Australian Government
Attorney-General's Department

November 2013

Attorney-General's Department

Submission

Productivity Commission Inquiry

into Access to Justice Arrangements

INTRODUCTION

The department welcomes the Productivity Commission's (the 'Commission') inquiry into access to justice arrangements.

In summary, the key themes in this submission relate to:

1. Avenues for dispute resolution

The department:

- encourages the Commission to examine the provision of Alternative Dispute Resolution (ADR) services as a means of promoting the principles of fairness and equity and avoiding lengthy and costly processes of judicial intervention
- would encourage the Commission to examine the following mechanisms being introduced to improve the ADR framework and increase its use across government and the community more broadly:
    - increased opportunities for ADR education and training for law students, the legal profession, judicial and court officers
    - development of standards and conduct obligations for ADR practitioners other than mediators, and
    - the development of an evidence base that demonstrates the effectiveness of ADR in resolving disputes.

2. Avenues for preventing issues from evolving into bigger disputes

The department:

- notes the work to increase legal problem identification and referral through the (Australian Government) Department of Human Services Collaboration Project
- draws to the attention of the Commission work the department has undertaken to investigate the role that greater government collaboration and 'joined-up' services could play in the holistic resolution of problems for the most disadvantaged Australians
- encourages the Commission to broaden its examination to include how legal health checks could be applied to businesses and the not-for-profit sector, and
- highlights the potential benefits of making better use of technology to:
    - provide access to information, support the delivery of services, and provide seamless and integrated service delivery, and
- encourages the Commission to examine how the use of toolkits can empower people to take responsibility for addressing their own legal issue.

3. Effective matching of disputes and processes

The department:

- recognises that family dispute resolution in parenting matters has been beneficial to the parties involved (and their children), and encourages the Commission to consider the benefits that could result from further efforts to improve early intervention in other areas of family law disputes, such as property.

- notes the sorts of programs in place that can assist self-represented litigants to make more informed choices about how to resolve their issues, including those that provide information and advice about prospects of success, other dispute resolution pathways, court processes and assistance drafting documents, and
- encourages the Commission to examine how improvements can be realised through better referral options between legal providers, courts and non-legal providers.

4. Improving accessibility of courts

The department:

- encourages the Commission to consider how the limited resources of the courts could be directed towards resolving the most intractable disputes so that access to courts for those disputes could be further strengthened by supporting people to resolve other (and most) disputes themselves
- encourages the Commission to examine how access to the courts can be increased by harnessing technology to provide access to information and support the delivery of services, and
- in relation to vexatious litigants, encourages the Commission to examine questions including what data is available on the number of vexatious litigants and the impact they have on opposing parties, courts and tribunals and the parties themselves.

5. Improving accessibility of tribunals

The department:

- notes the range of measures that are already in place to assist parties to access and participate in tribunal review processes
- sets out background and key principles developed from earlier consideration of issues linked to the accessibility of tribunals, and
- identifies a range of options for the Commission's consideration which would be relevant to the accessibility and efficiency of the Commonwealth merits review system, including:
    - changes to structure to amalgamate existing Commonwealth tribunals (as proposed by the Administrative Review Council in 1995 and more recently canvassed in the Skehill Review of small and medium agencies in the Attorney-General's portfolio), or
    - other changes to move towards a more unified and efficient system in the future (such as shared facilities and services, reducing multiple layers of external merits review and other cooperative initiatives between tribunals).

6. Effective and responsible legal services

The department:

- encourages the Commission to examine how a nationally uniform system of regulation could potentially reduce the regulatory burden and minimise compliance costs for legal firms and lawyers by creating uniform rules of practice across jurisdictions

- encourages the Commission to examine the value of early intervention such as early legal advice or the development of documents that reduce the likelihood of disputes arising (eg the value of wills and pre-nuptial agreements), and
- notes that the National Pro Bono Aspirational Target has been effective in encouraging pro bono work since its introduction in 2007 (with the number of lawyers undertaking pro bono work trebling over that period).

7. Better measurement of performance and cost drivers

The department:

- notes that there is a long-term departmental project to improve data collection across the civil justice system and encourages the Commission to consider the potential for this project to act as a vehicle to improving civil justice system data in Australia.

HOW CAN THE COMMISSION BEST ADD VALUE?

(Refers to Chapter 1 of the Commission's Issues Paper, September 2013)

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

The department recognises that for many people, the only time they will come into contact with the Australian civil justice system is as a consequence of a relationship breakdown, and a subsequent need to determine parenting arrangements for their children and/or the division of property.

The major life stressor represented by separation and divorce, including disputes about children and property, can have long-term impacts on a person's financial and physical well-being, as well as that of their children. Recognising that family dispute resolution in parenting matters has been beneficial, further efforts to improve early intervention in other areas of family law disputes (such as property) may be useful. (Page 23 of this submission contains further information about Family Dispute Resolution).

DISPUTE RESOLUTION AND THE IMPORTANCE OF ACCESS TO JUSTICE

(Chapter 2 of the Commission's Issues Paper, September 2013)

What should the objectives of the civil justice system be?

The objectives for the civil justice system should be developed with a view to guiding policy and program development across the civil justice system as a whole.

The department refers the Commission to draft objectives for the civil justice system that have been developed as part of the department's Civil Justice Evidence Base Project (page 44 of this submission refers to this in more detail).

In these draft objectives, the department suggests that an overarching objective of the Australian civil justice system could be that it *contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law*.

In addition, the department encourages the Commission to consider the following sub-objectives which suggest that the Australian civil justice system should enable people to:

- solve their problems before they become disputes
- resolve disputes expeditiously and at the earliest opportunity
- be treated fairly and have access to legal processes that are just
- have equitable access to the civil justice system irrespective of their personal, social or economic circumstances or background
- benefit from a civil justice system that values the well-being of those who use it, and
- be confident that the civil justice system is built on and continuously informed by a solid evidence base.

The word 'people' is intended to include any legal entity which may use services provided by the civil justice system including corporations, incorporated associations etc.

EXPLORING LEGAL NEEDS

(Chapter 3 of the Commission's Issues Paper, September 2013)

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

The department supports the view that an unmet legal need may not only lead to an exacerbation of the legal issue itself, but can also lead to and exacerbate other problems in the person's life such as health and social welfare problems.

Findings from studies such as the Legal Australia-Wide (LAW) Survey and also from other jurisdictions such as the United Kingdom indicate that legal problems are likely to be linked to stress-related illness, physical ill health, relationship breakdown, moving home and loss of income or financial strain.[1]

[1] Pleasence, P. and Balmer, N.J. (2009) Job Loss, Divorce and Family Disputes. *Family Law*, 39, see also Bennathan, M. (2002) The care and education of troubled children, *Therapeutic Care and Education*, Vol 1(1), 1992, 37-49.

Furthermore, there is a clear causal connection between the advent of some civil law problem types. For example, if legal matters associated with loss of housing or income/employment are left unchecked they can lead to non-legal consequences, such as family breakdown or divorce. These in turn can cause long-term psychological health problems for the individual involved.

These linkages have been illustrated in empirical evidence in England and Wales, which highlighted the actual or potential cost of unresolved civil justice problems. Analysis relying on 2007 data from the England and Welsh Civil and Social Justice Survey (CSJS) and undertaken by the Citizen's Advice Bureau[2] proposed that:

- for every £1 of legal aid expenditure on housing advice, the state potentially saves £2.34
- for every £1 of legal aid expenditure on debt advice, the state potentially saves £2.98
- for every £1 of legal aid expenditure on benefits advice, the state potentially saves £8.80, and
- for every £1 of legal aid expenditure on employment advice, the state potentially saves £7.13.

If left unmet, legal needs can potentially spiral into other non-legal problems and result in additional costs to government, as the affected individuals will require more intensive and costly interventions from a wider variety of services in an attempt to address their complex needs. Consequently, the department encourages the Commission to explore early intervention programs and 'joining-up' legal and non-legal services as a means to address legal and non-legal needs before they become more complex.

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

The LAW Survey found that legal problems are highly prevalent amongst groups in society that experience significant disadvantage. Demographic groups such as those with a disability, single parents, the unemployed, those who live in disadvantaged housing, and people living in regional areas (compared to those living in major city areas) had higher odds of experiencing legal problems.

The department refers the Commission to the LAW Survey for further background relevant to this question.

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

As a result of other service priorities for legal representation, Legal Aid Commissions (LACs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS) are more likely to offer advice and minor assistance in civil law matters. Community legal centres (CLCs) are often better placed to assist those with civil law matters who require more in-depth assistance. Given the number of Australians who

[2] Citizens Advice Bureaux (2013) *Towards a Business Case for Legal Aid*, LSRC International Research Conference, Oxford, 2013. Available from www.citizensadvice.org.uk/towards_a_business_case_for_legal_aid.pdf (accessed 14/5/13).

face family breakdown, LAC funding has been focused here. For Indigenous Australians, high incarceration rates have meant that the focus of ATSILS funding is on state criminal law.

The National Partnership Agreement on Legal Assistance Services (the 'NPA') is a four year agreement between the Commonwealth and each state and territory, which provides Commonwealth funding for LACs and sets out the agreed objective and outcomes for the legal assistance system as a whole. The NPA provides guidance to LACs about the types of legal matters that should attract Commonwealth funded legal services. Priority matters are those relating to the wellbeing of children or people who have experienced or are at risk of family violence. Civil law priorities include matters relating to social security benefits, consumer law, employment law, equal opportunity and discrimination cases.

Matrimonial divorce proceedings are specifically excluded as matters that should attract assistance, along with passport and change of name applications. For further detail see Schedule B of the NPA which can be obtained from the Standing Council on Federal Financial Relations website.[3]

COSTS OF ACCESSING CIVIL JUSTICE

(Chapter 4 of the Commission's Issues Paper, September 2013)

The department encourages the Commission to examine the use of translators and interpreters as an important part of increasing the accessibility of the justice system.

The department has developed internal guidelines on the best practice use of interpreters and translators to provide high-level guidance on when and how to use interpreters and translated information. The department could share these guidelines with the Commission on request.

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

The department acknowledges that courts have a key role to hear the most complex and intractable disputes that cannot be resolved by other means. For courts to perform this role, it is important to ensure that court processes and procedures are as efficient as possible.

The Federal Court of Australia and Federal Circuit Court of Australia have an individual docket system as the basis of their listing and case management system. The general principle underlying this system is that each case commenced in the courts is allocated to an individual judge who is then responsible for managing the case until final disposition. This system seeks to eliminate the need to

[3] Standing Council on Federal Financial Relations (2013) *Federal Financial Framework*, Available from www.federalfinancialrelations.gov.au (accessed 24/10/13).

explain the case afresh each time it comes before a judge, and aims to reduce the number of directions hearings requiring appearances before the Court.

The Victorian Registry of the Federal Court has introduced a 'Fast Track List' which streamlines court procedures for commercial matters where it is appropriate to do so. There a number of elements to streamlining procedures for these matters, including the abolition of pleadings, dealing with non-urgent interlocutory matters on the papers, and reducing the volume of discovery. The Court endeavours to deliver judgment within 6 weeks of the conclusion of the trial.

In the Federal Court, cases in some areas of law requiring particular expertise (including patents, taxation and admiralty) are allocated to a judge who is a member of a specialist panel.

The Family Court of Australia takes a less adversarial approach to trials in child-related proceedings, which is mandated by Division 12A of Part VII of the *Family Law Act 1975*. A number of principles are set out in the Act, including that trials in child-related matters are conducted without undue delay and with as little formality and legal technicality and form as possible.

Cases that come to the Family Court that involve allegations of sexual abuse and/or serious physical abuse of a child go into the Court's Magellan program which is a fast-track list where cases are managed by a small multi-disciplinary team (a judge, a registrar and a family consultant), who work closely with state child protection officers. The program aims to deal with these cases as effectively and efficiently as possible.

Other mechanisms are also in place to reduce the delays in courts, and increase the user-friendliness of the court experience. This includes services that provide assistance to self-represented litigants to resolve their legal problem, and an increasing use of technology by courts to improve their processes. These programs are considered in more detail in this submission on pages 14 and 36, respectively.

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

The department encourages the Commission to explore the view that obtaining assistance or support in dealing with non-legal issues may place a person in a better position to deal with their legal issues. This may reduce his or her exposure to legal costs and relieve the burden on courts. Conversely, failure by a person to address non-legal issues will often result in reoccurrence or exacerbation of his or her legal problems.

There is significant value to the justice system in encouraging people to seek assistance for non-legal issues, such as psychological and physical stresses, simultaneously as they resolve their legal problem. There is also value in helping people to identify which services can assist them, or referring them to appropriate services. Such improvements can be realised through better referral options between legal providers, courts and non-legal providers (page 18 of this submission identifies how legal interventions (such as legal health checks) can facilitate the referral of people to appropriate services).

The department also considers that there is benefit in viewing people and their needs holistically, and not just categorising them as a particular problem. This approach calls for different delivery mechanisms for legal assistance, which then work more closely together with non-legal services. Examples of this include medico-legal partnerships, co-located services and greater outreach to areas where people with significant disadvantage are likely to be found.

The department notes that there are initiatives in Australian courts that do provide people (attending courts) with multiple avenues for accessing information about, or being referred to, other services that may be of assistance to them. A number of programs to this effect are already operating with a great deal of success.

The Family Court and the Federal Circuit Court jointly ran an Integrated Client Service Delivery Program from 2006-2009. Due to the emotional nature of family law proceedings and the life events that lead to them, many litigants in the family law courts face significant mental health issues, either temporarily or on an ongoing basis.

The program involved the family law courts developing a referral network with community and government-based mental health service providers. This built the capacity of court registry staff to offer litigants referrals to appropriate services, and ensured that court registries held information about mental health services available in their area. The protocols developed under the program were tailored to the needs of different groups of people and different levels of mental health needs.

Another integrated court services program – the Client Integrated Service Program – was established in three Victorian magistrates' court venues in late 2006. This program offered a coordinated, team based approach to the assessment and treatment of defendants at the pre-trial or bail stage, linking them to support services such as drug and alcohol treatment, crisis accommodation, disability services and mental health services.

An evaluation of this program found that it had achieved significant positive results for both family law court litigants and the family law courts themselves. The evaluation found high levels of satisfaction with referrals made under the program amongst litigants, and a number of litigants reported significant positive outcomes as a result.[4]

Similarly, a Court Network operates in courts in Victoria and Queensland. It is staffed primarily by volunteers and provides non-legal support, information and referral to services such as community health, disability, interpreters and domestic violence support for persons attending court and to advocate for the needs of court users. In the 2011-12 financial year this service assisted over 162,000 people across Victoria and Queensland.

[4] Dr Stuart Ross (2009) *Evaluation of the Court Integrated Service Program – Final Report*. Available from http://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf (accessed 24/10/13).

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

The department encourages the Commission to examine the benefits of legal and other services making use of multiple modes of access, such as telephone and internet delivery, as well as traditional face-to-face services, to best respond to the public's needs and preferences. While the use of technology offers some innovative opportunities for the delivery of services, the department believes face-to-face assistance will always be required in certain settings – for example, when dealing with those people who have multiple, complex needs, or where persons do not have access to telephone services or other forms of technology.

The need for face-to-face assistance may vary according to an individual's capacity, the seriousness of the problem concerned and the kind of intervention called for. For example, information and preliminary advice may be given over the phone to those better positioned to help solve their own problems, but more involved methods of assistance for people with significant disadvantage or complex needs will require face-to-face help.

Technology is increasingly being used across the justice system, including by Commonwealth and state government, legal assistance services, courts and tribunals, and ADR service providers.

Technology initiatives can improve access to justice in a number of ways by:

- providing access to information
- supporting the delivery of services, and
- providing seamless and integrated service delivery.

Internet based initiatives

The department also encourages the Commission to examine the increased use of internet based initiatives as an innovative and potentially cheaper route to delivering information and advice. Websites offer convenience and address some of the geographical limitations associated with face-to-face services. They provide a relatively cost-effective means to reach a large group of people and can be scaled up without substantial additional investment. Simple and well-signposted entry points can be critical to facilitating broad community access to information, advice and support.

The NBN Regional Legal Assistance Program has provided $1.5 million in grant funding to Commonwealth-funded legal assistance providers to trial NBN-enabled initiatives in regional and remote areas. The objectives of the program are to increase access to direct legal assistance, provide better support for professional staff and practitioners, and identify innovative, collaborative ways of providing legal assistance services. Funding of $400,000 was distributed in 2011-12 and $1.1 million in 2012-13.

A number of internet-based services and toolkits are now on offer around the world. These allow users to access online resources such as template letters, guidance on legal processes and 'self-help' legal toolkits produced with the intent of providing guidance to enable individuals to handle their

legal problems alone. These toolkits empower people to take more responsibility for addressing their own legal needs where possible. Notable exponents of these online legal services include the US-based Rocket Lawyer, and both Slater & Gordon and Scott-Moncrieff & Associates in the United Kingdom. Greater development and use of information technology capabilities is required to encourage more opportunities for these kinds of innovations in legal service delivery in Australia.

All state and territory legal aid commissions provide legal information, factsheets and guidance for legal aid applications on their websites. The LawAccess website in NSW is a best practice example and offers over 2,000 plain language legal resources, in 33 community languages. By visiting the website www.lawaccess.nsw.gov.au individuals can access a large database of factsheets and minor advice about a range of legal issues.

The department's Access to Justice Website (www.accesstojustice.gov.au) is another internet-based initiative and central online portal which provides information, resources and referrals to assist the Australian public in dispute resolution. It is supported by the department and promotes a broader view of access to justice (going beyond lawyers and the courts) and emphasises the importance of delivering fair outcomes as efficiently as possible and resolving disputes at the most appropriate level.

Websites are most effective for individuals who are confident in using the internet, can understand the information presented and are able to apply the information to their legal issues. Greater personalisation of information through flow-through menus or selection options may enable individuals to better target their information needs. To be effective, websites should have high visibility, be accessible, well-known and convenient to use.

Online service delivery has particular advantages for individuals living in regional, rural and remote areas. A number of legal assistance providers have developed programs in this area. For example, Legal Aid NSW is running a joint web conferencing trial in Walgett and Grafton with the Aboriginal Legal Service NSW/ACT. Through the National Broadband Network Regional Legal Assistance Program (NBNRLAP), the North West Community Legal Centre in Devonport, Tasmania, utilises the NBN to enable the community in Smithton to access legal resources, including one-on-one advice.

The department suggests that a key, persistent barrier to effective online engagement is the digital divide, which refers to physical access to online services, as well as individuals' willingness and capacity to use the internet as an information resource. Notwithstanding the benefits to be gained from increased use of technology, for many, professional assistance (including legal advice) will still be required.

Telephone hotlines

Telephone services offer immediacy and convenience in accessing legal information and advice. Hotlines can be effective for people who live in rural, remote or regional areas, are experiencing mobility issues, are time constrained, have caring responsibilities or lack independent transport.

However, there are limits as to how comprehensive telephone services can be and they may not be suited for individuals who find it difficult to communicate their advice needs, do not have access to a telephone in a private setting or for whom operating hours are unsuitable.

All legal assistance services provide initial advice over the telephone. In NSW, the LawAccess (previously mentioned) helpline performs a triage role, dispenses initial advice and directs users to legal aid services and other community legal centres. Other legal assistance services also operate telephone services, alongside national helplines, such as the Family Relationship Advice Line.

Social media

Social media can enable the sharing of information and distribution of community legal education, the promotion of news and events, and generally help raise community awareness about a service.

The use of social media in legal assistance services is increasingly becoming commonplace. It offers increased reach and direct communication with the Australian public through smart phones. A number of innovative examples of the use of social media in the legal assistance sector are identified in the report titled 'Harnessing the Benefits of Technology to Improve Access to Justice'.[5]

LACs use various forms of social media to engage with the public. For example, YouTube channels are used by some jurisdictions to share legal information videos, Facebook pages are used to promote service awareness and Twitter accounts to highlight news and events. A survey conducted by the department in 2012 found that 50 per cent of CLCs had a social media presence.

The Family Court launched a Twitter account in October 2012 to provide the latest news, information, services and judgments.[6]

CONCENTRATED UNMET NEED

(Chapter 5 of the Commission's Issues Paper, September 2013)

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

As already mentioned in relation to 'Exploring Legal Needs' (page 6 of this submission), the LAW Survey sets out in some detail the particular groups in Australian society who face significant disadvantage in accessing civil justice, and who are especially prone to experiencing legal problems. The department would refer the Commission to the LAW Survey for more detail.

People who live in rural regional and remote Australia

People who live in regional, rural and remote Australia experience complex legal needs. Remote Australian communities may have lower income levels and participation in education and employment. Research suggests that socioeconomically disadvantaged groups such as these can be

[5] Standing Council on Law and Justice (2013) *Harnessing the benefits of technology to improve access to justice*. http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/harnessing_the_power_of_technology_analysis_paper.pdf (accessed 24/10/2013).
[6] Ibid.

more at-risk of legal issues.[7] However, due to population loss, private and public legal services are downsizing or relocating from some communities. The recruitment or retention of legal practitioners is also very difficult in remote Australia.

People from culturally and linguistically diverse backgrounds

Culturally and linguistically diverse communities tend to experience a range of linked legal and non-legal problems. Although there are risks associated with assuming homogeneity among culturally and linguistically diverse communities, key issues this community may experience include cultural barriers (language, cultural norms and traditional gender roles), structural barriers (lack of knowledge of available services and difficulties accessing them) and service-related barriers (service models may be culturally inappropriate or are perceived to be so).

Indigenous Australians

Indigenous Australians can also experience a range of multifaceted barriers in addressing their legal issues. Indigenous people may suffer multiple complex issues across a number of indicators, including health and wellbeing, life expectancy, employment and housing, and access to services. The 2012 LAW Survey showed an increased prevalence of multiple legal problems for Indigenous people and a relatively high chance of not finalising them. The LAW Survey found that indigenous Australians are 1.3 times more likely to experience multiple legal problems than non-Indigenous people, and that only 61% of indigenous respondents finalised legal problems.[8] Indigenous Australians are over-represented in all aspects of the criminal justice system, both as victims and perpetrators. Some Indigenous Australians lack a sense of ownership or engagement in the Australian justice system and an understanding of modern legal concepts, especially in remote areas where English is a third or fourth language.

What is the impact of self-representation on opposing parties, courts and tribunals and the SRLs themselves? How can parties be best assisted to self-represent?

The courts have suggested that self-represented litigants take more court time and are in and of themselves more expensive than other courts. For example, in its 2012-13 Annual Report the Family Court noted that it 'monitors self-represented litigants as one measure of the complexity of its case load. Self-represented litigants add a layer of complexity because they need more assistance to navigate the court system and require additional help and guidance to abide by the Family Law Rules and procedures'.[9]

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[7] Coumarelos, C, Macourt, D, People J, MacDonald, HM, Wei, Z, Iriana, R and Ramsey S, 2012, *Legal Australia-wide Survey: legal need in Australia*, vol. 7, Law and Justice Foundation of New South Wales, Sydney.

[8] Law and Justice Foundation of New South Wales (2013) *Legal Need of Indigenous people in Australia,* http://www.lawfoundation.net.au/ljf/site/templates/UpdatingJustice/$file/UJ_25_Legal_needs_of_Indigenous_people_FINAL.pdf (accessed 24/10/2013).

[9] Family Court of Australia 2012-13 Annual Report, page 55.

In 2012, and as part of the Civil Justice Evidence Base project (page 44 of this submission refers), the department commissioned a study of the population of self-represented litigants in the civil justice system in Australia.[10]

Overall the study found that in the Australian civil justice system very limited data is collected about self-represented litigants. The report recommendations included that:

- agency's existing case management IT systems be supplemented with a mandatory self-represented litigant field
- agencies develop and agree on a common definition of self-represented litigants, and
- agencies collect information on the basis of this clear definition and report on a range of information about self-represented litigants and how they interact with the civil justice system.

The department encourages the Commission to consider the benefits that might be achieved through programs that provide self-represented litigants with advice and support, including: advice about their prospects of success, other dispute resolution pathways that may be more appropriate, whether and how to commence and progress court proceedings, and assistance with drafting court documents (e.g. pleadings and affidavits), and preparation for trial and settlement negotiation. Such support may enable self-represented litigants to make more informed choices about how to resolve their problems, reduce delays and address other issues associated with self-representation.

These kinds of services may also assist in 'screening out' frivolous, vexatious or unmeritorious cases, and divert matters away from courts where appropriate. This is of significant value in ensuring that court resources can be devoted to those matters that need to be adjudicated. An evaluation[11] of the Self-Representation Service run by the Queensland's Public Interest Law Clearing House (QPILCH), found that three matters that were diverted away from the courts resulted in an estimated $52,000 in cost savings.[12]

Where a matter reaches the stage of court proceedings, services such as the QPILCH service ensure that self-represented litigants are able to understand the various stages of the court process (including the effect of court orders and consequences of non-compliance) and progress their matter as expediently as possible, which further reduces delays.

The courts have established several schemes to assist self-represented litigants. These services are provided free of charge to self-represented litigants.

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[10] Attorney-General's Department (2013) *An evidence base for the civil justice system*, http://www.ag.gov.au/LegalSystem/Pages/Anevidencebaseforthecivilјusticesystem.aspx (accessed 24/10/2013).

[11] The evaluation of the Self-Representation Service (pilot) run by QPILCH was undertaken in 2012. It examined the effectiveness of the service in relation to: usage, the types of services provided to clients and the effect the service had on the court, referring agencies and the clients (for a 9 month period).

[12] QPILCH (2012) *Evaluation of effectiveness of Queensland Public Interest Law Clearing House Self Representation Service in Federal Court and Federal Magistrates Court Brisbane*, http://www.qpilch.org.au/_dbase_upl/QPILCH_Federal_Court_Pilot_Evaluation_June_2012.pdf (accessed 24/10/2013).

The Federal Court and Federal Circuit Courts operate court-based pro bono lawyer schemes. With a significant proportion of migration-related matters involving self-represented litigants, the Federal Circuit Court has been able to facilitate assistance to litigants through its pro bono and other legal assistance schemes. In Melbourne, Victoria Legal Aid has a Migration Duty Solicitor Scheme in operation. Assistance is also provided in various states by way of organisations such as PILCH[13].

In the Federal Circuit Court, self-represented litigants with family law matters are assisted by duty lawyer schemes operating in capital cities and regional areas. The court partners with legal aid commissions and other organisations that make the services of legal practitioners available to assist litigants on the day of their matter being heard. Some examples of assistance provided include provision of legal advice, negotiating consent orders and, in urgent matters, the preparation of documents and representation.[14]

In Melbourne, Sydney and Brisbane the Federal Circuit Court has set up discrete industrial law small claims lists and endeavours to resolve such matters on the first court date. The Court is assisted by registrars who are able to facilitate a negotiated settlement in certain matters.[15] In addition the presence of representatives from the Office of the Fair Work Ombudsman facilitates the summary disposition of such matters.

AVENUES FOR IMPROVING ACCESS TO CIVIL JUSTICE

(Chapter 6 of the Commission's Issues Paper, September 2013)

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

The National Centre for Crime and Justice Statistics (NCCJS) within the Australian Bureau of Statistics (ABS) leads national statistical activity aimed at developing, improving and disseminating information about the Australian criminal justice system. These activities, combined with well-defined governance structures and strong stakeholder relationships result in the collection of consistent and robust data that can be interrogated and analysed.

The department considers that a similarly robust system of data collection and analysis benefit the Australian civil justice system. The department is pursuing this through the Civil Justice Evidence Base Project (page 44 of this submission examines this in more detail).

[13] Federal Circuit Court of Australia 2012-13 Annual Report, page 63.
[14] Federal Circuit Court of Australia 2012-13 Annual Report, page 63.
[15] Federal Circuit Court of Australia 2012-13 Annual Report, page 63.

PREVENTING ISSUES FROM EVOLVING INTO BIGGER PROBLEMS

(Chapter 7 of the Commission's Issues Paper, September 2013)

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

Early access to information about how to respond to legal and non-legal issues is vital to preventing those issues from evolving into bigger problems.[16] Initiatives already mentioned in this submission include:

- better use of technology (including the internet) to access information and toolkits that empower people to take responsibility for addressing their own legal issue (page 11 of this submission refers)
- programs in Australian courts that provide people with the information they need or referral services that may be of assistance (page 8 of this submission refers), and
- websites that provide information and resources to people, and when possible in a variety of languages (page 11 of this submission refers).

Advice and access to legal information and assistance

Access to information, advice and assistance can play a large part in resolving problems before they can escalate and become more complex.[17]

Increasing legal problem identification and referral: Department of Human Services Collaboration Project

Since early 2012, the department has been investigating opportunities to encourage greater collaboration between the legal assistance sector and the Department of Human Services (DHS). The project has focused on increasing communication between services at a local level to encourage better referral mechanisms and collaboration in community legal education. State legal assistance forums have played a central role by providing opportunities to bring together legal assistance services and DHS local zone managers.

The project recognises early intervention and prevention as key pillars of the NPA. By building stronger relationships between DHS and legal assistance services, legal problems may be identified earlier and legal assistance can be provided to avoid legal problems escalating.

The department is in the early stages of collaborating with DHS to develop a training module for DHS staff to identify legal problems and make meaningful referrals to legal assistance services. It is hoped

[16] A Strategic Framework for Access to Justice in the Federal Civil Justice System, September 2009, Chapter 6.
[17] The current NPA reflects this through its emphasis on early intervention and prevention. The Commission should also refer to the new Law and Justice Foundation study into the effectiveness of early intervention and prevention for legal assistance. This study is currently being finalised and the findings are likely to be of great interest and relevance to the Commission's inquiry.

that an increased awareness of the impact legal problems can have on DHS clients and better legal problem spotting skills will increase the opportunities for early intervention by legal assistance services.

Increasing public knowledge of the law: community legal education

LACs are required under the NPA to provide preventative and early intervention service[18] to meet key performance benchmarks. Community Legal Education (CLE) takes many forms, but it can be generally described as offering information on legal issues to the public. CLE can be delivered in a variety of ways, including hardcopy or online factsheets, outreach to remote communities or particular social groups and face to face information sessions.

To help people understand more about how the legal system works and to increase the likelihood of early intervention, Legal Aid ACT runs free face-to-face information sessions. These sessions cover a range of topics including young people and the law, dealing with police questioning, interviews and searches, going to court, separation, neighbourhood disputes, and employment law.

These programs are designed to increase public awareness of legal problems, giving individuals the skills and encouragement to seek legal assistance before a matter escalates.

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

The department encourages the Commission to consider the utility of instruments such as legal health checks for informing service providers of an individual's immediate needs and assisting in the provision of appropriate advice, support and referral. By becoming aware of these needs and treating them early, services can help to prevent the exacerbation of problems.[19]

Legal health checks

Problem identification instruments, such as legal health checks, work to best effect when they are delivered early, by an individual who is trained in holistic problem identification and able to accurately refer an individual to the appropriate service.

The department refers the Commission to the legal health check developed by the Queensland Homeless Persons Legal Clinic (which is in turn operated by Queensland Public Interest Law Clearing House Incorporated (QPILCH)). This approach has proven to be a useful resource in terms of providing lawyers with structure when working across areas of law that they are unfamiliar with (for example commercial lawyers volunteering in legal centres), helping them to determine a person's immediate needs and to assist in the subsequent tailoring of legal advice.

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[18] The NPA defines preventative services as: '…legal services provided by legal aid commissions that inform and build individual and community resilience through community legal education, legal information and referral.'

[19] The department notes that some civil justice problems remain unavoidable (in comparison to, for example, criminal justice problems) and an indicator may be less helpful in this instance.

In the event that a legal health check is used as a self-help tool, the department considers that it must be comprehensive and accessible for users. The 'Legal Health Check-up' booklet created by the Tasmanian Women's Legal Service is a good example of a self-help tool. It explains the legal dimensions of lifestyle documents, relationships, housing arrangements, finances and death of a loved one.

In relation to the concept of 'legal health checks', the department would encourage the Commission to broaden its investigation to include how legal health checks could be applied to businesses and the not-for-profit sector. This would be with a view to encouraging prevention, resilience and increased legal capability more broadly.

Legal intervention programs

Legal intervention programs, such as community outreach programs, need to be delivered to those areas where the services available are unable to meet the level of demand or legal need. Accurate data on legal need, drawn from Australian Bureau of Statistics' population research or from legal assistance services themselves, can help to target programs and services. The LAW Survey is also valuable here, as it looks at characteristics of high needs groups who access legal assistance to help address their problems. Such information would be useful in providing an indication of which legal assistance users may require more intensive legal assistance, and will also be of use in tailoring services to more thoroughly meet their specific requirements.

Detection Of Overall Risk Screen (DOORS)

The Australian Government funded the development of the DOORS. DOORS is a tool that can help professionals in the family law system to identify safety risks for people, and particularly risks to those families exposed to family violence and child abuse. The DOORS is simple, practical and flexible enough to meet the needs of different professionals, locations and people's demographics and also facilitates the referral of people to appropriate services and the development of client safety plans. While the use of the DOORS is not compulsory, agencies and practitioners can use it to inform their own screening and risk assessment practices.

In terms of a broad 'health check', the DOORS covers the following behaviour domains: client's culture and religious background, the separation, managing conflict with the other parent, how the person, the other parent and the people's child (ren) are coping, managing as a parent, children's safety, parent's personal safety, safety behaviour, and other stresses.

Over 2500 copies of DOORS have been distributed to family law practitioners, and the Family Law Section of the Law Council of Australia has been funded to provide information sessions for family lawyers in using the DOORS.

MATCHING DISPUTES & PROCESSES

(Chapter 8 of the Commission's Issues Paper, September 2013)

How might people with legal issues be better directed to multiple legal and non-legal services to meet their needs? How can services be 'joined-up' to assist in this regard?

The department encourages the Commission to examine the multitude of benefits that a 'joined-up' approach can provide. People with multiple needs can be able to access services in a more timely and convenient way and they are better enabled to resolve their problems at an earlier time. Earlier intervention means that support will not be as intensive or costly as later, when the problem is likely to have grown in complexity.

In practice, 'joined-up' service delivery for clients could be affected through:

- referral networks and formal agreements between separate services
- co-locating different services in one space, and
- integration and amalgamation of different services.

In these models, legal assistance services could act as one service within a co-located or integrated model, or one referral point within a referral network. For example:

- the West Heidelberg Community Legal Service[20] delivers an integrated model of assistance in partnership with Banyule Community Health, with which it has been co-located since its establishment in 1975
- Salvos Legal[21] and Baylink[22] in Australia, and
- 'Co-Op'[23] and one stop shops that are in operation in the United Kingdom.

These models all offer services to address a variety of needs, and enable people with multiple needs the opportunity to address those needs in a more holistic way. While there are currently no formal evaluations of Salvos Legal or Baylink, the department considers that the underlying concept of co-locating various services and facilitating referrals for clients to address their different needs best facilitates the delivery of holistic, 'joined-up' services. In addition, the Salvos Legal model provides a template for services to generate additional revenue to support their service activities.

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[20] Banyule Community Health (2012) *West Heidelberg Community Legal Service,* http://www.bchs.org.au/services/West_Heidelberg_Community_Legal_Service.php (accessed 24/10/2013).
[21] Salvos Legal (2013) http://www.salvoslegal.com.au/ (accessed 24/10/2013).
[22] Department of Human Services (2013) *baylink*, http://www.humanservices.gov.au/corporate/government-initiatives/baylink (accessed 24/10/2013).
[23] The co-operative legal services (2013) http://www.co-operative.coop/legalservices/ (accessed 24/10/2013).

The department funds Family Law Pathway Networks. These are local networks of family law system service providers (Courts, legal assistance services, family relationship centres, child support agencies, private lawyers, dispute resolution practitioners etc.) throughout Australia. They foster a more collaborative 'joined-up' family law system, leading to more effective and efficient local arrangements for these services and practitioners, to help bring about better outcomes for clients.

What place should the cultural mechanisms adopted by some groups to deal with disputes within their communities have in the dispute resolution system?

The department supports appropriate recognition of cultural mechanisms to deal with disputes in the broader dispute resolution system as this can help people to feel comfortable within an unfamiliar justice system.

As an example, Aboriginal Sentencing Courts present Australian law in a more culturally appropriate environment. Practical steps to achieve this include a less adversarial court room, open dialogue between both parties and the court, involvement of Aboriginal elders, respected persons and the community. Through this approach, institutions aim to gain the confidence of individuals and encourage them to feel some ownership of the court processes. The courts have both criminal justice aims (reducing recidivism, improving court appearance rates and reducing the over-representation of Indigenous people in the criminal justice system) and community building aims (providing a culturally appropriate process, increasing community participation and contributing to reconciliation).

The courts can provide a culturally appropriate process which includes participation of Elders and increased accountability of offenders. They can also increase Indigenous ownership of the administration of the law. However there is no strong evidence of reduced recidivism. Research is yet to be undertaken into the experience of victims.

How can referral services be best employed within the civil justice system?

The department notes that effective referral relies on:

- the correct holistic identification of problems (including non-legal problems), and
- a person's seamless transition between services.

Seamless transition is particularly important to ensure individuals do not stop from seeking help due to constantly shifting from provider to provider without obtaining any real assistance (otherwise known as 'referral fatigue').[24] This is particularly pertinent to those who have multiple needs, who may lack the resilience to persist with help-seeking in the face of multiple issues. Use of referral protocols may assist to ensure a seamless transition and facilitate an individual's ability to access assistance for their problems.

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[24] See e.g. Buck, A., Pleasence, P., Balmer, N.J. (2008) Do Citizen's know how to deal with legal issues? Some Empirical Insights. *Journal of Social Policy,* 37, 4: 661-681.

Referral can be both within the legal assistance services sphere (for example, where LACs refer people those ineligible for legal aid to pro bono services) and also across legal and non-legal services. One particular example is referrals made by the Queensland Police Service's (QPS) Supportlink, where referrals are made to Legal Aid Queensland if and when QPS becomes aware of a person having legal needs. Referrals between diverse services are one characteristic of 'joined-up' service delivery.

The use of specialised case managers is one option to assist Australians who face significant disadvantage, for whom legal problems are just one of the issues being faced. Case managers can ensure that referrals are followed through and can help facilitate the joining up of relevant services to address the needs of these Australians holistically.

Some family law services have been encouraged to undertake 'warm referrals'. This is where two practitioners from different agencies interact (often over the phone) about a client receiving a referral from one service to another, while the client is in the presence of the referring agency. This approach is to encourage the likelihood that the client will take up the referral.

USING INFORMAL MECHANISMS TO BEST EFFECT

(Chapter 9 of the Commission's Issues Paper, September 2013)

The department draws to the attention of the Commission the submission prepared by the National Alternative Dispute Resolution Advisory Council (NADRAC) (recently concluded)[25] which also addresses issues relevant to informal mechanisms of dispute resolution.

Alternative dispute resolution continues to emerge as a significant avenue for disputants to access justice in the civil justice system without judicial intervention. The department welcomes the Productivity Commission's consideration of ADR as an appropriate mechanism for improving equity and access to justice.

As identified in the Commission's Issues Paper, informal mechanisms, including ADR, are the main means by which individuals resolve their disputes. The department encourages the Commission to examine the following mechanisms as a potential way to improve the ADR framework and increase its use across government and the community more broadly:

- increased opportunities for ADR education and training for law students, the legal profession, judicial and court officers
- development of standards and conduct obligations for ADR practitioners other than mediators, and

[25] Following the Australian Government's announcement on 8 November 2013 to abolish or rationalise a number of non-statutory bodies, NADRAC will close. The closure of this group is a whole-of-government decision that was taken to simplify and streamline the business of government.

- supporting the development of an evidence base that demonstrates the effectiveness of ADR in resolving disputes.

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

The provision of ADR services in many ways promotes the principles of fairness and equity by providing avenues for people to resolve their disputes and avoid the lengthy and costly processes of judicial intervention. By approaching disputes from an interests-based approach (rather than a rights-based approach) ADR processes also allow for the consideration of a wider range of options, including both legal and non-legal remedies, and assist the people in dispute to solve problems jointly.

Data collection about ADR currently occurs in a fairly ad hoc way. The results of a survey currently being conducted by the department in conjunction with NADRAC (recently concluded) were provided to the Commission in mid-late November 2013 to inform further consideration of the issues raised in Chapter 9 (of the Commission's Issues Paper, September 2013) about the efficiency and cost effectiveness of ADR. The department also draws the Commission's attention to research conducted into Family Dispute Resolution and the Federal Court's use of ADR (below).

Family Dispute Resolution

The Australian Institute of Family Studies December 2009 report 'Evaluation of the 2006 Family Law Reforms' indicated that Family Dispute Resolution (FDR) appears to be working well for many parents and their children. In particular, the report considered that among parents who had separated after the reforms, 31 per cent of fathers and 26 per cent of mothers reported that they had 'attempted FDR or mediation'. About two-fifths of this group reached an agreement. Whether or not FDR resulted directly in an agreement, the majority of parents who had attended FDR and who had sorted out their disputes felt they had done so mainly through discussions between themselves. The report noted that this was consistent with a key aim of FDR, which is to empower disputants to take charge of their dispute. Parents who had not reached agreement at the time of FDR and who were issued with a section 60I certificate (affording them 'entry' into the court system) were the least likely to have sorted out or to have had a decision made about their dispute.

Also, the department and the Government are currently considering the following report pertaining to family dispute resolution and its effectiveness and the report could be made available to the Commission upon request:

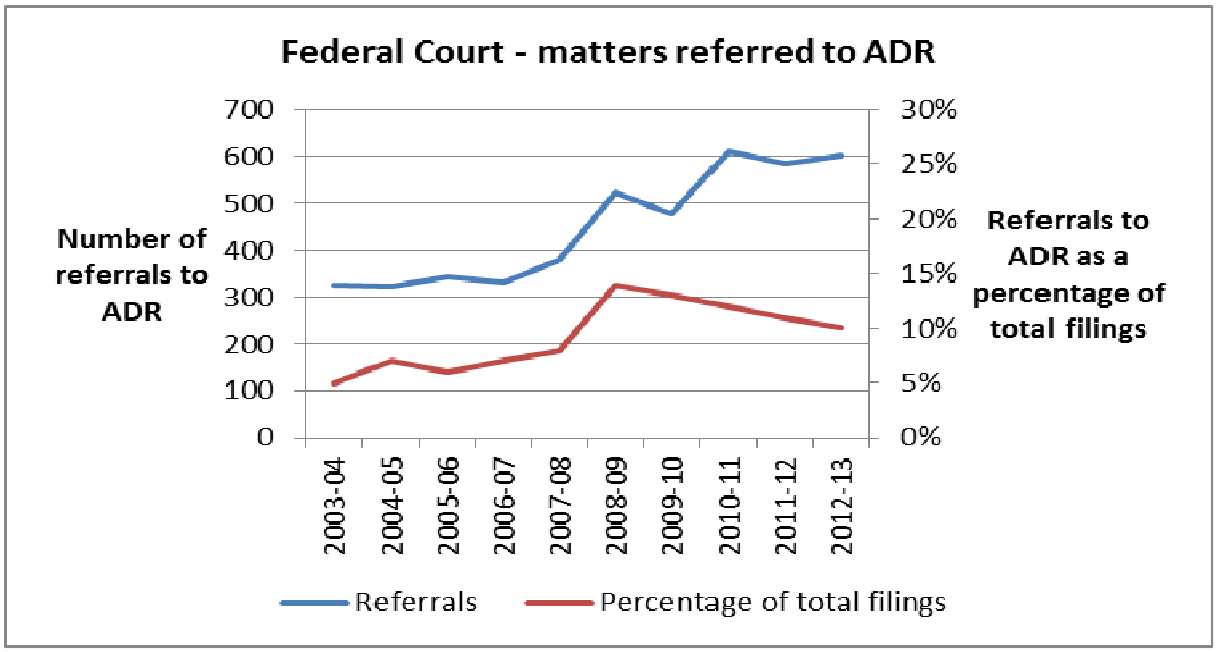
- Australian Institute of Family Studies: Post-separation parenting, property and relationship dynamics after five years.

ADR in the federal courts and tribunals

ADR is commonly 'annexed' to tribunal and court processes as a standard case management component.

Evidence compiled in the Federal Court Annual Report 2012-2013 demonstrates a positive trend toward referral to ADR processes and subsequent resolution of disputes without further judicial intervention. Courts can refer disputes to various forms of ADR including mediation, arbitration, early neutral evaluation, experts' conferences, court appointed experts, case management conferences and referral to a referee. Of these, the vast majority of cases are referred to mediation (602 out of a total of 613 matters referred to ADR in 2012-13).

The number of matters referred to ADR has almost doubled over the last 9 years (326 in 2003-04 rising to 613 in 2012-13). The percentage of matters referred by judges to ADR as a proportion of total filings has also increased (5% in 2003-04 to 10% in 2012-13). However there is the opportunity for more internal and external referrals. The 613 referrals made to internal ADR represented just 26% of applicable filings.



The overall percentage of matters referred to mediation that were resolved either in full or in part was 61% in 2012-13. There has been a consistent rate of resolution: 58% in 2007-08, 57% in 2008-09 and 2009-10, 59% in 2010-11, 61% in 2011-12. Data on resolution for prior years is not available.

Even where matters are not resolved, ADR may assist to narrow the issues in dispute and shorten hearing times. The increase in the number of matters being referred to ADR may have contributed to the rate of finalisations keeping up with the increase in filings in the last 3 years in the Federal Court, and the decreasing number of pending matters.

How might ADR be strengthened to improve access to justice?

As already mentioned (page 22 of this submission), the department considers that the ADR framework can be strengthened by:

- increased opportunities for ADR education and training for law students, the legal profession, judicial and court officers
- development of standards and conduct obligations for ADR practitioners other than mediators, and
- supporting the development of an evidence base that demonstrates the effectiveness of ADR in resolving disputes.

In 2012, NADRAC surveyed a number of Australian law schools to identify where, how and why ADR is taught in the undergraduate, juris doctor and postgraduate law degrees.[26] Out of the 32 Australian law schools, NADRAC received a total of 27 responses. NADRAC found that, while Australian law schools have moved towards recognising the importance of teaching law graduates about ADR, the increasing availability, use and sophistication of ADR suggests that future and current lawyers need to have knowledge and skills in relation to ADR so that they can participate in ADR processes and advise their clients about it. As identified by the Productivity Commission, ADR allows for greater flexibility, choice and confidentiality and can result in more favourable outcomes for all parties involved.[27] Education about an interests-based approach to dispute resolution, rather than a rights-based approach as commonly favoured by the legal profession and courts processes, achieves this outcome.

As highlighted by the Commission (Issues Paper, September 2013), ADR can be employed at any point in the dispute resolution process.[28] NADRAC also examined court referrals to ADR in a joint project with Flinders University and the Australian Institute of Judicial Administration (AIJA) in 2003. Research suggested an ongoing discrepancy continues to exist between judicial officers' understanding of, and attitudes towards, ADR.[29] Although the evidence collected since the release of NADRAC's report indicates an increase of judicial referral to ADR, more can continue to be done to enhance awareness and education among judicial officers. The report emphasised the benefits of judicial referral to ADR, highlighting that judicial officers bring authority to the referral process, which can be significant if parties or their lawyers are reluctant to use ADR. NADRAC also highlighted the benefits of having trained court officers to effectively assess ADR at first instance (particularly in relation to unrepresented litigants who need guidance about ADR as well as litigation processes).

Furthermore, the department's view is that ADR training for incoming and current judicial and court officers, in addition to the legal profession and law students, will assist parties and their

[26] National Alternative Dispute Resolution Advisory Council (NADRAC) (2011), *Teaching Alternative Dispute Resolution in Australian Law Schools*.
[27] Productivity Commission Issues Paper, p. 15.
[28] Productivity Issues Paper, p.15.
[29] National Alternative Dispute Resolution Advisory Council (NADRAC) and Australian Institute of Judicial Administration (2003), *Court Referral to ADR: Criteria and Research*.

representatives to identify the circumstances where it will be appropriate to facilitate greater use of ADR. This, in turn, has the potential for widespread benefits, including a reduction in the length and cost to parties in connection with formal justice processes, especially in smaller, repetitive and more routine matters.

Should practitioners delivering ADR services be regulated? If so, who needs to be accredited and at what level for the provision of different types of services?

Mediation

The department sees merit in developing standards and conduct obligations for ADR practitioners other than mediators.

The National Mediation Accreditation System (NMAS) is a voluntary industry system under which organisations qualify as Recognised Mediator Accreditation Bodies (RMABs) that may accredit mediators. To be accredited as a mediator, the RMAB requires a mediator to provide:

a. evidence of good character
b. an undertaking to comply with ongoing practice standards and compliance with any legislative and approval requirements
c. evidence of relevant insurance, statutory indemnity or employee status
d. evidence of membership or a relationship with an appropriate association or organisation that has appropriate and relevant ethical requirements, complaints and disciplinary processes as well as ongoing professional support
e. evidence of mediator competence by reference to education, training and experience. The threshold requirement for training and education includes:
    - completing a mediation course that fulfils certain requirements (e.g. completion of a minimum 38 hour program, participation in simulated mediation sessions as mediator and party) and teaches certain core competencies, and
    - passing a written and practical test.[30]

Additionally, accredited mediators have to undertake to comply with the Practice Standards. The Practice Standards set out practice and competency requirements for mediators and inform participants and others about what they can expect of the mediation process and mediators. This includes a description of the mediation process, dealing with power imbalances, impartiality requirements, confidentiality, competency and procedural fairness.

The department encourages the Commission to examine extending accreditation processes and approval standards such as those seen under the NMAS to other ADR practitioners, such as conciliators, is one mechanism that could be introduced to regulate ADR services through a non-legislative framework.

[30] Mediators Standards Board (2013) http://www.msb.org.au/sites/default/files/documents/Approval%20Standards.pdf (accessed 24/10/2013).

Family Dispute Resolution

Family Dispute Resolution practitioners are required to meet accreditation standards set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (FDRP Regulations). The regulations are administered by the department and provide nationally consistent standards, including academic requirements, ongoing professional development, a suitable independent complaints mechanism, police and working with children checks and professional indemnity insurance.

These practitioners provide FDR to separating families who are required under the *Family Law Act 1975* (section 60I) to make a genuine effort to resolve their dispute before applying to a Court for a parenting order under Part VII of the Family Law Act. The department considers there is value in maintaining nationally consistent standards for the delivery of FDR, particularly as practitioners deal with complex family law matters involving vulnerable people, including where there may be family violence and child abuse.

IMPROVING ACCESSIBILITY OF TRIBUNALS

(Chapter 10 of the Commission's Issues Paper, September 2013)

Tribunals in the Commonwealth have developed in a different way to other jurisdictions. This is partly the result of early moves to consolidate and the impact of constitutional limitations preventing Commonwealth tribunals from extending beyond merits review. As a result, the department's comments on this aspect of the review are limited to Commonwealth tribunals.

Commonwealth tribunals have been the subject of extensive consideration, in particular the Administrative Review Council (ARC) report number 39*, Better Decisions: Review of Commonwealth Merits Review Tribunals* of 1995 and the Commonwealth of Australia, Department of Finance and Deregulation, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio of 2012* (Skehill review). Both publications provide some useful considerations for improving the accessibility of Commonwealth tribunals.

The Commonwealth's merits review system – background

In 1971 the Commonwealth Administrative Review Committee (ARC) reported on establishing a comprehensive, coherent and integrated system of Commonwealth administrative law. The Committee recommended establishing a generalist administrative review tribunal. Specialist tribunals would only be justified in special circumstances where the appropriate expertise did not exist in a general tribunal.

The view at the time was that having fewer tribunals would provide the most efficient economic use of resources and result in a better and more consistent resolution of individual issues . The continued proliferation of tribunals was considered to be an inefficient use of resources, limiting effective government and harming public perceptions of government.

Consistent with the Committee's report, in 1975 the Commonwealth established the Administrative Appeals Tribunal as a general merits review tribunal. Over the years, additional specialist merits review tribunals were created which led to fragmentation and threatened to undermine the committee's intention of establishing a coherent merits review framework.

In 1995 the ARC recommended improving the Commonwealth's merits review system. One of the recommendations included establishing an Administrative Review Tribunal (ART) to encompass merits review across the Commonwealth. The ARC recommended the ART unite the Administrative Appeals Tribunal, (now) Migration Review Tribunal, Refugee Review Tribunal, Social Security Appeals Tribunal, and Veterans Review Board.

The ARC also recommended the ART have a consistent set of merits review levels across its proposed divisions. It was proposed to include an appeal panel for use in limited circumstances.

In 1997 the Howard Government announced it would legislate to establish the ART. The then Government introduced the proposal into the Parliament but the proposal was ultimately abandoned. In 2003 the then Government instead established a Tribunal Efficiencies Working Group.

Further consideration of options for Commonwealth Tribunals occurred as part of the Skehill review in 2012. The Review made a number of recommendations, including endorsement of the ART proposal with all Commonwealth merits review bodies to be rolled into the ART. However, the Skehill review recommended against immediate implementation of this option due to:

- requiring a large up-front capital investment to achieve efficiencies and effectiveness in the short term
- difficulties obtaining stakeholder support given the withdrawal of the previous ART proposal, and
- limitations on access to the appeal panel in the ART may have been seen as a curtailment of rights for the Social Security Appeals Tribunal and Veterans Review Board which have multiple tiers of review.

As a result the Skehill review recommended:

- actively pursuing the Tribunal Efficiencies Working Group Report
- designating the AAT as the Commonwealth's senior and 'lead' tribunal, with the President to have a leadership role to promote cooperation between, and identification and adoption of best practice tribunal administration by, all Commonwealth merits review bodies, and
- establishing a presumption against establishing new tribunals and instead confer new jurisdiction on the AAT.

The AAT currently has jurisdiction to review decisions made under approximately 450 separate pieces of legislation and this number is growing. In the last year alone, eighteen laws were enacted that conferred new jurisdiction on the AAT. The Tribunal exercises its powers in a number of divisions—General Administrative, Security Appeals, Taxation Appeals and Veterans' Appeals Divisions—and recently introduced a new division to consider matters under its National Disability Insurance Scheme (NDIS) jurisdiction. Senior members and members are assigned by the

Attorney-General to exercise powers in certain divisions. This ensures that the Tribunal is adequately equipped to deal with matters according to their workload, as well as the appropriate level of expertise.

Accessibility and legal representation

The department notes that the AAT has in place a range of measures designed to assist parties to access and participate in the tribunal review processes. Section 33 of the *Administrative Appeals Tribunal Act 1975* requires that tribunal proceedings be conducted with as little formality and technicality, and as much expedition required to properly consider the matters before the Tribunal.

The informality of Tribunal processes, coupled with costs of legal representation, has meant that a significant number of parties that lodge applications before the tribunal are self-represented. The Tribunal has established an outreach program to assist self-represented parties by providing them with access to information about the review process as well as notifications about key dates. The Tribunal also hosts schemes to provide legal advice and assistance in cooperation with legal aid organisations and works with parties to identify whether interpreters or other services are needed.

The Tribunal's case management processes are designed to deal with applications in a timely and flexible manner, promoting the equitable treatment of parties and enabling the Tribunal to determine the most appropriate manner for resolving disputes. Alternative dispute resolution has been incorporated as core part of the Tribunal processes, giving conference registrars the ability to have preliminary discussions with parties about the issues in dispute and explore whether the matter can be settled or an alternative form of dispute resolution (such as conciliation, mediation, case appraisal or neutral evaluation) or a hearing is required to achieve resolution. In the last year, 79 per cent of applications were finalised without resort to a hearing.

In certain instances (such as complex taxation matters) formal hearings, constituted by up to 3 Tribunal members and including legal representatives, may be appropriate and reflective of the complexity of the type of decisions being reviewed. The department's view is that the Tribunal is well placed to determine the appropriate level of formality for its proceedings, based on the needs of its users.

The recent addition of the NDIS jurisdiction for disability matters to the AAT demonstrates that a generalist tribunal should be sufficiently flexible to accommodate specialist needs. To ensure greater accessibility for parties with disabilities, the AAT has introduced a streamlined model for the review of DisabilityCare Australia decisions that is designed to be accessible, fair, informal and quick. This involves assigning a dedicated AAT Contact Officer for each applicant as soon as an application is received, and tailored communication to ensure that parties are able to better understand and engage with the process for reviews. Every party that brings a matter before the tribunal will also have access to a disability advocacy program to receive advice and support through the review process.

Principles for considering generalist and specialist tribunals

The ARC in its 1995 report considered that merits review tribunals should aim to be fair, just, economical, informal and quick. It recognised that the overall objective of the merits review system

is to ensure that all administrative decisions are correct and preferable. These aims are part of the AAT's legislative framework and remain current to this day.

The department supports the view that the merits review system should be fair, just, economical, informal and quick. This is a statutory objective of the AAT. While structural changes contemplated by the ARC have not been progressed, the Commonwealth has effectively established a functional, accessible and effective generalist tribunal in the AAT. The expansion of the AAT's jurisdiction demonstrates that a generalist tribunal can take on specialist jurisdictions without requiring separate tribunals to be created. However, the system also needs to operate with the additional principles of efficiency to support the broader objectives. There is scope to further explore ways in which this principle could be applied across the Commonwealth merits review system.

Issues

A general issue that arises in the context of improving the accessibility of tribunals is the comparative costs of accessing merits review with accessing justice in other forums, such as the courts. The Commission may wish to explore this matter further.

Beyond the recommendations of the ARC report and the Skehill review, the department suggests the following issues that could be further considered by the Commission concerning improving access to justice, efficiency and effectiveness of the Commonwealth merits review system:

- options for more incremental changes that would assist moving towards the desired end state of a unified system, including:
  - generalist tribunals sharing facilities and services (such as information technology and records management) with smaller, specialist tribunals
  - identifying improvements and efficiencies that might be achieved by cooperative initiatives between tribunals, such as those explored by the Tribunal Efficiencies Working Group and currently considered by the Commonwealth Tribunals Collaborative Forum
- other changes to structure to amalgamate existing Commonwealth tribunals
- whether establishing merits review jurisdiction in generalist rather than specialist tribunals leads to increased accessibility, effectiveness and efficiency of outcomes
- whether statutory distinctions between presidential and non-presidential members impacts on the efficiency, accessibility and informality of the tribunal
- whether the aspects of accessibility identified by the ARC in 1995 have been effectively implemented across the system and remain appropriate, and
- whether the cost of maintaining multiple layers of external merits review as of right are justified in a modern merits review framework, for example as judicial review of all decisions is available and internal review mechanisms are more common.

IMPROVING ACCESSABILITY OF THE COURTS

(Chapter 11 of the Commission's Issues Paper, September 2013)

The department encourages the Commission to consider the view that the accessibility of courts can be improved by encouraging people to resolve their disputes outside of courts where appropriate so that the finite resources of the courts can be directed towards the matters that need them most. Even if disputes are not completely resolved, parties can still attempt to narrow or clarify the issues in dispute so that court resources are only directed to the issues that cannot be resolved without judicial determination. The requirements to attend family dispute resolution (FDR) prior to filing a parenting matter with the court are considered an effective strategy to encourage resolution of disputes outside the court system.

Accessibility of the courts and the justice system more broadly, can also be improved by harnessing the benefits of technology to provide access to information and support the delivery of services.

The conduct of parties in civil disputes and vexatious litigants - how effective are model litigant rules and other existing legislative conduct obligations?

Family Dispute Resolution

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* introduced many reforms to the *Family Law Act 1975*. One of the reforms brought in the requirement for people to attempt family dispute resolution (FDR) to resolve any parenting dispute before filing an application for a parenting order under Part VII of the Family Law Act. The philosophy behind this approach was to encourage 'people to take responsibility for resolving disputes themselves, in a non-adversarial manner.'

Initially, from 1 July 2007, if people wanted to apply to the court for a parenting order (and they had not previously applied), they were required to attempt FDR. However, since, 1 July 2008 this requirement extends to all applications including new applications and applications seeking changes to an existing parenting order. Of note, where FDR is successful and parties are able to agree on arrangements for the children, they may simply agree orally or they may draft a written agreement with the practitioner's help. The practitioner may also refer clients for legal assistance with drafting documents. If they cannot reach an agreement, or, one of the parties fails or refuses to attend, or, the practitioner determines that FDR is not appropriate (for example where there is family violence), the practitioner can issue a certificate (under section 60I of the Family Law Act) that may be taken to court and filed with an application for a parenting order.

The Civil Dispute Resolution Act 2011

The Commonwealth *Civil Dispute Resolution Act 2011* encourages parties to take genuine steps to resolve their disputes prior to filing certain proceedings in the Federal Court and Federal Circuit Court of Australia. The department (in conjunction with independent researcher Australian Survey Research) is currently evaluating the Act to assess whether it is meeting its objectives and whether predicted impacts have come to light, as well as to inform future dispute resolution policy.

Some stakeholders predicted that the Act would substantially increase the cost and time to resolve disputes, and encourage satellite litigation. There is little evidence to support these concerns.

Should existing obligations to encourage cooperation be strengthened or expanded?

The department refers the Commission to the 2012 Australian Centre for Justice Innovation (ACJI) report, *Resolving Disputes without Courts—Measuring the Impact of Civil Pre action Obligations Research Project*.[31] The report states that some commentators find that existing pre-litigation obligations do not go far enough and that ADR should be mandatory in a wider class of disputes. While some noted the flexibility of the Civil Dispute Resolution Act as a positive, others noted this could result in 'lip service' as lawyers could comply by doing very little.

Similarly in the course of evaluating the Civil Dispute Resolution Act, the department has received some feedback that existing obligations to encourage cooperation are overly burdensome, and contradictory feedback that these obligations reflect what most people are already doing. The department is of the view that more information is required about the use and effectiveness of existing obligations to encourage cooperation to determine whether those obligations should be strengthened or expanded. The findings from this inquiry are likely to assist with this.

What processes are most appropriate for declaring an individual a vexatious litigant? What principles should courts use in making such declarations? How could less 'binary', more graduated arrangements produce better outcomes? What account should be taken of the long-term impacts that vexatious litigants have on their own personal wellbeing when making court declarations?

The Commonwealth *Access to Justice (Federal Jurisdiction) Amendment Act 2012* implemented in all four federal courts a model Bill developed by the Standing Committee of Attorneys-General (now the Standing Council of Law and Justice) concerning vexatious proceedings. The legislative regime sets out the circumstances in which vexatious proceedings orders can be made and the kinds of orders that can be made (without affecting the courts' other powers), which will assist in achieving greater uniformity across the laws relating to vexatious proceedings.

The Access to Justice (Federal Jurisdiction) Amendment Bill 2011 was referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Senate Committee reported on 29 March 2012. The Committee recommended that the Senate pass the Bill without amendment. However, the Committee noted concerns raised by the Chief Justice of the Family Court regarding limitations on the Family Court's powers in dealing with vexatious proceedings, and suggested, in the longer term, that the Government undertake a review of the nature and adequacy of the Family Court's powers to make orders with respect to vexatious litigants and proceedings.

[31] Australian Centre for Justice Innovation (2012), Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243975 (accessed 24/10/13).

In relation to vexatious litigants, the department would encourage the Commission to investigate questions similar to those raised (in the Issues Paper, September 2013) in relation to self-represented litigants. For example, what data is available on the numbers of vexatious litigants and the impact of vexatious litigants on opposing parties, courts and tribunals and the parties themselves.

Court processes - how and to what extent do the current discovery rules impact on access to justice? In what areas does discovery particularly affect access to justice? How could rules of discovery be reformed to improve access?

The department refers the Commission to recent Commonwealth discovery reforms. The *Access to Justice (Federal Jurisdiction) Amendment Act 2012*[32] clarified and reinforced the Federal Court's powers to limit the costs of discovery and encourage proportionality when dealing with discovery. This followed recommendations from the Australian Law Reform Commission (ALRC) March 2011 report, *Managing Discovery: Discovery of Documents in Federal Courts*.

The revised *Federal Court Rules 2011*, which commenced on 1 August 2011, also reflected some of the ALRC's recommendations from that report, including the use of discovery plans and clarification of judges' powers, such as through the making of orders to require applicants for discovery to provide security for discovery costs.

Reform in court procedures - how useful have pre-action requirements been in resolving disputes earlier? To which particular disputes are pre-action requirements most suited?

In relation to how useful pre-action requirements have been in resolving disputes earlier, the department refers the Commission to the 2012 Australian Centre for Justice Innovation (ACJI) report, *Resolving Disputes without Courts—Measuring the Impact of Civil Pre action Obligations Research Project* (reference provided above). The report considers and explores the use and effectiveness of pre-action requirements in respect of civil disputes. The report makes a number of recommendations to support the effectiveness of pre-action requirements (including in relation to cost effectiveness potential ongoing improvements).

The Commission invites comments on the appropriateness of court fees. What factors should be considered in determining court fees? How can processes for determining fee structures be developed to improve the incentives for disputants?

Recent reforms to the structure of federal courts fees occurred in 2010 and 2013. In 2010 the reforms involved changes to the structure of fees in the federal courts and AAT. These changes included increases to existing fees in the federal courts and the AAT, staged hearing fees in the Federal Court so that higher fees are payable in longer cases, and a daily hearing fee structure in the Family Court and the Federal Circuit Court. A small flat fee was introduced for litigants who

[32] Civil Justice Research Online (2012) *Exploring Civil Pre-Action Requirements: Resolving Disputes Outside Courts*, Available from http://www.civiljustice.info/access/26/ (accessed 24/10/13).

previously had been eligible for fee exemptions (such as recipients of Centrelink benefits or legal assistance). The revenue from the changes to fees provided injection of funds for legal assistance programs over four years.

Further changes to the fees structure commenced on 1 January 2013. Key changes included reinstatement of fee exemptions; general increases to court fees with particular increases to fees for corporations; new fees for publicly listed corporations; and introduction of new fees which target resource intensive matters, including fees for examinations in bankruptcy and winding up. The changes also consolidated and harmonised the drafting of the fees regulations, by updating the fees regulation in the High Court, creating a single fees regulation for the Federal Court and general federal law jurisdiction of the Federal Circuit Court, and a separate fees regulation for family law matters. The 2013 changes were intended to provide additional revenue of $102.4 million over four years, with accompanying funding of $38 million over four years reinjected into the courts. These reforms were developed in consultation with the federal courts.

In response to specific questions raised in the Commission's Issues Paper (September 2013), the court fee reforms progressed in 2010 and 2013 were motivated by the following considerations, which are discussed in more detail below:

- recognising that courts are a limited and expensive public resource by ensuring some element of cost recovery
- influencing court user behaviour to encourage efficient use of limited court resources, and
- facilitating equitable access to the court system.

Resourcing of courts and providing cost recovery

The court system is the most significant cost component of the justice system. In 2011-12, the Commonwealth spent $274 million on the federal courts.[33]

While there is clear public benefit in courts as state sponsored machinery for dispute resolution and enforcement of rights, their civil litigation function is performed at the request of parties who have immediate and almost exclusive interest in the conduct and outcome of litigation. Almost every developed country levies some charge for use of its courts.[34]

At the time of setting court fees in 2010 and 2013, it was considered appropriate for government to seek recovery from court users of some of the costs of courts' operation. This was seen as striking an appropriate balance between access to justice and the user-pays principle. In effect, regular court users involved in private disputes with capacity to pay should contribute to the cost of court related services.

In the federal system, the total amount of court fees collected remains significantly less than the cost to government of providing court services. It is estimated that for future years the Australian Government will only recover approximately 30 per cent of the total costs of operating the courts.

[33] See Annual Reports 2011-12 for the High Court of Australia (page 51); Federal Court of Australia (page 73); Family Court of Australia (page 151) and Federal Circuit Court of Australia (page 115).
[34] Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *The Costs and Funding of Litigation: A Comparative Perspective* (Hart Publishing 2010), page 13.

Cost recovery occurs in a number of other common law jurisdictions, such as New Zealand and the United Kingdom (the latter seeks full cost recovery, which is at 80 per cent when taking into account remissions - the equivalent of fee exemptions).

Influencing court user behaviour and court services

When setting the 2010 and 2013 fees, it was considered that fees, as a component of the total cost of legal services, can to some degree influence litigant behaviour, shape the kinds of matters which come before the courts and the way in which those disputes are resolved. In particular, cost is a factor which may dissuade litigants from accessing the court system as the first port of call for all dispute resolution. The desired corollary would be that limited court resources can be directed to those disputes which necessitate court-based resolution.

It was also considered that fees could encourage appropriate use of court services, ensure disputants are conscious of the cost of the service they receive, and encourage early resolution of disputes where appropriate (such as through alternative dispute resolution processes).

The Senate Legal and Constitutional Affairs References Committee Report on the *Impact of federal court fee increases since 2010 on access to justice in Australia* (June 2013) addressed a number of issues relating to the changes to court fees since 2010, including access to justice policy considerations and fees policy setting. The Report recommended that further research be conducted to obtain empirical data on the impact of court fees on disputant behaviour (Recommendation 1). The department anticipates the Productivity Commission report may provide some of this empirical data.

Facilitating equitable access to the court system

Facilitating equitable access to the court system was a consideration in structuring court fees.

It was considered that certain litigants should make a greater contribution to the cost of court services, based on factors such as frequency of use, capacity to pay and the nature of matters. In setting court fees, it was appropriate that fee structures target:

- litigants with capacity to pay (for example, higher fees for publicly listed companies and corporations, lower fees for non-corporations, and fee exemptions for persons with a lower capacity to pay such as recipients of legal aid and Commonwealth health care cards)
- litigation that is wholly or primarily for private benefit, and
- resource intensive court processes (for example, lengthy corporate law matters).

The 2013 fee changes targeted matters that are undertaken wholly or primarily for private benefit, as opposed to those with higher public interest. For example, the fees regime retains lower application fees for human rights matters.

The fee changes also recognised that the balance between private gain and public benefit in family law matters is different to the balance in general federal law, and that different considerations apply to financial and property matters, compared with parenting proceedings in which the best interests of the child is the paramount consideration.

Changes made to court fees in 2013 were designed to ensure those facing financial hardship and other disadvantaged groups were able to access the court system. Initiatives to promote access included providing full fee exemptions on the basis of financial hardship, and retaining the power of the court to defer payment of fees in cases of urgency or where it is warranted as a result of the person's financial circumstances.

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

The use of technology in the courts

The key objective for courts in using technology to improve service delivery is to allow litigants to engage with the courts without the need for them or their legal representatives to attend court premises for every stage in the litigation process. This significantly reduces the cost of conducting court proceedings and enhances the ability of people in regional areas to access court services.

In 2007, the Federal Court, the Family Court and the Federal Circuit Court launched the Commonwealth Courts Portal as a joint project for filing a number of court documents and conducting court proceedings online. The Federal Court has since launched its own online services platform. Through the courts' online services platforms, parties and lawyers can file a number of court documents (such as initiating applications), track their proceedings, create, edit and file applications relevant to their case, request court appearance dates and pay application fees. The platforms also allow certain proceedings to be conducted, and directions or orders to be given, online.

There has been substantial take-up of the federal courts' online services. As at July 2013, there were over 110,000 registered users of the Commonwealth Courts Portal.

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

Technology can assist with providing cost-effective access to information, as well as providing seamless and integrated service delivery, which can improve the capacity for services to reach more people[35] (page 11 of this submission also refer).

Research shows that four in five Australians now use the internet, a figure which varies depending on the age of the user, but is not dependent on socioeconomic status.[36] Those who live in regional, rural or remote areas may not have access to the internet. Furthermore, people with a disability or

[35] Strategic Framework for Access to Justice, Chapter 6.
[36] See, for example, Australian Government Information Management Office, Interacting with Government: Australians' use and satisfaction with e-government services, 2008.

from a culturally and linguistically diverse background may have trouble using online services that are not accessible or do not provide a translation capability.

What does the use of online dispute resolution overseas suggest about its potential use in Australia?

The department refers to the Commission to research undertaken while developing the Attorney-General's Department's technology papers, which revealed that the use of Online Dispute Resolution (ODR) is not as prevalent in the Australian civil justice sector as in other international jurisdictions, which suggests that there is scope for growth in this area.[37]

The department's view is that the evolving field of ODR is an area that is likely to impact the future resolution of disputes in Australia. As broadband speed and internet infiltration increase, it is likely to be a viable and accessible option for disputants. Given the increasing costs, backlogs, and delays currently being incurred by people when accessing traditional forms of dispute resolution, technology through services such as ODR, has the potential to alleviate some of these pressures.

EFFECTIVE AND RESPONSIVE LEGAL SERVICES

(Chapter 12 of the Commission's Issues Paper, September 2013)

In addition to examining the challenges faced by people in making choices about price, quality or quantity of the services they need or receive, the department would encourage the Commission to also investigate the value of early intervention (in the form of early legal advice or alternative dispute resolution), or through developing legal documents to reduce the likelihood of disputes arising in the future (for example, developing a will or pre-nuptial agreements).

A responsive legal profession - what problems stem from inconsistent regulation of the profession across jurisdictions? What are the costs and benefits associated with creating a national legal profession?

During the 1990s states and territories apart from South Australia introduced harmonised legislation for the regulation of the legal profession. However, since that time, differences between jurisdictions have developed for matters such as admission and practising certificates, costs assessment disclosure, complaints handling and discipline.

Inconsistent regulation of the legal profession across jurisdictions results in additional regulatory burden and compliance costs that have a flow on effect of increasing the cost of providing legal services to the community. In March 2010, ACIL Tasman published a Cost Benefit Analysis of Proposed Reforms to National Legal Profession Regulation. This report can be found on the Council

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[37] *SCLJ Priority Issues Paper #6 - Harnessing the Benefits of Technology to Improve Access to Justice: Analysis Paper*, section 4.4, (2012) http://www.sclj.gov.au/sclj/standing_council_publications/standing_council_other_pub.html (accessed 24/10/13).

of Australian Governments website at http://www.coag.gov.au/node/308. The report notes that the net annual benefit arising out of the reforms would be between $16.9 million and $17.7 million.

A nationally uniform system of regulation would reduce the regulatory burden and minimise compliance costs for legal firms and lawyers by creating uniform rules of practice across all jurisdictions in Australia. This would increase competitiveness of law firms.

Legal assistance service funding - what factors determine the volume and distribution of current funding for legal assistance at both the Commonwealth and state and territory level?

The volume of Commonwealth funding for legal assistance services is set through the Budget process. There is no link between the volume of funding and the cost associated with providing specified services. Funding is indexed annually using 'Wage Cost Index 1', which is based on 75 per cent of a wage cost factor and 25 per cent of consumer price index.

Currently, funding for LACs is distributed between the states and territories using a formula that takes into account differences in the need for legal aid services and the cost of providing services between each state and territory. This approach is similar to that used by the Commonwealth Grants Commission for GST distribution. The specifics of the funding allocation model are set out in the NPA.

Funding for CLCs is generally allocated on a historical basis under individual funding agreements. Most of these agreements are tri-partite in nature and include state funding. In the most recent allocation of new funding under the CLSP, SEIFA and CLSP service delivery data was used. In a number of instances, funding was targeted at CLCs known to be struggling to operate within existing resources.

Funding for ATSILS is distributed between eight providers (one in each state and two in the Northern Territory, with a single provider covering both NSW and the ACT) using a funding allocation model that adds weight for remote localities.

Three year funding allocations under the Family Violence Prevention Legal Services Program (FVPLS) have been assigned to 14 service providers as a result of the 2010-11 FVPLS tender process. One year funding agreements for 2013-14 have been extended to the same service providers at the approximate value of their 2012-13 funding pending the outcomes of the NPA review.

How should the total volume of funding and distribution of funds for legal assistance in Australia be determined and how should it be managed over time?

The current NPA provides Commonwealth priorities for the allocation of Commonwealth funds by LACs. This includes the priority that should be given to certain types of disadvantage and legal service in the areas of Commonwealth family, criminal and civil law.

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

As a requirement of the NPA, the department commissioned an independent review (of the NPA), which is being conducted by ACIL Allen Consulting (formerly known as the Allen Consulting Group). The NPA review is near completion, but is not publicly available at this stage. The NPA review contains two parts: a review of the progress made by LACs towards achieving the performance benchmarks that are set out in the NPA, and an evaluation of the quality, efficiency and cost-effectiveness of all four Commonwealth-funded legal assistance programs (LACs, CLCs, ATSILS and family violence prevention legal services for Indigenous Australians). The NPA review will note areas of service overlap and identify where there are benefits to be gained from services working more closely together.

How effective and appropriate are the current eligibility criteria for legal aid at targeting service provision?

The NPA review deals with this issue. The department is currently considering a model for legal assistance eligibility that takes into account client capability when assessing the extent of their need for legal assistance.

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

The NPA review deals with these issues.

How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff?

Staff recruitment is a key constraint on legal assistance service delivery in regional and remote areas. This problem is compounded by a lack of private practitioners to do outsourced or pro bono work.

Staff retention issues in regional and remote areas apply not only to lawyers, but other employees such as administrative officers and social workers.

How well does the 'mixed' service delivery model work for the successful delivery of legal aid services?

The department believes that the mixed model provides efficiencies in the delivery of legal assistance. It enables LACs to develop expertise in complex legal aid matters, and helps strike a balance between publicly funded legal services and the private sector, which in turn promotes control of costs.

The outsourcing of legal representation work by LACs to the private sector varies between jurisdictions. Those jurisdictions with the lowest rate of expenditure on outsourced legal work, the Northern Territory and Western Australia, are also the most sparely populated, suggesting a correlation with a lack of available private sector resources in regional and remote areas.

How effective has the NPA for legal assistance services been in addressing its objectives?

The department considers that the NPA has been effective in shifting the focus towards services for the earlier resolution of legal problems, with a corresponding reduction in expenditure on litigation.

The NPA sets out the objective and outcome for the legal assistance sector generally, including a focus on coordination, collaboration and the delivery of 'joined up services'.

The department also considers the introduction of jurisdictional forums has been successful in increasing the delivery of joined-up services. Subclause 29(f) of the NPA requires each state and territory to provide for jurisdictional forums to foster opportunities for improved coordination and targeting of services within the jurisdiction. Attendance at jurisdictional forums varies between the state and territories, but includes members from each of the four Commonwealth-funded legal assistance services, the Attorney-General's Department and state/territory justice Departments. These forums are regarded by members as an important opportunity to bring legal assistance and other related service providers together, to feed issues to government and to share information about government priorities and policy directions.

The NPA review report will contain further information on this subject.

How does the funding of legal assistance for criminal matters affect the funding available for civil (including family law) matters? Other than direct competition for resources, how does the funding of civil and criminal matters interact, especially in relation to people with complex legal issues?

The degree to which legal assistance for criminal matters impacts on the availability of funding for civil and family matters varies depending on the particular legal assistance service being considered. Under clause 33 of the NPA, LACs can only utilise Commonwealth funding for Commonwealth law matters, with the exception of early intervention and preventative legal services, and family law matters involving family violence or child protection issues arising under state and territory laws. This funding divide places some boundaries around competition between criminal and civil matters for legal aid resources.

In addition, the department administers the Expensive Commonwealth Criminal Cases Fund (ECCCF) to reimburse costs incurred by LACs in expensive commonwealth cases where the cost is likely to exceed $40,000. The purpose of the ECCCF is to assist LACs in meeting the high, one-off costs associated with particular criminal law matters so that their capacity to provide assistance for other Commonwealth priority matters such as family law is not affected. Commonwealth funded Community Legal Centres also provide assistance to disadvantaged people with criminal law matters

however the activity in the context of overall work is minimal, approximately 7 per cent of community legal centre work (2012-13 figures).

The Aboriginal and Torres Strait Islander Legal Services program is wholly funded by the Australian Government and there is no separation in funding by law type, meaning there is direct competition between civil and criminal matters for allocated resources.

Pro Bono - how important is pro bono work in facilitating access to justice? How much pro bono work is currently undertaken, by whom and for whom? What areas of the law, which groups or geographic locations is pro bono particularly important for?

Pro bono work is an essential element of the mix of services that the Australian Government and the legal profession provide to enhance access to justice in the Australian community.

The department encourages the Commission to consider the following reports from the National Pro Bono Resource Centre, which highlight the amount of pro bono work currently being undertaken:

> The *National Law Firm Pro Bono Survey 2012: Final Report* considers how much pro bono work is being undertaken and by whom, areas of law and practice, forms of assistance, barriers to pro bono work and associated costs. It should be noted that this report was limited to large law firms.
>
> The *Fifth Annual Performance Report on the National Pro Bono Aspirational Target* considers how much pro bono is being undertaken by firms that are signatory to the Aspirational Target, and the effect of the target on pro bono in Australia.
>
> *Pro Bono Partnerships and Models: A Practical Guide to What Works* highlights effective models for pro bono practice.

How successful has the National Pro Bono Aspirational Target been in encouraging pro bono work?

The department considers that the target has been very effective in encouraging pro bono work. Since its introduction in 2007, the number of lawyers undertaking pro bono work has trebled to over 8,000 lawyers nationally. In 2011-12, these lawyers undertook over 340,000 hours of pro bono work. The National Pro Bono Resource Centre reports can provide additional information.

It should be noted that the relationship between the Target and the Legal Services Multi Use List has also been very effective in encouraging pro bono.

What barriers are faced by lawyers seeking to provide pro bono services and how are they being addressed? To what extent are the responses to these barriers linked to the success of the national legal profession reform?

The barriers faced by lawyers seeking to provide pro bono services (and actions being taken to address these concerns) are outlined in various documents published by the National Pro Bono Resource Centre on its website at www.nationalprobono.org.au. Barriers include, but are not limited to, the cost of disbursements, uncertainties surrounding the length and complexity of litigation at the outset of a matter, risks of being the subject of an adverse costs order and requests being made at the eleventh hour (leaving insufficient opportunity to prepare properly for a matter).

Some, but not all, of the barriers to providing pro bono services may be addressed by legal profession reform. The content of legislation to implement greater uniformity for the legal profession is still under consideration by Ministers. However, as we understand the current proposal, the reforms may make it easier for lawyers to practise exclusively as a volunteer at a community legal service or otherwise on a pro bono basis as long as the lawyer is covered by professional indemnity insurance. In a general sense reducing red tape for legal practices may 'free up' other resources which can then be redirected towards pro bono activities, and may make it easier for practitioners to conduct pro bono work across Australian jurisdictional boundaries. However, the reforms are unlikely to address other barriers, such as requests for pro bono assistance being made at the eleventh hour.

The department notes also (for completeness) that the Legal Services Directions require Commonwealth agencies to take into account a legal services provider's pro bono work and commitments when deciding whether to engage that provider to perform Commonwealth legal work.

FUNDING FOR LITIGATION

(Chapter 13 of the Commission's Issues Paper, September 2013)

The department encourages the Commission to examine litigation funding as a means of contributing to building a more efficient and effective justice system by facilitating access to the legal system for parties who might otherwise be prohibited from pursuing a legitimate claim. The continued development of the industry in Australia has been the subject of ongoing scrutiny, and would benefit from continued monitoring and review.

Litigation funders

What risks are posed by litigation funding arrangements and how do these differ from the risks posed by contingent and other billing practices? What proportionate and targeted regulatory responses are required to manage these risks, and is more uniform regulation required across jurisdictions on this matter?

The Commonwealth *Corporations Amendment Regulations 2012 (No 6)* commenced on 12 July 2013. The Regulation clarifies that litigation funding arrangements are exempt from regulation under Commonwealth corporations legislation, as long as litigation funders have adequate practices in place to manage conflicts of interest.

The Regulation has received attention in the media including suggestion that it does not go far enough.

In addition to access to formal justice, the department flags that the main issues raised about litigation funding which stakeholders have suggested warrant more regulation are:

- the lack of national consistency, due to certain jurisdictions not abolishing maintenance and champerty
- potential satellite litigation arising from the lack of certainty surrounding litigation funding practices
- the potential conflict between the 'closed class' and the 'opt-out' approaches adopted in class action regimes
- potential conflicts of interest between the role of litigation funders and the lawyers' ethical obligations to their client
- potential cost associated risks to defendants and plaintiffs in funded proceedings due to a lack of capital adequacy requirements or licensing regime for funders, and
- ensuring people have access to independent legal advice or sufficient information on litigation funding to make an informed choice.

This inquiry by the Commission will allow identification and further consideration of relevant issues.

What are the benefits of litigation finding? In what areas of civil justice is it appropriate to consider use of litigation funding?

The department encourages the Commission to investigate the potential of litigation funding to enhance access to justice for many with genuine claims who are otherwise excluded from the legal system due to costs of litigation. Courts have generally accepted litigation funding as a matter of public policy.

Where challenged by defendants on the grounds of maintenance and champerty, it is the importance of access to justice which has generally led courts in Australia to approve funded proceedings.[38]

It has also been argued that litigation funding allows for the spreading of the risk involved in complex litigation and improves the efficiency of litigation by introducing commercial considerations that will aim to reduce costs.[39]

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[38] SCAG, Litigation Funding in Australia: Discussion Paper (May 2006), 5.
[39] *QPSX Ltd v Ericsson Australia Pty Ltd (No 3)* (2005) 219 ALR 1, [54].

In terms of areas of civil justice, litigation funding appears to be mainly used for insolvency claims and class actions, particularly in the securities and competition law areas.[40]

Litigation funding companies are generally not involved in personal injury type matters or other smaller claims, as the associated costs and risks make them unviable.[41]

Is there evidence that firms are settling more cases due to the availability of litigation funding?

The department refers the Commission to a Monash University study of Part IVA federal court class actions (from 4 March 1992 to 3 March 2009), which found that the settlement rate for funded Part IVA cases (100 per cent of the 10 resolved cases were settled) was found to be far higher than the overall settlement rate for Part IVA actions (approximately 41 per cent as at 31 August 2010).[42]

MEASUREMENT OF PERFORMANCE COST AND DRIVERS

(Chapter 14 of the Commission's Issues Paper, September 2013)

Access to justice related inquiries over several years have frequently commented on the lack of comprehensive and consistent data available to inform civil justice policy and program reforms. In particular, there has been a lack of information about the actual costs of different dispute resolution pathways and the economic and social impact of these costs.

In response to these concerns, the department is developing the architecture necessary to develop a strong, consistent evidence base across the civil justice system. This evidence base will enable us to answer important questions about the function and operation of the civil justice system in Australia and information about those who encounters it. The department will take relevant findings of the access to justice inquiry into account in this work – particularly in relation to improving the measurement of performance and cost drivers. The department encourages the Commission to consider the potential for this project to act as a vehicle to improving civil justice system data in Australia.

The project is long term and is currently focussing on the federal, formal civil justice jurisdiction. The project has developed draft objectives for the civil justice system (page 5 of this submission refer).

How can performance of the civil justice system be best measured?

Both the Strategic Framework for Access to Justice[43] and the Report on Government Services, 2013 highlight the importance of principles such as equity, efficiency, effectiveness in relation to access to justice. There may be value in exploring further how these principles can be used to strengthen

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[40] M Legg, 'Shareholder Class Actions in Australia – The Perfect Storm?' (2008) 31(3) UNSWLJ 669, 704-705.
[41] SCAG, Litigation Funding in Australia: Discussion Paper (May 2006), 4.
[42] Professor Vince Morabito, *An Empirical Study of Australia's Class Action Regimes*, September 2010, 5.
[43] Attorney General's Department (AGD) (2009) A Strategic Framework for Access to Justice in the Federal Civil Justice System, AGD: Canberra.

analytical frameworks relevant to measuring access to justice (for example, the Report on Government Services Courts Performance Indicator Framework).[44]

How can the costs of data collection be minimised?

The development and adoption of a Data Collection Framework and principles that encourage efficient data practices is one way to streamline data collection and reduce costs. A number of reports commissioned by the department in 2012 (available on the department's website[45]) revealed a range of data quality issues in relation to civil justice data, and that data is not always recorded electronically or systematically. This can make data collection, and subsequent analysis, resource intensive because data may need to be extracted manually from paper files.

'Data collection appears to be both more prevalent and consistent in the legal assistance sector. Community legal centres use a mutual database to store information about clients, their legal problems and disputes, and the services provided to them. Similar data collection practices also appear to be currently employed by legal aid commissions.'

The Commission's Issues Paper notes that data collection appears to be more prevalent and consistent in the legal assistance sector than elsewhere in the justice system. However, a lack of consistency in data collection and reporting remains an ongoing challenge in evaluating the legal assistance sector and formulating government policy. There are problems with the accuracy and consistency of data collection and reporting methods within and between the four Commonwealth-funded legal assistance programs. To remedy this situation the department has been working with service providers to develop standardised data definitions and data collection practices for the legal assistance sector. These data standards will be taken into account in the development of data standards developed as part of the broader civil justice evidence base project (page 44 of this submission).

What administrative data are currently collected, at the Commonwealth and state/territory level that may be useful in early identification of individuals at high risk of substantial legal need? What can be done to access such information and how can it best be coordinated and used?

Providers of legal assistance services provide regular reports to the Commonwealth as required to demonstrate performance under funding agreements. Under the NPA, the states and territories provide biannual reports to the Commonwealth against the agreed performance benchmarks for LACs only.

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[44] Report on Government Services, 2013; Courts Chapter Page 7.24.
[45] Attorney-General's Department (2013) *An evidence base for the civil justice system*, http://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx (accessed 24/10/2013).

The department does not collect data sets that would assist the Commission in the early identification of individuals with substantial legal needs. The department suggests that the Commission approach the national legal assistance peak bodies for data on the characteristics of clients who are the heaviest users of legal assistance services or require the most intensive assistance to resolve their legal problems. For instance, Legal Aid NSW conducted a study looking at the fifty most frequent users of its services from 2005 to 2010 (Legal Aid NSW Annual Report 2010-11).

The department has, however, compiled data from the annual reports of each of the federal courts over the last 13 years, which can be provided on request.

In conclusion

The department looks forward to continued liaison with the Commission throughout the inquiry, particularly in relation to the work of the department that holds a high degree of relevance to the inquiry's Terms of Reference (including the roundtable on ADR).

November 2013