THE LAW SOCIETY
OF SOUTH AUSTRALIA
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

LAW SOCIETY OF SOUTH AUSTRALIA'S RESPONSE TO THE

DRAFT RECOMMENDATIONS, DRAFT FINDINGS AND QUESTIONS

IN THE

PRODUCTIVITY COMMISSION'S DRAFT REPORT INTO ACCESS TO JUSTICE ARRANGEMENTS

DRAFT RECOMMENDATION / QUESTION / DRAFT FINDING	COMMENTS FROM THE LAW SOCIETY OF SOUTH AUSTRALIA
DRAFT FINDING 2.1 *Based on the most recent data, around 17 per cent of the population had some form of unmet legal need that related to a dispute that they considered substantial.*	The methodology adopted by the Commission in arriving at the figure of 17% is not clear. The LAW survey does not make any finding as simplistic as this. We note that the Commission's finding is based on its definition of "unmet need" (Table 2.2 p. 101). As the Commission correctly identifies what is "unmet need" is debateable and variable.
DRAFT FINDING 2.2 *Informal dispute resolution mechanisms such as ombudsmen could be better employed to address a significant share of unmet legal need, potentially reducing the proportion of the population with unmet legal need from 17 per cent to less than 5 per cent.*	The Society considers that increased government funding (by federal, state and local government*) for initiatives to develop and implement informal dispute resolution mechanisms** is considered to be an important and significant future contributor and (point of influence) in addressing and promoting greater availability of and participation in informal ADR processes. This will inevitably promote greater access to justice at 'grass roots' levels and is a strategic priority ahead of education, training and regulation. *read references to 'government' as references to federal, state and local governments **provide ADR guidelines (standardisation) for courts and tribunals, government departments, other public institutions and professional associations We note there is a heavy reliance on "ombudsmen" as a source of informal dispute resolution mechanisms. ANZOA lodged a submission with the Commission pointing out the effectiveness of ombudsmen. However we need to be careful not to extrapolate their use out as a substitute for Courts in all circumstances. ANZOA's website recognises that "An Ombudsman is an independent person who investigates complaints from citizens or consumers about agencies, departments or service providers".

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	We do not understand how the Commission then reaches its conclusion that the use of Ombudsmen would potentially reduce the unmet legal need from 17 per cent "to less than 5 per cent". In some of the problem types identified in Table 2.3 (p. 103) we already have Industry Ombudsmen (i.e. Consumer, Employment, Government and Health) yet they are some of the highest categories of unmet need. Ombudsmen provide an important role in overcoming the imbalance in power between consumers and large suppliers of services, especially in reaching a negotiated outcome. They are less suited, or unsuited, to other forms of determination of rights, and they cannot usually determine those rights.

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INFORMATION REQUEST 5.1 *The Commission seeks feedback on the likely effectiveness and efficiency of extending the use of legal health checks to those groups identified as least likely to recognise problems that have a legal dimension. More vulnerable groups include people with a disability, sole parents, homeless people, public housing tenants, migrants and people dependent on income support.* *Where greater use of legal health checks is deemed appropriate, information is sought on who should have responsibility for administering the checks. What role should non-legal agencies that have regular contact with disadvantaged clients play? Do these organisations need to be funded separately to undertake legal health checks?*	The difficulty with extending legal health checks to those groups identified is that one of the reasons they may not identify that they have a legal problem is because their vulnerability does not allow them to identify that. We question how they are expected to be able to understand and complete a health check unless they come forward; also, how any organisation can identify the need to administer such a tool. The obvious existing source of legal health checks are the legal aid providers, and community legal services.
DRAFT RECOMMENDATION 5.1 *All states and territories should rationalise existing services to establish a widely recognised single contact point for legal assistance and referral. The*	This recommendation has the potential to create a further administrative layer above the institutions of civil justice and the providers of associated services, with the disadvantages inherent in such a superstructure. It is also unnecessary. In South Australia at least, the Legal Services Commission serves this function. The Society operates a legal referral service and a legal advisory service. We

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service should be responsible for providing telephone and web-based legal information, and should have the capacity to provide basic advice for more straightforward matters and to refer clients to other appropriate legal services. The LawAccess model in NSW provides a working template. *Single-entry point information and referral services should be funded by state and territory governments in partnership with the Commonwealth. The legal professions in each state and territory should also contribute to the development of these services. Efforts should be made to reduce costs by encouraging greater co-operation between jurisdictions.*	see no need for change. As we understand it, LawAccess is not the only service provided in NSW. We question what is the benefit in a "single contact point"? Surely the more available contact points, the more chance of someone finding assistance. We also highlight that there can be benefit in having specialised legal services that are able to provide particular assistance to particular people. When you merge these specialised services into a "one stop shop", that specialist knowledge and skills are lost.

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INFORMATION REQUEST 6.1 *Is there scope for legal service commissions (and their equivalents) to directly enforce the Australian Consumer Law with respect to the activities of lawyers within their jurisdictions? What are the relative costs and benefits of consolidating the regulation of lawyers in this manner (as opposed to existing levels of cooperation with Offices of Fair Trading and their equivalents)? Are there alternatives?*	We take the view that as the ethical obligations of solicitors include the fundamental ethical duty to act in the best interests of the client in any matter in which the solicitor represents the client (4.1.1), avoid any compromise to their integrity and professional independence (4.1.4) and comply with the conduct rules and the law (4.1.5), we do not see the need for legal service commissions and their equivalent to start enforcing general Australian consumer law against lawyers. No doubt circumstances will arise where a breach of the consumer law will amount to a breach of the conduct rules giving rise to a complaint of unprofessional conduct, but we think that it is better dealt with in that context. We would prefer to see the ACCC and other statutory fair trading bodies applying their expertise (including quite complex economic assessments of anti-competitive conduct) rather than attempting to apply that level of expertise to a specific profession by the various State bodies. The risk that we see is that it may lead to a lack of uniformity and the lack of general expertise in this area may outstrip the resources of the local regulators. We also point out that with the gradual transition of legal practice companies to allow for shareholding by non-lawyers and the rise of some public listed legal practice companies engaging in quite large scale trade and commerce, the ability of regulators to deal with cartel or other anti-competitive behaviour will be limited by lack of experience and expertise and it is best left to a professional body such as the ACCC. In addition, the development of such expertise within local legal service commissions and their equivalents would have significant cost implications and this in turn may have ramifications for access to justice generally.”

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	We also query whether there is there a potential conflict between the regulator's role under the *Legal Practitioners Act 1981* (LPA) and then trying to investigate and enforce breaches of the ACL. Under the LPA (as amended) a breach of the ACL would be reportable under the LPA. Who then determines the penalty under the LPA?

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DRAFT RECOMMENDATION 6.1 ***In line with the proposed law in New South Wales and Victoria, other state and territory governments should amend their legal profession acts to require that the standard applied in any investigation of billing complaints is that the lawyer took reasonable steps to ensure that the client understood the billing information presented, including estimates of potential adverse costs awards.***	It has always been a common law requirement that a practitioner is to take reasonable steps to ensure the client understands how they will be charged and billed. A breach of this requirement is capable of constituting unprofessional or unsatisfactory conduct as defined in the LPA. However, this standard or test should be only one of a number of factors to be considered when deciding if there has been misconduct. Nonetheless we note that Schedule 3 of the *Legal Practitioners (Miscellaneous) Amendment Act 2013* will result in the implementation of such a requirement in SA. It is expected that this will come into effect on 1 July 2014. We also question whether this draft recommendation is an accurate reflection of what s. 174(2) of the proposed uniform law upon which it is asserted to be based. During the debate on the National Legal Profession reforms there was considerable discussion on the use of the word "reasonable" and the subjective nature of such a concept. The concept of "fair and reasonable" was as agreed to be a more preferable option. Further, this is not the standard for investigating billing complaints as the Commission asserts but rather one prerequisite for determining the validity of the retainer agreement.
DRAFT RECOMMENDATION 6.2 ***Where they have not already done so, state and territory governments should move to adopt uniform rules for the protection of consumers through billing requirements, as has already been done in New South Wales and Victoria.***	Uniform laws can provide the benefit of certainty and consistency to multi-jurisdictional law firms and their corporate clients. However, uniformity would not necessarily benefit South Australian consumers who are mostly clients of small to middle-sized practices with no offices/branches outside SA. Having said that, we support the move towards uniformity. We also highlight that one reason the National Legal Profession reforms did not succeed

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	was the excessive amount of regulation that would be introduced. It is unclear whether the Commission has analysed the SA *Legal Practitioners Act 1981* in an attempt to ascertain whether it provides adequate protection. Its adoption of the proposed NSW/Vic model as the "gold standard" does not appear to be based on an analysis of other available models. We suggest that the Commission should consider other available models.
DRAFT RECOMMENDATION 6.3 ***State and territory governments should each develop a centralised online resource reporting on a typical range of fees for a variety of types of legal matter.*** • ***This would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report averages, medians and ranges. Prices of individual matters from individual firms would not be publicly reported through this resource.*** • ***The online resource should also reflect which sorts of fee structure (such as, billable hours, fixed fees and events-based fees) are typically available for which sorts of legal matter, but would not advertise which providers offer***	The Society's Ethics and Practice Committee considers this may not be effective in SA where the majority of practitioners base their fees on the Supreme Court Scale or use it as a baseline. It would only really be useful in respect of volume claims areas such as migration, workers compensation or MVA matters. Unless whole profession participates by providing costing information, results will be skewed and non-representative. The Ethics and Practice Committee questions whether information of this nature is capable of being sufficiently accurate as to provide useful guidance to consumers of legal services apart from some very standard matters. For example, it may be possible to have standard charges for routine simple wills, trust deeds and land contracts, but it would be next to impossible for someone to gain guidance on the costs of engaging in a legal dispute or litigation based on a range of fees put up by lawyers. This is because every dispute is unique and the cost of prosecuting or defending a dispute is going to depend to a very large degree on the level of opposition and the complexity of the matter. In addition, the cost will be very dependent upon the expertise and efficiency of the practitioner taking on the work. Any online posting of a range of fees or even an average or median is unlikely to provide useful guidance. On the contrary, it is

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which structures.	more likely to mislead. It should also be pointed out that as from 1 July 2014, the SA Legal Practitioners Act will require similar disclosure and estimate provisions for legal costs as currently apply in New South Wales and Victoria. Another observation on median or average costs is that they tend to cloud the fact that some firms will specialise in expensive litigation with a great deal of expertise and attention to detail for clients who can afford that level of attention and desire it. Other firms may have more of a "one size fits all" approach and corresponding prices. On the other hand, there may be firms that have considerable expertise in a specialist area which allows them to be cheaper and more efficient in that area and possibly cheaper and more effective than lower priced firms that lack that specialist expertise. In the circumstances, it is difficult to see how an online resource where you have so many variable factors is capable of providing useful guidance to consumers of legal services. The Small Practice Committee commented that while the information is meant to be "confidential", the proposal has some challenges. For example, if there are only several practitioners in a particular area, it would not be difficult to reasonably identify the practitioner and therefore ascertain what his or her rates are. If this proposal were implemented, it would not take a genius to work out what your competitor's rates are. There are also concerns about whether such a proposal would have the effect of increasing access to justice. The publication of a person's fees and charges may not necessarily encourage a person to engage a lawyer. The decision to engage a lawyer is arguably based on other factors, such as legal need and the facts of the matter. Costs may be a factor but it is not the only factor.

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	The other issue that is questionable is whether a central website is needed. Many law firms and legal practitioners already have an online presence and already disclose what types of fee arrangements are available to clients e.g. “no win no fee”, “first 30 minutes free” etc Whilst some matters are amenable to “average” fees (i.e. conveyancing, wills, etc.) those matters do not generally fall within the category of problems giving rise to unmet legal needs (see table 2.3 on p. 103). The problems identified are generally particular to the parties involved and therefore not capable of falling within defined fees. At best the proposed resource would need to be extremely broad in its ambit. However, the Society’s Costs Committee thinks that the resource would be of benefit to the legal profession and consumers in that it will assist in the provision of fee estimates and will help with consistency of fees between similar matters. It is suggested that the Legal Practitioners Conduct Board would be a useful source of information about categorising areas of practice and fee ranges. Most costs experts would also have general information. Issues of concern to the Costs Committee are whether the provision of data is to be voluntary or mandatory, and how the cost of obtaining the information and complying with any requirement to provide information is to be funded.

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INFORMATION REQUEST 6.2 *How would central online resources with information about legal fees be implemented? What level of aggregation is required to avoid any confidentiality issues? On what measures should information be available (means, medians, hourly rates, total bills)? Are the prices charged by all providers relevant — for example, should a minimum threshold of number of cases of each type per year be required before cost data is submitted, should very small and very large firms be included?*	As above, we do not support the introduction of an online website that publishes rates and fees as we do not consider it is possible to provide meaningful data for members of the public.
INFORMATION REQUEST 6.3 *The Commission is seeking views on the appropriate 'hosts' for central online resources with information about legal fees — should they be hosted by each jurisdiction's Attorney-General's department, legal services commissioner (or equivalent) or legal aid commission? Could this*	As above, the Society does not consider that information about legal fees can be meaningfully collated. Similarly, to achieve meaningful ratings of quality of services would appear to not be attainable.

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resource exist alongside a 'directory' listing of firms who are willing to advertise their prices through, say, a law society website? *How could information on quality of service elements best be gathered and reported? Are there international examples that would be applicable in Australia? Where should such ratings be reported — should they be 'hosted' by governments, professional associations or independent providers?*	

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DRAFT RECOMMENDATION 6.4 ***In the event that overcharging is found from a complaint, complaints bodies should have the power to access existing files relating to the quantum of bills, including original quotes and final bills. The lawyer in question would be free to submit additional information if they saw fit. This process should not breach any privacy considerations within the lawyer-client relationship (though as a result of later investigations, the complaints body may wish to publish percentages related to any overcharging).*** • ***Lawyers should be required to provide access to this information within five days of the request.*** • ***The cost information should be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates. This could indicate that the lawyer's overcharging may be a systemic, rather than isolated, issue.*** • ***Any initial conclusions drawn from the cost information can contribute to an own motion***	We note that the power for the disciplinary body to require production of documents already exists through the current and to be amended versions of the LPA. The 5 day response time is oppressive and does not reflect the realities of legal practice (court commitments, flexible working hours, other workplace restrictions, etc). In relation to the second dot-point the Costs Committee is concerned that issues of confidentiality and the manipulation or misinterpretation of data be carefully considered. This is also tantamount to a form of "auditing". It was one of the matters debated during the National Legal Profession reform discussions and it has not been taken up in the NSW/Vic uniform law proposed model.

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investigation if the complaints body deems that one is warranted.	

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DRAFT RECOMMENDATION 6.5 ***Cost assessment decisions should be published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of cost amounts or broad dispute type).*** • ***Cost Assessment Rules Committees (and their equivalents) should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in cost assessments.***	Costs decisions in SA are a matter of public record but are not published and are difficult to access. We are in favour of ensuring that these decisions are reported and published. The development of taxation / adjudication guidelines has generally not been favoured because they run the risk of undermining the independence of the decision maker. However, it is conceded that consistency and certainty is in the best interests of the profession and consumers. Whether this outweighs the need for independence is a question that will need to be asked. The taxation decisions by Masters are not always reported and should be. Decisions should be a matter of public record. Court rules for taxations should refer to the requirements. The Court, through a Taxation Committee, should also publish separate guidelines to assist the profession with the taxation process and to ensure consistent results. This should be qualified by the fact that these decisions often turn on particular facts and they may also include the exercise of a discretion (for example, as to reasonableness) which may mean that the principles involved are not capable of being universally applied. This, however, is probably no different to most judicial decisions.
DRAFT RECOMMENDATION 6.6 ***Other state and territory governments should align their legislation with New South Wales and Victoria to allow disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of***	We are not sure what kinds of breach of consumer laws or obligations would also **not** constitute a breach of a lawyer's ethical obligations or the relevant conduct rules. An action by a lawyer which would constitute a breach of consumer law would be likely to also constitute an ethical breach which would in turn expose the lawyer to the possibility of a charge of misconduct.

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professional conduct rules). • ***This should include the ability for complaints bodies to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.*** • ***Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.***	The complaints body in SA has the ability to reprimand, require reimbursement etc and a breach of compliance would be considered to be unsatisfactory or unprofessional conduct. We also point out that Conduct Rule 4.1.3 says that it is a fundamental ethical duty to deliver legal services competently. We fail to see any real point of distinction between a failure to deliver legal services competently and failing to meet a hypothetical quality standard. We consider that fundamental ethical duties in conduct rule 4, namely to act in the best interests of the client, to be honest and courteous in dealings in the course of legal practice, to deliver legal services competently, diligently and as promptly as reasonably possible and to comply with the conduct rules and the law, would cover most "consumer complaints". Accordingly, we take the view that the combination of the conduct rules and a Legal Profession Conduct Commissioner effectively deals with these issues. Furthermore, under the amendments to the *Legal Practitioners Act 1981*, the Legal Profession Conduct Commissioner has wider powers than the present Legal Practitioners Conduct Board, including the power to require a practitioner to enter into a professional mentoring agreement. For further information, please refer to s 77J, s 77J(10) and s 90B of the *Legal Practitioners (Miscellaneous) Amendment Act 2013*.

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DRAFT RECOMMENDATION 6.7 ***As in New South Wales and the Northern Territory, all complaints bodies should be empowered by statute to suspend or place restrictions on a lawyer's practising certificate, while allegations are investigated, if the complaints body considers this in the public interest.***	• In SA the Supreme Court retains inherent jurisdiction with respect to the discipline of its practitioners. • The LPA provides that only the Supreme Court has the power to suspend or cancel a Practising Certificate, but the disciplinary bodies have various abilities to impose conditions on Practising Certificates. • The LPA amendments introduce "show cause" events which will broaden the circumstances under which Practising Certificates may be suspended or restricted. In our view the LPA is correctly gives the power to the Supreme Court to cancel or suspend a practising certificate, rather than putting that power in the hands of the regulator. The reason is that the regulator receives complaints, investigates (including of its own motion) and prosecutes. In those circumstances, it is appropriate for a disinterested body such as the Supreme Court to have the power to impose sanctions. In addition, matters can be and often are brought before the Supreme Court on very short notice. For further information, please refer to s 20AJ, s 20AD and s 20AE of the *Legal Practitioners (Miscellaneous) Amendment Act 2013*.
DRAFT RECOMMENDATION 6.8 ***The complaints body in each state and territory should be equipped with the same investigatory powers (subject to existing limitations) regardless of the source of a complaint. In particular, the power to compel lawyers to produce information***	The SA Legal Practitioners Disciplinary Tribunal has already been granted very wide-ranging powers to require information which are specifically not limited by claims of confidentiality or privilege (For further information, please refer to s 84 of the *Legal Practitioners Act 1981*).

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or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party, or was instigated by the complaints body itself.	

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INFORMATION REQUEST 6.4 *The Commission is seeking further evidence regarding the effectiveness of legal complaints bodies. Specifically, is there available evidence regarding whether:* *consumers are aware of complaints avenues and using them* *resolution of disputes and investigations is timely and the sanctions imposed proportionate* *consumers and lawyers are satisfied with the outcomes of complaints processes?*	Based on the number of complaints against practitioners that are referred in the first instance to the Law Society, it would appear that a substantial portion of the public are not aware of the existence of the current Legal Practitioners Conduct Board (to be replaced from 1 July 2014 by a Legal Profession Conduct Commissioner, who will serve largely the same function). Nevertheless, as complainants to the Law Society are referred to the Legal Practitioners Conduct Board, there is no reason to believe that the general lack of knowledge of consumers gives rise to any prejudice. The current Legal Practitioners Conduct Board has not always dealt with complaints in a timely manner and in some cases there has been very considerable delay which has not been good for consumers or the profession. We are, however, not aware of any surveys having been conducted by the Legal Practitioners Conduct Board or the Society that would give a reliable indication of the level of satisfaction of either consumers or lawyers with the existing process.

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DRAFT RECOMMENDATION 7.1 ***The Commonwealth Government, in consultation with state and territory governments, jurisdictional legal authorities, universities and the profession, should conduct a holistic review of the current status of the three stages of legal education (university, practical legal training and obtaining a practising certificate). The review should consider:*** • ***the appropriate role of, and overall balance between, each of the three stages of legal education and training*** • ***the ongoing need for the 'Priestley 11' core subjects in law degrees*** • ***the best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court (such as tribunal) options, and the ability to match the most appropriate resolution option to the dispute type and characteristics, into one (or more) of the stages of legal education*** • ***the relative merits of increased clinical legal education at the university or practical***	The Dean of the Flinders Law School, Professor Kim Economides, made the following comments: "Given the rapidly changing context of modern legal practice, a holistic review of the educational continuum would be most welcome. We therefore agree that a review of the Priestley requirements is timely, particularly now that the Council of Australian Law Deans (CALD) have developed their own – more comprehensive - standards for law schools (a copy of the CALD Standards, Introductory Context Statement and Threshold Learning Outcomes are available on the CALD website at http://www.cald.asn.au/resources). The Legal Practitioners Education and Admission Council is also currently reviewing MCPD and there are significant developments with vocational legal education. The questions to be considered appear to be the right ones, though we note that "law related education" (legal education taking place within schools) and "public legal education" (education about legal matters for the wider public) are both excluded. Whether the Commonwealth Government should be conducting this Review is however highly debatable – and in our view the Review would be better undertaken by a body visibly detached from current vested interests or at least representative of the full range of stakeholder interests concerned about legal education. Indeed, much of Productivity Commission's draft report appears to us to be creating policy "in the dark", and without any solid evidence base that University law schools are actually well-placed to provide, a view we believe is supported by

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training stages of education • ***the nature of tasks that could appropriately be conducted by individuals who have been admitted to practise but do not hold practising certificates.***	both historical and comparative examples. The 1987 review of Australian Legal Education, led by ANU academic Dennis Pearce (Dennis Pearce, Enid Campbell and Don Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (1987) ('Pearce Report') is one example, and the UK has recently commissioned a major review of legal education conducted by an independent team of experts (see LETR, http://letr.org.uk). This model of using independent experts tends to be favoured by other jurisdictions overseas when it comes to reviewing legal education." The Dean of the UniSA Law School, Professor Wendy Lacey, made the following comments: "I would support the comments made by Professor Economides and reinforce that, whilst involving complex issues, a review of the Priestley 11 would be welcome. However, in the event of any change to the compulsory core, Universities would need a sufficient transition period of up to 5 years, in order to accommodate curriculum reform and the teaching out of current LLB programs to existing students. With respect to clinical legal courses at University, such courses provide students with a rich, experiential learning opportunity not otherwise gained at Law School. Furthermore, clinical and professional learning experiences need not be solely focussed on legal practice, but on areas such as law reform and policy development. Thus, they can be quite distinctive to clinical legal experience gained

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	through GDLP/PLT programmes." The Society's Ethics and Practice Committee made the following comments: "We do not propose to repeat the submissions already made by the Society on this topic. We do observe that matters such as determining which of the range of legal dispute resolution options could be applied to a particular dispute tends to be learnt by experience and on the job training. It is undoubtedly the role of law schools to provide academic training so that students, by the time they graduate, have a sound technical knowledge of legal topics, but to advance from there to competence as a practising lawyer requires considerable practical experience and it is our view that there is no real substitute for that experience. Clinical legal education may well assist, but in the end the ability to make competent decisions as a lawyer requires experience as a lawyer. As for the last dot point about tasks that could be conducted by individuals who have been admitted to practice but do not hold practising certificates, we do not understand what this signifies. If you are admitted to practice, you are entitled to hold a practising certificate, although if you have been freshly admitted to practice, it is a restricted practising certificate and you are under the supervision of a more experienced practitioner. We observe that if you do not hold a practising certificate, you are normally not covered by professional indemnity insurance which we view as mandatory protection for consumers." The Society's GDLP Education Committee supports the recommendation made in 7.1. The

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	Committee also suggests that consideration be given to adding to recommendation 7.1 that post admission practice management training that may be a hurdle requirement before becoming a sole practitioner or a partner and trust accounting training for practitioners who have responsibility for the operation of the trust account. The Society Alternative Dispute Resolution Committee made the following comments: "The ADR Committee supports a review which includes looking at the best way to incorporate legal dispute resolution options into legal education, however educating future legal practitioners is not, at this time, considered to be a strategically important factor in promoting the uptake of ADR by courts and tribunals and government agencies/departments. This aspect is further complicated by the funding model for tertiary education which derives significant revenue from students. Training of legal practitioners is a different issue and is separately considered below. The structure of the legal system, from courts and tribunals through to government departments and public institutions and professional associations needs to be critically reviewed with regard to the availability of government funding for early and more easily accessible ADR. Relying on legal practitioners to improve access to justice by exposing more disputants to the possibilities of ADR addresses only one part of the issue of how

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	justice can be more readily accessed. Legal practitioners are not the only gate keepers for the effective management of early dispute resolution. The effective and efficient implementation of early dispute resolution is systemic and largely resides within the courts and tribunals and within government. Development of initiatives within the administration systems supporting courts and tribunals and government which increase pre action access to ADR should be prioritised over education and to a lesser extent training." The Society's Large Law Firm Managing Partners Group made the following comments in relation to draft recommendation 7.1: • The Priestley 11 is a mechanism that ensures consistency. It is necessary to have a standard set of core competencies. A law degree is aimed at training lawyers, not paralegals. The value of a law degree, if not encompassing such competencies, would be questionable. • A move for Law degrees to become "general business degrees" must consider the need for professional standards to be retained. • Implications for Professional Indemnity Insurance would need to be considered in conjunction with any changes to legal education, for example, to the Priestley 11. • A lot of unnecessary resources are presently spent on students in Stage 2, Practical Legal Training, as many who complete it will not be able to obtain employment in the law. Perhaps at that stage there should be other work options made available to law graduates. The current PII Scheme covers all employees in a firm, eg. Including paralegals. • Less regulation and more freedom is preferable to one size fits all legal training. • Demand led education may allow Universities to offer brief courses.

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INFORMATION REQUEST 7.1 *Which aspects of legal professional regulation present the greatest obstacles to the profession? Are there 'best practice' jurisdictions or would new forms of regulation represent the best way to reduce regulatory burdens while still meeting valid policy objectives?*	What we see as rather worrying is that whenever the question of legal profession regulation is visited, the regulatory burden increases. It never reduces. This means that the cost of practice goes up, therefore the cost to consumers of legal services goes up. There is always a case for further and better regulation as consumers need to be protected and there will always be examples of legal practitioners who have done the wrong thing and, in circumstances where the regulations have failed to deal with that conduct, the obvious answer is more regulation. The problem with this is that it does not strike a balance with the requirement for greater productivity and access to justice. It follows that whenever new regulations are proposed, the question should legitimately be asked, "is this really necessary?"
DRAFT RECOMMENDATION 7.2 ***Where they have not done so already, state and territory governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.*** • ***Legal complaint bodies, in cooperation with Offices of Fair Trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform***	There are no legislative bans on legal advertising in SA. Practitioners in all areas of law are entitled to advertise subject to ethical obligations not to engage in advertising that is misleading or deceptive and is likely to bring the profession into disrepute, and the applicable statutory obligations contained in the consumer laws. Federal Guidelines already do exist but are old and need updating to include reference to more modern electronic forms of marketing and advertising and to bring them into line with current community expectations. Statutory bodies with jurisdiction in relation to consumer law should be more pro-active in the regulation of legal advertising and in the provision of guidelines to the legal profession.

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practitioners and consumers of good practice in legal services advertising.	Conduct rules should reflect the Australian Consumer Law but a breach of ACL would, in any event, constitute grounds for disciplinary action even if there was no specific conduct rule in relation to that breach. The Society is formulating detailed advertising guidelines based on those provided some years ago by the then Federal consumer authority.

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DRAFT RECOMMENDATION 7.3 ***State and territory governments should remove the sector-specific requirement for approval of individual professional indemnity insurance products for lawyers. All insurers wishing to offer professional indemnity insurance products should instead be approved by the Australian Prudential Regulation Authority.***	Under s 52 of the *Legal Practitioners Act 1981*, as amended, the Society administers this State's Professional Indemnity Insurance Scheme as approved by the Attorney-General. The Scheme provides for cover up to $2million inclusive of costs for each and every claim. The Scheme is managed for the Society by Lawguard Management Pty Ltd, which has provided the following comments. In South Australia there are different levels of practising certificates and there is a recommendation for voluntary practising certificates – the question is whether that generates any insurance issues, but the Board of Lawguard does not consider that it raises PII issues. It is suggested that there should be uniform regulation of PII Schemes by APRA and not local bodies – but it appears that no contributor submitted that, and nor is there any data to show the logic behind it. There is no reference to the National Standards and no data about how the different Schemes are run. It is appropriate that Lawguard continue to have an interest in this issue. In relation specifically to draft recommendation 7.3, the SA PII Scheme does use only APRA approved insurers. The Society is not an insurer. There is therefore no reason to make further comment about this recommendation. The Board of Lawguard noted that Lloyds of London are exempt from APRA. They are however regulated by the UK equivalent of APRA. We query whether the recommendation may have been directed to Queensland which uses a direct offshore foreign insurer (DOFI) in Singapore. In Victoria, the LPLC is a statutory body that conducts State insurance and therefore is exempt from APRA, although the LPLC does reinsure with APRA insurers. It is also therefore a possibility that

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	this recommendation is directed to Victoria. The overall view is that the Board does not have any opposition to the recommendation.

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INFORMATION REQUEST 7.2 *Does the inability to operate as a limited liability partnership represent a significant cost to, or barrier to entry for, law firms? What are the potential benefits of allowing this particular business structure and to whom do the benefits accrue? What are the potential costs of allowing this structure and who bears those costs?*	The Society notes that major clients (eg banks) do not engage lawyers if there is a limitation of liability. It is not clear what the cost benefit of allowing limited liability partnerships would be. A cost saving may not be passed on.
INFORMATION REQUEST 7.3 *To what extent would harmonising accounting standards and mutually recognising audits between jurisdictions reduce the compliance burden on firms from maintaining trust accounts in each jurisdiction? Are there alternative ways to 'earmark' interest earned from the account as arising in particular jurisdictions? Is it possible to develop funding formulas to redistribute funds if national trust accounts are adopted? If so, what should these formulas be based on — legal activity or legal need in each jurisdiction?*	We consider that trust accounting standards and requirements in Australia are for the most part consistent. The main differences being isolated to terminology and the names of the regulatory bodies involved. South Australia is not presently participating in the Uniform National Laws. Having multiple jurisdictions can cause complexity but a large majority of practitioners (and therefore their clients) in South Australia would not obtain an advantage if SA were to participate in the Uniform National Laws. We also note this was an issue that was never resolved during the National Legal Profession debate. It requires accounting input. The problem is that not all States use their trust account interest for identical purposes but all are reliant on it (see p. 242). With single trust accounts the issue is then which jurisdiction should get the benefit of the interest income.

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INFORMATION REQUEST 7.4 *How should money from 'public purposes' funds be most efficiently used?*	It is unclear what this question has to do with access to justice unless it is suggested that the distribution of the public purpose fund income to legal aid commissions is not warranted and could be used elsewhere.
INFORMATION REQUEST 7.5 *In what areas of law could non-lawyers with specific training, or 'limited licences' be used to best effect? What role could paralegals play in delivering unbundled services? What would be the impacts (both costs and benefits) of non-lawyers with specific training, or 'limited licences', providing services in areas such as family law, consumer credit issues, and employment law? Is there anything unique to Australia that would preclude the adoption of innovations that are occurring in similar areas of law overseas? If so, how could those barriers be overcome?*	The Society's Ethics and Practice Committee made the following comments: • "Unbundled legal services" are legal services provided by legal practitioners which only deal with a limited aspect of a matter. For example, where a lawyer is engaged to draft a Defence in a litigated matter but is not also engaged to represent that party. Also, where a lawyer is engaged to appear on behalf of a person in an interlocutory matter but is not retained in respect of the entire litigation. Also, when a lawyer is engaged to draft a deed of settlement, or consent orders, in a matter in which they have not otherwise acted for the client. • The problem with providing unbundled legal services is the difficulty this presents to legal practitioners in complying with the requirements that they "act in the best interest of their client at all times", and provide legal services with competence and skill. • Section 21 of the LPA already recognises that there are areas of legal practice which should not be the exclusive domain of legal practitioners. A review should be undertaken to bring this up to date with public expectations and to adopt beneficial innovations in other countries such as the UK for example. We actually view this question as being: "Is there a role for people who are only partially

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	qualified in the law or have expertise in one area of the law delivering services other than under the direct supervision of a lawyer?". Law firms often employ paralegals, but all their work is checked by a lawyer before it leaves the law firm. We think that the prime example of a more limited service that was traditionally carried out by lawyers is the role of conveyancers. It would be very hard now to argue that conveyancers have no place in the Australian legal system because of their lack of knowledge and expertise in the areas of contract law and consumer law, etc. There is no doubt that in their specific field conveyancers (formerly land brokers) provide an efficient and cost effective service. The question that really needs to be asked is are there any other areas of practice that lend themselves to people with a very specialised knowledge that can deliver services without the supervision of a lawyer. It may be the case, but we are struggling to come up with examples. Lawguard made the following comments: • It was noted that the only barriers to this coming in would be if it changes the risk of legal practice. It is not considered that Lawguard needs to make any contribution to this issue. The Society's Civil Litigation Committee made the following comment: More than a change to professional conduct rules is required, and there will need to be explicit recognition that legal practitioners are not liable for failing to do work they are not contracted to do.

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	The Society's Large Firm Managing Partners Group made the following comments: • The impact of de-bundling of services on the standard of the professional service provided needs to be considered. We consider that the pressure from clients can be a cause of PII claims. • Proportionate liability is an issue. • Lawyers as suppliers in the market are constantly looking at how to be competitive and attract work. Law firms do this well. It is therefore not necessary to have a review into how legal services can best be provided. • Lawyers are unable to compete for some work due to price points. • The insurance market is fairly resilient and will be able to restructure and re-cost. Law clerks, paralegals and conveyancers already provide services within law firms in SA under supervision. In some jurisdictions advocates already appear (i.e. small claims, residential tenancies tribunals, etc.). The real concern with the Commission's thinking is to be seen in the paragraph starting at the foot of page 246 about the effect on lawyers' fees if competition from non-lawyers is permitted. There are a number of fundamental fallacies with this reasoning. Firstly it is the expertise that commands the fee. Secondly there is no economic foundation for "lawyers service charges more closely reflect their costs" (p. 247). Are lawyers not entitled to make a profit? The analogy with the medical

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	progression to some extent (p. 247) highlights that appropriately trained professionals can still do some of the ancillary tasks. That is what happens now in the legal profession.

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DRAFT RECOMMENDATION 8.1 ***Court and tribunal processes should continue to be reformed to facilitate the use of alternative dispute resolution in all appropriate cases in a way that seeks to encourage a match between the dispute and the form of alternative dispute resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.***	Central to the development and implementation (and therefore accessibility for effective ADR) of a wider range of ADR processes is strategically addressing the source, namely the courts and tribunals and government. A model which includes a 'triage' approach should be considered for all courts and tribunals. A 'triage' process administered by experienced and skilled professionals would direct disputes to the most suitable ADR process and oversee their management to resolution. Where resolution is not possible, the 'triage' process would then recommend the most appropriate next steps and make appropriate directions. The practitioners who administer and manage the 'triage' process should be selected for their good technical and practical understanding of ADR and their demonstrated keenly honed commercial sensibilities. Query the utility and effectiveness of pre-action protocols: Observed impediments to the uptake of pre-action protocols include: 1) added expense and delay 2) possible double handling and 3) inconsistency in their application and therefore greater potential for varying outcomes/levels of satisfaction with the process. Often, success depends on the ADR expertise of the practitioners and their commitment to the process. We conclude that the use of alternative dispute resolution must be accompanied by safe guards but allow for litigation if settlement cannot be reached. In addition, alternative dispute resolution needs to be "principled", that is to deal as best it can with the legal merits of an individual's claim, and not be tainted by disparity in economic power.

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INFORMATION REQUEST 8.1 *The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to $50 000).* *What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters, or to similar types of matters in other jurisdictions?* *The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes.*	The Society submits that many parties to a dispute mediate before going to court. Nonetheless we consider there is merit in courts and tribunals mandating compulsory mediation. The SA Magistrates Court has run a successful mediation scheme for many years, aspects of which have been mandated. Certain types of disputes which are more suited to resolution by compulsory mediation, for example retail leases should be identified and targeted for immediate funding. For example, small business and family law disputes where the legal costs in using formal ADR processes are often prohibitive. The Family Court of Australia and the Federal Circuit Court provide an effective ADR process for property settlement disputes through the conciliation conference (a confidential conference conducted by a Registrar of the court, with parties and legal representatives present and with the Registrar making recommendations). This process is more effective than the settlement conferences in the civil courts. However, more funding is needed so that more time is available (more than 1.5 hours) for each conference. Without more funding it is suggested that this facility be used for small property pools (say $200,000 or less). Large property settlement disputes could be: 1) referred to private court appointed mediators after proceedings are issued; and/or 2) be directed to mediation or collaborative law negotiation as a precondition to issuing proceedings.

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	A mediation-arbitration (med-arb) could be effective for resolving small family law estates (say $50,000 or less), administered by legal aid organisations. This approach has been used in Queensland and could be taken up nationally if funding is provided. It is important for the parties to have legal representatives present if possible regardless of the model being used or $value/complexity of the dispute. It would be helpful for small estates where complex parenting issues need to be resolved, if all issues were dealt with in the one ADR process. It is acknowledged that property settlements (even small estates) benefit from the involvement of ADR practitioners with expertise in the relevant field. We also suggest that the dollar limit for compulsory mediation may need to be jurisdictionally based. Rules already exist in our civil jurisdictions for compulsory mediation. One of the impediments is that mediations are not cheap. Private mediations appear to have a higher success rate than court supervised as the private mediators appear to take a far more "hands on" approach. Appropriate training for mediators (including judicial officers) is the cornerstone to a successful mediation. (See page 271 where this is referred to).

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DRAFT RECOMMENDATION 8.2 ***All government agencies (including local governments) that do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.***	We agree that all government agencies should develop and implement dispute resolution management plans. Funds should be allocated to assist the establishment of the processes necessary to drive not only the establishment and public promotion of the plans but also to encourage effective and informed review and reporting. Collaboration and information sharing to promote consistency and efficiency should be encouraged.
DRAFT RECOMMENDATION 8.3 ***Organisations within jurisdictions that are responsible for preparing information and education materials to improve access to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.***	We agree that the more that general awareness of ADR is increased the better. Education is an important part of addressing: 1) a greater uptake of ADR processes; and 2) better administration and management to achieve better outcomes.

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DRAFT RECOMMENDATION 8.4 ***Organisations involved in dispute resolution processes should develop guidelines for administrators and decision makers to triage disputes. Triage should involve allocating disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.***	See comments at 8.1 above. There is an absence of 'standard' protocols for managing confidentiality and privilege in ADR processes: some lawyers/ADR practitioners are reluctant to recommend mediation and other forms of ADR process to their clients because of the potential exposure to the evidentiary downside if a dispute is not settled. Administrators and users of ADR processes would benefit from 'tested' guidelines developed around effectively preserving confidentiality and privilege and avoiding/minimising disclosure risks.
DRAFT RECOMMENDATION 8.5 ***Consistent with the Learning and Teaching Academic Standards for a Bachelor of Laws, Australian law schools should ensure that core curricula for law qualifications encompass the full range of legal dispute resolution options, including non-adversarial options. In particular, education and training is required to ensure that legal professionals can better match the most appropriate resolution option to the dispute type and characteristics.***	The Society's GDLP Education Committee supports draft recommendation 8.5. We also provide comments from the Dean of the Flinders Law School, Professor Kim Economides, "We would support the mandatory teaching of ADR and there was an excellent paper advocating this move by Rachel Field at the last ALTA conference. Though this does raise a difficult question as to what should no longer be compulsory in order to make room in an already overcrowded curriculum and avoid what has become known as "the creeping core". We believe that the traditional approach to law teaching is too heavily weighted toward the adversarial model, and just the tip of the conflict ice-berg, and therefore does not reflect the reality of just how much of the law is practised outside of the court system and how the majority of disputes are resolved in practice. We believe that this traditional

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Consideration should also be given to developing courses that enable tertiary students of non-legal disciplines and experienced non-legal professionals to improve their understanding of legal disputes and how and where they might be resolved.	adversarial model is so ingrained that it would take some specific requirement in relation to teaching dispute resolution to change that culture in a number of law schools. It is also clear that both Government and Courts are also trying to divert matters away from litigation as much as possible. We therefore need to create more opportunities for our students to actively learn skills such as negotiation that, whether or not they practise, are transferable to professional life. Furthermore, there is some research evidence that suggests that if a less adversarial approach to teaching law is taken this actually can provide students with a better learning environment in terms of building their resilience and promoting well-being." The Dean of the UniSA Law School, Professor Wendy Lacey, made the following comments: "I would also endorse the comments made by Professor Economides, and highlight the fact that several Law Schools already teach ADR as a core component of the degree. Furthermore, many subjects already incorporate ADR and tribunal systems; perhaps not to a significant or optimum degree, however." The ADR Committee made the following comments: "Agree but as noted above (8.1) educating legal practitioners is not considered to be the most important factor in promoting the uptake of ADR."

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DRAFT RECOMMENDATION 8.6 ***Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.***	Accreditation is a complex issue presently being tackled by the Mediator Standards Board ('**MSB**'). Fundamental issues underlying the success of the MSB are that its continued existence relies on members' funding accreditation yet the MSB is not a representative body (the Board is elected at the AGM by members' votes). The MSB has issued National Mediator Accreditation Standards (NMAS) draft Approval Standards for accrediting mediators. Matters not addressed by the Standards include mutual recognition, complexities where mediators wish to be recognised as nationally accredited for the purpose of being on more than one list of mediators and how RMABs ('*Registered Mediator Accrediting Bodies'*) satisfy themselves that mediators meet the NMAS Approval Standards, consistency where application of Standards is devolved to RMABs who are taking different approaches to accreditation, re-accreditation and mutual recognition. There are related issues of complaints handling, in particular for legal practitioners who must meet a higher standard in order to practice law and the potential for this to influence the standard of mediation practised by a legal practitioner and that available from non-credentialed professionals. Other implications arise with regard to the extent and level of CPD requirements to be met by persons seeking accreditation – a large bandwidth of CPD will develop and create layers within the nominal "accredited mediator" which are not apparent to the ADR consumer.
DRAFT RECOMMENDATION 9.1	We agree with this proposal and support the proper funding of Ombudsmen to properly

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Governments and industry should raise the profile of ombudsman services in Australia. This should include: • ***more prominent publishing of which ombudsmen are available and what matters they deal with*** • ***the requirement on service providers to inform consumers about avenues for dispute resolution*** • ***information being made available to providers of referral and legal assistance services.***	manage their workloads. Refer also to our comments in response to Draft Finding 2.2 relating to the role of an Ombudsman - that it is important, but not universal.

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DRAFT RECOMMENDATION 9.2 ***Governments should rationalise the ombudsmen services they fund to improve the efficiency of these services, especially by reducing unnecessary costs.***	The reason that there are so many Ombudsman is that they have traditionally been industry based (i.e. Employee, Health, etc.). As they are generally tasked with dealing with consumer versus Government instrumentalities a degree of specialisation is required. Whilst having a more general charter the SA Ombudsman still has a primary focus on Government agencies. To "roll" all of these into one or "rationalise" the services on offer would dilute the expertise and focus of industry-based ombudsmen and therefore probably reduce their effectiveness. The Commission has recognised the need for specialisation, as under the proposed rationalised model it states it would "allow the development of greater expertise within a larger body" (p. 289).
DRAFT RECOMMENDATION 9.3 ***In order to promote the effectiveness of government ombudsmen:*** • ***government agencies should be required to contribute to the cost of complaints lodged against them*** • ***ombudsmen should report annually any systemic issues they have identified that lead to unnecessary disputes with government agencies, and how those agencies have***	The Society agrees with this recommendation.

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responded • ***government ombudsmen should be subject to performance benchmarking.***	

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DRAFT RECOMMENDATION 9.4 ***Governments should review funding for ombudsmen and complaints bodies to ensure that, where government funding is provided, it is appropriate. The review should also consider if some kind of industry payment would also be warranted in particular cases.***	The Society agrees with draft recommendation 9.4 and observes that the SA Ombudsman has a high volume of work. If they were better resourced, ASIC and the Financial Ombudsman Service could do their jobs more effectively.
INFORMATION REQUEST 10.1 Given the contextual differences of the specific matters that tribunals seek to resolve, the commission seeks feedback on how and where alternative dispute resolution processes might be better employed in tribunal settings, including in what types of disputes, to assist in timely and appropriate resolution.	The commentary in the lead up to this request contains a number of references to the performance of the VCAT. Care needs to be taken in using the VCAT as the benchmark as it is not recognised as the best example of how a Tribunal should operate. The South Australian Civil and Administrative Tribunal is being modelled on the WA Tribunal which we note is given only limited mention. The information request appears to be premised on a very haphazard analysis of existing Tribunals performances and we suggest that individual Tribunal annual reports do contain relevant performance data on ADR (or its equivalent).
DRAFT RECOMMENDATION 10.1 ***Restrictions on the use of legal representation in tribunals should be more rigorously applied. Guidelines should be developed to ensure that***	The Society opposes the recommendation that restrictions on the use of legal representatives in tribunals should be more rigorously applied. It should not be assumed that the involvement of legal representatives will necessarily, or even usually, produce inefficiency. In many cases they can have the opposite effect. The Society agrees with the observations on p 16 of the Report as to the desirability of legal

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their application is consistent. Tribunals should be required to report on the frequency with which parties are granted leave to have legal representation.	representation in some cases. However, the Report presents these as though they are exceptional cases. In fact, the advantages identified have application in a great many cases. The conduct of some matters may necessarily be complex. Lawyers who represent parties are often able to provide Tribunals with considerable assistance in performing their functions. Further, the legal profession has provided a valuable service by way of pro bono legal assistance not just because of legality and complexity but also due to the vulnerability (or comparative vulnerability) of parties in Tribunal proceedings. Moreover, and even where issues are not objectively factually or legally complex, many participants in the Tribunal system would prefer not to represent themselves for a variety of legitimate reasons. Some are not competent to make submissions, marshal facts and adduce necessary or appropriate evidence. Others lack the confidence to do so, even in a comparatively informal Tribunal setting. Some participants may not understand, or may not fully understand, the Tribunal process, the issues or the decisions made in their case. This applies particularly to the elderly, the young and the vulnerable. For all these persons, having the option of engaging legal proceedings is an important right (albeit one already curtailed to some extent by legislation). Denying persons the choice to be legally represented can actually act as a barrier to access to justice by discouraging persons (including vulnerable persons) to engage with Tribunals and by contributing to a sense on the part of participants in the Tribunal process that they were not able to present their arguments or evidence as they would have wished. The Society expresses no view about the proposed requirement to report on the

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	frequency with which parties are granted leave to have legal representation in itself. However, such reporting should not be required on the basis of an assumption that the involvement of legal practitioners necessarily adds complexity or inefficiency to Tribunal processes. We also note that ADR is embedded in most tribunal processes and suitable for most disputes. Often unnecessary expense is incurred in investigation and retrieving documents which can also positionally entrench parties and be counterproductive to early resolution. Strategies for fast tracking ADR in tribunals would enhance access to justice. The recently established WorkCover mediators panel may be worth reviewing in the broader context. In relation to the South Australian Civil and Administrative Tribunal that is presently being established, it is of concern that clients may not be entitled to legal representation before the SACAT, or if they are, it would be at they would have to bear the cost. In SA, lawyers are actively excluded from minor civil matters, eg via the jurisdictional limits and costs provisions. In SA, even with the $25,000 limit for small claims in the Magistrates Court matters, people are still seeking legal assistance. The legal issues are able to be confined by experienced practitioners. We consider that it is important to have a judicial outcome, i.e. such matters need to be heard by experienced legal judicial officers and that capped costs are preferable to there being no right to legal representation.

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DRAFT RECOMMENDATION 10.2 ***Legal and other professional representatives should be required to have an understanding about the nature of tribunal processes and assist tribunals in achieving objectives of being fair, just, economical, informal and quick. Legislation should establish powers that enable tribunals to enforce this, including but not limited to tribunals being able to make costs orders against parties and their representatives that do not advance tribunal objectives.***	The Society agrees that legal representatives should be required to have an understanding about the nature of tribunal processes and agrees that legal representatives should assist tribunals in achieving the objectives of fairness, justice, economy, informality and speed. The Society generally supports the introduction of powers for tribunals to be able to make costs orders against parties or, where they are represented, legal representatives. However, powers of this kind should be used sparingly, and such powers should only be available where appropriate preconditions are fulfilled. It should be recognised that the potential for an adverse costs order can itself deter persons from participating in the Tribunal process. The Society suggests that any new power to order costs against a party or its legal representatives should be confined by the following principles. 1. the power should only be exercisable where the Tribunal finds that there are special circumstances; 2. the power should only be exercisable where the party or their legal representatives (as the case may be) has acted in a manner that is manifestly unreasonable in all the circumstances; 3. the power should only be exercisable in relation to the legal representative of a party where the Tribunal is satisfied that the circumstances warranting the order have arisen as a result of the conduct of the legal representatives and not of the party themselves;

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	4. generally, parties or representatives at risk of a costs order should be warned by the Tribunal that, and in what way, the Tribunal considers that their conduct or proposed conduct is contrary to Tribunal objectives; 5. the power should only be exercised after giving the party or legal representative a fair opportunity to be heard, including, where appropriate, by adducing relevant evidential material in opposition to a proposed costs order. In our view, there is no equivalent to the Civil Procedure Acts in SA. As officers of the court, all SA practitioners have professional obligations not to impede the administration of justice and do everything reasonably practicable to act with due skill and competency. A breach of those obligations would be capable of giving rise to disciplinary action.

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INFORMATION REQUEST 10.3 *The Commission seeks views on the cost-effectiveness of consolidating all Commonwealth merits review bodies in one Administrative Review Tribunal along the lines recommended by the Administrative Review Council.*	The Society is of the view that the proposal to consolidate Commonwealth merits review bodies in a single Administrative Review Tribunal generally has merit. Particularly in a small State like South Australia, a "one-stop shop" for Commonwealth merits review is regarded as a sensible development. The benefits of specialisation of Tribunal members can be maintained by "streaming" or other appropriate approaches to intramural Tribunal organisation.
INFORMATION REQUEST 10.4 *Where consolidation of tribunals is not feasible, the Commission seeks views on options for greater use of co-location, shared administration and shared outreach.*	The Society is of the view that current arrangements for co-location of merits review Tribunals in Adelaide generally work well. An issue that sometimes arises is that persons with matters in more than one Tribunal do not perceive them as distinct and therefore, for example, may file a document in proceedings in one Tribunal which are required for a proceeding in another Tribunal. It is considered that these kinds of issues can be addressed by the adoption of sensible and sufficiently sophisticated protocols in a shared Tribunals registry.
INFORMATION REQUEST 10.5 *The Commission seeks views on whether current appeal and review mechanisms within and between tribunals, and between tribunals and courts, are operating fairly, efficiently and*	Currently an appeal lies "on a question of law" from a decision of the AAT to the Federal Court: *Administrative Appeals Tribunal Act 1975*, s 44(1). This provision has given rise to a great deal of complex and technical Federal Court jurisprudence. For some relatively recent examples, see *Avetmiss Easy Pty Ltd v Australian Skills Qualifications Authority* [2014] FCA 314 and the cases there referred to. Many appellants (especially self-represented appellants) have great difficulty identifying a "question of law" and thus invoking the jurisdiction of the Federal Court, even when the argument they wish to

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effectively, and what opportunities exist for rationalisation or improvement.	advance does or may genuinely raise an issue of law or statutory construction. Different formulations of the right of appeal may reduce the technicality that has arisen in this area, while still effectively confining appeals to points of law. For example, a reformulated right of appeal might confer jurisdiction on the Federal Court to hear appeals where it is contended that the decision under appeal is "affected by an error of law" or where the proposed appeal "raises a question of law", without the need to extract and state, in the abstract, a question of law. Before any specific recommendation is made, wider consultation should occur in relation to potential alternative formulations.

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DRAFT RECOMMENDATION 11.1 ***Courts should apply the following elements of the Federal Court's Fast Track model more broadly:*** • ***the abolition of formal pleadings*** • ***a focus on early identification of the real issues in dispute*** • ***more tightly controlling the number of pre-trial appearances*** • ***requiring strict observance of time limits.***	This recommendation is misplaced for several reasons: - Efficiency and real involvement in management are necessary in both Courts and Tribunals. However, it is for those courts and tribunals to tailor their processes to the matters with which they deal. - The recommendation is indicative of the 'top-down', rules-based approach which is generally unsuccessful in case management. Only flexible and active involvement by judicial officers is likely to be effective. The Courts are independent. They must decide how to manage their cases. The detailed recommendations are also inappropriate. The Law Council draft response has some useful material, and might be partly adopted. The SA Courts have developed a concept for fast track streaming that is likely to be adopted. The merits are unclear. The plaintiff will choose whether to enter it. The proposal includes fixed costs. This system works well in the Federal Court (where there is a docket system). However the Federal Court Fast Track model is limited in its application to matters/issues that are capable of being fast tracked. (See Practice Note CM8 section 2.1). Not all matters/issues across all Courts are suited. Further the elements identified in the recommendation are not the complete list that the Federal Court applies and should not be viewed in isolation. Whilst "fast tracking" has some merit it needs to be tailored and managed.

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DRAFT RECOMMENDATION 11.2 ***There is a need for greater empirical analysis and evaluation of the different case management approaches and techniques adopted by jurisdictions. These evaluations should consider the impact of different case management approaches on court resources, settlement rates, timing of settlements, trial length (for those matters that proceed to trial), litigant costs, timeliness, and user satisfaction.*** ***The Commission sees merit in courts within and across jurisdictions collaborating to better identify cases in which more or less intensive case management is justified (on a cost-benefit analysis).***	The Society agrees with this recommendation.
DRAFT RECOMMENDATION 11.3 ***The National Judicial College of Australia and other judicial education bodies should continue to develop and deliver training in effective case management techniques drawing from empirical evaluations to the extent that these are available.***	The Society agrees with this recommendation.

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DRAFT RECOMMENDATION 11.4 ***Courts that do not currently utilise an individual docket system for civil matters should move to this model unless reasons to do the contrary can be demonstrated. In courts where adoption of a formal docket system is not feasible, other approaches to ensuring consistent pre-trial management should continue to be explored.***	The Society agrees with draft recommendation 11.4 and makes several brief comments below. - The present structure of the SA District Court, which is not divided as to Criminal and Civil jurisdictions, makes an individual docket system impossible. - The SA District and Supreme Courts have Masters who oversee some aspects of matters. - Not all Judges have the ability to hear civil matters.
INFORMATION REQUEST 11.2 *The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration.*	The "one size fits all rule" is probably out dated. Tailored orders will ensure that different types of litigation are catered for.
DRAFT RECOMMENDATION 11.5 ***Jurisdictions that have not already acted to limit general discovery to information of direct relevance should implement reforms to achieve this, in conjunction with strong judicial case management of the discovery process. In***	There were differing views with respect to draft recommendation 11.5. It is acknowledged that discovery takes an inordinate amount of time. Comments included: - fast track proposals could be of assistance in some matters; - discovery by bundles is useful; - lawyers should be left to attempt to 'cut a deal' before a court process is commenced; - There should be

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addition: • ***court rules or practice directions should promote tailored discovery and clearly outline for practitioners and the court the discovery options that are available*** • ***courts that do not currently require leave for discovery should consider introducing such a requirement. Courts that have introduced leave requirements for only certain types of matters should consider whether these requirements could be applied more broadly*** • ***court rules or practice directions should expressly impose an obligation on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate*** • ***courts should be expressly empowered to make targeted cost orders in respect of discovery.***	○ Direct relevant disclosure; and ○ Experts; reports before proceedings. - It is necessary to have an interactive person on the bench, a Judge who shapes the matter and requests the documents that are necessary.

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DRAFT RECOMMENDATION 11.6 ***All courts should have practice guidelines and checklists which cover ways to use information technology to manage the discovery process more efficiently.*** ***All jurisdictions should ensure that, at a minimum, these checklists cover:*** ***scope of discovery and what constitutes a reasonable search of electronic documents*** ***a strategy for the identification, collection, processing, analysis and review of electronic documents*** ***the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)*** ***a timetable and estimated costs for discovery of electronic documents*** ***an appropriate document management protocol.***	The Society agrees with this recommendation but we note that it will depend on the ability of the Court itself to conduct litigation electronically.

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DRAFT RECOMMENDATION 11.7 ***Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.***	The Society agrees with this recommendation.
DRAFT RECOMMENDATION 11.8 ***Jurisdictions that have not adopted key elements of Part 31 of the Uniform Civil Procedure Rules (NSW) (or similar) should consider implementing similar rules, including:*** • ***a requirement on parties to seek directions before adducing expert evidence*** • ***broad powers on the part of the court to make directions about expert evidence, including to appoint a single expert or a court appointed expert.***	Members of the Society's Large Firm Managing Partners Group observed that the commercial list in Sydney is effective because the Judge directs the matters and that only experienced legal practitioners can manage in this area.
DRAFT RECOMMENDATION 11.9	We make the following comments:

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Practice directions in all courts should provide clear guidance about the factors that should be taken into account when considering whether: • ***a single joint expert or court appointed expert would be appropriate in a particular case*** • ***to use concurrent evidence, and if so, how the procedure is to be conducted.***	- It may be desirable to confine the number of experts in a matter. Some consideration is presently being given to having experts conferring before the preparation of their reports. - A lot of time and cost can be 'blown' here. - It is necessary to avoid a party being constrained. - In SA, under Court Rules, it is possible to adduce evidence. - There is a scarcity of experts in some fields, e.g. Building and construction law. - One SA firm is known to be currently working to gather the underlying facts to put to experts. Ie it is not useful to get the experts in too early. - Significant matters are now front end loaded. - Upfront, there should be agreed facts, known documents, and information about insurance risks about what is and isn't known. - Rigour must be placed on what is done before a matter enters the court process.

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DRAFT RECOMMENDATION 11.10 ***All courts should:*** • ***explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia*** • ***facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.***	The Society agrees with this recommendation.
INFORMATION REQUEST 12.1 *The Commission seeks feedback on the effectiveness of current overarching obligations imposed on parties and their legal representatives in litigation processes. In particular, how might the detection of non-compliance and the enforcement of these obligations be improved?*	The Society considers that extensive and co-ordinated data collection across all jurisdictions so that an accurate empirical foundation as to compliance can be first determined is essential.
DRAFT RECOMMENDATION 12.1 ***Jurisdictions should further explore the use of***	- SA Courts presently have in final draft pre-action protocols that are to be trialled in medical negligence matters and in building and construction law matters. (The plaintiff serves a notice. The defendant responds. There is an exchange of documentation sufficient to enable an understanding of the case.)

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targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements.	- Some argue that the pre-action protocol will restrict people's right of access to the courts. - Presently no concise way has been found to measure the success or otherwise of a pre-action protocol and therefore to identify the data that needs to be captured to allow an evaluation of the trial. - A large proportion of building and construction work is already largely being done outside court proceedings. - The court sees perhaps 5% of disputes that lawyers deal with. - Major matters are managed, without any statistics or reporting, without any recourse to the Courts. - The amount of time spent in courts has declined greatly in past years. - The courts have a very limited role. - Once a matter enters a court, because it will have passed through a pre-action stage, it needs a quick outcome. This requires a competent Judge. Pre action protocols have the potential to “front end load” legal costs. They have

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	become fashionable without any empirical data as to their success or cost. In the absence of litigation it is not possible for "judicial oversight of compliance" to be achieved. Once litigation is commenced past non-compliance becomes difficult to adjudicate upon unless by some form of punitive relief.

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INFORMATION REQUEST 12.2 *The Commission seeks feedback on how draft recommendation 12.1 might best be implemented, including which types of disputes would most benefit from targeted pre-action protocols.*	As noted above (8.1), the Society queries the utility and effectiveness of pre-action protocols, although that would depend to some extent on the contents of the relevant protocols. In South Australia, the Supreme and District Court Rules already provide for pre-action settlement offers to be made and considered in monetary claims. The Magistrates Court Rules contain other pre-action provisions intended to promote early resolution of disputes while a party issuing proceedings in the Federal Court must file a genuine steps statement. We consider that these provisions now work reasonably well, and we are not convinced of the need to prescribe further requirements (which would increase costs incurred at that stage) under the label of a more detailed pre-action protocol. Draft recommendation 12.1 provides for jurisdictions to "*further explore the use of targeted pre-action protocols*". We consider that, rather than seek to identify particular types of dispute which might benefit most from the introduction of targeted pre-action protocols, it may be better to consider how in general terms parties should be expected to conduct themselves before issuing proceedings, and then to consider whether those general standards of conduct ought to be modified in particular cases or types of cases.

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DRAFT RECOMMENDATION 12.2 ***Commonwealth, state and territory governments and their agencies should be subject to model litigant guidelines. Compliance needs to be strictly monitored and enforced, including by establishing a formal avenue of complaint for parties who consider that the guidelines have not been complied with.***	The Society agrees that Commonwealth, State and Territory governments and their agencies should be subject to model litigant guidelines although we also submit that the concept of a "model litigant" is fundamentally flawed and that regulators will always be have more resources than the other party. The federal model litigant guidelines are administered by the Attorney-General's Department's Office of Legal Services Coordination. The role of the OLSC is to assist agencies to comply with the directions, through a Compliance Framework, Guidance Notes, the Legal Services Multi-Use List Guidance Material, and education program. However it is unclear whether any action or complaint can be made to the OLSC in the event that a consumer or a legal practitioner wants to make a complaint about the conduct of an agency. The Society suggests that further consideration should be given to how the model litigant rules can be enforced and that a clear complaints process should be established.
INFORMATION REQUEST 12.3 *The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered?*	As the third tier of government, the Society finds it difficult to conceive why local councils should not be subject to model litigant requirements.

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INFORMATION REQUEST 12.4 *The Commission seeks advice on how draft recommendation 12.2 might best be implemented. How can the Office of Legal Services Coordination be better empowered to enforce the guidelines at the federal level? What is the most appropriate avenue for receiving and investigating complaints at the state/territory level (for example, a relevant ombudsman)? Can the content of model litigant guidelines be improved, particularly regarding government engaging in alternative dispute resolution?*	The Society is of the view that consideration should be given to ways in which abuse of any avenue of complaint, particularly by disgruntled unsuccessful litigants, might be prevented. The Society also suggests that consideration be given to whether the "model litigant rules" could be uniform across Australia.
INFORMATION REQUEST 12.5 *The Commission seeks feedback on whether model litigant requirements should also apply in cases where there is a disparity in resources between the parties to litigation (such as in matters involving large corporations, or where a party opposes a self-represented litigant). How might such requirements best be implemented?*	Governments and their instrumentalities should behave as "model litigants", and often (but not always) do. Insurance companies have a duty of utmost good faith, but only to their insured. There are no similar obligations on other commercial litigants such as professional debt collectors, private utilities and the like. An example of government as a litigant not behaving as a model litigant under legislation, which is the establishment of a South Australian Commissioner for fine enforcement, who is subject to no judicial oversight, but who can seize property, suspend licences, etc by purely administrative action. Similar comments might be made about "proceeds of crime" legislation, noting the recent High Court vindication of this as a penalty.

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INFORMATION REQUEST 12.6 *The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on earlier intervention with more graduated responses to manage vexatious behaviour reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants?*	Vexatious litigants by their very nature evolve over time. This is usually as a result of not achieving the outcome that they wanted or felt they were entitled to. To lower the bar may result in a premature curtailment of a party's rights to access the Courts/Tribunals. Mutual recognition between Courts/Tribunals of declarations of vexatious behaviour would reduce the need for duplicity of proceedings between jurisdictions. It is necessary to balance a litigant's right of access to the Courts and the problem of exploitation of the court system. The present tendency is weighted in favour of right of access, and it should not lightly be denied. It may be however, that there should be a lower bar to declarations that a litigant, or an individual piece of litigation, is vexatious. Given that at least some vexatious litigation is associated with mental illness, including the 'querulous litigant' syndrome, the Courts need easier access to medical and psychiatric assistance.
DRAFT RECOMMENDATION 13.1 ***Australian courts and tribunals should continue to take settlement offers into account when awarding costs. Court rules should require both defendants and plaintiffs who reject a settlement offer more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis.***	We suggest this issue should be addressed by the Rules in each jurisdiction. Courts have a general discretion to award indemnity costs orders against parties. The current regime in that regard is appropriate.

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DRAFT RECOMMENDATION 13.2 ***In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:*** • ***the stage reached in the trial process*** • ***the amount that is in dispute.*** ***For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.*** ***Fixed scales of costs should reflect the typical market cost of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories.***	In SA, the District Court has unlimited jurisdiction in damages, and thus should be treated as a superior Court, not subject to fixed amount costing. There is no evidence that fixed costs in the higher courts would benefit consumers. Matters in those jurisdictions are vastly variable and complex and the discretion of the court in awarding costs in that context is crucial. Collected data may be useful as a guideline however important to note that fixed scales are not necessarily based on what the market is charging but rather tend to reflect the requirements to enhance access to justice. We assume that this recommendation is in the absence of an entitlement to indemnity costs as foreshadowed in recommendation 13.1. The potential "market cost of resolving a dispute" is likely to be the solicitor client rate which is likely to be an hourly rate. As we move to alternative billing options there will be far greater variance between jurisdictions and between Courts and Tribunals. The proposal to collect "data" as to these "amounts and categories" would in those circumstances not appear feasible. In the absence of reliable data the setting of the "fixed amounts" becomes problematical.
DRAFT RECOMMENDATION 13.3 ***Superior courts in Australia that award costs, such as supreme courts and the Federal court, should***	This does exist in Victoria and NSW but it is too early to draw conclusions. The data will need careful analysis to ensure that such a process would really assist the profession, consumers, and the administration of justice.

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introduce processes for costs management, based on the model from English and Welsh courts. Parties would be required to submit, and encouraged to agree on, costs budgets at the outset of litigation. Where parties do not reach agreement, the court may make an order to cap the amount of costs that can be awarded.	We would also seek further clarification on how is it proposed that this would work where one party is a "deep pocket" litigant and the other has limited resources or is represented on a pro bono basis. The lowest common denominator will also lead to unfairness particularly where the funded client is a defendant and at the mercy of the plaintiff's pursuit on a non-meritorious action.

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DRAFT RECOMMENDATION 13.4 ***Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. The amount to be recovered should be a fixed amount set out in court scales.***	- We agree that parties represented on a pro bono basis should be entitled to costs orders, noting that the law as it presently stands does not allow this to occur. Such costs orders should be based on the normal cost scales applicable to each jurisdiction. - A retainer should be in place in all matters. In a pro bono matter the lawyer should forebear from charging. - An answer may lie in conditional retainer agreements, where the client is liable to pay legal costs if successful, but only to the extent that proper costs are recoverable from the opponent. However this introduces a contingency element. - The Federal Government has a requirement that firms that it briefs undertake a certain amount of pro bono work. - Additional pro bono services are not the solution to people achieving proper access to justice. - Insurance for legal risk, in the nature of "Medicare for legal problems" is required. - Pro bono work is voluntary, on a conscience basis, because lawyers wish to help out and should not be mandated. Lawyers voluntarily undertake a large amount of pro bono work. - Costs are an indemnity to the client, not a penalty to an unsuccessful litigant.
INFORMATION REQUEST 13.1	There are varying views, for example

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The Commission seeks feedback on the most appropriate means of distributing costs awarded to pro bono parties. Options to consider may include allocating the awarded costs from a case to: *the legal professional providing pro bono representation* *the not-for-profit body providing or coordinating the pro bono service* *a general fund to support pro bono services.* *The Commission is interested in any other options that could be examined.*	- it is inappropriate to distribute payments of costs won in a matter to a legal practitioner who was engaged on a pro bono basis (other than to reimburse them for out of pocket expenses) because such an arrangement would in effect be a contingency fee arrangement, not a pro bono arrangement. This also applies to a body providing access to pro bono services. - the costs awarded should not go to the party but rather to the pro bono service to fund its operations." There is merit in exploring the establishment of a pro bono fund, similar to a fidelity fund, to which applications for funding can be made by litigants who would otherwise not be represented.

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DRAFT RECOMMENDATION 13.5 ***Unrepresented litigants should be able to recover costs from the opposing party, subject to the costs rules of the relevant court.***	The Society is of the view that an unrepresented litigant should only be entitled to reimbursement for out of pocket expenses incurred by them in the course of the litigation (disbursements). It is a long-held tenet that "costs" mean the costs of legal representation. Such an entitlement may also encourage vexatious litigation. An unrepresented litigant should not be entitled to recover for "their time" as this would elevate them to the category of legal advisor which would be contrary to current regulatory regimes.
DRAFT RECOMMENDATION 13.6 ***Courts should grant protective costs orders (PCOs) to parties involved in matters of public interest against government. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.***	The Society is of the view that there already exists a body of case law which establishes that normal costs rules may not apply in public interest matters (The Blue Wedge). This is considered appropriate subject to proper safeguards (such as no profiting out of the litigation) and the ability for the court to exercise discretion.
DRAFT RECOMMENDATION 13.7 ***Subject to an initial favourable assessment of the merits of a matter, public interest litigation funds should pay for costs awarded against public interest litigants involved in disputes with other private parties.***	The Society is of the view that such a course would require careful consideration of what matters are classified as being in the public interest, and how non-government public interest matters are to be dealt with when the assets of individuals are at stake. It needs to be acknowledged that not all public interest matters are subject to pro bono retainers. We do not understand it to be suggested that where a pro bono litigant has succeeded,

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These funds would be resourced by cost awards from those cases where the public interest litigant was successful. Access to the fund should be determined by formally outlined criteria, with cases evaluated by a panel of qualified legal experts. The criteria should be based on those used by courts to determine if a party is eligible for a protective costs order in a dispute with government.	and has employed a solicitor on a commercial retainer, that solicitor should be denied recovery of their costs and the costs put into the pro bono fund. It is unlikely that the pro bono fund would have sufficient costs to pay for any costs awarded against public interest litigants involving disputes with private parties unless there was some government top up. It is the impression of the Society that whilst a significant number of public interest litigation cases succeed, the majority fail.

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INFORMATION REQUEST 14.1 *What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?*	This question is almost impossible to answer. The obvious answer is that if a litigant is not capable of understanding their rights and obligations or if the law is too complex then they should not be self-represented. We disagree that self-representation only "poses a few problems". Our experience has been that unless very well managed, litigation between unrepresented litigants often does not result in a "just" outcome because:- • The litigants have little idea of their true legal entitlements (dueboth to ignorance, and strong headedness), • as a result the relevant evidence is not produced, and • the presiding judicial officer has not got the time or the patience to identify the real issues, extract the relevant evidence. The obvious answer is proper funding of the Legal Services Commission or legal advisers, to reduce the number of litigants who are unrepresented for economic reasons. Litigants who are unrepresented because of unreasonable expectations will have to be managed through the Courts and Tribunals. Recent jurisdictional changes have increased the jurisdiction of the Magistrates Court of South Australia as regards Minor Civil Claims for claims up to $25,000 therefore requiring more persons to be unrepresented in such proceedings before the Magistrates Court. This is in a context of increasing complexity particularly having regard to recent motor vehicle reform and more motor vehicle claims being heard in the Minor Civil Claims Jurisdiction. The Magistrates Court (Civil) Rules as to costs are unnecessary complex and confusing,

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	particularly for unrepresented litigants. Claimants in Minor Civil Claims are not entitled to legal representation without leave of the Court. They face litigating matters before the Court where the defendant's representative at trial is likely to be an experienced claims manager from a large insurer often with legal training and significant Court experience. This places unrepresented litigants at a distinct disadvantage that, in our view, cannot be balanced without legal representation for the unrepresented person.

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DRAFT RECOMMENDATION 14.1 ***Courts and tribunals should take action to assist users, including self-represented litigants, to clearly understand how to bring their case.*** • ***All court and tribunal forms should be written in plain language with no unnecessary legal jargon.*** • ***Court and tribunal staff should assist self-represented litigants to understand all time-critical events in their case. Courts and tribunals should examine the potential benefits of technologies such as personalised computer-generated timelines.*** • ***Courts and tribunals should examine their case management practices to improve outcomes where self-represented litigants are involved.***	There is a difference between simplifying the process, which is to be commended, and providing an advisory service. A distinction probably needs to be drawn between Courts and Tribunals where in the latter there is likely to be a less formal approach/regime. The question is whether the whole system/process should be designed for the use of self-represented litigants. Once again a distinction between Courts and Tribunals may appear necessary. Is not the real issue how litigants can obtain representation? Self-represented litigants in the Courts are increasing but not dominant. They are increasing because they cannot afford legal assistance and funded bodies (i.e. legal aid commissions) are under resourced. Obviously, archaic jargon should be minimised. But the law is made up of legal concepts, such as a cause of action and its elements, and attempts to turn these into something else by different language are misplaced. The second dot-point of the recommendation is an example of the obscurity of 'plain language'.

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DRAFT RECOMMENDATION 14.2 ***Governments, courts and the legal profession should work together to develop clear guidelines for judges, court staff, and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction. The rules need to be explicit and applied consistently, and updated whenever there are changes to civil procedures that affect self-represented litigants.*** ***Governments should consider how lessons from each jurisdiction can be shared on an ongoing basis.***	We have no objection to this concept but we consider that this proposal needs to be balanced with the lawyer's obligation to their own client and the judges/adjudicators obligations to dispense fair and balanced justice. We query what force would such 'guidelines' would have.
INFORMATION REQUEST 14.2 *There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the*	Self-Represented Services are in fact pro bono services to a large extent. Any expansion of those services will rely on an increase of the pro bono commitment of the legal profession who are then in fact de facto free legal aid providers undertaking a task that Governments should fund. The Law Council is addressing this. Justice Net provides such a service. Other providers such as universities, legal clinics, advisory services, and the like, also do so. It is also happening in private legal practice.

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costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?	

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INFORMATION REQUEST 14.3 *How widespread are problems around conflicts of interest for providers offering unbundled services? Do provisions that deal with conflicts of interest need to be refined so as not to prevent people benefitting from discrete, one-off forms of advice from assistance services and if so, how might this best be done?*	In our view, lawyers are best at identifying conflicts of duty and there is no need to refine the existing common law with respect to duties in the legal context. The existing principles should be retained as a matter of public policy. In order to answer this question fully, it would be necessary to know which services are being proposed to be unbundled.
DRAFT RECOMMENDATION 15.1 ***The Commission recommends that no change be made to existing tax deductibility of legal expenses.***	The Society supports draft recommendation 15.1.
DRAFT RECOMMENDATION 16.1 ***The Commonwealth and state and territory governments should increase cost recovery in civil courts by charging court fees that reflect the cost of providing the service for which the fee is charged, except:*** • ***in cases concerning personal safety or the protection of children***	It is essential that, in a democratic society which relies on the rule of law, Governments subsidise courts and tribunals. The ability to apply for fee waivers and reductions already exists, is adequate, and should continue. We do not understand how moving to a full user pay system which is what this recommendation amounts to in any way promotes "access to justice" even with a fee relief model. The rationale that "The current low level of cost recovery in Australian Courts means that litigants do not internalise the cost to society of resolving their

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• ***for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.*** ***Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.***	disputes" is flawed in that: 1. It does not factor in the obligation of Governments to provide a functional and affordable Court system. 2. If the cost of legal representation is not a sufficient incentive to resolve matters the added burden of Court fees is not likely to be decisive. The justice system, similar to the health system, is *not* a user-pays system. It is an essential public service that ought to receive an appropriate amount of government support. We note that the Commission suggest recovering the actual costs of providing the service in "cases concerning personal safety or the protection of children". Children are vulnerable and financially dependent on others. We question how such costs could be recovered from children? Should a prosecution case that fails be required to pay the costs of the Court, and of the Defendant? Does the Commission propose that a criminal defendant, who is convicted at the end of a lengthy trial, should be required to pay the costs of the trial? We understand that criminal justice is not within the scope of the Commission's inquiry but we raise these issues with you in order to highlight the problems with this draft recommendation. If implemented, this recommendation is unlikely to increase access to justice and in fact many people will be forced out of the courts because they will be unable to afford its services. We also note, in passing, that the higher the cost of taking a matter into the Court, the

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	greater pressure on alternative dispute resolution procedures. The issue would be the lack of development of precedent, which leads to "dumbing down" of the law. A filing fee has been requested in order to present a debtors petition for bankruptcy – which is nonsensical if the debtor is bankrupt.

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DRAFT RECOMMENDATION 16.2 ***Fees charged by Australian courts — except for those excluded case types alluded to in draft recommendation 16.1 — should account for the direct costs of the service for which the fee is charged, as well as a share of the indirect and capital costs of operating the courts.*** ***The share of indirect and capital costs allocated through fees should be based on the characteristics of the parties and the dispute. Relevant factors should include:*** • ***whether parties are an individual, a not-for-profit organisation or small business; or a large corporation or government body*** • ***the amount in dispute (where relevant)*** • ***hearing fees based on the number of hearing days undertaken.***	The Society is strongly opposed to full cost recovery by courts. Such a scheme would impede access to justice and is not appropriate in a democratic society reliant on the rule of law. It is accepted that there needs to be a degree of consideration of the costs involved in certain types of matters and services but that overall public confidence in the courts can only be guaranteed if the courts remain truly "public" in their nature. The factors provided for consideration are arbitrary and would not lead to satisfactory outcomes. If this was to be applied it would be expected that there would be an improved service from the courts in return for the additional payment.
INFORMATION REQUEST 16.1 *The Commission invites views on the most appropriate means of determining fee*	We do not see that there is any means by which to achieve this. The Society is of the view that basing court fees on the economic value at stake could lead to injustice as it is not always possible to obtain a true economic value of a matter. Flexibility with respect to fees and costs is already achievable via court scales and

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contributions to indirect costs, based on the economic value at stake, in cases where a monetary outcome is not being sought, such as a major planning dispute.	discretion and should continue.

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DRAFT RECOMMENDATION 16.3 ***The Commonwealth and state and territory governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principles outlined in draft recommendation 16.1 and draft recommendation 16.2.***	It should be noted that even in complex and commercial matters, very high court fees can act as a real barrier to access to justice. Moreover, small commercial litigants often may not qualify for fee waivers (depending upon the principles applied) but the level of fees payable may nevertheless contribute substantially to deterring such persons from accessing courts and Tribunals to enforce their rights.
DRAFT RECOMMENDATION 16.4 ***The Commonwealth and state and territory governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals granting fee relief on a discretionary basis in exceptional circumstances.*** ***Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of fee relief if an eligible***	Such mechanisms already exist, and work well. Courts should give consideration to whether actions are vexatious or frivolous prior to awarding fee reductions or waivers. Victoria and South Australia (and probably other jurisdictions) already have fee waiver guides.

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party is successful in recovering costs or damages in a case. ***Fee guidelines in courts and tribunals should also grant automatic fee relief to:*** • ***parties represented by a state or territory legal aid commission*** • ***clients of approved community legal centres and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief.*** ***Governments should ensure that courts which adopt fully cost-reflective fees should provide partial fee waivers for parties with lower incomes who are not eligible for a full waiver. Maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales.***	

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INFORMATION REQUEST 16.2 *The Commission invites comment on the relative merits and costs of automatically exempting parties from paying court fees based on:* *the possession of a Commonwealth concession or health card, with the exception of a Commonwealth Seniors Health Card* *passing an asset test in addition to possessing a concession or health card* *the receipt of a full rate government pension or allowance.* *The Commission also seeks feedback on the most appropriate means of structuring a system of partial fee relief in Australian courts, including feedback on the costs associated with administering and collecting partial fees.*	These criteria would appear to be far too restrictive. The LAW Survey clearly shows that unmet legal need is not restricted to low income earners. The Society is of the view this runs the risk of imposing more complications which run the risk of increasing costs. A simple discretion on the courts is best. Essentially arbitrary rules and thresholds cause injustice in practice, and may be rorted. The criteria are based on status not need. A simple discretion by the Courts and Tribunals is best.
DRAFT RECOMMENDATION 17.1 ***Courts should extend their use of telephone conferences and online technologies for the***	The Society agrees with draft recommendation 17.1.

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purpose of procedural or uncontentious hearings where appropriate, and examine whether there should be a presumption in favour of telephone hearings or use of online court facilities (where available) for certain types of matters or litigants.	

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DRAFT RECOMMENDATION 17.2 ***Australian governments and courts should examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, to reduce court administrative costs and to support improved data collection and performance measurement.***	The Society agrees with draft recommendation 17.2.
DRAFT RECOMMENDATION 17.3 ***Courts should continue to facilitate civil matters being allocated to judges with relevant expertise for case management and hearing through use of specialist lists and panel arrangements.***	The Society agrees with draft recommendation 17.3.
INFORMATION REQUEST 17.4 *The Commission seeks input on the most appropriate mechanism for funding courts and allocating fee revenue. Options to consider may include:* *maintaining existing funding and revenue arrangements* *reforms to appropriations, which may include use*	Courts and Tribunals should be funded out of general revenue with provisions to ensure the adequacy of funding and the independence of the justice system. Where Court fees are charged, then they should be retained by the Court/Tribunal as a supplement to their budget.

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of separate appropriations for judicial salaries *a hypothecated model where courts are funded through retained fee revenue (with fees set by the government) and payments received from government in lieu of fees that have been waived. Alternatively, such a model could allow courts to set their own fees and levels of expenditure.*	

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DRAFT RECOMMENDATION 18.1 ***Australian governments should remove restrictions on damages-based billing subject to comprehensive disclosure requirements.*** • ***The restrictions should be removed for most civil matters, with the prohibition on damages-based billing to remain for criminal and family matters, in line with restrictions for conditional billing.***	The Society notes the risk that this would encourage speculative cases and bog down the courts. It may also lead to questionable results in the area of personal injury litigation. The Society cautiously encourages a discussion on the issue but notes this is a divisive issue for the legal profession. Litigation funders who are not regulated can offer contingency fees. It is not clear why lawyers cannot. Litigation funders typically fund class actions where there are a large pool of claimants who otherwise would have no access to justice. It offers the only recourse to the rule of law for these citizens against large well-resourced wrong doers who are often corporations whose legal fees are effectively assisted by the tax payer because they are deductible against their profits.
INFORMATION REQUEST 18.1 *The Commission is seeking evidence on appropriate percentage limits for conditional and damages-based fees. Specifically:* *Is the 25 per cent limit on uplift fees for conditional billing appropriate? What are the benefits and costs of changing this limit?* *Is a limit on damages-based fees necessary? If so, what should this limit be or how should it be determined? And should consideration be given*	Where a legal practitioner has borne the risk that they being might not be paid in relation to a matter, an uplift is reasonable. At the moment in SA practitioners can claim a 100% uplift which will be reduced to 25% when amendments to the LPA become effective on 1 July 2014. Any limit of an uplift would need to be established in consideration of whether party-party costs would be included or excluded, or counsel fees would be included or excluded. It can be argued that limits on damage based fees are necessary to prevent lawyers from being major shareholders in legal actions. Such a role creates a conflict between the interests of the client and those of the lawyer. The nature and detail of any uplift should be extensively researched and discussed. A body of work is presently being done by the Law Council of Australia, which could be

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to adopting a 'sliding scale' (where the maximum percentage payable to the lawyer decreases as the amount recovered by the client increases)?	drawn upon.

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DRAFT RECOMMENDATION 18.2 ***Third party litigation funding companies should be required to hold a financial services licence, be subject to capital adequacy requirements and be required to meet appropriate ethical and professional standards. Their financial conduct should be regulated by the Australian Securities and Investment Commission (ASIC), while their ethical conduct should be overseen by the courts.*** ***Treasury and ASIC should work to identify the appropriate licence (either an Australian financial services licence or a separate licence category under the Corporations Act) within six months of the acceptance of this recommendation by the Commonwealth Government after consultation with relevant stakeholders.***	The Costs Committee is of the view that regulation is welcome and long overdue. However it would be desirable to expressly exclude non-profit litigation funders with solely charitable purposes from these proposed requirements, at the very least to the extent that the requirements involve administrative effort and expense which those funders cannot afford. South Australia's Litigation Assistance Fund (LAF), for which the Law Society of South Australia acts as trustee, is an example of a non-profit litigation funder with solely charitable purposes. LAF, which is self-funded, only operates successfully (including from a financial point of view) due to the work of many volunteer senior legal practitioners who donate large amounts of their time. LAF only has two paid (part-time) employees. Charitable litigation funders such as LAF may be unable to afford the administrative effort and expense involved in complying with the proposed requirements. It would be a great shame if, unintentionally, the proposed reform had the effect of threatening the continued existence of a charitable fund which plays an important role in enabling access to justice and has done so successfully for many years. Further, as non-profit funders like LAF do only have charitable purposes, the need for the proposed requirements is far less as compared to the litigation funding companies who provide their funding for commercial profit purposes.
DRAFT RECOMMENDATION 19.1 ***The Commonwealth and state and territory governments, in collaboration with the legal profession and regulators, should develop a single***	The Society is not familiar with what has been developed in other jurisdictions and we are therefore not in a position to comment on this any further than our comments on unbundled legal services generally.

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set of rules that explicitly deal with unbundled legal services, for adoption across all Australian jurisdictions. These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address: • ***how to define the scope of retainers*** • ***the liability of legal practitioners*** • ***inclusion and removal of legal practitioners from the court record*** • ***disclosure and communication with clients, including obtaining their informed consent to the arrangement.*** •	

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DRAFT RECOMMENDATION 19.2 ***The private legal profession should work with referral agencies to publicise the availability of their unbundled services.***	We assume that referral agencies are business organisations that earn a fee, quite possibly from the legal practitioner, for referrals. Our only issue with the use by legal practitioners of referral agencies is that it should be subject to the usual ethical constraints on advertising, namely that they should not engage in misleading and deceptive conduct and that it should be subject to any conduct rules relating to sharing of receipts or profits with unqualified persons. We agree that there may be a duty to disclose to the client any such arrangement in order for the practitioner to discharge their fiduciary obligation to the client.
INFORMATION REQUEST 19.1 The commission seeks feedback on the prospects of legal insurance being offered by private providers and whether there are any public policy impediments to such an offering.	The Society received the following comments from Deputy Chief Magistrate Andrew Cannon in relation to information request 19.1. "Private party insurance will only be offered where the insurer expects to make a profit. To do this there must be many policy holders and predictable losses. To introduce legal cost insurance to the general public I expect it may not be successfully marketed as a stand-alone policy but can best be an add on to other policies. For example I note my latest Household Policy from Allianz has at page 26 cover for legal expenses incurred in relation to identity theft in the sum of $5,000, and at page 29 legal costs incurred in relation to legal proceedings brought by me or against me up to $5,000 in any insured period (each year). They must approve the expenses and they must not relate to family law disputes, personal injury claims, motor vehicle damage, criminal or road traffic offences or damages or penalties against me. Some interesting points arise from this insurance. I note that Allianz has a German heritage, and Germany has a very high level of legal cost

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	insurance. The extent of the cover is quite limited as to the fields of law and importantly the amount covered is fixed. This means the insurer's risk is low and predictable. This is a start but only a small one. We can conclude that general cost insurance is not likely unless costs are predictable or capped as in these policies. Hence my view that fixed rate and proportionate costs are not only good policy for other reasons but also as a precondition to encourage more widespread cost insurance. There are of course specialist insurers such as after the event insurance and as I note in my articles on this topic contingency fees are themselves a form of insurance in the broad sense that someone else (the lawyer) is taking a premium (the share of the damages) for sharing the risk of the claim failing. Private insurers have entered this market in the form of legal cost providers such as IMF and this development should be encouraged as it offers the only current viable remedy for small loss holders against a well-resourced commercial wrongdoer. I am pleased to note that the Draft Report supports the continuation of this development albeit with some regulation of it. I note that the Draft Report broadly supports the idea of event based proportionate party party cost shifting in the lower courts. I am pleased with this support for the policy that has long been in place in the Magistrates Court. It is in the Magistrates Court that the best hope for a broad based cost insurance market exists because of the volume of work and a cost scale which makes the cost risk predictable. Then an actuary can calculate the risk to the insurer and set a

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	premium to recoup enough in premiums to make a profit, whilst funding the legal profession to do its valuable work."

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INFORMATION REQUEST 21.1 *The Commission seeks views on whether the above demarcation of funds would be sufficient to ensure that appropriate resources are directed towards non-criminal, non-family law matters.*	Whilst it is commendable that criminal matters are funded it appears that this is at the expense of civil matters because of the limited funds available.
DRAFT FINDING 22.1 *Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.*	The Society welcomes draft finding 22.1, which found that specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.
INFORMATION REQUEST 22.1 *The Commission seeks views on the most appropriate model for engagement between governments and Indigenous-specific legal assistance services. Practical examples of successful models and the lessons from implementation are also sought.*	The Society also acknowledges draft finding 22.2, that there are poor incentives for State Governments to consider the ramifications of their legislative and policy changes on demand for Commonwealth funded services. The absence of State funding for Aboriginal legal services re-enforces the Commonwealth's responsibility to continue funding for Aboriginal and Torres Strait Islander legal services. Legal aid rates must be viable to attract a reasonable proportion of all levels of the profession.
DRAFT RECOMMENDATION 21.2 ***The Commonwealth and state and territory***	The Society agrees with this suggestion and considers it surprising if this is not already the case.

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governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.	

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DRAFT RECOMMENDATION 21.3 ***The Commonwealth and state and territory governments should use the National Partnership Agreement on Legal Assistance Services to align eligibility criteria for civil law cases for legal aid commissions and community legal centres. The financial eligibility test for grants of legal aid should be linked to some established measure of disadvantage.***	It would be a start to provide legal aid funding for civil disputes.
DRAFT RECOMMENDATION 22.3 ***While recognising there are significant challenges to addressing unmet need for Indigenous language interpreters, the Commonwealth and state and territory governments should agree and implement the proposed national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of the National Partnership Agreement on Remote Service Delivery.***	The Society agrees with draft recommendation 22.3.

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INFORMATION REQUEST 22.4 *The Commission seeks information on the level of funding required to expand interpreter services to meet some or all of the gap in Indigenous interpreter services.*	The Society suggests that consideration should also be given to ensure rural and remote services are provided.
INFORMATION REQUEST 22.5 *The Commission seeks information on the cost of a culturally appropriate Indigenous-specific alternative dispute resolution (including family dispute resolution) service(s), particularly in 'high need' areas. Views on the appropriate engagement model and governance arrangements are also sought.*	Culturally appropriate ADR is strongly recommended in family dispute resolution services (e.g. indigenous models for children and families, Muslim models and other cultures). ADR workers in agencies need training in these areas and should be drawn from culturally diverse backgrounds. Training in addressing family violence issues is essential. Agencies already address the latter well. Indigenous models may need to be utilised within communities or through agencies who work in communities.
DRAFT RECOMMENDATION 23.1 ***Where they have not already, all jurisdictions should allow holders of all classes of practising certificate to work on a volunteer basis.*** ***Further, those jurisdictions that have not done so***	We do not understand the final dot point in draft recommendation 23.1. There should be no suggestion that people should provide legal services without a practising certificate. As for practising certificates being free for some classes of people, this ignores the fact that in order to obtain a practising certificate in South Australia, a practitioner is required to hold professional indemnity insurance and there is obviously a minimum cost associated with this. It is an important consumer protection. Subject to that, we take the view that in order to encourage pro bono work (other than as part of ordinary legal practice), it is

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already should introduce free practising certificates for retired or career break lawyers limited to the provision of pro bono services either through a Community Legal Centre or a project approved by the National Pro Bono Resource Centre. This could be modelled on the approach currently used in Queensland. • ***For those not providing court representation, persons eligible for admission as an Australian lawyer coupled with a practising certificate that has expired within the last three years (without any disciplinary conditions) should be sufficient to provide pro bono work, particularly if the service is supervised.***	desirable to lower the financial barriers.

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INFORMATION REQUEST 23.1 *Would there be merit in exploring further options for expanding the volunteering pool for Community Legal Centres (CLCs)? For example, are there individuals with specialised knowledge that could provide advice in their past area of expertise such as retired public servants or retired migration agents, that CLCs could draw on in the relevant area? Are there currently any barriers to prevent this?*	The Society has not identified this as a problem, provided that the proper licensing and insurance requirements are complied with. If the person involved is not a legal practitioner, the CLC should point this out so that people using their services are not misled.
DRAFT RECOMMENDATION 23.2 ***The Commonwealth Government, and the remaining states and territories, should adopt the Victorian Government's use of a pro bono 'coordinator' to approve firms undertaking pro bono action. The coordinator should be situated within the Department with primary responsibility for legal policy.***	The Society assumes that what this means is that governments that are sourcing legal services from the private sector may want to be satisfied that the firms that they are using are carrying out an adequate amount of pro bono work. We repeat our earlier statements that pro bono work should be left to be voluntary, on a conscience basis.
INFORMATION REQUEST 23.2	Our experience of pro bono work carried out by the private legal profession is that they conduct exactly the same conflict enquiry that would be undertaken for a paying client. In that sense, we do not see a role for industry coordinators. This, however, may not be the

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The Commission seeks views on the potential for industry pro bono 'coordinators' to alleviate conflicts of interest for pro bono providers. Which, if any, industries should this apply to? Where should the 'coordinators' be housed? What should their relationship be with the industry? Are there barriers that would limit or prevent their effectiveness? If so, can they be circumvented or removed without affecting the relationship between law firms and their corporate client?	case for governments making their lawyers available for pro bono work.

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INFORMATION REQUEST 23.3 *The Commission invites views on whether other larger jurisdictions beyond the Commonwealth and Victoria, such as New South Wales, Queensland and Western Australia, should adopt a pro bono target, with conditions tied to government tender arrangements. What prevents the use of a single target by multiple jurisdictions? What approaches should be adopted by smaller jurisdictions to pursue similar objectives?*	We understand the Commission recognises that pro-bono provision of services is not without cost and is no substitute for properly funding the justice system.
DRAFT RECOMMENDATION 23.3 ***Any pro bono targets used by governments as incentives in tender arrangements should remain flexible. Reporting required for pro bono targets should be clear and simple.***	The Society agrees with draft recommendation 23.3.
DRAFT RECOMMENDATION 23.4 ***The provision of public funding (including from the Commonwealth, state and territory governments, and other sources such as public purposes funds) to pro bono service providers***	The Society agrees with draft recommendation 23.4.

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should be contingent upon regular, robust and independent evaluation of the services provided.	

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DRAFT RECOMMENDATION 24.1 ***All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).*** ***To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:*** • ***adopting common definitions, measures and collection protocols*** • ***linking databases and investing in de-identification of new data sets*** • ***developing, where practicable, outcomes based data standards as a better measure of service effectiveness.*** ***Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.***	The Society agrees with draft recommendation 24.1. Whilst inquiries of this nature serve a useful purpose the longitudinal collection of empirical data in a consistent manner will provide useful information against which reforms can properly be evaluated.

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DRAFT RECOMMENDATION 24.3 ***The Commission recommends that the LAW Survey, or a survey of similar scope and detail, be undertaken on a regular basis at least every 5 years. The results of, and underlying data from such surveys should be made publicly available.***	The Society agrees with draft recommendation 24.3.