless people and those with mental illness.

Administrative v judicial resolution

330. The Law Council notes that administrative dispute resolution mechanisms can and do work effectively in some areas. However, the Law Council submits that disputes over decisions or conduct which affects individual rights and property and commercial rights and interests should not be precluded from determination by the Court. That is, administrative resolution should not displace any concurrent or subsequent right to seek judicial determination.

Joined-up services

331. The Law Council would support the better coordination of court, legal and referral services, including by better resourcing courts to enable court registries to provide these services, or enable funded legal services to co-locate with courts.

332. The Law Council submits that the existing model, which has significant gaps and relies heavily on volunteers or pro bono practitioners doing what they can to assist unrepresented litigants, is unsustainable and is unlikely to ensure appropriate access to referral and joined-up services.

333. If such services are to be deployed in courts and managed by registries, it will be important to ensure appropriate training for registry staff. However, the Law Council considers the most appropriate bodies to provide these services are legal aid commissions.

(9) Informal justice mechanisms

Summary

- ADR is an important tool in the dispute resolution armoury. However, not all forms of ADR will be effective in all disputes. Mandating ADR in all cases is likely to increase the cost of the dispute resolution process without perceivable benefits in the timeliness of dispute resolution.
- There is a lack of reliable, consistent, and comparable data about referral to and use of ADR. A starting point may be to provide the courts and tribunals with resources sufficient to collect additional information on ADR referrals and outcomes.
- The Law Council's constituent bodies are very active in promoting the private provision of ADR. Both public and private ADR are widely used, however there is limited data on whether one or the other is more effective. The Law Council considers it may be appropriate to collect data on outcomes from public and private ADR processes.
- The Law Council can see a greater role for industry ombudsmen in areas where there are a high volume of disputes and small claims. However, the appointment of ombudsmen should not limit or replace the right to pursue other avenues, including determination by a court or tribunal.

334. Current practice in all Australian courts encourages early engagement with ADR (i.e. the resolution of disputes out of court) and usually requires parties to make reasonable efforts to resolve their dispute before the matter can be filed in court.

335. There are several different types of "formal" ADR, including mediation, arbitration, conciliation and early neutral evaluation. In a real sense most ADR is done informally by solicitors and barristers endeavouring to resolve matters by negotiation on behalf of their clients. A number of the Law Council's constituent bodies provide general information about ADR on their websites to assist members of the community to understand all of their options.

Effective use of ADR

336. The Law Council recognises that formal ADR is a very important tool in the dispute resolution armoury. However, it may not be effective for all disputes and there is serious potential for parties with fewer resources to suffer disadvantage. There is also potential for more sophisticated parties to take advantage of another party's relative lack of knowledge about their legal rights and responsibilities. Further, there is a danger that too frequent a reliance on ADR, the outcomes of which are generally confidential, will deny opportunities for courts and tribunals to provide

reasoned guidance and precedents to the legal profession, citizens and government agencies.[137]

337. The privacy of mediation, for example, immediately challenges one of the Victorian Law Reform Commission's (paragraph 102) fundamental tenets of justice, while its necessary secrecy defies another. Without openness, transparency and accountability mediation is hardly part of a system of justice.

338. It has been said that "Mediation is not about just settlement, it is just about settlement". No doubt it is good for parties to settle cases (and that is what for centuries their professional advisors have helped them to do) but settlement achieved through oppression is not so obviously a desirable end. Then it is just the successful exercise of vulgar force – the very thing that the system of justice was invented to defeat.

339. There are real risks to the parties where the protections of litigation are not available. That is, where there is no guarantee of seeing the relevant documents, where the economic power or strength of character (or even sheer unreasonableness) of a party become the most powerful forces in the negotiation, and where the figure with apparent authority is focussed on achieving settlement, not on redressing the imbalance so as to enable justice to be done.

340. The Law Council submits that those participating in mediation require legal advice and, in many cases, representation. Without access to legal advice and representation prior to participation in mediation or other ADR, participants may not be in a position to fully appreciate their legal rights and options. Mediators are largely restricted from providing legal advice to participants in mediation. In these circumstances, legal representation is crucial for parties to understand their legal rights and obligations and which underlying facts are relevant to resolving the dispute.

341. The Law Council recommends that the Productivity Commission review the annual reports of the Superior, District, Magistrates and County Courts in Australia since 2008 for information about the processes adopted in the Courts to enhance access to justice, which is focused upon the overarching or overriding obligations of the Court to reduce delay and cost in the administration of justice. As discussed below, comparative analysis is difficult on the current available data.

Data and evidence-based ADR policy

342. Reliable, consistent, comparable court statistics about referral to and use of ADR and the outcome and impact of ADR are not readily available in all jurisdictions in Australia. The Productivity Commission Report on Government Services expressly does not include any data on ADR or arbitration/mediation as part of justice system statistics. While individual courts and tribunals may record some information, possibly available in an annual report or on a website, this information is not consistent or comparable across jurisdictions or over time. As a result of this lack of comparable data, Australian ADR and civil litigation reform policy does not have a strong evidence base, and it is difficult to construct criteria or benchmarks to initiate

[137] See, for example, 'Dame Hazel Genn warns of 'downgrading' of civil justice', Law Society of England and Wales Gazette, 18 December 2008; Mediation Developments in England – Video with Professor Dame Hazel Genn; Experts warn against mandatory mediation at CIArb Mediation Symposium, Chartered Institute of Arbitrators, 21 October 2011.

or evaluate programs. NADRAC has repeatedly called for consistent data collection criteria, most recently in its 2009 report *Resolve to Resolve*.[138]

343. Identifying the information which should be collected and possible data sources is not an easy task, and the resources for analysing data once collected may be difficult to come by. The task is made more complex by the large number of courts, tribunals, government agencies and other organisations involved in the provision of ADR services and/or collection and analysis of data across many fields, as well as different information management systems utilised by courts/tribunals within the same jurisdiction.

344. Nonetheless, some basic data could be collected by all courts and tribunals, especially if such data is integrated into existing forms and procedures. This recommendation draws substantively from the American Bar Association Section on Dispute Resolution Task Force Memorandum on Research and Statistics (2005).

345. Such data might include:[139]

(a) Was ADR used in this case?

This information will simply identify how often ADR is used as part of civil litigation. It provides an important baseline so that any changes in ADR use can be related to changes in policy or practice, or to identify the kinds of cases or jurisdictions where ADR use is more or less frequent. This basic question raises the issue of what ADR means. For example, does it include court led settlement conferences? As a starting point, until a common definition can be developed, a clear statement of what ADR comprises as part of a court/tribunal's data collection will be needed.

ADR may be used independent of court processes, either in advance of court action or during the course of litigation. Capturing data about this ADR use may require information from parties and legal representatives as part of the court's data collection process.

(b) What ADR process was used in this case? More than one?

This could either be open ended or based on a list of choices (e.g. mediation, early neutral evaluation, arbitration [binding/non-binding], etc) with an "other" category. It allows the kinds of ADR used and the frequency of different processes to be identified and compared within a court over time, across courts within a jurisdiction or nationally.

What is called "mediation" in one jurisdiction may differ in significant respects from a process called mediation elsewhere. Where possible or practical, common definitions, such as those developed by NADRAC, should be used.[140]

(c) What/Who initiated ADR use?

[138] See also, "Building an evidence-base for the Civil Justice System", Civil Justice System framework and Literature Review Report, Attorney General's Department, 3 September 2012.

[139] This list, and the explanations for the individual items are drawn from a memorandum prepared by the ABA Section on Dispute Resolution Task Force on Research and Statistics in 2005. See http://meetings.abanet.org/webupload/commupload/DR014500/newsletterpubs/TopTenApril2006.doc

[140] Nonetheless, collecting the suggested data would be a significant improvement over the current situation, even without common definitions.

Possible response categories might include one or both parties, legal representatives, court rule, court staff, judicial officer, court order/consent, court order/resisted. One of the important policy issues about ADR is the issue of voluntariness and the impact of some degree of pressure through court rules or court referral. It is widely thought that the low uptake of ADR can be improved by some degree of compulsion, even in advance of litigation.

(d) Timing information

Courts currently collect a substantial amount of information on case timing. It would be important to collect the same basic litigation timing information in all cases, whether ADR is used or not, so that any differences in the cases where ADR is used can be identified.

Timing information could include date of any demand letter or required pre-action protocol; the date the claim is filed; date of choice for or referral to ADR; date of first ADR process; date of ending of ADR process; timing of discovery; dates of case management events; date the trial date was set, trial date; date of notice of appeal, and other key points in the progress of litigation.

Dates can be expressed as calendar dates or relative to other case events, for example before/after filing of the claim, before/after discovery, before/after other case management events, before/during/after trial.

This information will enable an understanding of when ADR is most often used, and can be linked to other data to see whether different forms of ADR are characteristically used at different points in the litigation cycle, or whether there are different paths to ADR use at different stages.

(e) Case type

In order to draw conclusions about variations in ADR use or paths to ADR by case type, this category will need to be more finely grained than simply civil or criminal.

(f) How was the case finalised? When?

How a case is finalised could include adjudication in whole or in part, settlement in whole or in part, withdrawal of a claim, default or summary judgment or other method. As with the timing information, finalisation information should be recorded in all cases, so that any comparison with cases in which ADR is used can be identified.

It might also be possible to seek information about whether party negotiation, lawyer negotiation or ADR process led to partial or complete resolution, though this is unlikely to be available as part of regular court data, unless the parties and/or their lawyers were asked specifically about causation. It is very difficult to identify whether ADR directly leads to a settlement, or to an earlier or better settlement, given that most cases settle eventually anyway.

(g) Other Issues

There are many other issues on which data could be collected, such as cost increase or savings, whether ADR had benefits other than settlement, satisfaction with the ADR process or other indicators of ADR quality. These

would require more detailed interrogation of parties and their lawyers, and a more elaborate evaluation process which could not be easily integrated into existing routine court data collection processes.

346. It is noted that courts and tribunals will require additional resources to collect and compile this data and any proposed data collection program should be developed in consultation with the courts.

Public v private provision of ADR

347. Without appropriate statistical data it is difficult to provide an adequate answer to the question about the appropriate balance between the public and private provision of ADR.

348. Accreditation of ADR practitioners requires detailed analysis. Industry and professional bodies currently accredit ADR practitioners in arbitration and mediation, however not all ADR practitioners are accredited. Competencies are assessed, with initial training and continuing professional development being criteria used for accreditation purposes. The Law Council is advised that anomalies have arisen, for example, in the national accreditation of mediators, where professionals and non-professionals are compared and accredited on the same criteria with no auditing programs in place.

349. It is submitted that professional bodies with their own assessment and accreditation processes should be left to accredit their own members. Law Societies and Bar Associations have sophisticated accreditation and professional standards schemes governed by Legal Profession Acts.

350. Others wishing to be accredited without the oversight of established professional bodies may require processes as currently adopted, for example, by the national mediator accreditation regime administered by the Mediator Standards Board, which is an unregulated industry body. Current developments create anomalies which are difficult to resolve and do not create improved consumer confidence. This area requires further investigation.

351. It is noted that the Law Council's constituent bodies are very active in promoting private provision of ADR. For example:

    (a) The President of the Law Society of NSW is responsible for appointing arbitrators, mediators, independent solicitors, experts and valuers pursuant to relevant dispute resolution clauses in contracts, agreements, terms of settlement and consent orders for example. The Law Society of NSW is also a Recognised Mediator Accreditation Body (RMAB) and accredits solicitor mediators under the National Mediator Accreditation System.

    (b) The Law Society of NSW also offers a range of high quality programs in several types of ADR, including:

        (i) the Law Society's Mediation Program, which assists people wishing to resolve a dispute through confidential, face-to-face mediation sessions. The Program is aimed at people who want to avoid going to court and who are willing to negotiate in good faith with the opposing party to reach a settlement. All mediators are qualified solicitors who meet stringent selection criteria and undergo advanced mediation training. The Program has been running since 1991 and is based on best

practice principles of mediation. There have been 11 mediations conducted in 2013.

(ii) the Law Society's Neutral Evaluation Program, which allows disputing parties to obtain a reasoned, non-binding assessment of their case from a neutral third party called an evaluator. The Program is aimed at people whose disputes are at a pre-trial stage and who want to understand the likely results of going to court. The process is confidential. Evaluators are senior legal practitioners who have been appointed by the Law Society ADR Panels.

(iii) the Law Society's Conveyancing Dispute Resolution Scheme, which provides assistance in disputes concerning a contract for the sale of land. The Scheme is run by the Law Society's Property Law Committee and aims to offer an impartial and authoritative alternative to litigation or arbitration. Under the Scheme, the Committee is available to adjudicate on disputes and provide the parties with a binding determination. This Scheme is available provided there is acceptance by the disputing parties of the following pre-conditions:

- Both parties and their solicitors must agree on the issue(s) submitted for determination;
- Both parties and their solicitors must agree to abide by the determination of the Committee, and
- The amount in dispute does not exceed $25,000.

(iv) the Law Society's Family Law Settlement Service (FLSS), which was run as a pilot project in 2012. The program was administered by the Law Society in conjunction with the NSW Bar Association, Family Court of Australia and the Federal Circuit Court of Australia. The objective of the FLSS was to reduce the backlog of matters in the courts which was resulting in considerable hearing delays. Once a matter was identified as suitable by the courts, the parties were invited to participate in a mediation organised through the FLSS. Stakeholders considered the FLSS a success with 41 of 89 (46 per cent) matters referred resulting in a settlement and a further four matters reaching partial settlement.

(c) the Law Institute of Victoria (LIV) is a Recognised Mediator Accreditation Body (RMAB) under the Mediator Standards Board and accredits mediators under the National Mediator Accreditation Standards. Further to this, the LIV has its own Accredited Specialist Mediators program. All mediators on this list have a minimum of five years of full time practice experience and a minimum of three years' experience in their area of specialisation. After passing a comprehensive examination process, developed by legal professional experts, all Accredited Specialists must maintain a high degree of professional development in their area of specialisation. They are required to apply for re-accreditation every three years.

(d) In addition, the LIV Mediators Directory[141] and LIV Arbitrators Directory[142] provides details of approved legal practitioners qualified to conduct mediations and arbitrations respectively. Mediators are listed together with their contact details and areas of practice or specialisation.

Ombudsmen

352. As noted in the Issues Paper, ombudsmen provide an accessible pathway for consumers, individuals and businesses to resolve their disputes. Generally, industry-based ombudsmen are a very good first port-of-call for consumers and have operated effectively in a range of industries, including banking and finance, telecommunications and energy. Industry ombudsmen are usually funded by contributions from members within the industry, who pay annual membership fees, and are free for consumers.

353. Government ombudsmen also exist in every jurisdiction, for the purpose of investigating alleged misconduct by government officials and agencies. All jurisdictions have appointed a generalist, government ombudsmen, while in certain jurisdictions there are specialist ombudsmen (for example, the Fair Work Ombudsman, who investigates complaints in relation to workplace rights and entitlements; the Commonwealth Law Enforcement Ombudsman, who investigates alleged breaches of rights by law enforcement agencies; and the Immigration Ombudsman, who receives and investigates complaints primarily in relation to people held in immigration detention.

354. The Law Council values the services provided by the Commonwealth Ombudsman, and Ombudsman Offices around Australia. These services extend beyond investigating individual complaints and resolving disputes involving government and industry, and include important review and reporting functions, including those prescribed in legislation. They play a crucial role in ensuring access to justice in relation to systemic issues.

355. In particular, ombudsmen have the potential to improve access to justice in areas where there are a large volume of disputes or complaints. Involvement by a government or industry ombudsman can promote swift resolution of complaints and disputes, by creating a commercial and reputational incentive to reach resolution.

356. However, it is important to recognise that industry self-regulation, via ombudsmen, has potential short-comings. Not all processes are transparent or reviewable, and decisions or recommendations are not binding. Companies may choose to opt-out. Further, there is no-one to advise a consumer or complainant as to whether they are settling their dispute on reasonable terms. This may be particularly problematic if an individual is required to contractually waive their further rights and entitlements as a condition of any settlement.

357. Accordingly, the Law Council would not support any proposal to limit access to other forms of dispute resolution, including access to courts and tribunals. Ombudsmen should remain one tool within a suite of mechanisms available to resolve disputes and facilitate access to justice.

[141] http://www.liv.asn.au/Mediators
[142] http://www.liv.asn.au/For-the-Community/Find-a-Lawyer-Directories/Arbitrators

358. The Law Council can see a greater role for industry ombudsmen, particularly in areas where consumer and commercial disputes often arise, where the amounts in dispute are small and where there is a willingness on the part of the claimant and industry-member to compromise their entitlements in pursuit of a fair outcome. This might also include industries in which service providers are required to be licenced or accredited, where an accreditation or licencing industry body exists.

(10) Improving accessibility of tribunals

Summary

- Tribunals are regarded as an effective and cheap mechanism for resolving smaller claims and disputes.
- Those who approach tribunals should retain the right to be legally represented, if they so choose. Restricting the right to legal representation can place one party in the proceedings at a distinct disadvantage, where the other party is a repeat-player.
- It will not be appropriate to adopt a one-size-fits-all approach to tribunals – there are strengths and weaknesses in both generalist and specialist tribunals.

359. As noted by the Issues Paper, tribunals provide an informal mechanism for resolving disputes. Formal rules of evidence usually applied in court are dispensed with to a significant extent. Tribunals offer an important, less expensive forum for a range of civil and administrative matters to be assessed on their merits and determined according to law.

Right to legal representation

360. While efforts have been made to reduce the complexity of tribunal procedures, tribunals nevertheless deal with matters of significant complexity and importance. In an attempt to further reduce the costs and length of hearings, some legislation has sought to take away the right of a person appearing in a tribunal to make their own decision about whether they want to be legally represented. In these instances, a person who wishes to be represented by a lawyer is required to ask for permission from the tribunal member hearing the matter.

361. It is not the case that restricting legal representation automatically saves time and money. To the contrary, the absence of legal representation can result in more protracted hearings with more assistance needed to guide an unrepresented person through unfamiliar procedures and to avoid irrelevant issues. Further, there is a real risk of unfairness, particularly where the other party, which may be a government agency or sophisticated industry group, has experienced officers appearing on their behalf, who are familiar with the relevant practice and procedure. Preserving for parties the choice to be legally represented in tribunal proceedings would ensure more matters are dealt with expeditiously and without risk to fairness.

Improving the efficiency of tribunal proceedings

362. There are a significant number of general and specialist tribunals in various jurisdictions, of varying sizes and dealing with different subject matter. The Law Council considers it would be very challenging, probably unrealistic, to propose a one-size-fits-all model, or a set of recommendations that would be relevant to improving the efficient functioning of all tribunals

363. The Law Council notes that it is unclear what impact the move to consolidated tribunals has had on access to justice. One example of a generalist, 'super-tribunal' is the Victorian Civil and Administrative Tribunal (VCAT), which reviewed its operations in 2010. The LIV has advised that, while VCAT is a useful forum for

dispute resolution, there have been a number of ongoing concerns with respect to the operation of VCAT, largely related to the capacity of VCAT to manage large volumes of unrepresented parties. In particular, the LIV has advised that VCAT would benefit from the introduction of an unrepresented litigant management plan; by ensuring that all parties (including unrepresented parties) understand the issues in the proceedings and the practices and procedures of VCAT, and give due assistance to parties who need it (including referrals to legal assistance where necessary), and to enhance the powers and duties of the principal registrar to assist users of VCAT, including giving reasonable assistance to persons to formulate their application and relevant forms.

364. It is noted that in October 2012 the NSW Government announced its response to the NSW Parliamentary Standing Committee on Law and Justice Inquiry on opportunities to consolidate tribunals in NSW. The central proposal is for the establishment of a NSW Civil and Administrative Tribunal (NCAT) into which 23 existing tribunals will be integrated, including the Administrative Decisions Tribunal, Consumer, Trader and Tenancy Tribunal and the Guardianship Tribunal. A small number of bodies will not be consolidated at this stage, including the Industrial Relations Commission and Workers Compensation Commission. NCAT is expected to commence operations on 1 January 2014.

365. The amalgamation of tribunals in NSW is generally regarded as a positive measure, however it remains to be seen if it will result in significant savings, and whether justice will be dispensed more swiftly or efficiently.

Appropriate balance between generalist and specialist tribunals

366. The Law Council considers there is ongoing value in maintaining specialist tribunals in certain jurisdictions, for example, native title, industrial relations, immigration and social security appeals, where there is a high volume of work and a need for tribunal members to have specialist expertise. In these circumstances, specialist tribunals are likely to be more efficient and less likely to make errors.

(11) Improving the accessibility of the courts

Summary

- Excessively high filing fees impose a significant burden on litigants and create an unreasonable and inequitable barrier to accessing the justice system. Reduction of filing fees would particularly assist those litigants on low incomes and reduce inequity in matters involving small players attempting to enforce their rights against larger corporations and governments.
- Courts have broad powers to deal with frivolous claims and vexatious litigants, but may be reluctant to use those powers in view of concerns about unduly impacting on individual rights.
- Court processes such as witnesses, experts and discovery form an important part of the civil litigation process and the Law Council notes there have been a number of changes to improve the efficiency and reduce the cost of discovery processes in recent years. The Law Council is wary of some reforms in court procedures such as pre-action protocols, as it is advised that there is little evidence suggesting pre-action requirements result in faster or earlier settlement of disputes.
- The Law Council supports the greater use of technology in proceedings to improve access to justice and efficiency of court processes.
- The Law Council notes that policy considerations underlying costs awards are complex. In some cases, it can be unfair to certain parties to require them to meet their own costs and consideration should be given to allowing courts and tribunals greater discretion in awarding costs according to equitable considerations.

Court fees

367. The Law Council considers that filing fees, particularly in the federal courts and tribunals, and also in some states and territories, have been set well above the capacity of most litigants to pay. As noted above, at paragraphs 157-160, the Law Council considers changes to filing fees have added significantly to the cost of litigation and have impacted on the capacity of many people to access the justice system in a meaningful way.

368. In July 2010 and January 2013, the Federal Government introduced substantial increases in filing fees in the federal courts and tribunals. Details of the changes are outlined in the Law Council's submission to the 2013 Senate Legal and Constitutional Affairs References Committee in relation to the *Review of the Impact of Filing Fee Changes since 2010 on Access to Justice*.[143]

369. In its submission to the Filing Fees Review, the Law Council stated that the recent changes to filing fees:

[143] See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2758%20-%20Inquiry%20into%20the%20impact%20of%20filing%20fee%20increases%20since%202010%20on%20access%20to%20justice.pdf

(a) impact significantly on low-to-middle income Australians and small-to-medium sized businesses, that do not qualify for legal aid or any fee exemption or waiver;

(b) are unreasonably large and not justified by any rational policy objective, or supported by evidence that changes to fees will advance the government's putative policy objectives;

(c) impose an unreasonable barrier to accessing justice, by making access to the federal courts contingent upon the capacity of litigants of various means to meet the substantial additional cost of litigating;

(d) impact upon litigants inequitably and establish a regime which disproportionately impacts on those of more limited financial means, notwithstanding the apparent attempt by the government to establish a larger burden for publicly listed companies;

(e) are being used to generate revenue for the federal government by way of an effective tax on court users; and

(f) are unfortunately justified on the basis that funds raised are being used to pay for essential government services, including legal assistance services and the federal courts, following years of chronic underfunding.

370. In addition to this, evidence emerged – and continues to emerge – that the fee increases have resulted in a significant burden for the courts, in both administering fee waivers and deferrals for disadvantaged litigants (the number of applications for which has naturally increased) and in chasing and prosecuting debtors of the court over unpaid court fees.

371. The Law Council notes that these changes to the federal courts' filing fees over 2010-13 led, in some cases, to an increase of over 300 per cent in the applicable fee for filing of certain documents.[144] The Law Council's submission to the Filing Fees Review contains significant research and discussion about the impact of these fees and the Law Council recommends that the Productivity Commission refer to it.

372. A significant problem with the manner in which filing fees are set is that increases in one jurisdiction will, sooner or later, result in similar increases in other jurisdictions, as governments move to prevent forum shopping. Accordingly, the actions of the Federal Government, in using the federal courts as revenue-raisers for other government programs, has access to justice implications for those who need to approach state and territory courts.

373. Data provided by the federal courts during a 2011 review of the filing fee changes demonstrates that the Commonwealth's policy behind the fee changes (that is, to encourage litigants to utilise other forms of dispute resolution) is ill-founded and simply has not worked. Instead, those who approach the Court are simply hit with a larger cost burden and are subject to further disadvantage when pitted against a party with more resources.

374. It is difficult to understand how this can be justified by the principle stated in the Attorney-General's Department's *Strategic Framework*, that:

[144] Ibid. Refer to the table at Attachment B.

"For a well-functioning justice system, access to the system must not be dependent on capacity to pay"[145]

Use of waivers

375. The Law Council is advised that the fee waiver and exemption system, which enables the courts to defer, waive or exempt certain categories of people from the requirement to pay fees, gives rise to a significant administrative burden for the courts. The burden arises not only in assessing and determining applications, but also chasing debts owed to the courts by those whose fee payment has been deferred.

376. It is further noted that, while the opportunity for persons to apply for fee waivers is available in most jurisdictions, the criteria for eligibility remains narrow and quite arbitrary. For example, the Law Council is advised that in the ACT Supreme Court, in one example, a disability pensioner was refused an exemption from having to pay a filing fee of approximately $750. The reasons given for refusal were that the pensioner had $200 in her account and she was spending $70 per week less than her pension. Effectively, this person was punished for being financially responsible and attempting to save for various contingencies.[146]

377. The Law Council submits that guidelines regarding the applicability and use of fee exemptions and waivers should be made clearer and uniform, to facilitate swifter application of objective criteria. Automatic exemptions might be applied to holders of a Centrelink healthcare card or other government pension card, as well as those in receipt of legal aid or other legal assistance.

378. The Law Council considers there are other categories of people, such as those on low incomes, who should also be able to apply, with the court to consider those applications on a case-by-case basis, having regard to the applicant's last tax return or recent pay receipts. The exemption category might be extended to those on incomes below a certain level, such as $35,000 per annum or the national minimum wage (currently $622.20 per week, or $32,354.40 per annum). In addition, there should be no fees in infants' matters, noting that infants require litigation for approval of the infants settlement. All decisions refusing a waiver should be signed off by two people.

Transcript fees

379. Fee waivers and exemptions do not extend to transcript fees, which can often be prohibitively expensive to acquire, but are generally regarded as necessary. The Law Council submits that consideration should be given to waiving transcript fees along with court fees for disadvantaged litigants, those on low incomes and those who are legally aided.

Conduct of the parties

Model Litigant Rules

380. The Law Council notes the submission of the NSW Bar Association in relation to the model litigant rules. The Law Council considers there are already significant

[145] AGD, ibid, *op cit* 1, page 50.
[146] See http://www.canberratimes.com.au/act-news/new-fees-a-barrier-to-justice-20120610-204mq.html

sanctions available to address breaches of the model litigant rules and suggests there is not a consensus within the profession as to whether the available sanctions should be extended.

Vexatious litigants

381. The Law Council notes that in all Australian jurisdictions, judicial officers are provided with broad powers under legislation to deal with vexatious litigants. There is no evidence that vexatious litigants are dissuaded by higher court fees and are generally unrepresented in proceedings.

382. The Law Council notes that vexatious litigants have the right to seek leave to appeal a court's decision to declare them vexatious. They can also apply to have their order varied or revoked and can seek leave of the court to bring new legal proceedings.[147]

383. The Law Council is unable to comment on the frequency with which the power to declare a person a vexatious litigant is used, or how often the power to revoke such an order is used. However, the Law Council is advised that courts are generally reluctant to declare a party 'vexatious' and it may take several findings by the Court that a party's claim is frivolous or vexatious before such an order might be made. This is understood to be a particular problem in family law matters.

Court processes

Discovery

384. Discovery is an important aspect of the civil litigation process and is a primary means by which parties to proceedings gather evidence and a better understanding of their opponents' – and their own – case.

385. As noted in the Issues Paper, discovery can be a very costly element of the proceedings, particularly in large cases involving large quantities of documents. Discovery has been the subject of recent inquiries, including by the Australian Law Reform Commission in 2010.[148]

386. The Law Council notes there have been a number of changes to improve the efficiency and reduce the cost of discovery processes in recent years. These have focussed on requiring the parties to proceedings to consider and meet the costs of discovery at the time discovery is sought (rather than at the conclusion of the matter), fixing maximum costs that can be recovered and raising the burden on parties to demonstrate the importance of discovery of certain documents. For example:

    (a) The Law Society of NSW notes that in March 2012 changes were made to the discovery process in the Equity Division of the Supreme Court of NSW

[147] Law Reform Committee, Parliament of Victoria, *Inquiry into Vexatious Litigants* (December 2008) http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/vexatious_litigants/final_report.pdf, at 9.4.2. See also Vexatious Litigants Act 1981 (Qld), section 4 - https://www.legislation.qld.gov.au/LEGISLTN/ACTS/1981/81AC035.pdf

[148] ALRC, *Managing Discovery: Discovery of Documents in the Federal Courts*, March 2011, Commonwealth of Australia. See http://www.alrc.gov.au/sites/default/files/pdfs/publications/Whole%20ALRC%20115%20%2012%20APRIL-3.pdf. The Law Council's submission to that inquiry is available here: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2300-2399/2358%20Discovery%20of%20Documents%20in%20Federal%20Courts.pdf

which includes the Commercial List, the Technology and Construction List, the Corporations List and the Revenue List (amongst others). Practice Note SC Eq 11[149] provides that the court will not make an order for disclosure of a document until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure. In addition, an order for disclosure will not be made unless it is necessary for the resolution of the real issues in dispute in the proceedings. The application for disclosure must set out:

(i) the reason why disclosure is necessary;

(ii) the classes of documents in respect of which disclosure is sought; and

(iii) the likely costs of such disclosure.

(b) In the Federal sphere, a number of important reforms were contained in the *Access to Justice (Federal Jurisdiction) Amendment Act 2012 (Cth).* Among other things, this legislation has provided the Federal Court with greater discretion in relation to the making of orders relating to discovery (that is, that some or all of the estimated cost of discovery be paid in advance, that security for costs be given by the party seeking discovery, and fixing the maximum cost that may be recovered for giving discovery/inspection). The Law Council is advised these provisions are operating well.

Witnesses and experts

387. The NSW Bar Association advises that:

> "By developing practice notes governing the use of expert evidence, the Courts can encourage prospective parties to discuss the extent to which they intend to rely on expert evidence before commencing proceedings, ensure parties promptly obtain expert evidence directions from the Court, minimise the costs of obtaining expert evidence, and reduce the hearing time of a case. So much is, for example, the express aim of the Supreme Court of New South Wales' Practice Note SC Eq 5 – *Expert Evidence in the Equity Division* - which commenced on 10 August 2012.[150] The Case Management Practice Note for the same Division – SC Eq 1 – also speaks of the use of expert evidence where it will be 'necessary' for the determination of the 'real issues in dispute' between the parties.[151]
>
> "In England and Wales, Civil Procedure Rule 35.1 now imposes a 'duty' on the court to 'restrict expert evidence' to that 'which is reasonably required to resolve the proceedings'.
>
> "Other means by which the incurring of unnecessary litigation costs associated with use of expert evidence includes court practice restricting the number of experts for each party,[152] directing the use of a single joint expert, and concurrent expert evidence (known colloquially as 'hot-tubbing'). Indeed, the success of

[149] Available online from: http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/574.
[150] SC Eq 5, paragraph 5.
[151] See eg SC Eq 1 *Case Management in the Equity Division*, paragraph 8.
[152] SC Eq 5 – Expert Evidence in the Equity Division.

concurrent expert evidence in Australia has led to its recent adoption in England and Wales.[153]

"English reforms have gone further than Australian reforms so far, in that since 1 April 2013, parties are now required to provide an estimate of the costs of expert evidence when making any application for use of expert evidence."

Reforms in court procedures

Case management

388. The Law Council notes there are various approaches to case management adopted by courts. Case management is also largely dependent on individual judicial officers, many of whom adopt significantly different approaches and techniques in case management.

389. Significant work has been carried out by the Federal Court, along with members of the Law Council's Federal Litigation Section, in developing the *Federal Court of Australia Case Management Handbook*, [154] which notes in its introductory paragraphs:

"1.2 …35 years experience of case management notwithstanding, views as to the best way for litigation to be managed in the Court were far from settled. Even on what might be thought every day issues, there were significant differences of approach in evidence.

"1.3 It also appeared that some judges were employing techniques which were seen, in some situations at least, to offer particular advantages, but which other judges and practitioners had not come across or considered employing. In the 2002 report on the Court's Individual Docket System it had been observed that "a large number of those interviewed had little knowledge of what different members of the court were doing or how different chambers were managing their cases". No doubt the position is much improved since then but the issue does not seem to have gone away.

"1.4 Further, it became apparent that the full breadth of the powers conferred on the Court was not always appreciated by practitioners and judges alike. On examination of the *FCA*, the *FCRs*, and the *Evidence Act*, the powers available to judges to manage individual cases are very wide indeed. In an absolute sense, there is little that a judge cannot do by way of case management. The major limitations on the Court's case management powers might be seen as residing more in constitutional than procedural law[2] – in particular the limitations imposed by the right to be heard, and to have controversies resolved by a tribunal which is and appears to be impartial.

"1.5 This work is a response to those insights. In addition it seeks to address, albeit indirectly, one of the inevitable difficulties of case management under an Individual Docket System in a federal court – the natural tendency for practices and approaches to differ from venue to venue and judge to judge."

[153] See *Practice Direction 35 – Experts and Assessors*, "Concurrent Expert Evidence" paragraphs 11.1-11.4.
[154] See http://www.fedcourt.gov.au/law-and-practice/case-management-handbook.

390. The Law Council considers this to be a very valuable resource for practitioners and judicial officers in the federal jurisdiction and suggests that consideration could be given to developing similar resources for practitioners and judicial officers in other jurisdictions.

391. The Law Council also refers to discussion above, in relation to "timeliness and delay", which outlines the powers of courts to expedite proceedings and to tailor case management procedures to the specific needs of a case.

Pre-action protocols

392. The Law Council recommends caution in relation to pre-action protocols. The Law Council is advised that there is little evidence suggesting that pre-action requirements have resulted faster or earlier settlement of disputes.

393. The Law Council notes that the Commonwealth Attorney-General's Department conducted a survey of legal practitioners in early 2013 to assist in assessing the effectiveness of pre-action requirements introduced under the *Civil Dispute Resolution Act 2010* (Cth). To the Law Council's knowledge, the outcomes of the AGD's review of the Act have not yet been made public. It is suggested that the AGD make the findings of the survey and associated review of the Act available to the Commission and stakeholders in this inquiry.

394. The Law Council's concerns with respect to pre-action protocols are that:

(a) pre-litigation obligations may tend to increase and 'front load' the costs of litigation, particularly in matters where expert evidence is necessarily part of the risk assessment for the consideration of settlement by the parties;

(b) the costs of litigation may be increased as pre-action obligations, such as 'genuine steps' requirements, may encourage collateral challenges concerning whether all genuine steps have been taken to resolve the dispute;

(c) there are a number of risks associated with mandatory pre-action ADR. For example:

(i) The pre-action battle ground becomes whether a party has or has not complied with the pre-action protocol;

(ii) It can entrench parties into positions that do not promote early resolution of the dispute;

(iii) Pre-action mediation can often be premature due to lack of case preparedness, which may sour the prospects of a mediation at a later stage; and

(iv) Unrepresented litigants would be prejudiced by this additional procedural layer;

(d) The imposition of cost consequences for a party declining to participate in mediation, or to act without bona fides within that process is unlikely to lead to the successful, early resolution of disputes. History and experience demonstrates that parties, properly advised, will often successfully mediate when they have sufficient information about each other's position, not before. This can be after the close of pleadings, after discovery, after the service of

evidence or prior to the matter being set down for trial. Forced mediation, with adverse costs consequences for failed participation, is unlikely to lead to an early or successful resolution of the dispute; and

(e) Despite best efforts to resolve disputes early and as informally as possible, there will inevitably be matters which will require determination by the courts.

395. The Law Council notes there is a significant amount of information available on improving pre-action procedures, which may be of benefit to this Inquiry.[155]

Use of technology

396. The Law Council supports the greater use of technology in proceedings, as a means of improving the accessibility of the court and efficiency of court processes.

397. The Law Council is advised that increased reliance on technology to administer and deliver court services may have a disproportionately adverse impact on applicants who do not have ready access to online service, such as applicants in RRR areas (including, for example, Indigenous communities) or in other disadvantaged circumstances. Accordingly, equitable access should be ensured by continuing to provide ordinary access through court registries.

398. The Standing Council on Law and Justice (SCLJ) has published a stocktake paper which reports on the range of technological initiatives currently used in the civil justice systems that improve access to justice.[156] The SCLJ has also published an analysis paper which highlights technology initiatives aimed at improving access to justice that have been identified as best practice through consultation across the Australian civil justice sector.[157]

399. Notwithstanding the general enthusiasm attending discussions around use of technology as a means of improving access to justice, the Law Council is advised that many court systems remain antiquated. For example, the Law Society of South Australia advises that:

> "…In the State Courts and Tribunals of South Australia information technology is fairly antiquated. A simple example is that e-filing is largely unavailable in courts and tribunals. When it is available it is sporadic and not uniform. In other words, whereas e-filing is available in some registries in others it is not. In one example where e-filing is not available in the registry it is available for interlocutory processes. There is no seemingly consistent approach even to that very basic subject.
>
> "The impact is that all legal firms in South Australia must employ people as rounds clerks. It appears in South Australia this is squarely a funding issue. Ironically the legal firms by and large have far better information technology systems than the courts themselves. There are examples of legal firms using

[155] See, for example, Tania Sourdin, Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts, October 2012, *Australian Centre for Justice Innovation,* Monash University.
[156] Available online from: http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/harnessing_the_power_of_technology_stocktake_paper_v2.pdf.
[157] Available online from: http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/harnessing_the_power_of_technology_analysis_paper.pdf.

their own information technology systems in the courts to assist in expediting trials. It is obvious but necessary to point out that court processes would be substantially improved with the greater use of information technology.

"An obvious example of that is the typical South Australian court room. Whereas one would expect information technology would be utilised effectively to assist in streamlining litigation, our court rooms largely do not extend to provide those facilities"[158]

Cost awards

400. The Law Council notes that costs awards and the policy considerations underlying them are complex.

401. In certain matters, such as family law, costs are generally borne by the parties themselves, whereas in other matters, including some negligence claims and commercial matters, costs usually follow the event.

402. Courts have broad powers with respect to costs, including the power to award costs against a party, the power to award adverse costs in the event that a party has engaged in adverse conduct or has been found to have abused the Court's processes. Costs are also potentially a means of enabling a well-funded litigant to intimidate a less-well-funded litigant and it is clear that courts are mindful of concerns about the unfairness to parties with fewer resources.

403. The Law Council notes that the approach to costs by different governments has also been driven by extraneous concerns, including to limit the liability of public or private insurers and to create a disincentive for people to litigate. For example, in June 2012 the NSW government introduced sweeping changes to the workers compensation scheme with the *Workers Compensation Legislation Amendment Act 2012*. Prior to these amendments insurers met injured worker's costs at rates regulated by WorkCover. Section 341 of the *Workplace Injury Management and Workers Compensation Act 1998* now provides that each party is to bear the party's own costs in relation to a claim for compensation.

404. The Law Council considers these kinds of costs provisions to be punitive and unfair to parties who are required to seek review of decisions by corporate or government authorities. It is inappropriate that a taxpayer, worker, or any other party should be left:

    (a) out of pocket for costs incurred when the review decision overturns an incorrect decision of the public authority; and

    (b) in a more costly position than had the review been undertaken in the Supreme Court.

405. The *Fair Work Act 2009* (Cth) (FW Act) places very considerable limitations upon the power of the Fair Work Commission ("FWC") and courts exercising judicial power under the FW Act to order that a party to proceedings under the FW Act pay all or any part of the legal costs incurred by another party to the proceedings. The

[158] Written comments from the Law Society of South Australia to the Law Council in response to the Productivity Commission's Issues Paper.

substantive provisions, namely sections 400A, 570 and 611 of the FW Act, in effect provide that costs are only available in circumstances of serious fault by one party.

406. The normal legal principle that applies in most civil courts in Australia, that costs follow the event, has long been absent from Federal industrial legislation. That state of affairs reflects a very long standing legislative policy that, in matters arising under Federal industrial legislation, any party wishing to utilise the services of a lawyer would bear the responsibility of meeting that lawyer's fees except in limited circumstances. In practice, costs orders have rarely been made in matters under Federal industrial legislation.

407. The Law Council is concerned generally that the complexity and range of Federal industrial legislation is such that the current policy approach has the potential to work injustice, at least in respect of some types of matters where significant legal costs may be required to either bring or defend an action. The policy can also impose an unfair burden on respondents particularly in complex court matters where extensive costs might be required to successfully defend proceedings, including proceedings where the applicant's prospects of success were small but nevertheless arguable.

(12) Effective and responsive legal services

Summary

- The Law Council opposes relaxation of restrictions on non-lawyers undertaking legal work. Significant risks and problems arise from proposals to allow people who are not legally trained and regulated to undertake legal work, in any area of practice. Traditionally, legal practices have sought to reduce costs by employing paralegals to carry out less complex tasks, under the direct supervision of a legal practitioner and under the protection of the practitioner's professional indemnity insurance policy. The Law Council considers that consumer protection and professional standards will be compromised if non-lawyers are permitted to undertake legal work.

- Law practices in recent years have begun to adopt business structures, other than the traditional partnership structure, including incorporated legal practices and multi-disciplinary structures. The Law Council supports further deregulation in this area, subject to the primary consideration that professional and ethical standards are maintained.

- Regulation of the legal profession in Australia is broadly consistent across jurisdictions after regulatory reforms introduced between 2004, up until the present. The Uniform Legal Profession Law will be introduced in NSW and Victoria shortly, covering around 70 per cent of the legal profession. It is unclear what impact, if any, inconsistent regulation has had on access to justice.

- Competition within the legal services market and among those seeking employment in the legal profession is very strong. Moreover, law practices adopt a range of billing practices, including time-based billing, fixed fees, capped fees and conditional costs agreements.

- The legal assistance sector is chronically underfunded. Legal aid fees fall short of the real cost of providing necessary legal services. There has been a significant withdrawal of experienced lawyers from publicly funded legal work and a rise in the number of unrepresented litigants. Greater investment in the legal assistance sector is urgently required to restore the sustainability of Australia's legal aid system.

- Investment in legal aid and the legal assistance sector will achieve downstream savings for the justice system and the broader economy. PWC estimates that every $1 invested in legal aid yields $1.60-$2.25 in downstream savings *for the court system alone.* This does not take into account savings for police and the corrections system through reduced imprisonment and re-offending and savings for the social security system and health system through reduced unemployment and health problems, which have been linked to unresolved legal problems.

- The Law Council considers that the National Partnership Agreement on Legal Assistance Services must be re-negotiated on a co-operative federalism basis. The current adversarial model pits the Commonwealth against the States and Territories by determining that Commonwealth funding will only be directed toward matters which arise under Commonwealth laws. This model has seen the Commonwealth's share of LAC funding fall from 55 per cent of total funding to around 33 per cent today. The Commonwealth, State and Territory Governments

must commit to national objectives for the provision of legal assistance and agree to appropriate funding, in equal shares.

- The legal profession's pro bono contribution is substantial. However, the efforts made by the profession to provide free legal services, or services at reduced rates, can never replace the responsibility of government to ensure access to legal assistance for those who cannot afford it. Further, mandating pro bono targets under legislation or to qualify for government legal work will disadvantage smaller firms and ultimately undermine the charitable culture within the legal profession.

Non-lawyers doing legal work

408. In general, performing legal work for a fee by those who are not admitted to practice, with a current legal practising certificate, is not permitted.

409. There are several sensible reasons for this, including that:

    (a) Australian lawyers are subject to the most extensive regulatory framework of any professional service provider in Australia. Non-lawyers are not subject to the same standards and expectations of ethical or professional conduct and are not subject to the same complaints handling and investigatory processes, and supervision by the court or legal services regulators;

    (b) Australian lawyers are subject to extensive education and professional training requirements both before and after they become eligible for admission as a legal practitioner. This requires specific knowledge about a broad range of legal areas (covered by the Priestly 11, as outlined above), expert knowledge about their areas of practice or specialisation and continuing education with respect to legal practice skills;

    (c) Legal practitioners are required to hold a high level of professional indemnity insurance, to ensure clients can be indemnified in the event of malpractice or negligence on the part of the practitioner. This is not a standard requirement for non-lawyers. All jurisdictions have a fidelity fund , the purpose of which is to provide compensation to clients who have lost trust money or property due to dishonest conduct by a practitioner or law firm; and

    (d) Legal practitioners owe specific duties to their clients and to related parties, including fiduciary duties and a requirement to observe confidentiality and client legal privilege. In broad terms, there is a duty for all lawyers to act in their client's best interests, which is a professional obligation second only to the lawyer's paramount duty to the Court and to the administration of justice. These obligations are unique to the legal profession and do not affect most non-lawyers. Breach of these obligations by lawyers can have serious professional consequences.

410. Currently, there are a limited number of areas in which non-lawyers are permitted to undertake work for profit, traditionally performed by lawyers, including:

    (a) conveyancing, in some jurisdictions;

    (b) migration agents – subject to the requirement under section 276 and 277 of the *Migration Act 1958* that non-lawyers are permitted to provide "immigration assistance", but not "immigration legal assistance"; and

(c) tax agents – although non-lawyer tax agents are generally restricted to assisting in the preparation of tax returns and advice on tax related matters, and are not permitted to offer, or purport to offer, legal advice or assistance.

Use of paralegals, law graduates and trainees

411. The Law Council notes that paralegals, law graduates and trainee solicitors are employed extensively by law practices to perform legal work under supervision by experienced practitioners.

412. For example, law practices commonly engage paralegals, under supervision, to prepare court documents, manage filing systems, prepare correspondence, appear at minor hearings (with the leave of the court) – such as return of subpoenas and hearings before the court Registrar, interview prospective clients, carry out discovery and inspect documents for privilege, arrange appointments for clients, collate and issue briefs for counsel, assist during hearings and a broad range of other tasks. Clerks employed by barristers' chambers provide similar assistance to barristers.

413. It is important to distinguish between employment of paralegals by law practices and the sanctioning of legal work by non-lawyers. Paralegals are subject to supervision by an experienced lawyer, who will usually hold an unrestricted practising certificate and must be a principal of the firm. Their work will be covered by their supervising solicitor/barrister's professional indemnity insurance policy. Paralegals are also legally trained and are usually studying for admission to practice themselves.

414. It is also noted that law students and trainees contribute significantly to the work of community legal service providers, as volunteers and under the supervision of a trained lawyer.

Should there be any further relaxation on non-lawyers doing legal work?

415. The Law Council opposes any relaxation of restrictions on non-lawyers doing legal work. One of the key objectives of national legal profession reform was enhancing the protection of clients of law practices and the protection of the public generally. Non-lawyers are generally unaccountable for their actions leaving members of the public with few options for recourse if things go wrong.

416. A number of issues would need to be addressed in any proposal to permit unqualified persons to offer legal services:

(a) what (if any) professional training requirements should be imposed on non-lawyers in specific areas;

(b) whether there will be any regulatory structure established to ensure consumer protection is maintained;

(c) what (if any) requirements there should be in relation to professional indemnity insurance;

(d) whether legal practitioners who continue to provide legal assistance in those prescribed areas of practice will be subject to dual regulation (to which the Law Council and its constituent bodies would be strongly opposed – as outlined below); and

(e) what impact there may be in terms of access to justice, including any potential diminution of competent legal representation in those areas, reduced efficiency of court or related proceedings and relaxation of consumer protection standards.

Business structures

417. Traditionally, the business structures used by law practices were partnerships and sole trading. However, in recent years a significant number of law practices have favoured other business structures, including incorporated legal practices (ILPs), multi-disciplinary practices (MDPs) and limited-liability partnerships.

Alternative business structures

418. There are two kinds of alternative business structures available to law practices in Australia – ILPs and MDPs. They are available in seven out the eight Australian States and Territories.

419. The underlying regulatory legislation for these alternative business structures is substantively uniform across the seven States and Territories that allow them.

420. As of 2012 there were around 2800 ILPs in Australia, two of which were listed on the ASX,[159] however that number will have increased significantly. There are only a small number of multidisciplinary partnerships, which have specific restrictions and requirements with respect to separation and supervision.

421. It has been suggested that a primary reason for Australian lawyers taking advantage of these structures is the growing reality and perception that the traditional structure of law firms no longer meets the needs of many practitioners and clients.[160]

422. The Law Council considers that there should not be any restrictions on the manner in which lawyers choose to practise unless the restriction is in the public interest. The paramount concern is the maintenance of ethical obligations and professional responsibilities, and consumer protection.

423. The legislation in Australia regulating ILP's achieves this in a number of ways:

(a) First, every legal practitioner director, officer or employee of an incorporated legal practice retains their professional privileges as a legal practitioner and must comply with their legal and professional obligations, including their ethical obligations under the legal profession rules. In other words, there is no corporate veil that shields legal practitioners in an incorporated legal practice from their individual duties and responsibilities as lawyers.

(b) Secondly, an incorporated legal practice must have at least one director who is a legal practitioner. Legal practitioner directors are personally responsible for ensuring appropriate management systems are maintained so that legal services are provided by the corporation in accordance with the professional obligations of legal practitioners and any other obligations imposed by legislation of professional rules. They must take all reasonable action

[159] As of 2012, there were 1200 ILPs in NSW, 454 in Queensland, 768 in Victoria and 384 in Western Australia (as outlined in the annual reports of the regulatory bodies.

[160] Steve Mark, Tahlia Gordon, Marlene Le Brun, and Gary Tamsitt, *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response* (2010).

necessary to ensure breaches of professional obligations do not occur, and to take appropriate remedial action where breaches do occur. In other words, legal practitioner directors are required to be the internal legal profession regulators of the corporation.

(c) Thirdly, the legislation ensures that in any situation where there is a conflict between the interests of the corporation and legal professional duties, legal professional duties are paramount.

Incorporated legal practices

424. Incorporated legal practices have proven to be an increasingly popular business structure for law practices. Independent legal profession regulators report that the introduction of incorporated legal practices have not led to any additional problems in legal practice, nor have they led to an increase in complaints – in fact the level of complaints about legal services provided through incorporated legal practices have steadily decreased. By way of example, in 2011-12 less than 2.5 per cent of all formal complaints about legal services in New South Wales related to incorporated legal practices and multidisciplinary partnerships.

425. The Law Council is advised that incorporated legal practices are predominantly sole practitioner practices or mid-size firms of two to five partners. The Legal Services Commissioner in New South Wales has reported that of the 900 or so incorporated legal practices in that jurisdiction as at August 2009, 65 per cent operate as sole practitioner practices and further (approximately) 30 per cent of ILPs are mid-size practices of 2-5 partners. This is not surprising given the breakdown of law firms by number of partners in paragraph 45.

Multi-disciplinary practices

426. As mentioned above, there a small number of MDPs in Australia which, by their nature, provide legal as well as other services. For example, a multi-disciplinary partnership may provide tax and accounting services in addition to legal services.

427. MDPs are subject to similar regulatory controls as apply to incorporated legal practices. For example, each legal practitioner partner of a multidisciplinary partnership is responsible for the management of the legal services provided by the MDP and must ensure that appropriate management systems are implemented to enable legal services to be provided by the MDP in accordance with the professional obligations of Australian legal practitioners.

428. The Law Council's policy[161] with respect to MDPs is that it is imperative that legal practice legislation ensures that no commercial or other dealing relating to the sharing of profits within an MDP diminishes in any respect the professional obligations of a lawyer practising (within an MDP), including:

(a) professional conduct rules;

(b) duties to the court;

[161] See Law Council of Australia Policy Statement on Lawyers' Business Structures, October 2001. See http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/national-profession-project/policies-and-guidelines?layout=article&id=157 and note also a range of other materials on MDPs and alternative business structures.

(c) obligations in connection with conflict of interest;

(d) duties of disclosure to clients; and

(e) ethical rules.

429. To reinforce the primacy of a lawyer's ethical obligations and professional responsibilities and in recognition of the role that lawyers' fulfil in relation to the administration of justice, the Law Council policy is that provisions enabling the creation of MDPs give effect to the following principles:

(a) a lawyer practising within an MDP, whether as a partner, director, employee or in any other capacity, shall ensure that any legal services provided by the lawyer are delivered in accordance with his or her professional obligations;

(b) an MDP shall not, by way of partnership deed, employment contract or in any other manner, require a lawyer practising within the MDP to act in breach of the lawyer's professional obligations under legal practice legislation or the professional conduct rules; and

(c) legal profession legislation shall prevail over legislation regulating business structures to the extent of any inconsistency.

Limited liability partnerships

430. The Law Council notes that law practices are not permitted to operate as limited-liability partnerships (LLPs) under Australian law. LLPs are permitted in a number of other jurisdictions, for example the United States, United Kingdom, China, Germany, Canada, Greece, India, Japan and Singapore. They were introduced as a business structure with limited liability for professions such as the legal profession, and are a preferred business structure for international law firms.

431. LLPs offer the benefits of incorporation and limited liability (as is the case with incorporated legal practices) under a partnership structure which governs the relationship between the members of the LLP.

432. The Law Council considers there would be benefits in enabling Australian law firms and practices to form a LLP and is currently examining the topic in detail.

Inconsistent regulation

433. As outlined above in the 'Background' section, regulation of the legal profession is state-based. While there are inconsistencies, the regulatory frameworks in each jurisdiction impose similar standards on lawyers across the board. The Law Council is advised that there are compliance costs for firms which operate in multiple jurisdictions. However, this is unlikely to have a significant impact on access to justice.

434. As outlined earlier in this submission, lawyers are required to clearly outline their fee and costs structures before agreeing to act for a client. There is ample opportunity for prospective clients to compare fee structures with other firms. After a matter has concluded, the law practice may be required to have their bill of costs independently assessed and it must be approved by the Court.

435. The legal profession is the most comprehensively regulated profession or industry in Australia. There are almost fifty different regulatory bodies for a profession numbering approximately 60,000, including legal services regulators, law societies and bar associations, fair trading officers, consumer watch-dogs and others. Lawyers who are found to have overcharged may be subject to professional consequences, including suspension of the right to practice and being struck of the roll of legal practitioners.

Legal education and skills

436. Legal education and training requirements are outlined above under 'Background'.

437. The Law Council considers that the existing legal professional admission and post-admission training requirements are appropriate. In particular, legal qualifications of Australian lawyers are internationally recognised and respected, and have provided a strong foundation for the internationalisation of the Australian legal sector over the last 20 years.[162] Notwithstanding this, there are further improvements which could be made.

438. The Law Council notes that there are reports of a significant oversupply of law graduates emerging from Australian law schools each year, such that many graduates are unlikely to gain employment in Australian law practices or in corporate legal roles.[163] Some commentators have suggested that demand for graduates has also diminished, particularly among large firms, due to the changing business profile of 'top-tier' and some 'mid-tier' firms.[164]

439. It is unclear what, if any, impact this oversupply of graduates has had on legal costs.

Billing practices

Time-based billing

440. The Law Council acknowledges that a persistent concern raised in reference to legal costs has been lawyers' billing practices and, in particular, the traditional practice of 'time-based' billing.

441. Typically, time-based billing by law practices involves charging clients according to certain increments (usually 6 minute increments), based on a certain hourly rate. The hourly rate will depend on who is performing the work.

442. The Law Council notes that dissatisfaction over time-based billing is not only expressed by clients, but also by many legal practitioners. It is sometimes observed that the value of professional work done is not simply a factor of time but rather of intensity of effort and inspiration. Time based billing pays no regard to the relative responsibility undertaken in a range of types of matter and stands in tension with a proportional approach to the value of the civil proceeding and the legal costs of investigating and prosecuting or defending it.

443. Complaints about time-based billing have included:

[162] See, for example, Duncan Bently and Joan Squelch, *Internationalising the Australian Law Curriculum for Enhanced Global Legal Practice*, 2012, Curtin University report for the Australian Government Office of Teaching and Learning.
[163] See for example 'Next generation dreams of a life in practice', *The Australian*, 18 October 2013.
[164] See, 'Many who graduate will never work as lawyers, the *Australian Financial Review*, 14 October 2013.

(a) lack of transparency regarding the necessity of time spent on a matter and the perceived incentive for law practices to perform unnecessary work in order to inflate fees;

(b) inefficiency, where it is suggested that the billing structure creates an incentive to take more time than is necessary on particular tasks; and

(c) increased stress and workload for lawyers, who may be subject to daily expectations in terms of billable hours performed.

444. However, the Law Council notes that time-based billing is only one form of billing structure employed by firms, and that market pressure is already leading many firms and practitioners to prefer alternative billing arrangements in order to remain competitive.[165] The profession does not have a clear consensus on the issue and there is a strong view supporting the freedom of firms to adopt their own billing practices and leave it to market forces to determine which is the most efficient.

Alternative forms of billing

445. Examples of alternative forms of billing by law practices include:

(a) event-based billing or fixed fees – whereby the law practice will agree to a set fee for conducting certain work;

(b) capped fees – whereby the practitioner agrees to act at an hourly rate, but agrees to cap fees at a certain level;

(c) conditional fees – as discussed further below; and

(d) contingency fees – which are prohibited in Australia, again discussed further below.

446. It is noted that competitive firms will adopt a range of different billing practices, appropriate to the matter in question.

447. The difficulties of devising effective and equitable models for costing professional legal work are significant but there is an urgent need to address the issue. The Law Council is following international efforts in this area and will be focussing its attention on working with the profession in the development of alternative models.

Legal assistance services

448. The Law Council has provided a summary of the various government-funded legal assistance service providers above, under 'Background'.

449. The Law Council notes the Attorney-General's Department currently has a report of the Review of Legal Assistance Services, carried out by the Allen Consulting Group (the ACG Inquiry). The Law Council speculates that the report may contain a significant amount of information about the structure and organisation of legal assistance services in Australia and the Law Council suggests that, once released, the report will hopefully be a useful source of information for this Inquiry.

[165] See for example 'Lawyers consider alternative billing', Lawyers Weekly, 27 May 2005, http://www.lawyersweekly.com.au/news/lawyers-consider-alternative-billing

450. Accordingly, the Law Council recommends that the Productivity Commission not expend significant resources covering ground which may have already been dealt with, to a significant extent, by the ACG Inquiry. For example, some questions raised in the Issues Paper refer to issues which were specific subjects for the ACG inquiry and it may be unnecessary to duplicate that work in the context of the present inquiry.

451. However, the Law Council makes the following comments with respect to any inquiry into the efficiency and effectiveness of legal assistance providers:

    (a) The Law Council has advocated for the development of national minimum standards for legal assistance services. These standards should be embodied in a new National Partnership Agreement which sets out carefully considered outcomes, the services needed to deliver those outcomes and the funding mechanisms necessary to achieve them. This approach is consistent with other national partnership agreements under the cooperative federalism model and has been described in more detail in the PWC Report on Legal Aid Funding.[166] Development of these standards would be a significant project and should involve input from significant stakeholders. The objectives set out in the current National Partnership Agreement lack this input and the content of a fully articulated legal assistance services platform.

    (b) What constitutes a good or successful legal services outcome may be highly dependent on the circumstances of the case. For example, it is not reasonable to assess the productivity of a legal aid provider based on the number of successful cases concluded or on client satisfaction, in isolation of the circumstances of each case and broader programs being operated by the legal services provider. Furthermore, there is not necessarily any relationship between cost efficiency, and the provision of quality service and/or a positive outcome.

    (c) The vast majority of services provided by legal assistance providers (in particular, LACs and ATSILS) relate to criminal law matters. It is difficult to assess the performance of legal assistance providers in relation to the provision of civil law assistance, which has been largely restricted in most jurisdictions to a very limited category of family law matters.

452. As noted throughout this submission, funding for LACs has contracted to the point where LACs in all jurisdictions have been forced to deny services to most Australians. Many people who fall below the Henderson Poverty Index are ineligible for a legal aid grant.

<u>Why provide adequate funding to the legal assistance sector?</u>

453. Governments have a responsibility to fund legal aid to ensure access to justice in accordance with international obligations[167] and commitments to ensure social inclusion. Funding for legal aid is also justified by the benefits it brings to society and

[166] PWC, *op cit* 16.

[167] See: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Rights of the Child (CRC); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Universal Declaration of Human Rights (UDHR).

individuals including upholding rule of law, providing just and effective judicial outcomes in addition to increased efficiencies in the courts and the justice system.

454. When legal assistance is not available to anyone except the most economically and socially disadvantaged in our community, the integrity of the justice system is challenged. Regardless of means, all Australians should have access to legal services. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance sector is therefore critical in achieving social inclusion.

455. Access to legal representation also helps to achieve the goals of the justice system and ensures equality before the law. In criminal proceedings, for instance, a legally aided representative will assist a defendant in deciding to plead guilty or proceed to trial, to raise an effective defence, or to access diversion programs that may reduce recidivism. Legal representation therefore assists courts in making better quality decisions and appropriate sentences, while minimising the significant social costs that arise from unrepresented defendants.

456. Providing access to experienced legal representatives also increases the efficiency of the legal system. Experienced representatives are able to deal with issues expeditiously and minimise legal errors which can lead to aborted trials, appeals or retrials. A study conducted in 2007 by the Victorian Department of Justice found that the costs associated with an aborted criminal trial are on average $7,419 and a criminal adjournment costs on average $935.[168] Further, the total average costs of a retrial (conducted over one week in the Supreme Court of Victoria) have been estimated at $47,572.[169] As noted in the PWC Report commissioned by National Legal Aid:

> "There is a direct relationship between the efficiency of the court and the provision of legal aid. Efficiency is achieved through the provision of information, advice, legal assistance, dispute resolution, and representation for matters that would otherwise be self-representing. Costs to the justice system are also avoided because cases are diverted from court rather than needing a hearing or decision by the court."[170]

457. As outlined earlier in this submission, increasing numbers of litigants are entering the court system without legal representation, due largely to the contraction in legal aid funding. The increase in numbers of unrepresented litigants that occurred following the funding restrictions placed on legal aid in 1996 have been commented upon in numerous reports by law reform commissions, parliamentary committees and other bodies.[171]

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[168] Cited by Victorian Bar, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* April 2008; PricewaterhouseCoopers, page 24.
[169] Ibid.
[170] PWC, ibid, *op cit* 17, page 25, available at: http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf.
[171] See, for example: Senate Legal and Constitutional References Committee, *Legal Aid Report 3,* AGPS, Canberra, 25 June 1998, [3.21-45]; Professor Stephen Parker, *Courts and the Public* (1998) AIJA 106-111; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) Report No. 89, [5.51-67], [5.147-157]; The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (September 1999) Project No. 92: Family Law Council, *Litigants in Person* (2000) at http://www.law.gov.au/www/flcHome.nsf/Web+Pages/C40B3532575784A2CA256B49001CF823?OpenDocum

458. Unrepresented litigants have an impact on courts, in terms of both time and cost, and on the conduct and outcomes of trials.[172] This has lead one judge to comment that: "the question of how to cope with [unrepresented litigants] is the greatest single challenge for the justice system at the present time … cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges."[173]

459. Providing adequate funding for legal aid and access to justice may initially appear expensive, but as former Chief Justice Gleeson commented:

> "The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid."[174]

460. As noted previously, PWC has estimated that the net positive efficiency benefit for the justice system (in terms of the cost of running the courts) amounts to a return of $1.60 to $2.25 for every dollar spent on legal aid.[175]

461. The Attorney-General's Access to Justice Taskforce identified the following reasons why access to justice is important:[176]

- Maintenance of the rule of law is fundamental to Australia's economy and prosperity as it allows planning and underpins social and economic development.
- Access to justice is an essential element of the rule of law that frames the relationship between state and society, founded upon an accepted set of social, political and economic norms.
- Access to institutions enables people to protect their rights against infringement by other people, bodies and the government and ensures accountability.
- Barriers to justice enforce poverty and social exclusion as there is a legal dimension to many of the issues commonly faced by people (e.g. family breakdown, credit and housing issues, discrimination, and exclusion from services).

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ent; Rosemary Hunter, *The Changing Face of Litigation* (2002), Law Society of New South Wales, *Position Paper: Self-Represented Litigants* (27 May 2002): cited by the Australian Institute of Judicial Administration, *Forum on Self Represented Litigants* (2005).

[172] Ibid, *op cit* 17, available at: http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf.

[173] Davis J, *The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system* (2002) 12 JJA 155 at 168.

[174] Chief Justice Murray Gleeson, *State of Judicature* (speech delivered at the Australian Legal Convention, Canberra, 10 October 1999).

[175] PWC, Ibid, *op cit* 17, page ix. However, as noted earlier in this submission, this is a highly conservative estimate, as it does not analyse the reduction in flow-on costs to the litigant, dependant, employment, assets, social welfare, prisons and the health system in terms of the cost/benefit of investment in legal assistance.

[176] AGD, Ibid, *op cit* 1, page 1.

- Legal aid can assist in ensuring that the law is applied correctly and thus the justice system returns an effective outcome. This is particularly important in cases where people's liberty or safety is at risk.

Evidence of inadequate funding

462. Numerous reports, inquiries and studies released over the past decade have established that the legal assistance sector is chronically underfunded.

463. In December 2009 the Senate Legal and Constitutional Affairs inquiry into Access to Justice concluded that:

> "The committee accepts that the legal aid system is not adequately funded, and accordingly, recommends that governments and relevant stakeholders review existing funding arrangements and service delivery levels to ensure that the legal aid system is properly resourced to meet the needs of the Australian people, as well as recommending an increase in funding for legal aid service providers."[177]

464. The Committee specifically recommended that the Government increase funding for LACs, CLCs and ATSILS.[178] The Report also recommended a nationwide review and modernisation of legal aid fee scales (with inbuilt inflators) so as to promote practitioners' continued participation in the system. The Law Council strongly supported those recommendations.

465. The Commonwealth Government has largely been responsible for the stagnation in legal aid funding over the past decade. As figures obtained by the Law Council indicate, in 1996-97 the Commonwealth contribution was $128 million out of a total income for legal aid commissions around the country of $264 million – which was roughly 50 per cent. In 2011-12 the Commonwealth contribution has dropped to roughly 33 per cent of total income.[179] The following table, prepared for the Law Council by PWC, sets out the funding picture for LACs since 1997:

[177] Senate Legal and Constitutional Affairs Committee, 8 December 2009, *Access to Justice*, Commonwealth of Australia.
[178] Recommendations 9, 23 and 27 - Senate Legal and Constitutional Affairs Committee, 8 December 2009, *Access to Justice.*
[179] The figures were obtained from the National Legal Aid website: http://www.nla.aust.net.au/category.php?id=9.

Table 1 –Actual (2012) real funding of legal aid commissions per capita by source ($ 2013)

Year	Commonwealth grants	State grants	Spec. trust & statutory interest**	Self generated income**
1997	10.59	6.06	1.89	3.25
1998	8.78	6.57	2.01	2.37
1999	8.64	6.82	2.13	1.72
2000	7.87	7.88	2.20	2.41
2001	7.80	7.83	2.40	1.63
2002	8.32	9.24	2.75	1.45
2003	8.01	8.90	2.65	1.40
2004	8.10	9.75	2.71	1.64
2005	8.77	9.87	3.32	1.69
2006	8.53	9.84	3.63	1.75
2007	8.35	10.21	4.70	2.07
2008	9.27	9.95	5.71	1.82
2009	8.51	10.53	5.56	1.50
2010	8.86	10.51	5.01	1.46
2011	9.15	11.38	4.58	1.44
2012	9.07	11.92	4.04	1.66
2013*	8.97	11.88	3.91	1.38
2014#	9.19	11.88	3.91	1.38
2015#	9.42	11.88	3.91	1.38
2016#	9.65	11.88	3.91	1.38

Source: NLA, ABS 6401.0 CPI, ABS 3101.0 Estimated Resident Population

** Budgeted*

*** These are considered state sources of funding*

 # Budget and forecasts

Note: Excludes Commonwealth funding for Community Legal Centres.

466. Demand has grown for legal aid services as the Australian population has grown and policy induced factors have stimulated need. In addition, various changes to law over the past ten years have resulted in an increased complexity of cases which legal aid commissions are required to fund. This increased complexity has led to an increase in the cost of cases across all courts by 78 per cent in real terms (i.e. inflation adjusted) from 1998 to 2008.[180]

467. This decrease in funding and increase in demand has forced commissions to employ policy 'levers' to control costs, such as enforcing tougher means and merits tests and lowering fees paid to private practitioners. This has resulted in a reduction in the number of practitioners willing to accept legal aid briefs.[181] The results of inadequate funding are discussed in more detail below.

[180] PWC, Ibid, *op cit* 16, page 4.
[181] Ibid, page 5.

Results of inadequate funding

468. As detailed in a report recently conducted by PWC entitled *Legal Aid Funding: Current Challenges and the Opportunities of Cooperative Federalism*, legal aid funding is grossly inadequate, with adverse consequences for vulnerable Australians:

- Current legal aid means tests in some jurisdictions exclude some people who are at or below the Henderson poverty level.
- There is a very serious problem in attracting and retaining able and experienced lawyers to service the needs of those who qualify for legal aid. This leads to unjust outcomes for vulnerable Australians.
- Legal aid for civil cases is minimal.
- Under-funding legal aid imposes additional costs on the justice system due to failure to settle cases early, mistrials, appeals, re-trials, inappropriate incarceration, and so forth.
- There is an inequity in access to representation.

Withdrawal of private practitioners from legal aid work

469. The underfunding of the legal assistance sector has resulted in the level of fees paid to private practitioners undertaking legal aid work not accurately reflecting the cost of delivering legal services. In short:

- legal aid fees are below the real cost of generally providing the necessary legal service and increases are needed to at least meet costs;
- there is a significant withdrawal of experienced lawyers from publicly funded legal work;
- there is some diminution in the quality of publicly funded legal representation; and
- a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

470. In 2003 FMRC Legal Pty Ltd was commissioned by the Law Council of Australia to produce a report on the change in the economics of legal practice over the previous decade. Their report concluded, as follows:

- Over the preceding decade the nature of legal practice has changed substantially in Australia. The profession has seen the development of a clear structure of a (small) group of large national firms, a “second” tier of smaller but nevertheless still substantial commercial practices, and then a very large array of small to mid-sized practices providing a more community based service.
- Fewer and fewer of these smaller and mid-sized firms are finding themselves in a position to undertake publicly funded legal work.
- There is a belief that the increase in the cost of practice in the last decade has outstripped the increase in the hourly rate of publicly funded legal work making

it difficult for firms to undertake this work and still achieve a reasonable level of return – in fact, a loss would be incurred in many instances.

- The increase in the cost of practice in the last nine years has been substantial, well ahead of CPI. It has only been through "small" productivity gains, escalating charge rates and increasing author gearing that practices have been able to maintain profit.

471. The focus of the FMRC report was cost per solicitor chargeable hour. The report identified that the cost of delivering a chargeable hour of legal time per employed solicitor in a major regional city was approximately $140 per hour, including the lawyer salary and ordinary overhead costs. In a suburban practice, it was identified as approximately $153 per hour – and in a remote country region, approximately $132 per hour. These rates do not include any component for profit to the employer of the employed solicitor. Nor do they include any allowance for a write-down of work in progress or non-recovery of debt.

472. With legal aid rates in the same period being below $130 per hour (and more commonly ranging from $88 to $105 per hour), regional, suburban and country practitioners in average practices did not recover their true cost of employing a practitioner to undertake legal aid work. Most legal aid work was undertaken at a loss, which creates an enormous disincentive for private firms to take on legally assisted matters.

473. Therefore it is clear that legal aid is a losing proposition even if the solicitor doing the work is paid a very low salary. As a result "juniorisation" occurs of those private practitioners who undertake legal work. Law firms cannot afford to have their high charging fee earners undertaking significant volumes of legal aid work. The opportunity costs of undertaking legal aid work as against a lower volume of higher paid work means that it makes little sense for experienced practitioners to decline full fee-paying clients in favour of legal aid clients.

474. In December 2006 the report of TNS Social Research, commissioned by the Commonwealth Attorney-General's Department, found that:

- Remuneration matters, including the low hourly rate and issues with the number of hours allocated under the stage of matter payment structure, were the *key reasons* for disengagement from legal aid among all firms.

- Approximately one in three firms that are currently practicing family or criminal law have moved away from the provision of legal aid services.

- If nothing were to be done in terms of making legal aid more attractive for private practitioners, a larger number of firms that are currently providing legal aid would decrease their revenue in the next five years rather than increase.

- Approximately two-thirds of firms in RRR areas currently provide legal aid compared with approximately half of firms across all locations. A further one in four firms in regional and remote areas that used to provide legal aid have ceased providing these services.

- There has been a net drop-out of approximately 10 per cent of firms doing legal aid work in family law matters in RRR areas.

- There has been a net drop-out of approximately 3 per cent for legal aid for criminal law matters in RRR areas.

- Any decline in the supply of legal aid by firms in regional and remote areas is likely to have a greater impact because there are significantly fewer firms operating in these areas.

475. In response to the findings of the TNS survey the Commonwealth Attorney-General's Department commissioned a review of remuneration arrangements for private practitioners providing legal representation services in family law matters. TNS were commissioned to explore arrangements for engaging and remunerating private practitioners. They consulted with the staff of Legal Aid Commissions as well as conducting telephone interviews with private practitioners.

476. Relevantly, the report found that:

- remuneration must be increased to ensure the sustainability of the legal aid system;
- high volume providers are currently struggling to maintain sustainable legal practices with the fees received from legally aided matters;
- fees need to increase to prevent further disengagement of these providers; and
- an increase in fees to $190-$200 (GST inclusive) to match court scales, would ensure long-term future sustainability.

477. The findings of the TNS surveys mirror to a large extent the findings of the Law Council's Erosion Report released in February 2004.

478. That report provided further evidence that:

- there is a rise in the number of self-represented litigants for a variety of reasons, one of which is a significant lack of available publicly funded representation;
- there is an inequity in access to representation;
- legal aid fees are below the real cost of generally providing the necessary legal service and increases are needed to at least meet costs;
- there is a significant withdrawal of experienced lawyers from publicly funded legal work;
- there is some diminution in the quality of publicly funded legal representation;
- the courts are impacted by the increased number of unrepresented litigants; and
- a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

479. In 2008 the Victorian Bar commissioned a similar study conducted by PWC into the fees paid by Victoria Legal Aid to barristers in criminal cases. The report expressed serious concerns that the under-funding of Victoria's criminal justice system over the

past 15 years could lead to increased costs from aborted trials and retrials and poorer outcomes for victims and defendants alike.[182]

480. As documented in the PWC Legal Aid Funding Report,[183] funding cuts to legal aid commissions have caused very significant cuts to services. As detailed in this submission, that has left large segments of the population without practical access to the legal system. While these cuts have been described as "efficiency dividends", "better targeting of priority groups", for example, in simple market terms, the legal assistance sector is not meeting market demand.

481. The Law Council believes that LACs have, reached a point where further "efficiencies and economies" cannot reasonably be expected to address the yawning gap in legal need. It is therefore a question of injecting appropriate funds into the system to enable the LACs to implement their charter, to provide appropriate legal assistance for disadvantaged members of the community. In the long run the impact of increasing fees to private practitioners undertaking legal aid work will be:

- an increase in the number of practitioners prepared to undertake legal aid work;
- an increase in the number of *experienced* practitioners prepared to undertake legal aid work; and
- a reduction in the number of unrepresented litigants.[184]

What level of additional Commonwealth funding is required?

Legal Aid Commissions

482. The Law Council has obtained recent advice from PWC as to the level of additional funding required to restore the Commonwealth's share of LAC funding to a 50 per cent share with the states and territories, which is set out in the following table:

Table 1 - Level of additional Commonwealth funding

Financial Year	CW Input Grants	State Input Grants	Level of additional funding required
2012-2013	$205.90 million	$276.42 million	$70.52 million
2013-2014	$213.73 million	$291.39 million	$77.66 million
2014-2015	$222.39 million	$303.19 million	$80.80 million
2015-2016	$231.95 million	$316.23 million	$84.28 million
Total			**$313.26 million**

Source: NLA, RBA, ABS 3101.0

Note: Numbers may not add due to rounding.

483. As noted earlier, these figures are projections of the amount of additional funding (that is, over and above already committed funding) required each year to return the Commonwealth to a 50 per cent share of legal aid funding. They assume funding from the States and Territories will remain static. The figures have been adjusted for

[182] Victorian Bar Ibid, *op cit* 168.
[183] Ibid, *op cit* 16.
[184] Numerous papers have been written about this including Family Law Council report on litigants in person – August 2000, and ALRC report "Managing Justice" pages 359-388.

expected changes in the population and movements in the consumer price index. In order to return Commonwealth per capita funding levels to return to even this reduced 1997 rate, additional funding of $313.26 million would be required over the forward estimates.[185]

484. Currently, the vast majority of people that qualify for legal aid are receiving a government benefit. Implicit in this figure is that funding restrictions on LACs have resulted in the setting of a means test that eliminates all but the very poorest of society. Substantial funding increases are required in order to meet the definition of socio economic disadvantage as measured by the Henderson poverty index.

485. If the government wishes to rely on the legal aid system as a tool of social inclusion, additional funds need to be provided to LACs to allow the means test to be raised to also cover the 'working poor'.

Aboriginal and Torres Strait Islander Legal Services

486. The importance of dedicated Indigenous legal services and the pivotal role they play in helping Aboriginal and Torres Strait Islander people access the legal system has been well established. However, a shortfall in funding to dedicated Indigenous legal service providers is curtailing the most likely means by which Indigenous people can seek legal help.

487. ATSILS are critically underfunded in all jurisdictions. ATSILS are funded almost exclusively by the Commonwealth, whilst LACs are generally funded by both Commonwealth and State/Territory Governments.

488. Nationally, Indigenous people are around 15 times more likely to be imprisoned than non-Indigenous people.[186] Due to the level of funding available to ATSILS, almost all of ATSILS services are directed toward criminal justice.

489. International treaty bodies have recognised the importance of adequate ATSILS funding, as illustrated by the reports of the CERD Committee, Committee on the Rights of Children and the UPR. For example, in its 2010 Concluding Observations on Australia's performance of its obligations under the CERD, the CERD Committee called for "an increase funding for Aboriginal legal aid in real terms, as a reflection of its recognition of the essential role that professional and culturally appropriate indigenous legal and interpretive services play within the criminal justice system."[187]

Community Legal Centres

490. Ensuring that community legal centres have adequate funding is one of the most simple and direct means to tackle the problems faced by those that have difficulties accessing the justice system.

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[185] Allowances have been made for both population growth and movements in the CPI. Over this time the CPI measured by the Australian Bureau of Statistics has increased 38 per cent. At the same time the population has also grown by approximately 15 per cent. See PWC Report, ibid, *op cit* 17, page 55.

[186] SCRGSP Ibid, *op cit* 6.

[187] Committee on the Elimination of Racial Discrimination, *Concluding Observations – Australia,* 77th Session, 2-27 August 2010, CERD/C/AUS/CO/15-17, page 6. See http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/449/00/PDF/G1044900.pdf?OpenElement. See also recommendations of the Universal Periodic Review at http://www.ag.gov.au/Humanrightsandantidiscrimination/Internationalhumanrights/Pages/default.aspx

491. CLCs are not-for-profit community-based organisations that provide legal advice, information and education to marginalised and disadvantaged client communities and those with special needs. They provide services to more than 350,000 people each year through over 200 centres.[188] They are a key component of Australia's legal assistance system, and provide services which complement and extend the services provided by Legal Aid Commissions and the private profession.[189]

492. Providing adequate funding to CLCs intersects with the need to improve the accessibility of legal services generally, particularly in RRR areas, for Aboriginal and Torres Strait Islander peoples and for the most vulnerable and disadvantaged, preventing and minimising social exclusion.

493. The Review of the Commonwealth Community Legal Services Program conducted by the Attorney-General's Department in March 2008 confirmed that CLCs are a vital resource for the financially and socially disadvantaged. The review confirmed the sector is providing services to clients who are significantly disadvantaged. For example, 58 per cent of clients received some form of income support, 82 per cent of clients earned less than $26,000 per annum, and almost 9 per cent of clients had some form of disability.

494. In addition, there is a growing body of evidence that many disadvantaged members of the community often face a 'cluster' of problems that, if left unresolved, increase their social exclusion with long term implications for their health, employment capacity and general well-being. Community legal centres' client centred approach to service delivery and focus on preventative and early intervention strategies mean that they are well placed to address this need.[190]

495. NACLC, the peak national organisation representing CLCs in Australia, recommends baseline funding for Commonwealth Community Legal Services Program funded CLCs of $500,000 per Centre. This baseline funding is based on significantly reduced costs compared to commercial practices or even government legal aid. It does not include costs specific to service delivery for CLCs in RRR areas.

496. There are a total of 49 CLCs in RRR areas across Australia, which are experiencing significant challenges in their ability to meet legal needs. NACLC considers that the Commonwealth should consult with the CLC sector to identify the additional costs incurred by RRR CLCs and to establish a RRR funding formula that will adequately support these CLCs.

497. The Law Council believes that an injection funding to bring CLSP-funded CLCs funding in line with the baseline funding requirement, and consultation with the CLC sector to better target funding to RRR CLCs across Australia, remains necessary to allow CLCs to continue to act as an essential tool of social inclusion.

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[188] NACLC, *Why Community Legal Services are Good Value,* http://www.naclc.org.au/multiattachments/2287/DocumentName/NACLC_value_web.pdf

[189] As defined by the Attorney-General's Department: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_CommunityLegalServicesProgram_TheCommunityLegalServicesProgram.

[190] Accessible here: http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738. See also the LAW Survey, Ibid, *op cit* 22.

National Partnership Agreement on Legal Assistance Services

498. The NPA on legal assistance services sets out the intergovernmental agreement for the funding of legal assistance services. Under the NPA, the Commonwealth, States and Territories share funding responsibility for the LACs, while the Commonwealth bears dominant financial responsibility for CLCs, ATSILS and FVPLS.

499. The Law Council submits that, in addition to the increased Commonwealth funding required to restore legal assistance services to their mid-1990s position, the NPA must be renegotiated to restore the financial position of the LACs and bring equity to funding for other service providers.

500. It is noted that the report of the review of the NPA, carried out in 2012-13 by the Allen Consulting Group, is with the Attorney-General's Department and has not been publicly released. This is unfortunate, because stakeholders contributing to this Inquiry have not had the opportunity to analyse the report and provide feedback through this process. The Law Council also understands that those people appointed to the Advisory Committee for the NPA Review have not seen the report or had opportunity to provide any feedback. Accordingly, these comments must be made without the benefit of the recent report by ACG.

501. The existing agreement is based on a formula implemented in the first years of the Howard Government, under which the Commonwealth agreed only to fund the provision of legal aid for matters arising under federal laws. This cut Commonwealth legal aid funding for people who the Commonwealth had special responsibility (for example, pensioners and beneficiaries, recent migrants, etc.) which had applied since 1973. Once implemented, the agreement saw a sharp and substantial decline in Commonwealth funding for legal aid (as outlined earlier), with the Commonwealth's share falling from around 55 per cent of the total, to around 33 per cent.

502. While determining the appropriate level of funding for legal aid may present challenges, determining the appropriate funding model is the most critical aspect. Under the current model, the Commonwealth is effectively in an adversarial arrangement with the states and territories, by attempting to delineate between state and federal law matters as a basis for funding.

503. PWC considered a range of intergovernmental agreements for funding in areas of joint federal/state responsibility and recommended that the NPA be negotiated on a 'cooperative federalism' basis, in the following terms:

> "In essence, cooperative federalism involves a move away from the combative and defensive approach taken to Commonwealth-State negotiations in the past, in favour of a genuine partnership. Overall, the objectives of the cooperative federalism reforms can be summarised as:
>
> - identification of national goals, as distinct from Commonwealth or State ones
> - a move to a shared, cooperative approach to addressing these national policy issues
> - a focus on outputs, outcomes and objectives rather than inputs and prescriptive funding conditions

- a high degree of budget flexibility for States and Territories in allocating funds to achieve the agreed outcomes
- an emphasis on measurable performance indicators, transparent reporting and shared accountability
- a clarification of the responsibilities and roles of each level of government
- the subsidiarity principle, reflecting the view that ideally, decisions are taken by a level of government closest to those affected, subject to the need for broader coordination and harmonisation in some instances
- less incentive for cost-shifting between levels of government
- a particular focus on social inclusion
- reduced administrative and compliance overheads."[191]

504. The Law Council submits that a new NPA must be negotiated on the basis of the principles set out in the PWC Report, setting down national objectives for the provision of legal assistance as a starting point. As the dominant financial partner, the Commonwealth should retain primary responsibility for funding ATSILS, CLCs and FVPLS.

505. A key objective for the NPA should be the establishment of a civil law assistance framework, to enable more Australians to access legal assistance in civil law matters.

Pro bono

506. The legal profession's contribution to pro bono is outlined above, under 'Background'.

507. The Law Council and its constituent bodies are proud of the contribution made by the legal profession to pro bono assistance. The efforts by private firms and barristers to build pro bono activities into their business models have built upon a strong charitable culture within the profession. This is also evidenced in the work done by lawyer volunteers in community legal centres and informal pro bono work done by many lawyers in the course of their private practice.

508. That said, the Law Council does not consider that pro bono services offered by the profession should ever be mandated. For example, government legal services procurement guidelines, which require tenderers for government legal work to meet certain pro bono thresholds, favour larger firms with the resources to undertake significant pro bono work, and to track and record the pro bono assistance provided. The Law Council does not consider such guidelines assist in promoting pro bono activities by smaller law practices and recommends they be applied more flexibly.

509. The Law Council's constituent bodies have been active promoters and facilitators of pro bono. For example:

[191] Ibid, *op cit* 16, page 8.

Law Society of NSW

(a) The Law Society of NSW Pro Bono Scheme was established in 1992, through which the Law Society refers eligible members of the community needing legal assistance to firms willing to provide legal services on a free or substantially reduced fee basis. Assistance can include legal advice, preparation of documents and, if required, representation in court. The Law Society's Pro Bono Scheme also provides legal assistance on an 'in-house' basis for eligible applicants.

(b) The Law Society of NSW's Pro Bono Policy encourages members to provide pro bono legal services as part of their wider professional responsibility. The Policy states that "The promotion of pro bono services should not lead to a reduction of legal aid or to a failure by government to properly fund Legal Aid, Community Legal Centres and other government funded legal services".

Law Institute of Victoria

(c) In 2008, the LIV adopted a policy statement on pro bono work.[192] The statement notes that the LIV does not consider pro bono work to be a substitute for government's responsibility to provide adequate funding for free and accessible legal services. However, the LIV supports the legal profession's ethical obligation to enhance access to justice for disadvantaged persons or charitable and community organisations, and promote the public interest, by encouraging the voluntary contribution of its members to undertake pro bono work.

(d) The LIV currently has an agreement with the Public Interest Law Clearing House (PILCH) to administer the LIV's Legal Assistance Service (LIVLAS). PILCH has administered LIVLAS on behalf of the LIV since 2002. LIVLAS operates as a referral service that facilitates the provision of pro bono legal assistance from the private legal profession to the community. LIVLAS can assist in facilitating referrals for: administrative law, criminal law, equity/probate, employment law, civil law, commercial law, property law, media and entertainment law, family law and local government matters.

(e) In the 2012-13 financial year, there were 1770 requests for LIVLAS assistance.

(f) The Law Institute of Victoria also operates a free Legal Referral Service. In 2012, it provided 30,903 referrals for legal advice from legal practitioners. Under the Referral Service, members of the public seeking a referral for legal advice are given free legal advice involving a half-hour consultation. It is conservatively estimated that the value of the free legal advice provided in 2012 by LIV members through the Referral Service was $3.862 million.

(g) The LIV notes the report prepared by the Institute for Sustainable Futures on the Economic Value of Community Legal Centres.[193] The report identified that, along with clear benefits to individuals, community legal centres also provide broader public benefits to society, particularly in reducing the need

[192] LIV, Policy Statement on Pro Bono Work
http://www.liv.asn.au/PDF/About/Governance/2009OctProBonoLIVPolicy.
[193] Institute for Sustainable Futures on the Economic Value of Community Legal Centres Report 2006
http://www.isf.uts.edu.au/publications/edgertonpartridge2006economicvalue.pdf.

for individuals to interact with the legal system, thereby reducing the cost to government.

Victorian Bar

(h) The Victorian Bar has a pro bono scheme with 900 volunteers who make themselves available to provide advice, preparation of court documents and representation. It also has a duty lawyer scheme with 150 volunteers rostered to appear at certain magistrates' courts and in the superior courts on an ad hoc basis.

Law Society of South Australia

(i) As with their interstate colleagues, South Australia lawyers provide a lot of free or heavily discounted legal services. Much of that work is done by individual lawyers out of their own sense of social responsibility and personal commitment to justice. Many legal firms have specific pro-bono policies and practices. Many lawyers take on work where they will fund the claim, or where they will wait for payment until the claim is successful, or where they just write-off costs. As well as these private initiatives, in South Australia the Law Society operates an advisory service and a litigation assistance scheme. The Legal Services Commission funds various kinds of legal representation and provides advisory services. JusticeNet acts as a clearing house, trying to find lawyers who can help with individual legal problems. The Aboriginal Legal Rights Movement supports Indigenous Australians, and there are established community legal services in Adelaide and country areas which provide legal advice and representation.

(j) Despite this range of providers, many miss out on legal assistance. In January, a South Australian Council of Social Services study found approximately 10,000 South Australians annually had an unmet need for legal assistance for consumer credit problems alone.

ACT Law Society

(k) The ACT Law Society operates a Legal Advice Bureau, supported by 72 legal practitioners who volunteer their time. In 2012, the LAB assisted 1189 clients in relation to a broad range of legal issues, which was a 14 per cent increase on 2011.

(l) The ACT Pro Bono Clearing House also coordinates referral of requests for pro bono assistance to participating firms. In 2012, 83 applications for assistance were received. Of these, 46 were successfully referred on to a firm as they met the merit and means test. Barriers to pro bono assistance.

Criminal matters

510. The Law Council is advised that, while the legal profession strives to provide substantial pro bono in this area, practices specialising in criminal law have limited capacity to provide large amounts of pro bono. This is largely due to the cost involved and the incapacity of most criminal lawyers to carry the cost of a lengthy criminal trial. Many law practices which undertake a significant amount of criminal law work accept a significant number of briefs from legal aid commissions and, due to the very low fees payable under a legal aid grant, those firms simply do not

operate with sufficient margins to cross-subsidise, in order to absorb the cost of a pro bono practice.

Family law matters

511. The National Pro Bono Resource Centre has recently published a report *Pro Bono Legal Services in Family Law and Family Violence: understanding the limitations and opportunities*, which found significant limitations on the capacity of the private profession to provide more pro bono assistance in family law.[194] Some of the key findings of that report were that:

(a) Demand for legal assistance in family law and family violence matters is high and existing services provided by LACs, CLCs and FVPLS, and pro bono assistance offered by the legal profession, are unable to meet legal need in family law;

(b) Unrepresented litigants in family law matters put a significant strain on the family law system, with broad negative impacts;

(c) There are significant differences in the way pro bono legal work is perceived and undertaken by family law practitioners compared to other areas of practice, simply because of the nature of the legal problems and clients; and

(d) Family law practitioners already carry out so much extra unpaid work for their legally aided or reduced-fee clients, they have little capacity to take on additional pro bono work.[195]

[194] National Pro Bono Resource Centre, Ibid, *op cit 10*.
[195] Ibid, pages 16-19.

(13) Funding for litigation

Summary

- The Law Council is currently engaged in a national consultation process with its constituent bodies as to whether the legal profession will support lifting the prohibition on contingency fees. The Law Council expects to be in a position to provide a more concrete submission on this point at a later stage of the inquiry.
- Conditional costs agreements and uplift fees are permitted in all Australian jurisdictions, to varying degrees, and are an important means by which the legal profession can facilitate access to justice in a range of civil claims, principally personal injury, workers compensation, medical negligence and product liability claims.
- Subject to the development of an appropriate regulatory framework for commercial litigation funders, the focus of government should be to develop and maintain a favourable business environment for litigation funders, to improve competition and increase the availability of litigation funding products in Australia.
- Litigation insurance products have had strong success in overseas jurisdictions and have the potential to significantly improve access to justice in Australia. It is recommended that governments engage with the peak insurance bodies to develop a framework for the establishment of affordable litigation insurance products in Australia.
- The court rules governing class action procedures in Australia presently include a number of safeguards directed to ensuring the procedure is not abused so as to procure settlements which are inconsistent with the broader interests of the class being represented. The most prominent of these safeguards is the requirement for court approval of class action settlements. Experience suggests that while court approval is a critical safeguard and must be maintained, there are some further refinements to current procedures that may enhance their effectiveness. One reform which could be considered is promoting the wider use of powers to appoint amici curiae to provide a contradictor at the hearing of applications for class action settlements. This could most appropriately be achieved through a practice note or guidelines issued on a court-by-court basis.
- The Law Council does not support any changes to tax deductibility for legal services incurred in the course of gaining or producing assessable income. Individuals generally do not commence litigation in order to receive a tax deduction. The denial of a deduction for a business taxpayer would lead to a lack of symmetry in the tax system, and would unfairly disadvantage business taxpayers.

Contingency fees

512. The charging of contingency fees by legal practitioners is prohibited in all Australian jurisdictions. Contingency fees are defined as the practice of setting legal fees as a percentage or proportion of the overall agreed settlement or court awarded compensation paid to the client. Subsequently and by custom, it also means that no fees will be charged if the claim is unsuccessful.

513. The issue of whether the prohibition on contingency fees should be lifted in Australia remains contentious. Contingency fees are permitted in the United States and Canada and have recently been made lawful, on a limited basis, in the United Kingdom, with the introduction of capped contingency fees.[196] The changes in the UK followed the comprehensive report of Lord Justice Jackson into the *Review of Civil Litigation Costs*.[197] A sustained and trenchant consideration of the issues led his Lordship to recommend that the contingency fee approach was a more acceptable and effective means of promoting access to justice than the existing conditional fee arrangements.

514. The Law Council is currently engaged in a national consultation process with its constituent bodies as to whether the legal profession will support lifting the prohibition on contingency fees. Accordingly, the Law Council is unable to express a view at the present time about whether the ban should be lifted, and if so, what restrictions on contingency fees should be retained. The Law Council expects to be in a position to provide a more concrete submission on this point at a later stage of the inquiry.

Conditional costs agreements

515. It is important to distinguish contingency fees from conditional costs agreements, which are permitted by law in all Australian jurisdictions.

516. Legislation in all Australian jurisdictions allows for the making of conditional costs agreements, which often also provides for an uplift fee or success fee.[198] Under conditional costs agreements, the client agrees to pay their lawyer's fees if the case succeeds, including an additional uplift or success fee. The agreement with the client may provide that in the event of success, an 'uplift' fee will be paid by the client, based on a proportion of the lawyer's overall fee. The uplift cannot be referenced as a percentage of the settlement or award achieved for the client.

517. These kinds of agreements are typically entered into on a "no-win, no-fee" basis, whereby in the event the case is unsuccessful, the lawyer will waive part or all of their professional fees (although not all fees and disbursements are always waived under such agreements). For people who cannot afford to pay legal costs up-front or on a 'pay as you go' basis, this type of agreement enables a person to access legal services, to pursue their meritorious legal claims.

518. In Australia, conditional costs agreements are typically used in personal injury, workplace injury, public liability, medical negligence and product liability claims. These kinds of fee agreements assist the capacity of claimants to pursue certain types of civil claim, where law practices are able to absorb the significant costs of civil litigation on behalf of their clients and seek to recoup those costs if successful. Criminal proceedings, proceedings under the *Family Law Act 1975 (*Cth) and certain

[196] Introduced by way of the *Damages Based Agreements Regulation 2013* (UK).
[197] Lord Justice Rupert Jackson, *Review of Civil Litigation Costs – Final Report*, December 2009, UK Ministry of Justice. See http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf
[198] It should be noted that in NSW, pursuant to s324(1), *Legal Profession Act 2004* (NSW), conditional fee agreements which provide for an uplift fee are not permitted in relation to claims for damages.

other types of proceedings[199] are specifically excluded and cannot be the subject of conditional costs agreements.

519. Contrary to common perceptions about the behaviour of practitioners in these matters, it is clear that conditional cost arrangements provide a strong incentive for law practices to carefully assess and advise clients of the risks and costs of litigation against the potential outcomes. Traditionally, most cases take 2-3 years to resolve, and the practitioners typically carry the costs and expenses for the duration of the claim.

520. In all cases, uplift fees must not exceed 25 per cent (excluding disbursements) of the legal fees otherwise payable[200] and render the costs agreements subject to additional disclosure requirements regarding:

    (a) the law practice's legal costs/usual fees;

    (b) the basis of calculation for the uplift fee;

    (c) an estimate of the uplift fee or, if that is not reasonably practicable, the range of estimates of the uplift fee; and

    (d) an explanation of the major variables that will affect the calculation of the uplift fee.

521. In addition, there are significant controls placed on the use of uplift fees. For example, as noted in the VLRC inquiry:

> "In some jurisdictions in Australia, legal and/or ethical obligations have been imposed on lawyers requiring that they be satisfied as to the merit of a client's case. In Victoria, the *Legal Profession Act 2004* provides that if a conditional costs agreement relates to a litigious matter 'the agreement must not provide for the payment of an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely'. In NSW, lawyers are prohibited from providing legal services in connection with damages claims or defences which do not have merit. There may be costs and disciplinary consequences."[201]

522. Various jurisdictions have imposed restrictions on 'uplift fees' or 'success fees' which can be charged by law practices on the successful conclusion of a matter, largely in response to perceived concerns about the potential encouragement this gives to litigious behaviour, particularly in the context of personal injury claims.

523. While recognising the conflict of interest that conditional fee arrangements can engender and the concerns expressed by Lord Justice Jackson in the UK review of civil litigation costs,[202] the Law Council considers that uplift fees are appropriate for certain matters and provide an additional mechanism for law practices to absorb risk and represent parties in deserving claims. It is also appropriate that the amount of

[199] For example, in the Northern Territory law, proceedings under the following legislation are precluded from being the subject of conditional costs agreements: (a) Adoption of Children Act; (b) Community Welfare Act; (c) Crimes (Victims Assistance) Act (repealed); (d) Victims of Crime Assistance Act.
[200] s284(4)(b), *Legal Profession Act 2006* (ACT); s324(5), *Legal Profession Act 2004* (NSW); s324(4), *Legal Profession Act* (QLD); s308(4)(b), *Legal Profession Act 2007* (TAS); s3.4.28(4)(b), *Legal Profession Act 2004* (VIC); s284(4)(b), *Legal Profession Act 2008* (WA).
[201] Ibid, *op cit* 26, page 182.
[202] Ibid, *op cit* 197.

the uplift fee be capped at a certain level. Prohibiting uplift fees altogether is likely to simply send a signal to firms that they will incorporate any additional risk into their ordinary fee structure.

Litigation funders

524. The Law Council has given extensive consideration to the issue of litigation funding, its risks and benefits and appropriate regulation. In this regard, the Law Council refers the Productivity Commission to the Law Council's "Policy Statement on Regulation of Third-Party Litigation Funding."[203]

525. The Law Council notes there is a strong and ongoing debate about the increasing prevalence of litigation funding companies in Australia. Views about the risks and benefits of third-party litigation funding tend to vary depending on the party expressing concerns. Most concerns revolve around conflict of interest and capital adequacy.[204] The tripartite agreement between the funder, lawyer and client and the profit driven motives of the funder raise concerns that the interests of the funder and the client in relation to key decisions are likely to diverge. Companies required to defend claims also point to the uncertain capital base of funders entering the market and the capacity of those funders to meet adverse costs orders in the event that the litigation fails or is discontinued.

526. However, the majority of those involved in the discussion, on both sides, tend to agree that it is appropriate to establish a formal regulatory framework around litigation funders. The issue seems likely to be the subject of detailed examination by Government in the near future but at present the Law Council considers the most appropriate framework may be the Australian Financial Services Licencing regime administered by the Australian Securities and Investments Commission.

527. Presently, litigation funders and law practices retained by them are required under the *Corporations Amendment Regulation (No.6) 2012* to demonstrate that they have 'adequate arrangements' in place for managing conflicts of interest. The Law Council considers this is an inadequate solution. Litigation funders are effectively providing a financial product, in the same way that a bank lends money and charges interests; or an insurer manages risk for a premium. It seems axiomatic that each of these financial services should be subject to similar prudential and regulatory requirements. Moreover, the expansion of litigation funding into areas of consumer interest and the perceived risk (however low) that a litigation funder may act contrary to the interests of the class would appear to necessitate a clearer regulatory framework.

528. The following have been identified as matters on which regulation or guidance may be supported by the Law Council, in principle:

    (a) clarification of restrictions on litigation funders performing legal work;

    (b) guidance as to the appropriate level of control by funders over the class action proceedings;

[203] See http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/RegulationofthirdpartylitigationfundinginAustralia.pdf.
[204] Michael Legg, *Regulation of Litigation Funding*, Centre for Law, Markets and Regulation, UNSW. See http://www.clmr.unsw.edu.au/article/deterrence/public-v-private-enforcement/regulation-litigation-funding

(c) improved transparency in pricing practices under litigation funding agreements;

(d) improvement of disclosure requirements in relation to some or all terms of the funding agreements to the Court, clients and defendants/respondents;

(e) prudential regulation of litigation funders;

(f) regulation of offshore litigation funders;

(g) requiring that settlement of a funded matter be approved by the Court;

(h) limitation of the role of litigation funders in settlement discussions, including prohibition on the funder dealing directly with the opposing party(s) and imposing a fiduciary obligation on the funder; and

(i) specification of mandatory terms for litigation funding agreements, including cooling-off periods and provision of independent (secondary) legal advice for class members.

529. Subject to appropriate regulation, the Law Council also recommends that government policy in this area be directed toward establishing a favourable business environment for litigation funders, to improve competition and increase the availability of litigation funding products in Australia.

Litigation insurance

530. The Law Council submits that litigation insurance products could significantly improve access to justice and equitable resolution of legal disputes in Australia.

531. However, such products are generally unavailable in Australia due to the lack of premium pool. In particular the Law Council notes in the late 1990s, litigation expense insurance was facilitated by the Queensland Law Society, but was discontinued in 2000 due to the difficulty determining the appropriate premium according to risk.

532. The Law Council suggests that the Productivity Commission could very usefully consult with the Insurance Council of Australia and major insurers operating in Australia to consider whether factors affecting the viability of litigation insurance products can be addressed. The Law Council considers litigation insurance may be more easily actuarially assessed in the current environment for a range of legal matters, including family law, property and minor commercial disputes, etc. Moreover, consideration could be given to linking before-the-event (BTE) insurance products to other insurance products, such as home and contents insurance. The growth of before-the-event insurance in Australia could be assisted by the development of consistent and reliable data, as discussed below in response to Chapter 14.

533. The Law Council also considers after-the-event (ATE) insurance for liability claims, including personal injury and other matters, may be more amenable to risk assessment following implementation of significant limits on the liability of tortfeasors in most jurisdictions over the last 15 years.

Litigation Insurance in the United Kingdom

534. The Law Council is following efforts to encourage the development of litigation insurance in other countries and offers the following observations on the position in the United Kingdom.

535. Litigation expenses insurance has been available in the United Kingdom for over 20 years. There are 2 forms of litigation insurance:

(a) BTE insurance, which is usually purchased as an add-on to some other form of insurance, such as home and contents. For example, an insurer may give a policy holder the option of acquiring litigation expenses insurance with their home insurance for a higher premium; and

(b) ATE insurance is purchased after the event giving rise to the cause of action, but before any proceedings have commenced.

BTE litigation insurance

536. BTE insurance has been promoted by the UK Civil Justice Council (CJC), which noted that the case for a strong market in legal expenses insurance (i.e. BTE insurance) had become as important as the case for ATE insurance.[205] The CJC recommended that:

> *"…encouragement should be given to the further expansion and public awareness of Before the Event insurance to provide wider affordable access to justice funding complemented where necessary by strong After the Event insurance".*[206]

ATE litigation insurance

537. ATE insurance has found strong support in England and Wales, following the almost complete removal of legal aid for personal injury matters.

538. Prior to recent changes to the law with respect to cost recovery, claimants were able to obtain after-the-event insurance and/or enter into a conditional fee arrangement with their solicitor, with costs and the uplift fee recoverable from the opposing side at the successful conclusion of the matter. However, on 1 April 2013, in response to reforms recommended by the Lord Jackson review of civil litigation costs, [207] amendments were introduced which prohibited recovery of success fees.[208]

539. Law practices are still able to enter into conditional fee agreements with their clients, however the clients bear the cost of any uplift charged, as well as the ATE insurance

[205] Civil Justice Council (UK), "Improved Access to Justice – Funding Options and Proportionate Cost", Report and Recommendations, August 2005, page 50-51. Report Available at http://www.civiljusticecouncil.gov.uk/files/Improved_Access_to_Justice.pdf#search=%22improved%20access%20to%20justice%20funding%20options%20and%20proportionate%20cost%22,
[206] Ibid, page 51.
[207] Ibid, *op cit* 197. See http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf
[208] Subject to certain limited exceptions, including insolvency matters, publication and privacy matters, certain types of damages claims and ATE insurance to cover procurement of expert evidence in clinical negligence claims.

premium. [209] In personal injury matters, the *Damages Based Agreements Regulations 2013* (UK) introduced capped-contingency fees, allowing firms to charge an uplift of up to 25 per cent of the damages awarded, if successful, up to a limit of 100 per cent of the law practice's base fee (although this limitation does not apply in appeal proceedings). [210] Separate credit arrangements are generally established through a credit provider, such as a bank, to cover disbursements and other immediate expenses associated with the litigation. Interest accrues over the course of the litigation and is taken from the overall award, if successful. If the claim is unsuccessful, the claimant is not liable for any costs, in most circumstances.[211]

540. ATE insurance has generally been available in the UK for all types of cases except family law, criminal cases and employment tribunal claims.

541. ATE insurance is generally available in 2 ways:

    (a) under delegated authority, where a legal firm has been given written authority to write standard policies; and

    (b) individually written policies, where the insurance company assesses the case individually.

542. Individually written policies are generally subject to higher premiums than those issued under delegated authority, due to the requirement for the insurance company to conduct an individual risk assessment. It is then incumbent upon the practitioner to maintain a strong winning record, or have future applications for policies refused.

Other jurisdictions

543. The Law Council is aware of the success of the litigation expenses insurance market in Europe, particularly Germany. The ALRC considered the prevalence of litigation expenses insurance in Europe, relative to Australia and noted that:

> *"A barrier to LEI in Australia has been the uncertainty over legal costs. The success of European LEI schemes, such as those in Germany, has been linked to their more predictable, fixed litigation costs".* [212]

544. The Law Council notes that since the ALRC's examination of this issue in 1999-2000, there have been considerable changes to Australia's civil litigation system 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.

Class actions

545. Representative or group proceedings, which are commonly referred to as class actions, were permitted in the Federal Court following passage of the *Federal Court*

[209] See http://hsf-litigationnotes.com/jackson-reforms/conditional-fee-agreements-cfas-after-the-event-ate-insurance/
[210] http://www.glovers.co.uk/news_article459.html
[211] However, the claimant may be liable for some costs if the defendant makes a 'Part 36 offer' (in Australia, referred to as a 'Calderbank' offer) to settle the claim, whereby if the claimant fails to secure a judgment or settlement which is higher than the offer, they will be liable for the ongoing costs from the time the offer was made. They may also be liable for costs if the Court thinks the claimant has acted 'unreasonably'.
[212] ALRC, ibid, *op cit* 13 – see Executive Summary, paragraph 5.30. Available at http://www.austlii.edu.au/au/other/alrc/publications/reports/89/

of Australia Amendment Act 1991, which introduced Part IVA into the *Federal Court of Australia Act 1976* (Cth) allowing representative proceedings. In part, a mechanism for representative proceedings was intended to facilitate product liability litigation in Australia.

546. It is noted that litigation funding considerations have influenced the direction and nature of class action litigation in Australia. Where the individual claims of group members are small, potential "class representatives" are unwilling to expose their own assets to adverse costs orders in order to pursue small damages awards. Protection from adverse costs orders cannot reliably be obtained via co-funding agreements with other claimants since those agreements are impractical to administer and enforce within the group once the litigation is underway. Law firms might offer no-win, no-fee agreements but, in the main, they do not provide the class representative with protection against adverse costs orders and, in any event, few law firms have the internal resources to bear the demands of long-running, complex class action litigation. Even if a firm can act on a no-win, no-fee agreement, a rational firm is unlikely to do so unless there is a real prospect of recovering its fees at the conclusion of a successful action. In practical terms, that tends to mean that class actions are confined to claims for which the likely relief will include a substantial damages award from which the solicitor-client fees can be reimbursed. Thus, there are few class actions for product-warranty or public liability claims, since the relief typically does not provide a pool of funds for payment of the solicitor-client component of legal costs.

547. For those reasons, class actions have tended to concentrate in shareholder, investment, or serious mass-tort (e.g. bushfire) claims. Moreover, class representatives' anxiety to obtain practical protection from adverse costs orders has been a primary reason for the evolution of third-party litigation funding, since one of the obligations typically undertaken by the commercial funder is an obligation to meet any orders for security for costs, or for adverse costs. The costs of providing security, and the outright risk of an adverse costs order, are the significant risks that a commercial funder takes in return for the chance of a "success fee" or "commission payment" in the alternative event that the litigation is ultimately successful. It remains the case, of course, that litigation funding is only a commercial proposition if the potential outcome of the particular action is a substantial damages award from which the funder's "return on investment" can be paid.

548. This is not to say that the class action regime has been only used for investor or mass tort claims. There have also been four cartel class actions to date, three of which have settled.[213] Class actions seeking compensation for other causes have been successfully concluded,[214] and consumers who complain of excessive bank fees are using the class action facility to have their claims properly considered.[215] More recently, victims of excessive interest rates charged by a pay

[213] Vitamins (*Darwalla Milling Co Pty Ltd and other v F Hoffman-La Roche Ltd and others* (2006) 236 ALR 322); Cardboard boxes (*Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd,* [2011] FCA 671); Air cargo (*Auskay International Manufacturing & Trade Pty Ltd v Qantas Airways Ltd,* FCA, VID 903 of 2009); Rubber chemicals (*Wright Rubber Products Pty Ltd v Bayer AG,* FCA, VID 837 of 2009).
[214] Tobacco licence fee recovery following *Roxborough and Others v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; *Williams v FAI Home Security Pty Ltd (No 5)* [2001] FCA 399; The Longford gas plan explosion class action (*Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* [2003] VSC 244).
[215] *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30).

day lender have commenced proceedings against Cash Converters in two class actions.[216]

549. The Law Council notes there are concerns among parts of the legal profession and among large corporations concerning funded class action law suits involving corporations and securities law matters. The emergence of this kind of litigation is one of the more significant developments in corporate Australia over the last decade and has significant cost implications for Australian business, which may have flow-on effects for Australia's international competitiveness. Aggregate settlements of this kind of litigation over the last decade now exceed $1.1 billion. This litigation rarely goes to trial for various structural reasons.

550. The Federal Court's "Part IVA" model for class actions, and variants on that model now available in some state courts, have demonstrated a capacity to address the various practical issues which arise in class action litigation. In particular, it is notable that a number of decisions in recent years have laid out strong guidelines for the appropriate structuring of litigation funding arrangements, including third-party funding arrangements and the (less-frequent) use of claimant co-funding arrangements.

551. It is noted, for instance, that one important court-managed mechanism already used for assuring the "capital adequacy" of third-party litigation funders is the procedure for requiring litigation funders, either by direct order or via an order ostensibly directed to their funded clients, to provide bank-guaranteed security for costs. Orders for security for costs are routinely sought and provide the courts with an opportunity on a case-by-case basis to balance the utility of litigation funding arrangements against the legitimate concerns of defendants to ensure that adverse costs can be recovered if the class action is unsuccessful.

552. An additional important safeguard arising in respect of class action litigation concerns their settlement. Class actions using the "Part IVA" model cannot be settled (or discontinued) without leave of the court. Again, there is now a large body of jurisprudence establishing the procedures to be followed and principles to be applied by courts in considering applications for settlement approval. The Law Council considers that those procedures are, in general, working effectively, with rigorous attention to the interests of justice and, in particular, the proper interests of all of the class members. Experience suggests that while court approval is a critical safeguard and must be maintained, there are some further refinements to current procedures that may enhance their effectiveness One reform considered by the Law Council, for instance, has been the wider use of powers to appoint *amici curiae* to provide a contradictor at the hearing of applications for class action settlements, or the appointment of independent costs assessors to vet the class lawyers' claims for costs, but the Law Council considers that these are modifications best addressed in a practice note or guidelines issued on a court-by-court basis rather than by legislation or other external regulation.

Tax deductibility

553. The Law Council submits that individuals generally do not commence litigation in order to receive a tax deduction and that not all expenditure on litigation is deductible in any event. Further, the Law Council considers it inappropriate for any

[216] *Gray v Cash Converters International Limited and others* (Federal Court Nos. 2089 of 2013 and 2090 of 2013).

changes to laws relating to deductibility of appropriate legal expenses that are a cost of doing business.

554. The proposition being considered tends to reveal a misunderstanding of the system of general deductions under the Australian income tax system.

555. Section 8-1 of the *Income Tax Assessment Act 1997* provides as follows:

> General deductions
>
> (1) You can ***deduct*** from your assessable income any loss or outgoing to the extent that:
>
> (a) it is incurred in gaining or producing your assessable income; or
>
> (b) it is necessarily incurred in carrying on a * business for the purpose of gaining or producing your assessable income.
>
> Note: Division 35 prevents losses from non-commercial business activities that may contribute to a tax loss being offset against other assessable income.
>
> (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
>
> (a) it is a loss or outgoing of capital, or of a capital nature; or
>
> (b) it is a loss or outgoing of a private or domestic nature; or
>
> (c) it is incurred in relation to gaining or producing your * exempt income or your * non-assessable non-exempt income; or
>
> (d) a provision of this Act prevents you from deducting it.
>
> For a summary list of provisions about deductions, see section 12-5.
>
> (3) A loss or outgoing that you can deduct under this section is called a ***general deduction*** .

556. The section does not create deductions for particular amounts that are allowable for business taxpayers and not private taxpayers.

557. The section strives to ensure that taxable income on which tax is paid is the amount of income less the cost of its production. It is often the case that business taxpayers have more deductions than non-business taxpayers. That is usually the product of them having spent more on earning the business income. Businesses have a vast range of commitments that salary and wage earners and other non-business taxpayers do not. Both kinds of taxpayer are subject to the same tests. Both need to establish that the expenditures (losses and outgoings) have the nexus with income earning activities. Both types of taxpayer need to show that the capital and private exclusions do not apply. To illustrate, under present law legal expenses incurred by business may not be deductible when they are regarded as capital outgoings. This will often be the case where the litigation seeks to defend a structural aspect of the business which gives rise to an enduring benefit.

558. If an expense is incurred to earn assessable income, then there ought be entitlement to deduct the expense when arriving at taxable income. The denial of a

deduction for a business taxpayer would lead to a lack of symmetry in the tax system, and would unfairly disadvantage business taxpayers.

559. In any event, it is submitted that there is no evidence to suggest that tax deductibility of legal costs to business means they are more likely to pursue litigation as the report asserts. Litigation is generally undertaken when other avenues resolving the dispute have been exhausted. Tax deductibility is unlikely to be a critical determinant of a litigant's decision to proceed.

(14) Better measurement of performance and cost drivers

560. The Law Council supports, in principle, the collection of data and other information to assist policy development in relation to access to justice.

561. The Law Council's key concerns with respect to the gathering of data are that:

    (a) Data collection is done in a largely piecemeal, arbitrary and reactive way; and

    (b) It creates an additional cost burden for the courts and legal assistance providers, which are often required by Federal and State Attorney-General's Departments to collect new information, without any or sufficient allocation of funding to support the additional work (which can be substantial).

562. The Law Council refers to the literature review undertaken by Dr Liz Curran for the Commonwealth Attorney-General's Department:

> "The literature domestically and internationally, identifies the lack of a common language with which to articulate results, the lack of a framework in which to capture them and the difficulties in being able to measure and prove success. Where such results based measurement exists, it will often need to be descriptive, subjective and there is a risk that cannot be avoided, of its being anecdotal and vague.
>
> …
>
> "Some of the national evaluations reported that statistics kept by LACs, ATSILSs and CLCs currently, reveal little about the contexts, challenges and rationales behind why and how the services are delivered.
>
> "Studies that involve 'Client Satisfaction Surveys' are problematic if applied to the legal assistance sector, in view of the overriding obligations of the legal profession under the various legal professional legislation and conduct rules which impose duties and obligations which can conflict with what a client might want or expect (for example, the paramount duty to the court)."[217]

563. Recent government inquiries may have developed a database on the performance of the legal assistance sector, including matters briefed out to private firms. However, the Law Council is not aware of any attempt in the past to collect detailed information about the outcome of matters undertaken by the private profession.

564. It may be possible to survey the profession, in order to establish a statistical database for certain matters, including the length of time and manner of resolution of matters over a certain time period. However there are likely to be limitations on the capacity of law practices and barristers to provide detailed information, due to:

[217] Dr Liz Curran, *A Literature Review: examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services*, February 2012, Curran Consulting: Enhancing Justice and Human Rights, pages 6-7.

(a) the likely time and expense involved (which would be particularly difficult for smaller practices and sole-practitioners to absorb);

(b) obligations of confidentiality to clients;

(c) commercial-in-confidence considerations; and

(d) concerns about the potential for certain information to be misinterpreted, in the absence of context relating to the particular matters involved.

565. Moreover, differences in civil procedure and legislative frameworks across jurisdictions, as well as areas of specialisation of various law practices, would need to be carefully considered and accounted for in making any analysis of the data. For example, it is likely that a small debt-related matter will, of its nature, be resolved more quickly and at lower cost than a common law negligence claim.

566. The Law Council also notes that it may be difficult to conduct useful comparisons in relation to legal fees. Different firms have different cost-profiles and charging practices. There will be variations between firms based in metropolitan and regional areas, as well as CBD-based firms and those in suburban areas. Legal fees also vary according to the level of experience or responsibility of the practitioner (i.e. solicitor, associate, senior associate, salary partner, equity partner, principal or managing partner/director). The cost and risk profile of a firm will also vary depending on its areas of specialisation.

567. The Law Council suggests that a key priority in this area should be the development of nationally consistent data collection policies, to be applied across legal assistance providers (including LACs, ATSILS, CLCs and FVPLS) and Federal, State and Territory courts. Currently (for example) there is no consistently applied definition of what amounts to a 'legal inquiry'. There is also no central body collecting and publishing data coming out of Australian legal service providers and courts.

568. The Law Council would be pleased to consider proposals for the collection of information about the private profession, and ways to overcome some of the concerns identified above.

Conclusion

569. The Law Council regards this Inquiry as potentially one of the most significant opportunities in recent memory, to establish a case for restoring the foundations of the Australian civil and criminal justice systems.

570. While previous inquiries have examined structures, practices and procedures within the civil justice system, there has not previously been an analysis of the economic value of access to justice in Australia by an Australian Government institution.

571. As demonstrated by the length of this submission, the complexity of the issues covered by this inquiry is difficult to overstate. There are no simple solutions to some of the fundamental issues facing Australia's courts and legal assistance providers. This is particularly the case in a fiscally conservative environment, in which governments of all persuasions require information to underwrite political decisions about the funding of courts and legal services, which most people hope they will never have to use.

572. However, when legal problems and disputes do arise, without legal assistance many of those people are effectively left on their own, to navigate unfamiliar, complex and expensive dispute resolution processes and legal frameworks.

573. The failure by successive governments to invest in legal assistance services and the courts is short-sighted. The short term savings come at much greater mid-to-long term costs and the social harm done by inequitable access is significant.

574. The majority of Australians are ineligible for government-funded legal assistance, but cannot afford a private lawyer. For those who are eligible, civil law assistance is virtually unavailable in any event.

575. A substantial and growing number of those litigants proceed unrepresented. This has significant cost implications not just for the courts, but at every stage of the dispute resolution process, where unrepresented parties do not fully understand their rights or responsibilities, or the processes they are attempting to navigate.

576. Steady attrition of court resources and funding, in the face of growing service delivery costs and increasing demand for court services, has increased delays and diminished the capacity of most courts to provide services to sections of society where unmet legal need is greatest.

577. The Law Council submits that it is not sufficient to simply find new "efficiencies" within the existing framework. These problems are fundamental and systemic, and can no longer be ignored.

578. If Australian citizens are to enjoy anything even approximating access to justice, all Australian governments must revisit the objectives and funding models for the justice system, starting with the courts and legal assistance services. There is a need for an inter-governmental commitment to nationally agreed objectives for the delivery of legal assistance services for those who cannot afford a private lawyer; and to achieving fair and equitable access to the justice system for all Australians, regardless of where they live, what they earn or who they are

579. The Law Council looks forward to ongoing engagement with the Inquiry and commends this submission to the Productivity Commission.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Productivity Commission Issues Paper

Areas of inquiry – comparative note

Past reports consulted comprise:

- Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) (***Civil Justice Review***);
- Access to Justice Taskforce, Attorney General's Department, Australian Government, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) (***Strategic Framework Report***);
- Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Access to Justice* (2009) (***Access to Justice Report***); and
- Law and Justice Foundation of New South Wales, *Legal Australia-Wide Survey: Legal Need in Australia*, Access to Justice and Legal Needs Vol 7 (2012) (***Legal Australia-Wide Survey: Legal Need in Australia***).

Issues Paper		Past Reports
1.	About this inquiry - What has the Commission been asked to do? - What is in scope? - How can the Commission best add value?	N/A
2.	Avenues for dispute resolution and the importance of access to justice - Avenues for civil dispute resolution - Why is access to justice important?	Civil Justice Review - Chapter 1: Overview of the Civil Justice System. Strategic Framework Report - Chapter 3: The Supply of Justice; - Chapter 4: Conclusions about Access to Justice. Access to Justice Report - Chapter 2: The ability of people to access legal representation.
3.	Exploring legal need - What is legal need? - How many Australians experience legal need?	Legal Australia-Wide Survey: Legal Need in Australia. Strategic Framework Report - Chapter 2: The Demand for Justice.

Issues Paper		Past Reports
4.	The costs of accessing civil justice - Financial costs - Timeliness and delays - Simplicity and usability - Geographic constraints	Civil Justice Review - Chapter 11: Reducing the Cost of Litigation. Strategic Framework Report - Chapter 3: The Supply of Justice, see p34 (Costs of the Commonwealth Justice System); - Chapter 9: Costs. Access to Justice Report - Chapter 2: The ability of people to access legal representation; - Chapter 4: The Cost of Delivering Justice.
5.	Is unmet need concentrated among particular groups? - Self-represented litigants	Civil Justice Review - Chapter 9: Helping Litigants with Problems and Hindering Problem Litigants, see p563 (self-represented litigants). Strategic Framework Report - Chapter 8: Court based dispute resolution, see p111 (self-represented litigants). Access to Justice Report - Chapter 5: Measures to reduce the length and complexity of litigation and improve efficiency, see p90 (Measures relating to self-represented litigants). - Chapter 8: The ability of Indigenous people to access justice.
6.	Avenues for improving access to civil justice	Each of the reviews contains extensive recommendations. Civil Justice Review - Chapter 1: Overview of the Civil Justice System – Factors influencing the Civil justice System, includes distribution of civil and criminal business of the courts (71 ff).
7.	Preventing issues from evolving into bigger problems	Civil Justice Review - Chapter 2: Facilitating the Early Resolution of Disputes without Litigation.
8.	Effective matching of disputes and processes	Strategic Framework Report - Chapter 6: Information about the law.

Issues Paper		Past Reports
9.	Using informal mechanisms to best effect - Alternative dispute resolution - Ombudsmen	Civil Justice Review - Chapter 4: Improving Alternative Dispute Resolution. Strategic Framework Report - Chapter 7: Non-court models of dispute resolution. Access to Justice - Chapter 6: Alternative means of delivering justice.
10.	Improving the accessibility of tribunals	Civil Justice Review - Chapter 12: Facilitating Ongoing Civil Justice Review and Reform, see p722 (VCAT). Strategic Framework Report - Chapter 3: The supply of justice; - Chapter 7: Non-court models of dispute resolution; - Chapter 10: Administrative law.
11.	Improving the accessibility of courts - The conduct of parties in civil disputes and vexatious litigants. - Court processes. - Reforms in court procedures - Cost awards and court fees - The use of technology	Civil Justice Review - Chapter 4; Improving the Standards of Conduct of Participants in Civil Litigation; - Chapter 5: Case Management; - Chapter 9: Helping Litigants with Problems and Hindering Problem Litigants, see p590 (vexatious litigants). Strategic Framework Report - Chapter 8: Court based dispute resolution. Access to Justice Report - Chapter 3: The adequacy of legal aid; - Chapter 5: Measures to reduce the length and complexity of litigation and improve efficiency, see p86 (case management).

Issues Paper		Past Reports
12.	Effective and responsive legal services - A responsive legal profession - Legal assistance services - Legal assistance service funding - Pro bono	Civil Justice Review - Chapter 10: Achieving Greater Access to Justice: A New Funding Mechanism; - Chapter 11 Reducing the Cost of Litigation. Strategic Framework Report - Chapter 11: Legal Assistance; - Chapter 12: Building Resilience. Access to Justice - Chapter 2: The ability of people to access legal representation; - Chapter 3: The adequacy of legal aid; - Chapter 7: The adequacy of funding and resource arrangements for community legal centres.
13.	Funding for litigation - Contingent billing - Litigation funders - Class actions - Tax deductibility of legal expenses	Civil Justice Review - Chapter 1: Overview of the Civil Justice System, see p77 (availability of public and private resources for funding); - Chapter 3: Improving the Standards of Conduct of Participants in Civil Litigation, see p181 (duties of insurers and litigation funders); - Chapter 8: Improving Remedies in Class Actions; - Chapter 11: Reducing the Cost of Litigation, see p676 (class action costs), see p642 (percentage contingency fees); - Chapter 12: Ongoing Civil Justice Review and Reform, see p725, (tax deductibility of legal expenses). Strategic Framework Report: - Chapter 11: Legal Assistance. Access to Justice - Chapter 5: Measures to reduce the length and complexity of litigation and improve efficiency, see p85 (Litigation funding).
14.	Better measurement of performance and cost drivers	Strategic Framework Report - Chapter 9: Costs.