Submissions on the Productivity Commission Draft Report on Access to Justice Arrangements
May 2014

Reference	Underlying Facts, Assumptions and Recommendations	Comment
Para 2.5 Page 95 and page 107 – draft finding 2.2	Unmet legal need can be reduced to less than 5% by use of informal dispute resolution mechanisms such as ombudsmen	The optimism of the amount by which unmet legal need can be reduced must be acknowledged. 1. Reliance on the Australia Institute Study rules out children as it only surveyed 1001 adults from an unspecified location. This means that any unmet need in the form of separate representation for children in family law or child protection matters is automatically excluded. 2. Secondly, the anticipated reduction of unmet legal need presumes capacity to access and engage with alternative or informal dispute resolution bodies. Tasmania has a disproportionately high degree of decentralisation, of welfare reliance and of illiteracy which will affect take-up rates. 3. The previous Labor government had allocated extra funding to Legal Aid's family dispute resolution programme, which diverts a significant number of families away from litigation and resolves

		disputes early. Whilst core funding has been maintained, the recent budget removed the additional funding (which equated to $ 444,000 for Tasmania in 2013-4) thereby reducing the Commissions' ability to steer more disputes away from court. 4. To state the obvious, civil matters (apart from family law and the civil disbursement fund) are no longer funded by Legal Aid Commissions. No family law property matters are either – only parenting proceedings.
Para 3.1 and page 115	Costs of litigation grow as cases progress	Care must be taken not to remove the right to proceed in a more formal court or tribunal environment on the basis that ADR or other methods will solve legal problems. The recent budget removed almost $4million from the Family and Federal Circuit courts (a cut of 2.5%) and the full effect of any recommendations flowing from the KPMG report (the findings of which have not yet been released) is not yet known. However if the number of Family Consultants and Registrar is reduced this is likely to lead to an increase in average case length times.
Para 3.3 and Page 118 and page 123	How do the costs of accessing justice impact on individuals? and How complex is the civil justice system?	1. Whilst people are increasingly encouraged not to use lawyers in family law matters (by the funding of Family Relationships Centres and the like), the reality is that through incessant tinkering, Parliament has caused even the parenting provisions of the Family LAW Act to be so complex as to be incomprehensible to most litigants. There is a push to streamline and simplify the statutory pathway (eg Parkinson) and this needs to be support by government if it is serious about access to justice. The Report does note the fact that there are two sets of Rules (page 124) but the Act itself is problematic 2. When discussing this issue little notice appears to be given to the practical effects on people not seeking a remedy to their legal problems. In family law matters this can result in (a) People living in shelters rather than in their homes, with

		children having to change schools and live in transient accommodation; (b) Fathers in particular unable to maintain a role in children's lives (c) People relying on government benefits when the other spouse should properly be paying child support and/or spouse maintenance.
Para 5.2. Page 161	All law societies apart from Tasmania offer a solicitor and law firm referral service Web based services	The draft report is incorrect. The Law Society of Tasmania offers a referral service, searchable by firm name and/or region and/or area of practice. The Family Court has launched a "do it yourself divorce" youtube segment. However as acknowledged by the Report, such things can quickly become out of date and need monitoring and updating to remain effective.
Para 5.3	Referring people to appropriate sources of advice The LawAccess model	As Family Law is a federal system there is a risk of duplication of services if each state puts time and money into providing online or even hard copy advice and information. Efforts should be made to share and apply knowledge and any created resources across legal aid commissions, law societies etc. In principle, a one stop referral service, properly resourced is worth supporting. It is all very well providing greater awareness and access to legal services but if people cannot afford them or are unable to secure legal aid, good referral services won't help. Because Legal Aid do not fund civil matters, these questions end up being asked in after hours free advice clinics run by Community Legal Centres. Given the sheer range of issues no lawyer can be skilled up enough to answer them all effectively. Providing more lawyers on the ground and better web-based resources to those community legal centres should be a priority.

		The reference to US-style medical legal partnerships (page 173)is not a concept readily transferrable to Australia, where there is an almost free healthcare system combined with a capacity to purchase medical insurances, and we have well paid doctors almost completely paid by the tax payer. In comparison, legal "health" and legal services attract miniscule government funding, there are no comparable national legal insurance schemes and remuneration as at about 1/3 of the private rate.
Recommendation 6.1 and 6.2	Recommendation to amend the *Legal Profession Act* with respect to billing complaints and the need to show that the practitioner took reasonable steps to ensure that the client understood the information presented. Adoption of uniform billing requirements	The Society does not support further regulatory burden as suggested without a need being shown. The Legal Profession Board deals with a large number of complaints related to costs. It has not identified a need for consumer provision to be enacted.
Recommendation 6.3 And information requests at page 196 and 197	Development of an online resource reporting on a typical range of fees for a variety of types of matters	The dangers inherent in such a resource would need to be dealt with. There are difficulties in gathering data and its use.
Recommendation 6.4 and 6.6	Expanded powers of complaints bodies – see page 199 and 210	
	An holistic review of the 3 stages of legal training	It is difficult to see that a compelling case for such an expensive undertaking is made out
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	The Law Society supports the recommendation

	resolution best suited to the needs of that dispute. These reforms should draw from evidence-based evaluations, where possible.	
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 Law Society notes that in Tasmania very few legal disputes proceed to the point of hearing or trial without the opportunity or requirement to participate in mediation or conciliation. This is the case in the Magistrates Court and in the Supreme Court. The Workers Rehabilitation and Compensation Tribunal also imposes compulsory mediation. The Law Society notes that in family law disputes ADR is encouraged at an early stage and throughout the conduct of many matters, whether Court ordered or facilitated and/or with the assistance of family relationship centres. The Law Society considers it would be useful to seek further comment directly on this issue from the Family Court, Federal Circuit Court, Family Law Section of the Law Council of Australia, the Legal Aid Commission of Tasmania and Relationships Australia.
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.	The Law Society has no comment on this recommendation.
Draft Recommendation 8.3	Organisations within jurisdictions that are responsible for preparing information and education materials to improve access	The Law Society considers it is sensible to increase greater awareness about ADR

	to justice and increase general awareness about dispute resolution should incorporate alternative dispute resolution as a central platform in those materials.	
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.	The Law Society has no comment on this issue other than to note development of guidelines would be sensible
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. 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.	The Law Society considers that the six month Tasmanian Legal Practice Course which is undertaken by University of Tasmania students after graduating with a Bachelor of Laws intending to practice (this course or its equivalent being a pre-requisite to admission to practice) offers opportunity for learning and teaching of ADR. One of the competency standards for a practical legal training course is lawyer skills. This includes a need to have understanding and competency in negotiating settlements and agreements and facilitating early resolution of disputes. The Law Society has no specific comment on this point.

Draft Recommendation 8.6	Peak bodies covering alternative dispute practitioner professions should develop, implement and maintain standards that enable professionals to be independently accredited.	The Law Society supports the recommendation
Information Request 9.1	Given the difficulty in estimating the individual costs of the various functions of some ombudsmen and complaints mechanisms, the Commission seeks feedback on whether the estimates it has derived can be further refined. The Commission also seeks feedback on the costs of ombudsmen undertaking systemic reviews.	Nil response. The Law Society notes this information request can perhaps best be addressed by Ombudsmen. .
Draft Recommendation 9.2	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.	The Law Society supports increasing the efficiency of Ombudsman services. Given the other draft recommendations, which are intended to increase utilisation of Ombudsman services in order to reduce unmet legal need, it appears the total budget of any rationalised Ombudsman services would need to stay the same, and no doubt increase. Otherwise, the increased utilisation of Ombudsman services will stretch their capacity to maintain effectiveness and timeliness.
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	The Law Society notes that if these recommendations progress, they appear equally applicable to industry ombudsman. The Law Society supports the recommendations in relation to systemic

	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 responded government ombudsmen should be subject to performance benchmarking.	issues and benchmarking in respect of Government and industry ombudsman. In respect of government agencies contributing to the cost of complaints, the Law Society notes that this is effectively applying the industry Ombudsman funding model to Government Ombudsman. The applicability of that model may require further consideration in the context of Government ombudsman. For example, the Commission's report notes that concessions need to be given to non-government agencies with 'little opportunity to internalise the cost of complaints by improving their internal practices'. It appears from the Ombudsman of Tasmania annual report that government agencies may also have little opportunity to meet the Commission's aim of internalising these costs and taking steps to reduce them. For example, the annual report notes that high complaint numbers against particular agencies are to be expected due to the relative numbers of interactions the public has with the respective agencies. In respect of an agency with a high number of complaints, the Ombudsman found that only 17% of complaints were partly or wholly substantiated.
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 Law Society supports the recommendation.
	CHAPTER 10: TRIBUNALS	
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	Mediation is already compulsory in some tribunals. The Law Society considers that compulsory mediation at the outset of a dispute may be useful in helping to narrow and identity issues in dispute. Care needs to be taken so that sufficient information has been exchanged and issues identified to make mediation worthwhile.

	disputes, to assist in timely and appropriate resolution.	
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 their application is consistent.	The Law Society has concerns about a blanket recommendation in these terms and does not support the recommendation. The chapter on this section tends to create an assumption that all tribunals fit the definition of being commissioned to be just, quick, efficient and low cost without regard to technicalities and legal forms, generally setting their own procedures and not bound by the rules of evidence (e.g. page 300). While this may be the case for some tribunals it is not the case for all; there are a range of tribunals including specialist tribunals which act more like a traditional Court. The complexities of cases can vary from simple to extremely complex. The ability of the parties to communicate and handle matters themselves will vary including as between themselves particularly in the case of unequal bargaining positions and a party engaging in-house counsel or other professionals, and external legal representation can assist in advancing matters in terms of time and cost effectiveness. This chapter appears to direct criticism to the legal profession for 'creeping legalism' and formality etc. It is considered that any criticism must also include criticism of tribunals themselves, both in their administration and as to the members conducting matters. It is for those administrators and members to have processes and rules in place which embody the requirements of the Tribunal. If those requirements include less formality, dispensing with the rules of evidence and concentrating on ADR then that is a matter for the Tribunal to enforce and promote.

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.	The short answer is that legal practitioners do have the required understanding because they must; to adequately represent the interests of their clients and fulfil their ethical obligations. The Law Society repeats its comments and concerns above. Opportunities for ongoing education and training being made available to legal and professional representatives to assist in keeping up to date with any changes and varying best practice and procedure in tribunals would be expected to be of mutual benefit in terms of time and efficiency. The objectives of tribunals must be clear and consistent.
	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 Law Society has concerns about this recommendation and does not support it. This conflicts the role of the representative. What may be seen to be legitimate steps taken by a legal representative to appropriately protect and advance the case of their client may not be seen to 'advance tribunal objectives' (whatever those objectives are stated to be and how broadly or transparent they are) although it may be in the paramount interests of the client. With the exception of perhaps rare situations of gross abuse of process this sanction being freely available in tribunals broadly may create difficulty in parties wishing to bring matters to the tribunal or the willingness of representatives to be engaged for fear of personal costs orders in matters where representation realistically assists in progressing the matter. Of further concern page 317 of the draft report states that in cases where representation might generally be required there should be requirements on representatives to 'support' the objectives of the tribunals in which they appear.
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	Discovery is an essential part of any litigation. In Tasmania the law is presently that discovery is to be made of all documents in a party's possession custody or power directly relevant to the issues raised by the pleadings. The relevant rule is to the following effect: For the purposes of this Division, but subject to any agreement

	process. In 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.	between the parties or an order of the Court or a judge, the discovery obligation is a continuing obligation and the discoverable documents are documents – (a) that are directly relevant to the issues raised by the pleadings; and (b) of which, after a reasonable search, a party is aware; and (c) that are, or have been, in that party's possession, custody or power. (2) For subrule (1)(a),the documents must meet at least one of the following criteria: (a) the documents are those on which the party intends to rely; (b) the documents adversely affect the party's own case; (c) the documents support another party's case; (d) the documents adversely affect another party's case. (3) For subrule (1)(b), in making a reasonable search, a party may take into account the following: (a) the nature and complexity of the proceedings; (b) the number of documents involved; (c) the ease and cost of retrieving the document; (d) the significance of any documents likely to be found; (e) any other relevant matter. The rule is presently a hybrid of other states discovery requirements.

		Discovery is to be made of discoverable documents upon request. The Tasmanian rules provide for an application to a court to vary the extent of the discovery requirement or to otherwise tailor discovery to suit a particular piece of litigation at a directions hearing. The Tasmanian experience has not been that discovery has been overly onerous. The rules providing for a departure from the requirement to make discovery are available and can be utilised. It is not considered that leave should be first required before a party is obliged to make discovery. If the nature and extent of discovery is problematic the present procedure allows the matter to be raised at a directions hearing
Information Request 12.1 Page 371	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? This effectively assumes that in the absence of regulation Lawyers and their clients are not interested in the timely and efficient resolution of disputes. Or that the parties themselves are incapable without mandatory requirements of attempting to do so.	As the report notes Tasmania is the only jurisdiction without overarching obligations.
Draft Recommendation 12.1 Page 374	Jurisdictions should further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute	The Society is likely to support the first part of this recommendation. There appears to be no harm at all in jurisdictions exploring the use of pre-action protocols in targeted areas. This however does not necessarily require judicial oversight in the absence of evidence that

	and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements. This rightly assumes that not all disputes benefit from pre action protocols. It somewhat cynically assumes that the in the absence of judicial oversight the parties are incapable of complying or raising issues concerning the other parties non-compliance.	the parties to litigation are incapable of raising with the Court breaches of pre action protocols.
Information Request 12.2 Page 374	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.	The Society suggests that no action be taken by the Commission until the Commonwealth Attorney- Generals' Department's review on pre-action requirements in the federal jurisdiction has been released. The Society further suggests that it may be easier to remove specific types of claims or value of claims from pre action requirements as opposed to listing specific types of claims that must be subject to pre action protocols. For example claims for debt or liquidated demands, or claims where the cost of compliance with pre action protocols would be disproportionate to the value of the claim.
Draft Recommendation 12.2 Page 382	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. Assumes that the common law is inadequate. The report notes that the Commonwealth has written guidelines as do	The Society is likely to support the draft recommendation and further the Commission should investigate the practicality of Model litigant guidelines being enshrined in legislation. Consideration should be given as to whether or not sanctions could be given for non-compliance by the court or tribunal where the non-compliance has occurred.

	many of the states (not Tasmania) Report notes that compliance is mixed and enforcement is difficult or non existent	
Information Request 12.3 Page 382	The Commission seeks views as to which, if any, local governments should be subject to model litigant requirements. How should such requirements be administered? The report gives no consideration or rationale as to why they should or should not be included.	It is suggested that local governments should not be the subject of model litigant guidelines. The power imbalances at least in this state do not arise.
Information Request 12.4 Page 383	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?	It is suggested that rather than external bodies enforcing model litigant guidelines consideration also be given to sanctions for non-compliance by the court or tribunal where the non-compliance has occurred. That is non-compliance can be raised by the opposing party during the litigation. Sanctions need to be significant to provide a sufficient incentive for government and its agencies to comply.
Information Request 12.5 Page 383	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?	It is submitted that model litigant guidelines should not apply to private parties. Private parties are subject to the rules of Court and their legal practitioners to ethical and professional standards. As is pointed out in Box 12.3 page 375 government model litigant guidelines go beyond that. To apply model litigant guidelines to private parties is to ignore the fact that they have developed at common law not just because of the amount of resources available to the Crown but also due to the inherent power of the Crown and the fact it must act in the public interest whereas private parties do not.

Paragraph 13.1 Draft recommendation 13.1	The Commission is considering whether to require both Defendants **and** Plaintiffs who reject a settlement offer more favourable than the final judgment, to pay their opponents post-offer costs on an indemnity basis. It also recommends that Australian Courts continue to take settlement offers into account when awarding costs. This rests upon the assumption that there is a power imbalance between Plaintiff and Defendant as a result of the fact that a Defendant can be required to pay indemnity costs in the event of a pre-trial offer which is rejected. This affects the likelihood of a Plaintiff accepting an offer as they are not at risk of indemnity costs.	The Society is likely to support this recommendation as it addresses an underlying power imbalance between Plaintiff and Defendant. Courts and Tribunals have an interest in ensuring that settlement is reached prior to trial in appropriate cases and costs are an effective mechanism of ensuring that genuine efforts at resolution are made.
Paragraph 13.2 Draft recommendation 13.2	The current system in the lower courts with respect to the calculation of costs causes uncertainty for litigants who are unsure of the ultimate amount that they will be required to pay when commencing litigation or defending it. There needs to be a balance between restitution for the party who has expended costs and are ultimately successful, but also that costs do not act as a barrier to litigation generally. Further, that the parties be discouraged from spending more than is necessary for costs. Fixed events based costs scales do not provide sufficient indemnity for some successful litigants where expenses exceed the fixed amount. Fixed scale of costs will sometimes provide greater indemnity than	This is an extremely complex costs scale which would require significant data collection to properly and accurately reflect the amount of costs that ought be paid to a successful party at the stage reached within the case. Each state would vary according to its own circumstances and the difference between fees charged from state to state would be significant. It is probably a task of such complexity that it is unlikely to be successfully implemented. The Society suggests an amendment to the scale so that it incorporates an automatic review of the amounts contained within the scale at a set fixed period, for example, each two years. This would avoid the scale becoming stagnant and out of step with the costs incurred by litigants in the pursuit/defence of their cases.

	activity based scales in cases where parties undertake less activity where expected and achieve the same outcome. Costs should be proportional to the amount in dispute and this can be encouraged by setting amounts in the fixed events based scale proportional to the amount in dispute. The Commission prefers a model where costs are awarded based on the average costs that have been paid in similar cases of similar value at the similar stage of trial and a model of this nature would need to draw on a wider range of recent average costs data and would be dependent on rigorous and consistent data collection within the court system. The instruction such as scale would be complicated. The Commission recommends that costs be awarded between parties on a standard basis and set according to fixed amounts contained within a scale and that that scale should vary according to:- • The stage reached in the trial process • The amount that is in dispute The scale of costs should reflect the typical market costs of dissolving a dispute of a given value and length.	
Paragraph 13.3 Draft recommendation 13.3	The Commission is seeking the view of the Profession in relation to the introduction of a costs budget at the outset of litigation where	This recommendation suffers from not inconsiderable problems. The likelihood of the parties reaching agreement pre-trial of the amount of costs that they are intending or are likely to incur, is remote. It is likely

	parties would be expected to reach an agreement as to the level of costs to be incurred in the matter at hand. Courts would have the power to make an order to cap the amount of costs that can be awarded.	to create an additional step in the proceedings which in itself will cause further costs as the parties debate how much they intend to spend and what is reasonable. It would also involve some degree of disclosure to both the court and your opponent as to matters of tactics and evidence which would reveal the underlying case in greater detail than one or other party might choose to do. One would wonder at what sanctions could be imposed on a party who had exceeded its costs budget but for good reason. The Society suggests that this recommendation is flawed and impractical.
Paragraph 13.4 Draft recommendation 13.4	The Commission is recommending that parties who are represented on a pro-bono basis should be entitled to seek costs awards. The Commission believes that there is an imbalance between pro bono parties and non pro bono parties engaged in litigation given that the party who is non pro bono is not at risk of a costs order. This lends itself to abuse in that a fee paying client may choose to "exploit disadvantaged groups" who are engaging pro bono lawyers. If opponents are not at risk of a costs order, they have a reduced incentive to settle or to conduct litigation in an expedient or reasonable fashion. The blurring of this concept with the conditional no fee no win agreement is noted by the Commission, and therefore the question of where costs awarded in these circumstances in favour of a party represented pro bono is not resolved by the Commission within its report.	While the Commission is not able to provide a view as to where costs awarded in pro bono cases should be allocated, this suggestion remains nothing more than that. As a recommendation it is currently unworkable without the question of where those costs, which are awarded, should be allocated, whether to the lawyer, to the client or some other institution. It is true that the undertaking of pro bono work should be encouraged and that parties represented pro bono are at a tactical disadvantage because of the issue of costs, but until the question of where costs are to be allocated is resolved, we could not support this recommendation in its current form.
Paragraph 13.5 Draft	This recommendation is that unrepresented litigants should be able to recover costs from	The Society is unlikely to support this recommendation as it would encourage persons to engage in litigation as a means of gaining

recommendation 13.5	the opposing party. The Commission makes the same observation with respect to self-represented litigants as to the fact that they are at a tactical disadvantage during proceedings, given that their opponent is not at risk of a costs order, and make the same observation. In this recommendation however, the costs recoverable would be payable to the litigant.	income and payment and create uncertainty around the definition of an Australian legal practitioner. While not ideal, the current system is the most appropriate in place, namely that unrepresented litigants should only be able to recover what they have expended in the pursuit of their case, and not be "renumerated" for work undertaken in their own matters.
Paragraph 13.6 Draft recommendation 13.6	The Commission seeks the introduction of protective costs orders to parties involved in public interest litigation and the capacity for the courts to make "no costs orders" in public interest cases where the litigant is unsuccessful. It suggests the creation of criteria to assess the implementation of a PCO and seeks our view.	In principle the Society has no objection to the introduction of a scheme of this nature as a protective costs order would encourage public interest litigation where it has been recognised by the Courts as fitting within that category. The drafting of guidelines should be within the consultation of the Society to ensure that it properly reflects the criteria that need to be met in order to attract an order of this nature.
Paragraph 13.7 Draft recommendation 13.7	The Commission is seeking to introduce a public interest litigation fund which would receive costs that have been paid in favour of successful parties in public interest cases and that those funds could then be used to assist other parties who are engaged in public interest litigation. This recommendation is to deal with the issue of costs orders in public interest cases where protective costs orders have been made in favour of a public interest litigant, or public interest litigation generally.	We have no objection to the introduction to a scheme of this nature, although its development and implementation would be necessarily complex and upon the recommendation at present, would require the introduction of a new scheme involving a panel of qualified experts to formally apply criteria to then determine whether a litigant is entitled to a payment from that fund.
Paragraph 14.1	The Commission is considering whether	The Society has no objection in principle to the three suggestions.

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 and whether they should: 1. Ensure all forms are written in plain English; 2. Assist self-represented litigants to understand all time critical events and examine the potential benefits that technology such as personalised computer generated time lines; 3. Examine case management practices to improve outcome where self-represented litigants are involved.	
Paragraph 14.2 Draft recommendation 14.2	The recommendation is looking at how Governments, Courts and the legal profession can work together to assist self-represented litigants within Court and Tribunals of each jurisdiction. The recommendation is noting that rules need to be explicit and applied consistently and updated whenever there are changes to civil procedures that affect self-represented litigants.	The Society is of the view that the recommendation should not necessarily extend to the legal profession. The legal profession already have ethical and professional obligations imposed on them which flow down to how they deal and treat self-represented litigants. The Society recommends encouraging Law Locieties to run an annual CPD event that people could attend in relation to educating the legal profession as to best practice when dealing with self-represented litigants. We otherwise endorse the recommendation that Governments and Courts should develop guidelines as to how they are dealt with. We note that some jurisdictions already have guidelines as to how lawyers and barristers should deal with SRLs. Also courts such as the Family Court have guidelines for trial judges etc.
Paragraph 14.2 Information request 14.2	The Commission is seeking feedback as to whether there are grounds for extending partially or fully subsidised unbundled services for self-represented litigants. Further how existing and any additional	For Tasmania this issue essentially lies in funding. The Legal Aid Commission is not even in a position to fund civil litigation; however potentially a civil scheme could be re-established in legal aid to provide some form of unbundled services if there was the funding available to do so. We understand that the Community Legal Centres offer some

	services may form part of a cohesive legal assistance landscape and whether there would be costs and benefits associated with any extension of the services. Further if there are any self-representing parties who have sufficient means, what co-contribution arrangements should apply.	form of unbundled services for family law clients however there may be benefits in extending this type of service in civil cases.
Paragraph 14.3 Information request 14.3	The Commission is seeking information as to how widespread problems are around conflicts of interest are for providers of unbundled legal services and whether provisions that deal with conflicts of interest need to be refined so as to not prevent people benefiting from one off forms of advice from assistance services.	Community Legal Centres are really the only centres that are currently providing a form of unbundled legal services in Tasmania that we are aware of. They have some mechanisms in place whereby they use first names for one off advices in order to limit conflicts of interest. It is often a question for the practitioners as to whether they hold a conflict of interest
Paragraph 14.3 Draft recommendation 14.3	The Commission recommends that Governments, Court and Tribunals work together to implement consistent rules and guidelines on lay assistance for self-represented litigants.	We have no issue and endorse this recommendation.
Paragraph 15.1 Draft recommendation 15.1	The Commission examines whether or not there should be changes to the existing tax deductibility of legal expenses and it is recommended that there is no change.	We endorse the recommendation of the Commission.
Chapter 16	This Chapter provides a useful background to the challenges for the Commonwealth and State Governments in the policy of setting court and tribunal fees. There is a clear dichotomy between the competing interests of providing access to	This conclusion is fundamentally flawed. Draft recommendation 16.1 concludes that, inter alia, Court fees should reflect the cost of providing the service for which the fee is charged, except: • In cases concerning personal safety or the protection of

	justice and achieving costs recovery in the Court system in order to achieve a neutral cost of providing the Court services. The report concludes that full costs recovery "should be the default". This argument is based, among other things, on the principals that: • Higher costs recovery is necessary to improve the resourcing of Courts; • The costs to litigants do not sufficiently reflect the cost of the service they receive; and • Many public benefits of litigation can be addressed through targeted subsidies.	children; and • 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. That recommendation further concludes that fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants. **Why is this conclusion flawed?** Firstly, we know of no other essential public service where the costs of providing such service is fully recovered: • The government cost of providing healthcare services is not cost neutral; • Neither is education; • The cost of state registration does not cover the cost of providing road and road-related services; and • The list could very well go on. Surely, it is a fundamental principal of modern society (not to mention the rule of law) that access to justice is: an essential service; the responsibility of the government of the day; and an intrinsic part of living in a common law democracy.

		Secondly, any member of the legal profession would almost certainly agree with the proposition that the commercial value of a dispute does not necessarily reflect the legal complexity of such dispute. Similarly, the significance of a $3,000 dispute over property damage to the motor vehicle of a single mother living in a rural area with three young children may be far more than a $2 million dispute for a multi-national corporation. Any significant increase in Court fees will certainly hinder access to justice. Thirdly, any number of factors will affect what the necessary costs are that need to be recovered by any Court. For example • Geographic spread; • Population spread; • The number of different areas of law to be dealt with; and • Any number of other matters; will affect the resources required and therefore the cost of providing those services. In this regard, the report uses a comparative example of the percentage of costs recovery in the United Kingdom. The United Kingdom is over a far smaller geographic area than Australia, with a much higher population. Clearly, there are a number of significant factors that affect the cost of provision of Court and Tribunal services between these two jurisdictions. From that point of view, it seems to be a fairly inappropriate comparison. Quite simply, the proposition that Courts and Tribunals should be cost

		neutral is both inappropriate and unachievable if there is to be any reasonable consideration of access to justice. The above considerations also clearly apply with regard to draft recommendation 16.2. Having said that, there is however some sense in the proposition of draft recommendation 16.3 – that "the Commonwealth, State and Territory Governments should ensure tribunal fees for matters that are complex and commercial in nature are set in accordance with the principals outlined in draft recommendation 16.1 and draft recommendation 16.2." When looking at significant commercial matters of some complexity – for example the Bell Group litigation in Western Australia and the C7 litigation in New South Wales – it is not unreasonable to argue that the cost to those users should reflect the significant cost to the taxpayer of these disputes. Where disputes drag on for months or even years and result in judgement pages numbering in the hundreds, if not thousands, it is not unreasonable to accept a far more significant contribution to the cost that comes from the public purse. Draft recommendation 16.4 considers establishing formal criteria for waiver, reduction or postponement of fees in Courts and tribunals on the basis of financial hardship. This is a system that is already in place in many, if not all, Courts and tribunals in Australia and certainly makes a significant amount of sense.
Chapter 17 – Courts – Technology, Specialisation and	Chapter 17 provides a useful analysis of relevant issues affecting the use of	We do however provide the following observations:

Governance	technology within the Court system and specialisation and other systematic factors which may assist in gains in efficiency and streamlining processes. Draft recommendation 17.1 regarding extending the use of teleconferences and online technologies for procedural and uncontentious hearings is supported. Similarly, draft recommendation 17.2 with regard to the examination of the opportunities to use technology to facilitate more efficient and effective interactions between Courts and users is also supported.	• While the theory of using technology for streamlining and efficiency is positive, the method of implementation of such initiatives will materially affect the efficacy of that technology; • Similarly, it is important to remember that there are sectors of this society who through financial factors, age related factors, disability and many other factors do not have the same ability to access and use technology as many others; • It would be useful if there was some communication and uniformity across jurisdictions including Federal and State, as to which particular systems are used or implemented. Surely such uniformity much be able to result in cost savings for the various jurisdictions and an ability for users to more easily familiarise themselves with different systems. **Specialisation** Draft recommendation 17.3 with regard to civil matters being allocated to judges with relevant expertise for case management and hearing through the use of specialist list and panel arrangements is supported in theory. However there needs to be a certain amount of flexibility in that framework. This is due to a number of factors, including: • Some jurisdictions will certainly not have enough work in certain areas to support dedicated lists or judicial officers in those areas; • The size and frequency of disputes in any area will necessarily ebb and flow, to that end is it important that there is some flexibility in the allocation of matters so that the resources of each judicial officer are utilised most efficiently not just with regard to the type of matters allocated to them but also the

		volume.
Chapter 18 – Private funding for litigation	Recommendation 18.1 suggests that restrictions on damages based billing be removed, but there be comprehensive disclosure requirements.	The Society has not reached a policy position on this issue. There needs to be some significant caution and consideration as to how best to implement such a significant change, if it were to occur. Firstly, the issue of comprehensive disclosure is an important one. There is no dispute that anyone entering into an agreement with a lawyer for damages based billing should be made very well aware of the nature and effect of that arrangement. However, it has been our experience that the majority of clients find comprehensive disclosure requirements highly confusing and very difficult. Indeed, recent examples such as the numerous Keddies complaints have illustrated that comprehensive cost disclosure, while important, does not in and of itself prevent the abuse by lawyers of the trust placed in them by their clients. Secondly, the anecdotal evidence suggests that damages based billing is commonplace in the United States. Without reference to any specific cases in those jurisdictions, it also appears to be the case that there is regular reliance on punitive damages in addition to damages which reflect the loss suffered by a Plaintiff. Conversely, in Australia there are very strict guidelines (and they continue to become stricter) as to how damages are calculated in relation to matters and what damages are recoverable. It is important to consider in the context of damages based billing what effect costs recovery has in relation to damages. It would be very unfortunate if, after a payment of percentage of damages to lawyers, injured parties, or other parties entitled to damages, were unable to care for themselves with the damages received from litigation.

		This is essentially an issue to be addressed in the context of how best to structure the damages based billing model. The concept outlined in draft recommendation 18.2 that third party litigation funding companies should be required to hold a financial services licence and be heavily regulated is supported without reservation
Chapter 19 – Bridging the gap	Recommendation 19.1 suggests that a set of rules should be developed that deal with unbundling legal services	The Society does not support the proposition of unbundled legal services. Even where a very clear retainer agreement is entered into there is significant risk of confusion between the service provider and the consumer with regard to who has which responsibility with regard to legal matters. The majority of legal matters are, by their very nature, complex. To attempt to cherry pick certain specific aspects out of a complex legal matter and then suggest that a lawyer has the responsibility of some, but not all, of those aspects creates myriad difficulties for all parties involved. The ensuing risk of consumers alleging that they have not been advised in relation to matters to which they should have been advised and service providers alleging that they have not provided advice where they should have provided advice due to each respective understanding of a retainer agreement is perilous. Further, any number of legal matters, or factual scenarios, will almost certainly have any number of inter-related legal issues and consequences. To attempt to compartmentalise these matters into unbundled legal services is fraught with risk.
Chapter 20 – The	20.1, page 574. Use of civil law at the LAC's	It is important to note that in Tasmania the Legal Aid Commission only

legal assistance landscape	around the Australia 20.8, page 601. The funding cut from the Cth over 4 years commencing 2013/2014. Report states that funding for frontline legal services will not be affected.	funds Criminal and Family Law work. No aid is granted for civil matters. The graphs on page 602 to 603 neglect to show the 2013/2014 year. Although the financial year has not yet ended, in order to get a good idea of the current funding the graphs should be added to before the report is finalised. Due to the Cth cuts it makes sense to include 2013/2014.
Chapter 21 – Reforming legal assistance services Draft recommendation 21.1	21.1, page 616. Discusses the need to reduce duplication of services amongst relevant organisations. Demarcation of criminal and civil funding 21.2, page 633. Diverting funding to larger CLC's and LAC's for civil matters 21.7, pages 659 – 664. Discusses whether there is adequate funding.	There should be appropriate measures in place for potential Tasmanian Aboriginal Centre clients to be referred to that organisation. This is not an issue in Tasmania. Very few Commonwealth criminal matters are funded. The vast majority of Commonwealth funds are utilised for family law matters. No civil law matters are funded. Care needs to be taken that inefficiencies are not created by two separate administrations, staff, etc. Why is consideration not given to funding the private profession to provide services? This may not be suitable in all areas of civil law, but needs to be considered as a service delivery model. There can be no doubt that the legal assistance sector is chronically underfunded. The benefits of proper funding have been demonstrated by a number of studies.
Chapter 22 – Assistance for Aboriginal and Torres Strait Islander people	22.5, page 707. Draft recommendation 22.4	This draft recommendation is supported. Draft recommendations 24.1 -24.3 also seem like a positive way forward
Chapter 23 – Pro		The assumptions in this chapter are open to question.

bono services		There are no large law firms operating in Tasmania. Very few firms are signatories to the Aspirational Target. However, a large number of practitioners provide pro bono assistance to those who need it. They do so without fanfare or recognition. The situation is, the Society expects, similar throughout regional Australia. The segment of practitioners mentioned above barely rate a mention in the draft report. That calls into question the figures used and conclusions drawn from them. The Society agrees that pro bono assistance is not an answer to access to justice problem. The Society supports better coordination in the delivery of pro bono services.
Chapter 24 – Data and evaluation	24.4, page 760. Improving data collection and evaluation.	Draft recommendations 24.1 – 24.3 are supported, on the basis that the cost of overhauling collection systems recommended in 24.2 are worth outweighed by the expected benefits.