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Access to Justice Arrangements

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The Productivity Commission

The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. Its role, expressed most simply, is to help governments make better policies, in the long term interest of the Australian community.

The Commission's independence is underpinned by an Act of Parliament. Its processes and outputs are open to public scrutiny and are driven by concern for the wellbeing of the community as a whole.

Further information on the Productivity Commission can be obtained from the Commission's website (www.pc.gov.au).

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5 September 2014

The Hon Joe Hockey
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's final report into *Access to Justice Arrangements*.

Yours sincerely

Dr Warren Mundy
Presiding Commissioner

Angela MacRae
Commissioner

Terms of reference

I, David Bradbury, Assistant Treasurer, pursuant to Parts 2 and 3 of the Productivity Commission Act 1998, hereby request that the Productivity Commission undertake an inquiry into Australia's system of civil dispute resolution, with a focus on constraining costs and promoting access to justice and equality before the law.

Background

The cost of accessing justice services and securing legal representation can prevent many Australians from gaining effective access to the justice system. For a well-functioning justice system, access to the system should not be dependent on capacity to pay and vulnerable litigants should not be disadvantaged.

A well-functioning justice system should provide timely and affordable justice. This means delivering fair and equitable outcomes as efficiently as possible and resolving disputes early, expeditiously and at the most appropriate level. A justice system which effectively excludes a sizable portion of society from adequate redress risks considerable economic and social costs.

Scope of the Inquiry

The Commission is requested to examine the current costs of accessing justice services and securing legal representation, and the impact of these costs on access to, and quality of justice. It will make recommendations on the best way to improve access to the justice system and equity of representation including, but not limited to, the funding of legal assistance services.

In particular, the Commission should have regard to:

1. an assessment of the real costs of legal representation and trends over time
2. an assessment of the level of demand for legal services, including analysis of:
   (a) the number of persons who cannot afford to secure legal services but who do not qualify for legal assistance services, and
   (b) the number of pro bono hours provided by legal professionals
3. the factors that contribute to the cost of legal representation in Australia, including analysis of:

(a) the supply of law graduates and barriers to entering the legal services market

(b) information asymmetry

(c) other issues of market failure

(d) the structure of the legal profession in State and Territory jurisdictions

(e) legal professional rules and practices

(f) court practices and procedures

(g) models of billing practices

(h) the application of taxation laws to legal services expenditure, and

(i) other features of the legal services market which drive costs

4. whether the costs charged for accessing justice services and for legal representation are generally proportionate to the issues in dispute

5. the impact of the costs of accessing justice services, and securing legal representation, on the effectiveness of these services, including analysis of:

   (a) the ability of disadvantaged parties, including persons for whom English is a second language, to effectively self-represent, and

   (b) the extent to which considerable resource disparity impacts on the effectiveness of the adversarial system and court processes

6. the economic and social impact of the costs of accessing justice services, and securing legal representation

7. the impact of the structures and processes of legal institutions on the costs of accessing and utilising these institutions, including analysis of discovery and case management processes

8. alternative mechanisms to improve equity and access to justice and achieve lower cost civil dispute resolution, in both metropolitan areas and regional and remote communities, and the costs and benefits of these, including analysis of the extent to which the following could contribute to addressing cost pressures:

   (a) early intervention measures

   (b) models of alternative dispute resolution

   (c) litigation funding

   (d) different models of legal aid assistance

   (e) specialist courts or alternative processes, such as community conferencing

   (f) use of technology, and

   (g) expedited procedures

9. reforms in Australian jurisdictions and overseas which have been effective at lowering the costs of accessing justice services, securing legal representation and promoting equality in the justice system, and

10. data collection across the justice system that would enable better measurement and evaluation of cost drivers and the effectiveness of measures to contain these.

The Commission will report within fifteen months of receipt of this reference and will consult publicly for the purpose of this inquiry. The Commission is to provide both a draft and final report, and the reports will be published.

David Bradbury
Assistant Treasurer

[Received 21 June 2013]

Contents

The Commission's report is in two volumes. **This volume contains chapters 18 to 25, appendix A and references.** Volume 1 contains the overview, recommendations, summary of the Commission's main proposals and chapters 1 to 17. Below is the table of contents for both volumes. Appendices B to K are referred to in the chapters but are not included in the report. They are available from the Commission's website (www.pc.gov.au).

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This inquiry uses unpublished data from the Legal Australia-Wide Survey (*LAW Survey*). This survey was undertaken by the Law and Justice Foundation of New South Wales, and more details of the survey are provided in Coumarelos et al. (2012). The Commission acknowledges the Foundation for providing the survey data for use in the inquiry report; any errors in its use are solely the responsibility of the Commission.

The Commission acknowledges the assistance of the South Australian court system, which allowed the inquiry to survey users of South Australian courts. The Commission also acknowledges data provided by Comcare, the NSW Costs Assessment Scheme and a number of other stakeholders who provided useful information about litigation costs to the inquiry. In addition, the Commission acknowledges the data and information of the costs and benefits of service provision provided by various legal aid commissions and other legal assistance providers.

The Commissioners would like to express their appreciation to Dominique Lowe, who led the inquiry, and the team: Meredith Baker, Elina Gilbourd, Geoff Gilfillan, Pragya Giri, Suzana Hardy, Andrew Irwin, Vashti Maher, Rosalie McLachlan, Dianne Orr, Alan Raine, Tina Samardzija, Anthony Smith, Leo Soames and Kirsten Wren.

Disclosure of interests

The *Productivity Commission Act 1998* (Cth) specifies that where Commissioners have or acquire interests, pecuniary or otherwise, that could conflict with the proper performance of their functions during an inquiry they must disclose the interests.

Dr Warren Mundy has advised the Commission that he is a Fellow of the Australian Institute of Company Directors and that he has not been involved in any way with the preparation of that organisation's submissions to this inquiry.

Abbreviations and explanations

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACAT	ACT Civil and Administrative Tribunal
ACCC	Australian Competition and Consumer Commission
ACG	Allen Consulting Group
ACL	Australian Consumer Law
ACT	Australian Capital Territory
ADR	alternative dispute resolution
AGD	Attorney-General's Department
AIFS	Australian Institute of Family Studies
AIJA	Australasian Institute of Judicial Administration
ALAF	Australian Legal Assistance Forum
ALRC	Australian Law Reform Commission
ANAO	Australian National Audit Office
ANEDO	Australian Network of Environmental Defender's Offices
ANZOA	Australian and New Zealand Ombudsman Association
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
ATSI	Aboriginal and Torres Strait Islander
ATSILS	Aboriginal and Torres Strait Islander legal services
AVO	Apprehended Violence Order
CALD	culturally and linguistically diverse
CCLC	Consumer Credit Legal Centre NSW
CFDR	coordinated family dispute resolution
CIJ	Centre for Innovative Justice
CLC	community legal centre
CLE	community legal education

CLSIS	Community Legal Service Information System
CLSP	Community Legal Services Program
COAG	Council of Australian Governments
CRIS	Consultation Regulation Impact Statement
DHS	Department of Human Services
EDO	Environmental Defender's Office
EWON	Energy and Water Ombudsman NSW
FCA	Federal Court of Australia
FCC	Federal Circuit Court
FCLC	Federation of Community Legal Centres (Victoria)
FCWA	Family Court of Western Australia
FDR	family dispute resolution
FMC	Federal Magistrates Court of Australia
FRC	Family Relationship Centre
FSP	Family Support Program
FTE	full time equivalent
FVPLS	family violence prevention legal services
GST	Goods and Services Tax
HCA	High Court of Australia
HCLC	Hunter Community Legal Centre
HECS	Higher Education Contribution Scheme
HELP	Higher Education Loan Program
HRSCATSIA	House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs
ILNP	Indigenous Legal Needs Project
IT	information technology
LACs	legal aid commissions
LAF	Legal Assistance Forum
LANSW	Legal Aid New South Wales
LAQ	Legal Aid Queensland
LAW Survey	Legal Australia-Wide Survey
LCA	Law Council of Australia

LECS	legal expenses contribution scheme
LEI	legal expenses insurance
LIV	Law Institute of Victoria
LSC	Legal Services Commission
MRT	Migration Review Tribunal
MYEFO	Mid Year Economic and Fiscal Outlook
NAAFVLS	North Australian Aboriginal Family Violence Legal Service
NAAJA	North Australian Aboriginal Justice Agency
NAATI	National Accreditation Authority for Translators and Interpreters
NACLC	National Association of Community Legal Centres
NADRAC	National Alternative Dispute Resolution Advisory Council
NATSILS	National Aboriginal and Torres Strait Islander Legal Services
NCAT	New South Wales Civil and Administrative Tribunal
NCYLC	National Children's and Youth and Law Centre
NDIS	National Disability Insurance Scheme
NFP	not for profit organisation
NLA	National Legal Aid
NPA	National Partnership Agreement
NPBRC	National Pro Bono Resource Centre
NSW	New South Wales
NSWADT	New South Wales Administrative Decisions Tribunal
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
NTLAC	Northern Territory Legal Aid Commission
NZ	New Zealand
OECD	Organisation for Economic Co-operation and Development
OLSC	Office of Legal Services Coordination
OPC	Office of Parliamentary Counsel
ORIC	Office of the Registrar of Indigenous Corporations
PBS	Portfolio Budget Statements
PC	Productivity Commission
PCLC	Peninsula Community Legal Centre

PCO	protective costs order
PIAC	Public Interest Advocacy Centre
PILCH	Public Interest Law Clearing House
PLEAS	Public Legal Education and Support
PM&C	(Department of) Prime Minister and Cabinet
PPF	Public Purpose Fund
PTO	Public Transport Ombudsman
PwC	Pricewaterhouse Coopers
QAILS	Queensland Association of Independent Legal Services
QC	Queen's Council
QCAT	Queensland Civil and Administrative Tribunal
Qld	Queensland
QPILCH	Queensland Public Interest Law Clearing House
RLC	Redfern Legal Centre
RMIT	Royal Melbourne Institute of Technology
RRT	Refugee Review Tribunal
SA	South Australia
SACAT	South Australian Civil and Administrative Tribunal
SAT	State Administrative Tribunal
SBDC	Small Business Development Corporation
SEIFA	Socio-Economic Indexes for Areas
SRL	self-represented litigant
SRS	Self Representation Service
SSAT	Social Security Appeals Tribunal
Tas	Tasmania
TIO	Telecommunications Industry Ombudsman
UK	United Kingdom
UNSW	University of New South Wales
UQ	University of Queensland
US	United States
VALS	Victorian Aboriginal Legal Service
VCAT	Victorian Civil and Administrative Tribunal

VCOSS	Victorian Council of Social Services
Vic	Victoria
VLA	Victoria Legal Aid
VLRC	Victorian Law Reform Commission
VSBC	Victorian Small Business Commissioner
WA	Western Australia
WLS	Women's Legal Service

Explanations

Billion	The convention used for a billion is a thousand million (10^9).
Meaning of 'civil law'	In this report, the term 'civil law' is used broadly and includes family law matters. It excludes criminal law matters.

18 Private funding for litigation

Key points

- Lawyers and third party litigation funders can charge fees that depend on the outcome of legal action. This enables claimants to pursue actions they would otherwise not be able to, increasing access to the civil justice system.
- Lawyers offer 'conditional' billing — where no fee is charged if the legal action is unsuccessful and an 'uplift' percentage is added to the lawyers' fees if successful.
- In some countries, lawyers can also offer 'damages-based' billing where the lawyer receives an agreed share of the amount recovered by the client. This is prohibited in Australia because of concerns that it creates perverse incentives for lawyers. However, as it can promote access to justice for plaintiffs, and the potential risks are no worse than for permitted forms of billing, the prohibition should be removed subject to appropriate consumer protections.
- Restrictions on damages-based billing do not apply to third party litigation funders, which already fund litigation in exchange for a share of the amount recovered. They also typically provide indemnity for adverse costs orders and often manage claims on behalf of clients.
- The Australian market for litigation funding is small but has operated for two decades. Funded cases tend to relate to insolvency, large commercial claims and class actions.
  - The market has been facilitated by three features of the legal landscape which, in combination, are unique: the 'cost-shifting' rule; the absence of after-the-event insurance; and the ban on lawyers charging damages-based fees.
- Litigation funding has been the subject of considerable public debate, with opponents arguing that it facilitates unmeritorious claims and that funders take advantage of plaintiffs for their own gain. The Commission has not received evidence that would lead it to believe these are current or likely future problems, or that the courts and regulators are not able to address problems if they emerge.
  - Moreover, it appears that some concerns arise from the underlying laws, not how litigation is funded. Such problems are best addressed directly by reforming the laws, rather than by restricting mechanisms that assist access to justice.
- While the Commission supports litigation funding, it recognises that consumers need to be adequately protected — in particular to provide some assurance that funders will follow through on financial promises. Therefore, in addition to oversight by courts, funders need to be licensed to ensure they hold adequate capital to manage their financial obligations.
- Further, in order to facilitate consistent treatment, the discretion of courts to award adverse costs against non-parties, including litigation funders, should also apply to lawyers charging damages-based fees.

Most parties that encounter a legal problem and elect to engage a lawyer will do so privately, meeting any legal fees with their own resources. However, litigation costs can be large, easily running into the tens of thousands of dollars (chapter 3), are often poorly understood by clients (chapter 6) and can escalate due to the actions of the opposing side. Not all clients have the capacity to meet such costs at a given point in time.

The market has responded by offering alternative modes of billing that make meeting lawyers' fees more manageable (chapter 6). This chapter focuses on billing agreements in which the fee (or a part of it) is only charged if the legal action is successful. These agreements tend to be used by plaintiffs with monetary claims and can be made between clients and their lawyers or with a third party litigation funding company. By waiving fees until the outcome of the claim is known, the lawyer or third party effectively provides upfront funding for the claim and shares in the financial risk of litigation.

Private funding is especially suited to claims where plaintiffs are only able to pay their legal fees by virtue of receiving a financial settlement or award. Private funding can provide an important avenue to accessing justice for litigants who lack (liquid) financial resources but have meritorious claims.

This chapter describes funding agreements and the regulatory framework in which they operate (section 18.1), examines the debate on the merits of private funding (section 18.2), and outlines a way forward for regulation of private funding with a view to striking the appropriate balance between protecting consumers and avoiding unnecessary barriers to access to justice (section 18.3).

18.1 What is private litigation funding?

While both lawyers and third party litigation funding companies can provide upfront funding for a client to bring their case, regulatory restrictions mean that the nature of funding agreements offered by the two differ. At present in Australia, litigation funding companies charge fees as a share of the amount recovered by the client, while lawyers are prohibited from charging in this way.

Funding agreements with lawyers

A lawyer can provide a client with upfront funding to bring a case by agreeing to only charge the client for (some or all) services if the legal action is successful. In a conditional agreement the fee is based on the lawyer's regular hourly rate and in a damages-based (or 'contingent') agreement the fee is based on the amount recovered. In Australia, conditional billing is permitted for most civil matters, while damages-based billing is prohibited.

Conditional billing

In a conditional agreement the lawyer's service fee depends on whether the legal action results in a successful outcome. A 'no win no fee' agreement is a type of conditional fee where no fees are charged for the lawyer's services unless the outcome is successful. The lawyer will often charge an 'uplift fee' — a percentage in addition to their regular rate (usually based on hours worked) to compensate for the risk of not being paid at all if the legal action is unsuccessful. The uplift fee can also be considered as a form of interest for deferred payment, because conditional fees can result in the lawyer not being paid for an extended period, sometimes several years (Qld LSC 2011).

The term 'no win no fee' can be somewhat misleading, as the client is still responsible for paying disbursements (such as fees for court filing, barristers and experts) and, under the cost-shifting rule, the client bears the risk of paying the other party's costs if the outcome is unsuccessful (chapter 13). Correspondingly, if the client is successful some of their costs will be paid by the other party — although, the client will usually be liable for the entirety of the uplift fee payable to their lawyer because it cannot be claimed from the other side on a standard basis (Funds in Court, sub. 152).

Conditional billing is allowed in all Australian jurisdictions for most civil (excluding family) matters and is prohibited for criminal matters with further restrictions in Western Australia, South Australia and Tasmania for matters related to children and migration.[1] Restrictions generally reflect the view that while conditional fees are appropriate for financial matters, they are not appropriate for matters related to the assertion of rights. This is because litigants do not make a monetary recovery from cases relating to rights, and so may be unable to pay lawyers' fees even if they win. Moreover, in relation to family matters, under a conditional fee the lawyer has an incentive to prioritise winning over conciliation, which is undesirable for resolving the dispute, particularly where there needs to be an ongoing relationship (for example, involving joint custody of children).

For 'litigious matters' — those that are likely to involve proceedings in a court or tribunal — the uplift fee is subject to a cap of 25 per cent over the regular legal costs payable (excluding disbursements).[2] This limit is intended to prevent lawyers from inflating fees to unreasonable levels and provide a threshold for the amount of risk lawyers accept. The level of risk a lawyer will tolerate should increase with the size of the uplift, as this increases their expected return. With an uplift of 25 per cent, lawyers should be willing to accept cases that have at least an 80 per cent chance of success. This is a relatively high

1 *Legal Profession Uniform Law No 16a* (NSW), *Legal Profession Uniform Law Application Act 2014* (Vic), *Legal Profession Act 2007 and Legal Profession Regulation 2007* (Qld), *Legal Profession Act 2008* (WA), *Legal Practitioners Amendment Act 2013* (SA), *Legal Profession Act 2007* (Tas), *Legal Profession Act 2006* (ACT), *Legal Profession Act 2006* (NT).

2 Law practices in NSW were previously prohibited from charging an uplift fee in relation to damages claims, however amendments under the *Legal Profession Uniform Law No 16a* have brought legislation in line with other jurisdictions.

success threshold compared to the 100 per cent limit in the United Kingdom, under which lawyers should be willing to accept cases that have a 50 per cent chance of success.[3]

In addition to an upper limit on uplift fees, the relevant Acts in New South Wales, Victoria, Western Australia, Tasmania and the Australian Capital Territory require lawyers to be reasonably confident of a successful outcome in order to charge uplift fees (on top of normal fees in a conditional agreement):

> The agreement must not provide for an uplift fee unless the law practice has a reasonable belief that a successful outcome of the matter is reasonably likely. (for example *Legal Profession Uniform Law Application Act 2014* (Vic) s. 182(2)(a))

While in South Australia the opposite condition has been introduced as part of recent amendments to legal profession regulation:

> The agreement must not provide for the payment of an uplift fee unless the risk of the claim failing, and of the client having to meet his or her own costs, is significant. (*Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA) s. 5.26.4(a))

Since the uplift fee mainly comprises compensation for the risk the lawyer bears, the South Australian rule appears to be more appropriate as it only provides for uplift fees in cases where the risk to the lawyer of not being paid is relatively high. The contrasting rule in other jurisdictions provides for an uplift fee where the risk of not being paid is relatively low. This is likely intended to encourage lawyers to offer conditional fees for cases with higher 'merit'; however, as discussed below, conditional billing provides this incentive without the need for uplift fees.

Leaving aside the merits of the two approaches, the Commission considers that restrictions on charging uplift fees based on lawyer beliefs about the likelihood of success are not appropriate, judgments are hard to observe making such regulation difficult to enforce in practice. However, there is no evidence that either of these approaches gives rise to a material impediment to access to justice or leads to widespread inappropriate litigation.

Conditional billing is also subject to disclosure requirements in each jurisdiction, which are waived for 'sophisticated' clients (chapter 6), including informing the client prior to agreement of: the practice's legal costs; the uplift fee or the basis for its calculation along with an estimate; and (in some jurisdictions) the reason why the uplift fee is warranted.

How extensively is conditional billing used?

Conditional billing is most commonly used in matters involving monetary claims, such as personal injury, workers compensation, will disputes and defamation. This is because

[3] These probabilities bring the expected return (value of possible outcomes multiplied by their chance of occurring) of the conditional fee in line with receiving the normal fee with no risk, meaning that a risk neutral lawyer would accept them.

lawyers tend to only offer these agreements when there is, or is likely to be, money available to pay legal costs after the matter is finalised (Qld LSC 2012).

Information on the use and quantum of conditional billing is limited. The Queensland Legal Services Commission's *Billing Practices Checks* (2013b, 2013c) provide some information on the extent of conditional billing in Queensland.[4] Respondents were asked whether they 'always', 'sometimes' or 'never' used various billing practices. The responses revealed that:

- Smaller firms rarely used conditional fees — 80 per cent reported never billing on a 'no win no fee' basis, while 60 per cent reported never using other conditional fee arrangements.
- Larger firms were more likely to use conditional fees — with 73 per cent sometimes charging on a 'no win no fee' basis and 55 per cent sometimes using other conditional fee arrangements.

This disparity is unsurprising since smaller firms are less likely to have the capital to pay for litigation upfront and have less capacity to bear risk.

Information collected by Funds in Court — an office of the Supreme Court of Victoria which reviews solicitor-client fee agreements as part of its role administering funds held in Court on behalf of people under a legal disability[5] — provides some insight into the size of uplift fees. Funds in Court (sub. 152) has found that in conditional fee agreements that include an uplift fee, lawyers almost invariably charge the full 25 per cent. Funds in Court also observed that the full uplift tends to be charged irrespective of the risk involved in the case, even where clients have a strong case with no prospect of losing.

Hence, lawyers' fees, together with the uplift percentage, can substantially reduce the amount of the award the litigant ultimately receives. As the Centre for Innovative Justice noted: 'Sometimes this means that even successful disputants are left with little but vindication once they have settled their legal bills' (2013, p. 13).

Damages-based billing

In a damages-based agreement, which is prohibited for lawyers in all Australian jurisdictions, the lawyer receives an agreed percentage of the amount recovered for the client and is not paid if the legal action is unsuccessful. This is commonly termed a 'contingent' agreement, including in Australian legislation. However, conditional and

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4 The *Billing Practices Check for Smaller Law Firms 2013* comprised 322 responses to a survey sent to 1600 managing partners and directors of law firms with six or fewer practising certificate holders and to principals of sole practices. The *Billing Practices Check for Medium to Large Law Firms 2013* comprised 70 responses to a survey sent to 180 managing partners and directors of law firms with seven or more practising certificate holders.

5 Meaning they are under 18 years of age or are unable to manage their own affairs by reason of an intellectual or physical disability.

contingent fees are sometimes confused in policy discussion since both are 'contingent' on the outcome of legal action (Jackson 2009a). For clarity, the Commission uses the term 'damages-based' where remuneration is a function of the award or settlement.

While lawyers are prohibited from charging damages-based fees, fees are charged as a share of damages by some non-lawyers such as litigation funding companies (discussed below) and LawAid, a not-for-profit charitable trust managed by the Law Institute of Victoria and the Victorian Bar Council, which provides funds for disbursements in exchange for up to ten per cent of the plaintiff's award (excluding costs) (Funds in Court, sub. 152). A similar scheme is operated by the Law Society of South Australia, which deducts 15 per cent of the plaintiff's damages in exchange for fully funding legal action (chapter 19).

Overseas, regulation of lawyers charging damages-based fees varies. It is prohibited in several countries including Belgium, Denmark and Singapore and permitted in others, including Finland, Italy, Japan, the United States, Canada and (more recently) the United Kingdom (Jackson 2009a). Box 18.1 describes regulatory arrangements in a selection of countries where damages-based billing is permitted.

Box 18.1 Examples of damages-based billing rules where it is permitted

United States

Damages-based billing is in common use, usually in personal injury cases, breach of contract claims and class actions. It is prohibited for divorce and criminal matters. Regulation varies between states, and can include capped percentages and agreements being subject to court review of reasonableness. For example, in Oklahoma fees are limited to 50 per cent of the amount recovered, while a number of other states use a sliding scale where the upper limit progressively drops as the amount recovered increases (discussed further below).

This can be an attractive billing option for plaintiffs in the United States as — unlike in Australia, Canada and the United Kingdom — they do not face the threat of paying the other side's costs in the event of a loss.

Canada

All provinces in Canada allow damages-based billing, with Ontario, the most populous jurisdiction, the last to permit damages-based fees in 2004. Regulation varies by province, for example, British Columbia has a 40 per cent limit on personal injury cases while other provinces require fees to be 'reasonable' (and subject to court approval to be enforceable). In Ontario, in the event of success, the lawyer's fee may either be a multiple of the ordinary fee (like conditional fees in Australia) or expressed as a percentage of the amount recovered.

United Kingdom

In the UK, damages-based billing was introduced in 2010, following consultation by the Ministry of Justice, for matters before the employment tribunal. It was expanded to all civil litigation in April 2013 on recommendation from the Jackson review. The fee is capped at 25 per cent of damages in personal injury cases, 35 per cent of damages on employment tribunal cases and 50 per cent of damages in all other cases.

Sources: Jackson (2009a); Antonow (2010); UK Ministry of Justice (2013b).

Funding agreements with third parties

Unlike lawyers, third party litigation funding companies ('litigation funders') are not prohibited from charging damages-based fees. Litigation funders provide the financial resources to bring a claim — often providing security for costs and agreeing to pay any adverse costs ordered by the court, which can be a strong deterrent for resource constrained plaintiffs, particularly when the defendant is relatively well resourced (chapter 13). The funder is paid a share of the amount recovered and is not paid if the case is unsuccessful.

Litigation funding can promote access to justice by providing finance for the prosecution of genuine claims by plaintiffs who would otherwise lack the resources to proceed. Since funders choose cases based on commercial viability, their involvement favours cases with relatively high costs, large payouts and low risk and is unlikely to improve access in relation to rights-based, non-monetary claims. However, the access benefits of litigation funding should not be underplayed, particularly in relation to complex matters where the initial costs of investigation and collecting expert evidence may be substantial and the defendant is well resourced. There may also be an advantage for the opposing party as the litigation funder has better resources to meet an adverse costs order should the case it is funding fail (SCAG 2006).

Along with financial support, litigation funders bring expertise and experience. For example, funders can supervise the provision of legal services and ensure that costs are minimised, keeping the lawyer accountable on behalf of the client. The funder can also assist in developing the case by collecting information to assess the viability of the claim.

In the case of class actions, litigation funders identify, contact and organise members of the class where it might otherwise be unfeasible for a group of plaintiffs to organise themselves. Moreover, they remove the liability for adverse costs, which is a particularly pronounced disincentive in bringing class actions because non-representative group members are statutorily immune from costs ordered against the representative party (Grave et al. 2012). This means the representative party is normally liable for all adverse costs ordered, but is only entitled to a share of the payout.

Litigation funders are sometimes framed as providing a similar service for plaintiffs to that provided by insurers for some defendants. The two services mirror each other — insurance providers receive upfront payments from (potential) defendants in exchange for bearing uncertain losses on their behalf in the future, while litigation funders make payments on behalf of plaintiffs in exchange for an uncertain future pay off (Silver 2013). The funder's payoff will be negative if the action is unsuccessful. However, Grave et al. (2012) argued that the analogy should be drawn with caution because funders and insurers are regulated differently, set different contractual terms and have differing degrees of financial interest in, and control of, the litigation.

The market for litigation funding in Australia

The development of the Australian litigation funding market has been aided through a unique combination of circumstances — the cost-shifting rule (chapter 13); the lack of after-the-event insurance; and that lawyers are prohibited from charging damages-based fees.[6] Put simply, 'commercial funders have filled the gap that lawyers were not permitted to enter' (Hodges et al. 2012, p. 49). The growth of the market has also been facilitated through endorsements of individual funding agreements by courts.

The Australian market has operated for two decades. Initially funding only insolvency cases, litigation funders gradually expanded into funding large commercial claims and class actions. The first involvement by a third party funder in a class action in Australia occurred in 2001 when Insolvency Litigation Fund Pty Ltd (a subsidiary of Bentham IMF) funded an industrial dispute relating to the termination of waterfront worker contracts.[7] Morabito (2010) identified a further 17 third party funded class actions in subsequent years.

A small number of well-established firms operate in the local market. Two are listed on the Australian Securities Exchange: Australia's largest funder, Bentham IMF Ltd, and Hillcrest Litigation Services Limited (HLS). Other funders in the market include LCM Litigation Fund Pty Ltd and Litigation Lending Services Pty Ltd. Several Australian funders have invested in litigation overseas, and international litigation funders have also entered the Australian market in recent years including Comprehensive Legal Funding LLC, International Litigation Funding Partners Pte Ltd and Quantum Litigation Funding Pty Ltd (Grave et al. 2012).

Regulation of third party litigation funding in Australia

Historically, improperly encouraging litigation ('maintenance') and receiving a share of gains in return for maintaining a case ('champerty') were torts and crimes in all Australian jurisdictions. While these laws stemmed from concern that the judicial system should not be the site of speculative business ventures, the primary aim was to prevent abuses of court process through vexatious litigation, elevated damages, suppressed evidence, and bribed or intimidated witnesses (Barker 2011).

Two decades ago, the NSW Law Reform Commission (1994) had already noted that the public policy concerns relating to maintenance and champerty were giving way to recognition of the access to justice benefits of financial assistance to litigation. In 1995, a statutory exception to the rule against champerty developed, which meant insolvency practitioners were able to contract for the funding of cases if these were characterised as

6 After-the-event insurance is purchased after the legal claim arises (for example after an accident), usually to insure against the costs of disbursements and having to pay the costs of the other party in the event the case is lost (chapter 19).

7 *Batten v CTMS Ltd* (1999) FCA 1576.

company property (SCAG 2006). Litigation funding arose under this statutory exception and subsequently diversified. The majority of Australian jurisdictions have abolished the torts and crimes of maintenance and champerty and it appears likely that they are obsolete as crimes under Australian common law (Grave et al. 2012).

There has been little government involvement directly in the litigation funding market. That said, the market is no 'wild west' as some commentators have suggested. Rather, regulation of litigation funding has largely been through the decisions of courts (box 18.2).

Box 18.2 Key decisions on litigation funding by Australian courts

***Campbells Cash and Carry v Fostif* (Fostif) — High Court 2006**

A challenge on appeal by the defendant (Campbells) to the plaintiff's (Fostif) third party funding agreement based on the common law grounds of maintenance and champerty. The funding agreement was upheld by the High Court on the basis that it provided social utility and could foster the aims of class action legislation. The High Court decision also expressed confidence that existing processes in courts would be sufficient to deal with a funder that manipulated due process or breached professional duties.

***Jeffrey & Katauskas Pty Ltd v SST Consulting Pty Ltd* (Jeffrey) — High Court 2009**

After Richard Constructions was unable to pay an adverse costs order, Jeffrey & Katauskas sought an order of costs against its litigation funder, SST Consulting, alleging the funding agreement constituted an abuse of process because it did not include indemnity for adverse costs. The High Court dismissed the appeal by majority, holding that the funding agreement did not constitute an abuse of process. This ruling clarified that litigation funders are not required to provide indemnity for adverse costs. Funders tend to do so in practice, and, where the funding agreement does not include indemnity for adverse costs, courts have discretionary power to order adverse costs against non-parties including funders (as occurred in *Gore v Justice Corporation* (2002) 119 FCR 429).

***Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (Multiplex) — Federal Court 2009**

The Full Federal Court found that the funding agreement for that class action constituted a 'managed investment scheme' that needed to be registered under the Corporations Act (s9).

***International Litigation Partners Pte Ltd v Chameleon Mining* (Chameleon) — NSW Court of Appeal 2011**

The NSW Court of Appeal held that the funding agreement was a 'financial product' within the meaning of the Corporations Act and that the funder required an Australian financial services licence (AFSL). This decision was appealed in the High Court which, in October 2012 (HCA 45), held that litigation funders were exempt from holding an AFSL because funding arrangements are a 'credit facility' rather than a 'financial product'.

Sources: Hodges et. al. (2012); Grave et al. (2012); NSW OLSC (2012b); Bentham IMF (sub. DR204).

The Standing Committee of Attorneys-General (2006) noted that in over 20 court challenges to litigation funding agreements since 1998, none had been struck down.

Although, in some cases the funder and lawyer were ordered to alter contracts to provide sufficient information to facilitate informed consent by plaintiffs.

Additionally, litigation funders are subject to consumer protection laws such as prohibitions on misleading and unconscionable conduct and unfair contract terms (Legg 2011). Bentham IMF and HLS are also members of the Financial Ombudsman Scheme which provides their clients with an independent complaint avenue. In over 10 years in this Scheme, Bentham IMF has received only one complaint — which was resolved in favour of the funder by the Ombudsman — from the hundreds of thousands of people and entities it has funded (Walker 2013).

Since the *Fostif* decision of the High Court, debate on litigation funding has shifted away from concern about the permissibility of third party funding to whether and how it should be regulated. The *Fostif* decision recognised that litigation can be made more efficient through the 'commercial objectivity' of the funder.

The *Multiplex* and *Chameleon* decisions made litigation funding agreements subject to the provisions of the *Corporations Act 2001* (Cth) which were designed to regulate managed investment schemes and to protect investors in those schemes. The then Minister for Financial Services, Superannuation, and Corporate Law noted that the Federal Court decision in *Multiplex* effectively halted all existing class actions, as none complied with the managed investment scheme provisions (Bowen 2010).

As a result of the then Minister's concerns, the Australian Securities and Investments Commission (ASIC) provided temporary relief from the Corporations Act requirements through class orders released in 2010. In a longer term response, the Australian Government introduced the Corporations Amendment Regulation 2012 (No 6), which excluded funded class actions from the definition of a managed investment scheme. It also provided an exemption from the requirement to hold an Australian financial services licence (AFSL) for persons providing funding as part of either a single-party or multi-party litigation if they had appropriate processes in place for managing conflicts of interest. ASIC (2012) published a regulatory guide to assist funders that had been exempt from the licence requirement with managing conflicts. In setting out the reasons for the exemptions, the Explanatory Statement to the regulation said that:

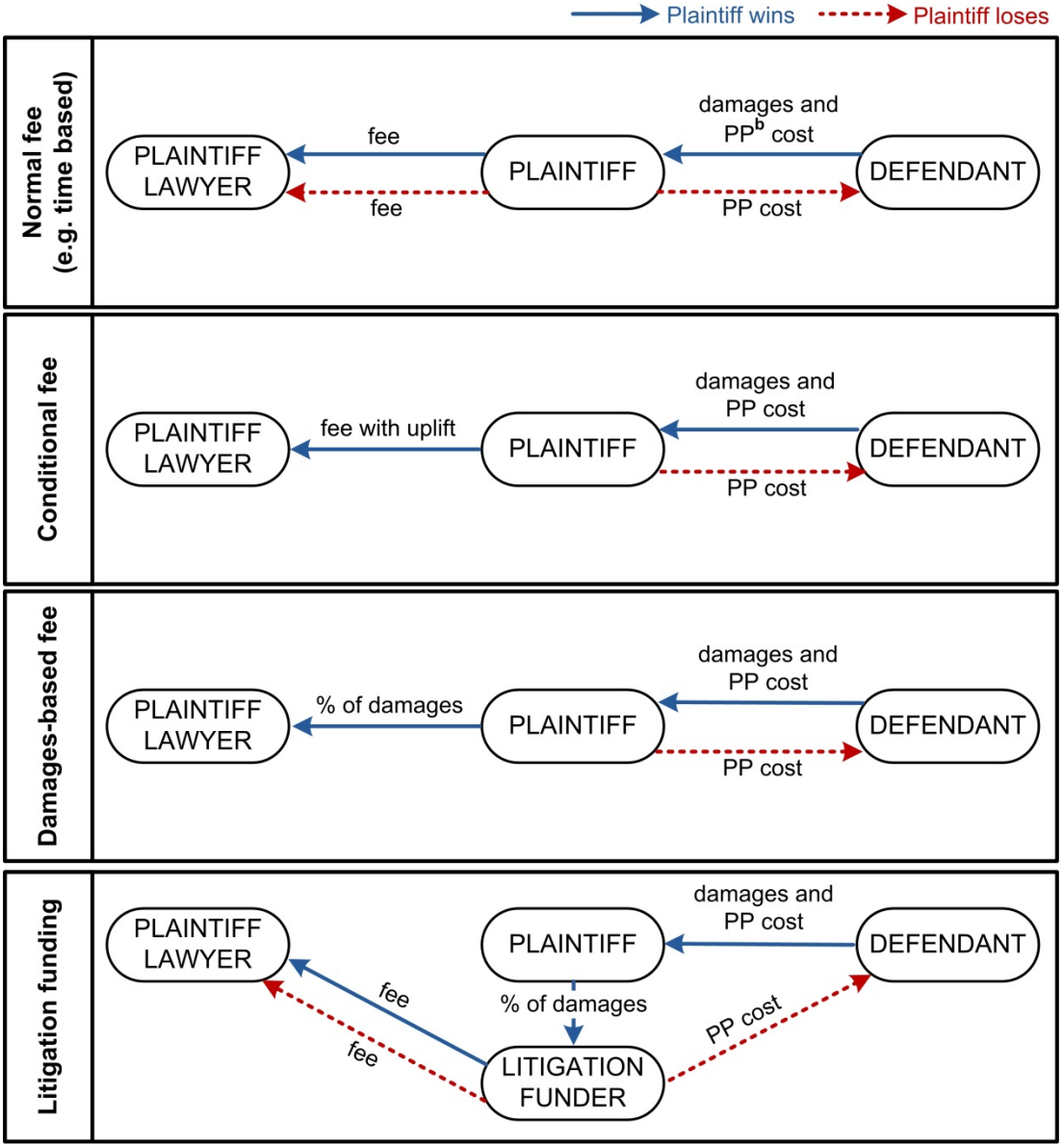
> The government considers that these requirements are not appropriate for litigation funding schemes. The Government supports class actions and litigation funders as they can provide access to justice for a large number of consumers who may otherwise have difficulties in resolving disputes. (Explanatory Statement, Select Legislative Instrument 2012 No. 172, p.1)

However, the current Government, concerned about the lack of regulation in the market, has announced plans to convene an advisory panel to examine conflicts of interest and moral hazards between lawyers and litigation funders, with particular focus on plaintiff law firms that finance class actions (Merritt 2014).

Comparing funding agreements — where do the risks and returns lie?

Unlike normal hourly billing, each of the funding agreements discussed above shifts some of the risk associated with bringing a claim from the plaintiff to the lawyer or litigation funder. As compensation for bearing this risk, the lawyer or litigation funder shares in the return from litigation. In order to consider the relative benefits of these billing agreements in any discussion of policy reform, it is important to understand how the different funding agreements compare (figure 18.1).

Figure 18.1 **Cash flows in different billing arrangements**[a]



[a] Disbursements not depicted. [b] PP: party-party or adverse costs, assuming costs follow the event (chapter 13).

18.2 The debate on the merits of private funding

Conditional and damages-based billing give rise to similar concerns

While regulatory treatment differs for conditional and damages–based billing, the concerns raised about them are largely similar. Namely, that they might promote unmeritorious claims, create conflicts of interest between lawyers and clients and lead to excessive profits for lawyers.

Do these agreements promote unmeritorious claims?

The first concern is that litigants are encouraged to pursue 'weak' or unmeritorious cases because they do not pay lawyers' fees in the event of loss. However lawyers — facing the risk of not being paid if the case is lost — have a strong financial incentive to reject cases with low prospects of winning (Cabrillo and Fitzpatrick 2008). As explained in submissions:

> … the no win-no fee model also allows lawyers to act as an early gatekeeper for the judicial system, ensuring that the cases brought forward are those that have reasonable prospects of success. (Slater & Gordon Lawyers, sub. 56, p. 8)

> We are unaware of any legal practice which would seek to engage in 'wild' litigation when there is no merit in the claim, as the legal practice will be bearing the cost of the litigation and face little to no prospects of success. It is economic suicide to contemplate such action. It simply does not and would not occur. (Australian Lawyers Alliance, sub. 107, p. 20)

Clients are also discouraged from pursuing unmeritorious claims because they still pay disbursements and face the threat of paying the other side's legal fees if they are unsuccessful. Many commentators have noted that Australia's cost-shifting rule (in contrast to the own cost system in the United States) should act as a similarly effective deterrent to frivolous litigation if damages-based billing were introduced. Maurice Blackburn Lawyers submitted that:

> Jurisdictions such as Ontario in Canada and more recently the United Kingdom demonstrate that the introduction of [damages-based] contingency fee arrangements together with the retention of a loser pays costs rule will see an increase in access to justice without an explosion of frivolous claims. The US, on the other hand, does not have a loser pays costs rule, has a more activist judicial culture and a greater willingness to award exemplary (as opposed to compensatory) damages; all of which provide considerable incentives to potential litigants to 'chance their arm'. (sub. 59, p. 13)

This is consistent with reported experience in the United Kingdom where uptake by law practices has been very limited to date — in a report prepared for the UK Civil Justice Council, Peysner (2014) characterised the introduction of damages-based billing as 'a damp squib' and elaborated that damages-based agreements 'appear to be like the Yeti: they are believed to exist but hardly any sightings have been made' (p. 10). A key reason

provided by lawyers for their reticence to use damages-based fees was that they preferred to explain fees to clients in relation to the work or hours involved, rather than as a share of the damages. However, as discussed below, the latter conversation is likely to be more meaningful for the client.

The Commission considers that, on balance, both lawyers and litigants face sufficient incentives to avoid bringing frivolous claims. Though, in order to provide effective deterrence, litigants need to be well informed about disbursements and both the likelihood and potential value of an adverse costs order.

Do they create conflicts of interest?

The second concern is that having an interest in the outcome can create conflicts for lawyers. The Consumer Action Law Centre provided an example in relation to conditional fee agreements:

> … it might be in a lawyers' interest to accept a 'low-ball' settlement offer so they get their fee even where the client wants to reject the settlement and have a matter proceed to determination, where there remains a risk of losing (and where the lawyer might not be paid at all). (sub. 49, p. 27)

However, Chief Justice Martin noted that in the case of conditional fees, potential conflicts appear to be well managed:

> … the lawyers very often in a big personal injury case will have put out tens, perhaps hundreds of thousands [of dollars] of fees in getting expert reports, their own time and so on and so forth. They have a very real commercial stake in the outcome of that case and they bring that stake to bear when they're advising their client in the settlement negotiations which always precede the trial. … I'm not aware of a lot of evidence to suggest that lawyers have overborne their clients into taking an inappropriate settlement in order to mitigate their own personal risk of an unsuccessful outcome. So the risk is certainly there. I think they are mitigated by making sure that any acceptance is subject to client approval. (trans., p. 599)

In this regard, it is important that the lawyer and client explicitly outline the 'win' outcome upfront and that the lawyer provide adequate disclosure to ensure the client has understood before the billing contract is signed. This would protect against circumstances where the lawyer mitigates their risk by defining the win outcome broadly, such as any circumstance where the lawyer recommends accepting an offer to the client (chapter 6).

Some have argued that while conflicts of interest are manageable in relation to conditional fees they are more pronounced under damages-based fees. Allens contended that damages-based fees might motivate lawyers to:

- encourage vulnerable plaintiffs to agree to an inappropriate contingency fee, for example, a contingency fee that does not reflect the work required in resolving their claim and/or the degree of risk of the claim being unsuccessful;

- adopt an inappropriate position or strategy in anticipation of a large award of damages and, consequently, a large fee, even where a client would have been satisfied with, for example, a non-monetary resolution to the dispute, such as an immediate and fulsome apology;
- refrain from pursuing viable causes of action or appropriate interlocutory steps on the basis that these will increase legal costs;
- encourage an unreasonably high contingency fee or fail to inform a client that a certain contingency fee is not in their financial interest;
- seek to settle a claim prematurely in order to capture the greatest fee for the least amount of work; or
- pursue large, high value claims to the point where it is no longer commercial for the defendant to continue, thereby forcing the defendant to settle regardless of the merit of the plaintiff's claim. (sub. DR232, p. 2)

Several of these conflicts are not unique to damages-based billing. The unfortunate reality for consumers of legal services is that lawyers can charge excessive fees, adopt a position that is incongruous to the needs of the client and fail to adequately inform their client under any billing arrangement. This does not provide an argument for prohibiting any particular form of billing — rather, these risks need to be managed across the board with more robust sources of information and redress for consumers, as outlined in chapter 6.

Similarly, in relation to Allens' last concern, plaintiff lawyers have a financial interest in pursuing claims to settlement regardless of whether they are being paid by the hour, on a conditional basis, or as a share of the damages.

The Commission remains unconvinced that, compared to conditional billing, the lawyer's interest is more 'direct' under damages-based billing in any way that leads to worse incentives for lawyers.

On the contrary, some of the 'conflicts' listed by Allens are actually beneficial to consumers because they mitigate the poor incentives under time-based billing (chapter 6) by encouraging lawyers to weigh up actions against their cost. Under conditional or other time-based billing the lawyer's fee increases with hours worked. As a result, the lawyer has no reason to limit the avenues explored and, by extension, the client's costs — this is undesirable given that delayed outcomes can have both tangible and intangible costs for clients (chapter 3). In other words, a settlement that is 'premature' with respect to a full academic exploration of legal rights may well be 'timely' in terms of the client's wellbeing. Under damages-based billing the lawyer's fee is result-based and does not increase with the hours worked. This creates an incentive for the lawyer to keep costs low in order to increase their net payoff from the case. Or put another way:

> Contingency fees [damages-based] align the interests of the lawyers with those of their clients. The incentive for both parties is for the largest payout in the shortest possible time. Time billed becomes irrelevant, while inefficiencies and delay become the enemy of the lawyer as well as the client, whereas in traditional litigation, lawyers who are paid by the hour benefit from the convoluted road taken to resolve disputes. (Maurice Blackburn, sub. 59, p. 13)

Emons and Garoupa (2006) analysed the incentive effects of different billing methods and concluded that the incentives of lawyers are aligned with clients more efficiently under damages-based billing, compared to conditional billing, because lawyers adjust their effort to the amount at stake.

Moreover, when viewed from the perspective of the client, the argument that linking fees to damages creates a more pronounced conflict is based on a false delineation of the funds used to pay for legal action into 'damages' funds and other funds held by the litigant. Legal fees under any billing agreement reduce the litigant's overall financial gain from legal action and can be expressed as a proportion of the amount recovered. Damages-based agreements simply make this proportion explicit at the outset of the agreement.

As they are result-based, damages-based fees also offer the benefit of being a 'proportional' payment for the client, this is in contrast to conditional billing where the outcome may be successful but might only result in a nominal amount recovered which could leave the client without sufficient funds to pay the lawyer's full fee and uplift. Some evidence of this can be found in the United Kingdom's Jackson Review which published data for clinical negligence cases closed or settled in 2008-09. It showed that, in many cases funded through conditional billing, the claimant costs were higher than the damages received — in a subset of these cases, claimant costs were as high as 400-700 per cent of the damages (Jackson 2009a, p. 524).

A further benefit of damages-based billing, given that complaints about the complexity of billing and uncertainty of final costs are common, is that it is arguably a simpler fee structure for clients to understand and to use as a basis for comparison between providers. However, as mentioned above, this is only the case if clients understand their obligations in relation to disbursements and potential adverse costs orders.

Do lawyers profit excessively?

A third concern is that conditional and damages-based fees can lead to excessive profits for lawyers because fees exceed the work and risk involved. Funds in Court raised this issue in relation to uplift fees being charged at the full 25 per cent regardless of the risk involved:

> … why is the maximum amount almost invariably charged? I mean, the idea obviously is to take account of the risk the solicitors face and the disbursements that they might have to fund, but often cases proceed as an assessment of damages effectively and there is little risk that the solicitors won't recover in the end one way or the other. (trans., p. 866)

A lack of relationship between the risk faced by lawyers and the premium charged to compensate them for bearing that risk suggests that there is limited competition and a lack of consumer information and bargaining power. Such concerns are best addressed directly and are discussed below and in chapter 6.

There is also concern that if conditional and damages-based fees were to coexist in a market characterised by limited competition and consumer information, lawyers would

offer conditional agreements for low value claims and damages-based agreements for higher value claims — where they may receive a larger sum without a corresponding increase in effort. Jones Day Lawyers explained:

> Litigation law firms running large class actions in this country have been making, on the bigger claims, fees around 10 million up to 25, 30 million dollars … which is an enormous amount of money anyway based on hourly rates and so on. If you started allowing our learned lawyers to charge the sort of … contingency rates being charged by litigation funders … it creates a different world of participation for the lawyer. Imagine the prospect of being able to obtain 350 to 450 million dollars as your fee on a case. (trans., pp. 251-2)

Funds in Court raised similar hesitance in relation to damages-based fees for large personal injury settlements, providing an example where a client was awarded $6.5 million in damages and paid $280 000 in legal fees and disbursements. Funds in Court noted this represented only 4.3 per cent of the total award and that a damages-based fee could have substantially reduced the amount available for future care (trans., p. 865).

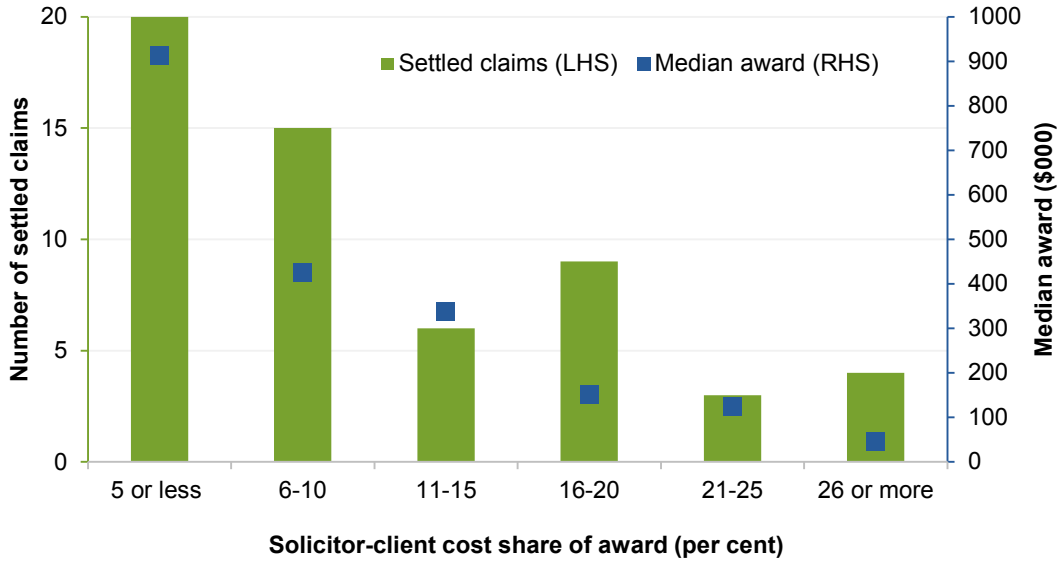
The Commission sought further information to ascertain whether this was a typical ratio and was provided with de-identified data for the 57 applications of solicitor–client costs that Funds in Court had settled in the previous seven months. Figure 18.2 shows the distribution of solicitor-client costs as a share of damages — this share is calculated in relation to the original claim for solicitor-client costs, rather than the amount paid after negotiation on behalf of the plaintiff by Funds in Court. The original claims better reflect standard billing practice because the majority of plaintiffs do not benefit from their fees being reviewed by Funds in Court.

It is unclear whether other jurisdictions have offices that perform the same function as Funds in Court. However, the Commission notes that the office creates substantial savings on legal fees for its beneficiaries — in the data provided to the Commission, solicitor-client fees were reduced on average by 25 per cent (with reductions ranging from 0-77 per cent of the original claim). As such, other jurisdictions may benefit from examining the model used in Victoria.

These data show that, while solicitor-client fees comprised less than 5 per cent of the award in around a third of settled claims, the proportion was substantially higher for other claims. Moreover, larger claims (on average) are associated with smaller shares of solicitor-client costs — meaning that damages-based fees are likely to lead to excessive remuneration for higher value claims. These excessive profits can be avoided by implementing caps on damages-based fees on a ‘sliding scale’ — where the cap reduces as the claim amount increases (discussed further below).

Figure 18.2 **Legal fees as a share of the award[a]**

Personal injury claims



[a] Applications for solicitor–client costs settled by Funds in Court (2 December 2013 to 2 July 2014).

Data source: Funds in Court, Supreme Court of Victoria.

Litigation funding also gives rise to concerns …

As with conditional billing arrangements, some participants have expressed concerns about the merits of litigation funding. Concerns span a number of issues including that litigation funding encourages unmeritorious claims; funders take advantage of plaintiffs for their own gain; and that the market is not adequately regulated (discussed in section 18.3).

Does litigation funding promote unmeritorious claims?

In an adversarial system, the benefits that litigation funding offers to plaintiffs generally come at a cost to defendants. This has led to some opposition to litigation funding — the most prevalent from corporate defendants and their agents in relation to an apparent increase in securities class actions (brought by shareholders against companies). These stakeholders have argued that these actions are unmeritorious and expressed concern that rapid growth of litigation is leading to an excessively litigious culture as in the United States — however, this path is unlikely (box 18.3).

In examining concerns about unmeritorious claims it is important to distinguish between whether litigation funding promotes additional claims as distinct from whether these claims are unmeritorious.

Box 18.3 Are we going down the American path?

Emmerig and Legg (2014) contrasted the volume of securities class actions recently threatened or filed in Australia to filings in the US and noted that, on a per capita basis, activity in Australia was nearing par with the US, commenting that:

> The concept that the ratio of securities class action litigation in Australia would be higher than the US is indeed a sobering one. Is it really suggested that corporate governance standards and legal compliance suddenly deteriorated to warrant this position?

Any rise in actions might equally indicate that existing levels of wrongdoing are increasingly being held to account. Moreover, Spender cautioned that the figures underlying this assertion should be considered closely:

> The report compares filed actions in the US with a larger Australian sample of threatened and filed actions. … The US figures are based on 166 federal securities class actions commenced in 2013, which ignores the considerable activity undertaken at the state level … corporations targeted in the Australian proceedings do not confine their activities to domestic markets, so it is hard to see why a local population metric is helpful. (2014, p. 33)

Arguably, a more meaningful basis for comparison would be filings by listed company. To illustrate, the table below shows information for 2013 — which, relative to filings in the previous 10 years, was average for the US and above average for Australia.

	Shareholder class actions	*Population (approx.)*	*Actions per million people*	*Listed companies*	*Actions per company*
Australia	5	23 mil	0.2	2195	0.002
US	166	319 mil	0.5	4972	0.03

Based on the table, when compared by:

- population — actions were 2.4 times more likely in the US.
- listed company — actions were almost 15 times more likely in the US.

The economic impacts of these actions also differ. The largest securities class actions in the US settle for over 35 times the values of the largest in Australia. To 2013, the top ten settlements in the US range from around $1-7 billion, while the top ten settlements in Australia range from $35-200 million. This is partially explained by greater use of punitive damages in America, with the anticipated judgments impacting settlement amounts.

Therefore, the suggestion that Australia is becoming as litigious as the US is unwarranted. Such an outcome is also unlikely because the loser pays rule will continue to provide a strong deterrent to bringing unmeritorious claims and the comparatively limited use of punitive damages reduces the expected return from litigation.

Sources: Emmerig and Legg (2014); Spender (2014); Allens (2014); Comolli and Starykh (2014); ASX (2014); CIA (2014).

Data from the sector provide insight into the number of claims funded. Bentham IMF has funded 159 completed cases since its listing in 2001 (Bentham IMF Limited 2014). LCM Litigation Fund has reported that as at May 2013 it has funded 175 completed cases since it was established in 1998 (LCM 2014; Grave et al. 2012). Across the sector as a whole, the share of 'additional' claims is extremely small — constituting less than 0.1 per cent of the overall civil litigation market by volume (Barker 2011).

The question then becomes, of these additional 0.1 per cent of claims, what, if any, are unmeritorious.

Litigation funders are unlikely to promote unmeritorious claims because they invest in litigation with a view to making a profit and so perform a gatekeeping function, similar to lawyers charging conditional or damages-based fees. This means access to funding is restricted to cases where the return is expected to be relatively high, and the risk is low:

> The legal experience, expertise and risk aversion of commercial litigation funders in Australia has served to prevent unmeritorious claims rather than facilitate them. Commercial funders usually assume the risk of paying adverse costs if the case is not successful so that their threshold requirement of merit is very high. (Kalajdzic et al. 2013, p. 142)

For example, Bentham IMF noted that given its stringent criteria, less than 5 per cent of the applications it receives are funded (sub. 103, p. 3). Moreover, Kalajdzic et al. (2013) observed that its payouts for lost cases have been modest while recovered amounts in successful cases have been substantial — an outcome that suggests a sound financial framework.

Moreover, court oversight — both in relation to incentives provided by the threat of adverse costs and the ability to dismiss frivolous claims — provides further checks against parties bringing unmeritorious claims.

The Commission considers that there are strong incentives for parties to only bring meritorious claims. Nevertheless, it examined the evidence put forth by concerned stakeholders.

The only information provided to the Commission related to high settlement rates of securities class actions, which were seen as an indication that these claims were unmeritorious. For example, the Australian Institute of Company Directors (AICD), responding to the Commission's draft report, noted:

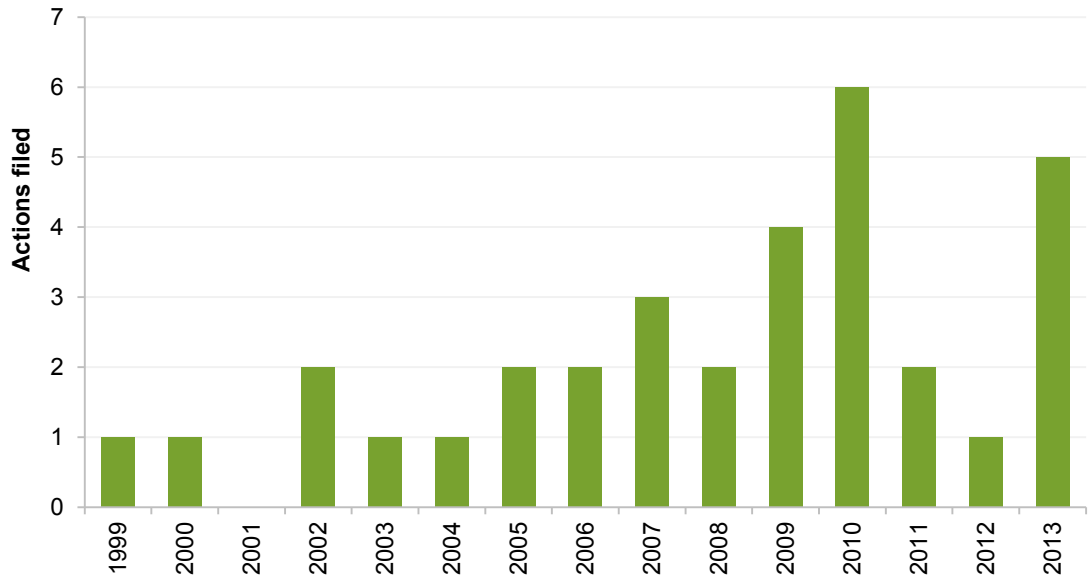
> The Draft Report states that opponents to litigation funding are concerned that funded class actions lead to a rise in unmeritorious litigation but that there was no evidence presented to the Commission to suggest that this is the case. In this regard it is appropriate to re-iterate to the Commission that Courts are reluctant to make summary judgments in complex matters and that the majority of class actions against corporations settle. For example, despite the number of shareholder class actions initiated against corporations, we are not aware of one action in Australia that has proceeded to a court judgment. (sub. DR172, p. 3)

Allens (2014) identified that a total of thirty shareholder class actions have been commenced in Australia, around one or two annually, and *at most* six in one year (figure 18.3). Only four of these actions proceeded to trial and none proceeded to final judgment. AICD argued that it is 'prudent' for firms to settle these actions because the cost and time involved in defending them takes away from 'core business activity'. In itself, the fact that these cases settle out of court does not amount to evidence that they are unmeritorious. These firms are sophisticated defendants, and therefore in a position to

assess whether a settlement is 'fair' compared to the expected judgment and have the resources to proceed if they consider it is not.

Further, the prevalence of settlements is not unique to shareholder claims, nor is it unique to funded claims — as noted in chapter 11, less than 3 per cent of matters that reach supreme and district courts are resolved through final judgment.

Figure 18.3 **Shareholder class actions filed**



Data source: Allens (2014).

The notion that firms are paying 'go away' money so that they can focus on their 'core business' does not accord with the experience of some stakeholders. For example, Maurice Blackburn noted that settlements are not made hastily, nor are the sums insignificant:

> These cases on average take about three and a half to four years before they settle and they're often extremely hard-fought with tens of millions of dollars on both sides run up in legal costs, so there's not much evidence of people just falling away. The second thing is the quantum of the settlements … we have now settled I think four shareholder class actions for amounts north of 100 million. We have recently settled a class action against Leighton for an amount of 69 million. These are not amounts of money that you would pay if you just thought, 'Gosh, it's a bit too much trouble to go through all the pain, anxiety and hurt. Why don't we just pay 69 million to make it go away.' (trans., p. 644)

The Australian Shareholders' Association provided an alternative explanation for the propensity of defendants to settle:

> … the directors are very concerned about their reputations. I think that is a driver in part as to why they are settling. The distraction issue is legitimate. You do hear it all the time but a lot of people have litigation going on all the time. I mean, litigation is just a part of life. Why you

> have to settle this sort of litigation as opposed to other forms of litigation, I struggle to see why it is, except that it goes to the heart — discovery goes to the heart of communications between management and boards on bad news. (trans., p. 713)

AICD adds that companies settle because there are 'many unsettled areas of Australian class action law, particularly in relation to actions commenced by shareholders, which adds to the level of uncertainty for companies' (sub. DR172, p. 3). Indeed, the ultimate concern does not relate to the activity of litigation funders but to the underlying laws and rights that they facilitate access to. The viability of each claim depends on the underlying law — litigation funders simply provide access to existing rights. Recognising this, AICD (2014) has proposed the introduction of an 'honest and reasonable director defence' to the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth).

In the Commission's view, in terms of achieving a balance of risks, public debate about the underlying law is clearly more appropriate than attempting to stifle a mechanism that provides broader access to justice benefits. Further, given the small proportion of additional actions (less than one per cent) and the relatively low number of securities class actions in Australia, there is a risk that the spectre of actions, rather than evidence, is driving policy debate.

Are funders taking advantage of plaintiffs?

Some have raised concerns about the possible extent of influence that litigation funders have on cases, noting that they may take advantage of plaintiffs for their own gain. These concerns often stem from comparing the relatively small returns to individual members in class actions with the large returns to their funder and law firm. However, closer examination reveals this comparison is not appropriate as the return to individual class members is commensurate to their individual loss, while the return to the funder compensates them for managing the case and adopting the risk of an adverse cost order on behalf of the entire class.

This point is best illustrated by way of example, in a class action being funded by Bentham IMF currently before the Federal Court, 43 500 group members are seeking $57 million in damages from ANZ bank for unfair fees.[8] This translates to an average claim of only $1300 per group member, which highlights the scale economies that can be achieved through the involvement of a litigation funder — while this action is an important assertion of their rights, each member would be unlikely to take action on their own as their individual claims would not cover the legal fees. Even if the funder is paid a significant portion of the damages, the position of group members is improved compared with not being able to bring the claim at all.

8 *Paciocco v Australia and New Zealand Banking Group Limited* (2014) FCA 35.

Moreover, the benefits of this class action will also likely spread to other consumers in the event that ANZ and other banks change their policies in response to the Federal Court ruling. King & Wood Mallesons (2014) considered the impacts might spread further than banks, by also influencing fees of other credit providers, utility providers, telecommunications and other subscription services, such as gyms.

A more appropriate measure is the relative share of payouts taken by funders. The Standing Committee of Attorneys-General indicated that the share of payouts from successful cases that are paid to litigation funders is typically between one-third and two-thirds of the proceeds, though in some insolvency cases it has been as high as 75 per cent of the award (SCAG 2006). More recently, Barker (2011) observed commissions ranging between 20 and 45 per cent. This is consistent with reporting by the largest funders:

- As a proportion of the total income generated to date through funded cases, Bentham IMF has been paid one third and claimants have received two third (EY 2013).
- HLS described fees as falling in a typical range of 25-45 per cent of the amount recovered (HLS 2011).

While the funders' fees may seem like a large proportion of the amount recovered some, such as Attrill (2012), contend that given the costs, risks, time to resolve, coordination effort and the potential for adverse costs orders, the returns to funders do not appear to be excessively high. As opposed to a lawyer in a conditional agreement, the funder often covers all of the costs of litigation (including disbursements) and provides indemnity for adverse costs.

Funding agreements also tend to stipulate that claimants will not be required to pay more in legal costs and commissions than they receive in compensation — providing an assurance that they will not be out of pocket after pursuing the claim.

A further concern relates to funders favouring 'opt in' groups — where group members need to have signed a funding agreement or a retainer with the law firm, as opposed to 'opt out' groups where a group member is anyone affected by the action. Funders understandably prefer excluding potential group members who have not signed a funding agreement upfront, in order to prevent 'free riders' benefiting from the legal action without contributing to its cost.

To get around this problem, a novel approach was adopted in a class action brought by shareholders against the National Australia Bank.[9] The claim was funded by International Litigation Funding Partners Pte Ltd (ILFP). For the first time, the court gave notice to potential group members that did not join the action upfront, inviting them to register to partake in settlement, even though the action was not initiated on an opt out basis. The notice stated that if the action resulted in a successful outcome and the group member received compensation they were required to pay a commission of 30-40 per cent

9 *Pathway Investments Pty Ltd v National Australia Bank Limited* (2012) 72 (Supreme Court of Victoria).

(depending on the number of shares they held) of their compensation to the funder, and a share of the legal costs and expenses incurred by the representative plaintiffs in conducting the proceedings (Supreme Court Of Victoria 2012).

More recently, in a number of actions, funders have sought to initiate claims on an opt out basis, where the funder takes a share of each group member's payouts as compensation for facilitating the claim, but no affected person is excluded solely because they did not sign a funding agreement or retainer upfront. For example, such an application was made in May 2014 in an action against Allco Finance Group, also funded by ILFP, with the judgment to be delivered in December 2014.[10] This move towards opt out groups demonstrates that court processes are well equipped to overcome concerns relating to funded class actions.

… but overall funding provides benefits

The criticisms levelled against litigation funding serve to highlight the way it has evened the playing field between corporate defendants and plaintiffs. For example, the pressure on defendants to settle mirrors the difficulties faced by plaintiffs in maintaining cases against companies without backing from a litigation funder.

Given that plaintiffs face several barriers to pursuing claims, and that defendants are often in a better position to bear legal expenses, the Commission is of the view that litigation funding can play an important role in promoting corporate accountability — tipping the balance towards the middle rather than unfairly disadvantaging defendants. Or as explained by Chief Justice Martin:

> … people who've been sued by people who are funded by litigation funders don't like them and that's understandable but they do, I think, augment the very limited means by which people who can't otherwise afford to go to court can have their cases properly presented. (trans., p. 600)

By providing funding for plaintiffs, funders prevent 'deep pockets alone from making companies immune to legal pressure on wrongdoing' (Rich Krasnoff, sub. 100, p. 1). They are effective in this role, specifically because their involvement is based on financial interest:

> Australian Securities and Investments Commission chairman Greg Medcraft said class action litigation was 'very good at equalling up the tables' and was 'a good market-driven solution'. 'I think they democratise access to the law,' he told the Financial Review Legal Conference in Sydney on March 30. 'If done responsibly, I think they are a good thing.' Australian Competition and Consumer Commission chairman Rod Sims said … 'From our point of view that is terrific, because if companies are trying to enforce the act that means less that we have to do … If companies feel aggrieved, the more they take the action themselves rather than through us, the better.' (Boxsell 2012, p. 59)

[10] *Blairgowrie Trading Ltd & Anor v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liquidation) CAN 077 721 129 & Ors* NSD 1609/2013.

Litigation funders provide an important complement to regulatory activity by enabling aggrieved parties to initiate and maintain claims. In a recent report on Major Project Development Assessment Processes, the Commission highlighted the benefits of third party enforcement, noting that 'not even the best-resourced and most diligent and competent regulatory agencies could be expected to deal with, or even be aware of, every significant act of noncompliance' (PC 2013d, p. 313). While regulators focus their limited resources on penalising wrongdoing, litigation funders can facilitate compensation for the wronged parties. This complementary relationship has played out in class actions against Storm, Centro Retail Group and Multiplex, where funders pursued compensatory actions following punitive action against those companies by ASIC (GLG 2014).

Overall, litigation funding promotes access to justice, and is particularly important in the context of class actions where, although action could create additional benefits when viewed from a broader or community-wide perspective, (often inexperienced) claimants might not take action given the scale of their personal costs and benefits.

18.3 A way forward for private funding

The Commission supports the role of third party litigation funders in facilitating plaintiffs to pursue their claims and considers that there would be benefit from lawyers entering this market by being permitted to charge damages-based fees. However, while private funding provides clear access to justice benefits, there is concern that, if unmonitored, litigation funders and lawyers could commit violations which eliminate the 'equalizing effect' between corporate firms and plaintiffs that private funding is intended to create (Kalajdzic et al. 2013). Accordingly, funding, by both lawyers and third parties, needs to be subject to regulation that protects the consumers of these services and prevents abuse.

Improving the operation of conditional billing

There is already support for conditional billing, both in Australia and overseas. Following a comprehensive review in the UK, Lord Justice Jackson concluded in favour of conditional fee agreements:

> … there can be no objection in principle to lawyers agreeing to forego or reduce their fees if a case is lost. Nor can there be any objection to clients paying something extra in successful cases as compensation for the risks undertaken by their lawyers, provided that the extra payment is reasonable. (Jackson 2009a, p. 96)

And, while some concerns have been raised about consumers' ability to understand these agreements (chapter 6), the access to justice benefits cannot be denied. As one participant submitted:

> We would not have been able to sue the Defendant without no win/no fee. No win/No fee enables individuals to sue large organisations. Whilst it may have been possible for us to take out a mortgage or otherwise obtain credit, we would not have gone down that path. We had

> already suffered huge losses (over $500,000). … If we had to continually fund litigation and the Defendant was aware of that, they could have continually delayed the matter proceeding to Court hoping we would have run out of funds. (Gabrielle Hall, sub. DR323, p. 1)

As noted above, a number of safeguards already exist for conditional billing: its use is limited to particular civil (excluding family) matters; additional disclosure requirements and; for litigious matters, a 25 per cent limit on the uplift fee. However, the evidence presented by Funds in Court suggests that this limit is no longer a maximum but has become the default, with lawyers charging the full 25 per cent regardless of the risk associated with a claim. The Law Institute of Victoria also noted:

> At the time the cap was introduced, 25 per cent was considered to be the uppermost amount that could be charged however, practitioners are able to charge a lesser fee - or no fee. There is little evidence that in practice a lesser uplift fee is charged. If the upper limit of the fee is increased it is more than likely that the increased amount will be what is typically charged. There is probably no appetite to increase the uplift fee, however, with the benefit of consumer understanding about the operation of the fee there remains the option for clients to negotiate the reduction of the fee. Thus, even a modest increase in the fee could be managed well by all parties. (sub. DR221, p. 50)

The fact that, at present, the full uplift is charged as a default suggests that clients have limited information and bargaining power — meaning they would be unlikely to be able to negotiate as suggested by the Law Institute of Victoria. Negotiating uplift is particularly difficult for clients because the lawyer is better able to assess the prospects of the claim. Under these conditions, an increase in the uplift fee would likely lead to larger fees without a corresponding increase in risk accepted by lawyers — meaning that there would not necessarily be any access to justice benefits from such an increase.

As a result, the Commission considers that the limit on uplift fees should not be increased from 25 per cent at present. Rather, there needs to be better oversight to ensure that lawyers do not charge the full 25 per cent when this is not warranted. The measures outlined in chapter 6 should go a significant way to improving oversight of billing for legal services, and providing effective restitution for consumers in cases of misconduct or overcharging.

Allowing damages-based billing

Based on the examination above, the Commission considers that damages–based billing is unlikely to promote unmeritorious claims or create insurmountable conflicts of interest compared with permitted forms of billing.

On the contrary, damages-based billing is likely to provide some advantages. First, it can increase access to legal advice where lawyers take on claims they would not have accepted under other forms of billing. At the other end of the spectrum, it may create some competition for litigation funders (discussed below). Second, it benefits claimants by providing an upfront assurance that legal fees will be commensurate to the value of taking

legal action. As noted by the Victorian Law Reform Commission (VLRC), in its *Civil Justice Review* (2008), the prohibition on damages–based fees is contrary to proportionality — a key goal of an effective civil justice system. Additionally, as a regulatory tool, prohibition should only be used as a last resort — where there are insurmountable risks associated with an activity that far exceed its benefits.

And finally, as explained in chapter 6 in relation to hourly billing, banning particular forms of billing can inhibit pricing innovation — potentially prohibiting firms and clients from using the billing option that best reflects the value of services provided and the circumstances of the client.

Balancing the potential risks and benefits, the Commission recommended that the prohibition on damages-based fees be removed in its draft report. This was met with a polarised reaction from participants (box 18.4).

Box 18.4 Selected participants' views on damages-based billing

Some participants were strongly opposed, often citing the potential for conflicts of interest:

> We are concerned that allowing lawyers to charge contingency fees (damages-based billing) will undermine the well-respected integrity of the legal profession and will have the potential to create conflicts of interest between lawyers and clients. (AICD, sub. DR172, pp. 4–5)
>
> Lifting the ban is likely to affect significantly the independent judgement of lawyers and undermine the rationale for permitting third party (non-lawyer) litigation funding. Further, any access to justice improvements that contingency fees may facilitate is outweighed by the costs of permitting this type of billing arrangement. (Allens, sub. DR232, p. 1)
>
> This is an entirely different scenario from the conditional-billing arrangement where time-cost billing is accepted. For example, damages-based billing can foreseeably lead to the early or inopportune cessation of proceedings when the lawyer considers it uneconomical to persist with the proceeding. (UNSW Law Society, sub. DR289, p. 17)

While others recognised that, with adequate consumer protection, there are potential benefits to introducing damages-based fees:

> Subject to there being adequate consumer safeguards, Legal Aid NSW has no objection to relaxing the restrictions on private practitioners charging [damages-based] contingency fees. [They] would provide a market mechanism to enable private practitioners to undertake matters that they are currently unwilling to take on a conditional fee basis, because the risk of conducting complex litigation is not adequately rewarded by the chance to recover their ordinary fees. (Legal Aid NSW, sub. 68, p. 105)
>
> … private funding of litigation (including through class actions) can be an efficient way to improve access to justice and can reduce reliance on public funding for litigation (whether through regulator action or legal assistance services). We agree with the Commission's view that damages based billing does not in practice create a different set of risks to conditional billing. (Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202, p. 29)

The concerns expressed highlight the need for effective consumer protection. Of particular concern is that, under current conditions in the market, 'retail' consumers are vulnerable to being overcharged — both in conditional arrangements where the maximum uplift is being levied as a default and in other billing arrangements (chapter 6). Initially — at least while

these broader issues in the market are addressed — the Commission supports a percentage limit on damages-based fees.

Some participants commented on appropriate limits, for example Maurice Blackburn (sub. DR197) proposed 35 per cent of the settlement or award, while the Actuaries Institute (sub. DR243) suggested a 20-25 per cent 'safe harbour' level, with higher amounts subject to court approval.

The Commission considers that a single percentage limit will not provide adequate protection for consumers because any such limit increases proportionately with the size of the settlement or award and so does not prevent lawyers earning excessive or 'windfall' profits on high value claims. To address this concern, percentage limits need to be set on a sliding scale, where the percentage limit progressively drops as the settlement or award increases (box 18.5).

Further, in order to target the percentage limits to those consumers that are vulnerable to signing up to an unfair percentage, a sliding scale should only apply to 'retail' clients, with no restriction for 'sophisticated' clients.

The Commission does not have sufficient information to recommend appropriate percentage limits at this stage. Instead, these should be determined by governments through an independent, transparent evaluation of typical ranges of recovered amounts and legal fees in addition to consultation, both within and outside the legal profession. This evaluation could draw on data from the first year of operation of the 'online cost resource' recommended in chapter 6. Such an approach was supported by Consumer Action Law Centre and Consumer Credit Legal Centre NSW:

> We do not have a fixed view on the appropriate level, but suggest that governments undertake widespread consultation about this issue. We submit that a significant proportion of compensation awards should be paid to claimants, and that sharing of court and settlement awards in such matters should be — 'fair and reasonable'. (sub. DR202, p. 30)

Some overseas models may serve as a starting point, a number of states in the US use sliding scales for medical liability and malpractice claims, for example in California percentages are capped at:

- 40 per cent of the first US$50 000 recovered
- 33.3 per cent of the next US$50 000
- 25 per cent of the next US$500 000, and
- 15 per cent of any amount exceeding US$600 000 (CA Bus. & Prof. s. 6146).

Similarly, in New York, percentages are capped at:

- 30 per cent of the first US$250 000 recovered
- 25 per cent of the next US$250 000
- 20 per cent of the next US$500 000

- 15 per cent of the next US$250 000, and
- 10 per cent of any amount over US$1 250 000. (N.Y. Judiciary Law s. 474(a))

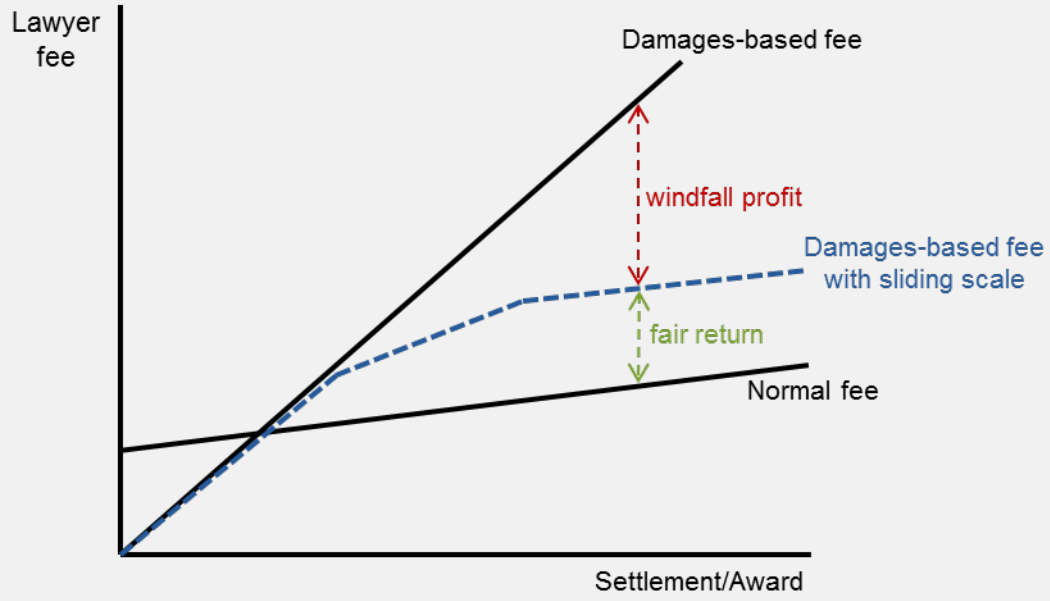
A sliding scale was also recommended for personal injury actions in the Taylor review in Scotland (2013) with significantly lower percentage limits: 20 per cent of the first £100 000, 10 per cent between £100 001 and £500 000 and 2.5 per cent on amounts over £500 000.

Box 18.5 Percentage limits on a sliding scale

Normal fees, based on the lawyer's hours, tend to increase at a slower rate than the award or settlement (chapter 3), while damages-based fees, by their nature, increase proportionally with the settlement or award. The diagram below depicts the divergence in fees that can occur as the settlement or award increases — which can potentially create windfall profits for lawyers on high value claims.

Windfall profits can be avoided by imposing percentage caps on a 'sliding scale' — an upper percentage limit on fees that reduces as the amount recovered increases. Such a scale tapers the growth of the lawyer's portion of any settlement or award. While the lawyer's payment still increases, it does so at a progressively slower rate as the size of the settlement or award increases. This ensures lawyers' fees for large claims are not excessive relative to their costs.

That said, some extra profit relative to normal fees is warranted, analogous to the uplift fee for conditional billing. Ideally, the sliding scale needs to balance curtailing windfall profits while allowing a fair return for the lawyer, including interest for delaying the payment of fees and compensation for the additional risk borne. The compensation for risk should reflect a spread of wins and losses across a firm's overall caseload.



In contrast to overseas jurisdictions that apply sliding scales only to particular civil actions, the Commission considers that, at least initially, such sliding scales should apply to damages-based billing for all types of matters where it is permitted. Once jurisdictions

develop and implement a sliding scale, it should operate for a period of three years. Following this initial period, the scale should be subject to review, and can be refined to more accurately reflect fair returns, allow appropriate incentives for lawyers as well as guarding against excessive windfall gains. This review would benefit from data on damages-based billing rates collected as part of the online cost resource recommended in chapter 6.

In addition, effective disclosure is required to ensure that clients understand the fee. Since a potential benefit of damages-based billing is that it is a simpler fee structure for clients to understand — disclosure requirements need to be developed with a view to preserving its simplicity. This would include a requirement that the percentages charged for different recovered amounts be outlined upfront. Also, where a damages-based fee is levied it should be the sole form of billing. That is, damages-based fees should not be used in conjunction with other forms of billing such as a share of damages as well as an hourly fee. Finally, in line with broader disclosure requirements the billing agreement should make clear the client's other liability for costs — for example whether the client or lawyer is liable for disbursements and adverse costs (discussed below).

RECOMMENDATION 18.1

The Australian, State and Territory Governments should remove restrictions on damages-based billing (contingency fees). This recommendation should only be adopted subject to the following protections being in place for consumers:

- the prohibition on damages-based billing for criminal and family matters, in line with restrictions for conditional billing, should remain.
- comprehensive disclosure requirements — including the percentage of damages, and where liability will fall for disbursements and adverse costs orders — being made explicit in the billing contract at the outset of the agreement.
- percentages should be capped on a sliding scale for retail clients with no percentage restrictions for sophisticated clients.
- damages-based fees should be used on their own with no additional fees (for example, lawyers should not be able to charge a percentage of damages in addition to their hourly rate).

Protecting clients of third party litigation funders

While litigation funding provides clear access to justice benefits for plaintiffs, the Commission considers that direct regulation of litigation funders is appropriate in order to mitigate the following risks.

- Agreements may be struck unfairly (for example, with excessive commissions) because consumers have limited capacity and experience compared to funders.

- Funders may exercise too much control over proceedings, and may place pressure on the court system.
- There are potential conflicts of interest between funders, lawyers and plaintiffs.
- There is a lack of financial supervision and therefore no measures to encourage a funder to hold adequate capital relative to its financial obligations.

Litigation funders are already regulated by courts to some extent. As noted above, courts have previously ordered funding agreements to be rewritten to facilitate informed consent. Brian Ward & Partners also noted that litigation funding has led to security for costs orders being both higher and more likely '… because the courts see less need for a discount where the entity standing behind the plaintiff is there for a purely profit motive' (sub. DR292, p. 2).

Such court oversight provides some assurance to clients of litigation funders and, to some extent, mitigates the first three risks above. However, this is predicated on courts being aware that a funder is involved in a case, and having jurisdiction over the funder. Spender (2008) noted that although courts have inherent jurisdiction to make orders binding on funders, because funders are not officers of the court and not necessarily bound by the rules of the court, sanctions for contempt of court or abuse of process may be slower and more difficult to impose. To this end, the VLRC (2008) recommended that a set of 'overriding obligations' in relation to conduct in civil proceedings should apply not only to litigants and legal practitioners, but also to third parties, such as litigation funders and insurers, to the extent that they influence proceedings. To facilitate this, the VLRC also recommended that:

> Parties should be required to disclose the identity of an insurer or litigation funder that exercises control or influence over the conduct of the insured or assisted party in the course of the proceeding. The court should have discretion to order disclosure of a party's insurance policy or funding arrangement if it thinks such disclosure is appropriate. (2008, p. 476)

Some courts have implemented changes that reflect these recommendations. The Federal Court and Supreme Court of Victoria have released practice notes requiring that, for class action proceedings, funding agreements be disclosed prior to the initial case management conference and provide for redaction 'to conceal information that might reasonably be expected to confer a tactical advantage on the other party'.[11] The Supreme Court of Western Australia has also introduced rules requiring 'interested non-parties' such as litigation funders to be identified to the court and places duties on these parties in relation to the conduct of the case, including a duty to cooperate with the parties and the Court and not engage in misleading or deceptive conduct.[12]

[11] Federal Court Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976 (Cth) (commenced July 2010) and Supreme Court of Victoria Practice Note No 9 of 2010: Conduct of Group Proceedings (commenced January 2011).

[12] Supreme Court Amendment Rules 2012 Order 9A.

Therefore, in relation to the first three risks, it appears that courts are both active and well-equipped to monitor litigation funders and are capable of introducing the necessary rules themselves.

However, court oversight is undertaken on a case-by-case basis, and thus cannot verify whether a funder is in a sound position to meet all of its concurrent financial obligations, particularly given that funders tend to operate across multiple jurisdictions. The Australian Shareholders' Association outlined the risk for clients:

> … the capital adequacy of those approaching small shareholders seeking money from them is probably the most important area in terms of any regulatory intervention to ensure that they have got the readies to back up their initiation of a class action. (trans., p. 711)

While this risk is relatively limited for established market players who have reputations at stake, it is nonetheless possible with 'fly by night' or disreputable operators. The case of Argentum Capital's involvement with Centaur Litigation provides an example of the possible risks.[13]

In the United Kingdom, a self-regulatory approach has been adopted via a *Code of Conduct for Litigation Funders* published by the Association of Litigation Funders of England and Wales. Members of the Association agree to abide by the Code, which sets out requirements relating to the conduct of funders, including: ensuring promotional literature is clear and not misleading; not seeking to influence the client's lawyer; and capital adequacy requirements (ALF 2014a). The office of the Association also provides a complaints avenue for consumers who believe a funder has violated the Code. In February 2014 the Association introduced a £2 million minimum capital requirement. This is below what could be regarded as adequate capital requirements but is designed 'to prevent brokers claiming to have funds trying to join the association' (Beioley 2014).

The Code does not have regulatory force, but can have some effect, provided the members voluntarily comply. For example, Argentum Capital offered to withdraw its membership from this scheme subsequent to the Association making enquiries about concerning media reports (ALF 2014b).

While such requirements are important, the Commission considers they are more appropriately set out explicitly in court rules and through licensing under enforceable legislation (in relation to capital adequacy), rather than by a self–regulatory industry code.

In its draft report, the Commission recommended that litigation funders be licensed as financial service providers under the Corporations Act, either with an Australian financial services licence (AFSL) or a tailored licence, and monitored by ASIC. This form of

[13] Butler (2014a, 2014b) reported on Argentum Capital, an international funder, which was funding Maurice Blackburn's equine influenza class action. Argentum was backed by Centaur Litigation, which collapsed in June following revelations that it was a Ponzi scheme. Maurice Blackburn had ended its agreement with Argentum in May. Up to this time all of the firm's bills had been paid and $2.25 million had been lodged with the Federal Court as security for the defendant's (Commonwealth) costs. However, Centaur/Argentum were involved in a number of other actions worldwide.

regulation was met with strong support from participants — both from supporters and opponents of litigation funding.

A small number of participants did not support licensing. Specifically, Maurice Blackburn (sub. DR197) and the Australian Shareholders' Association were both concerned that licensing could create a barrier to entry:

> We don't support [licensing] because we think that would diminish competition and that in effect it would be a way in which these funders were muzzled or made it hard for them to take action. (Australian Shareholders' Association, trans., p. 710)

While the Commission understands that licensing and capital requirements could create some barriers to entry and advantage incumbents in the market, it nevertheless considers these are justified to ensure that only reputable and capable funders enter the market. Moreover, given the case-by-case nature of court ordered security for costs (and that these only cover defendant legal costs), the Commission remains in favour of a licence regime to verify the capital adequacy of litigation funders in addition to court oversight.

Importantly, as with other financial regulation, it would only be practical for capital adequacy conditions to require management of the financial risk, not its elimination. For instance, the purpose of the current AFSL is to ensure that:

- licensees hold sufficient financial resources to conduct their financial services business in compliance with the Corporations Act
- there is a financial buffer that decreases the risk of disorderly or non–compliant wind-up if the business fails
- there are incentives for owners to comply with the Corporations Act through risk of financial loss (ASIC 2013).

An AFSL is not intended to prevent companies failing or becoming insolvent, nor does it guarantee compensation to consumers who suffer a loss. Nonetheless, the presence of the licence itself may provide adequate regulatory oversight to address the risk of disreputable operators. Careful consideration of the exact balance between consumer protection and regulatory burdens would be an important consideration for the consultation process undertaken to develop a licence.

Further, it is unclear whether ASIC should administer the licence given its mandate is being reviewed as part of the Financial System Inquiry (the Murray Inquiry). The Interim Report has flagged potentially narrowing ASIC's functions:

> Given the breadth of ASIC's mandate, it can be argued that ASIC has too many regulatory functions, with staff spread between too many responsibilities. It is possible that narrowing ASIC's mandate may allow it to become a more tightly focused regulator and target higher-risk entities, although there are also benefits and efficiencies from bringing together similar functions. … Options for narrowing ASIC's mandate could include moving consumer protection functions to the ACCC or a new financial consumer protection agency, creating a new financial services and

> conduct regulator, creating a new specialised market supervisor … (Murray 2014, pp. 3–124, 3–127)

The Commonwealth Treasury's initial submission to the Murray Inquiry noted that policy changes since the Wallis Inquiry had blurred some of the responsibilities between the Australian Prudential Regulation Authority (APRA) and ASIC and submitted that 'It is timely for the Financial System Inquiry to address overlaps or gaps between the roles of the regulators to ensure a clear demarcation between regulators is maintained' (2014, p. 26). It appears that litigation funding falls in one such 'gap'.

On the one hand, ASIC's capital adequacy requirements may fall short of the large long-term commitments made by litigation funders, suggesting that APRA could be the appropriate authority, both because of the long-term promises and that indemnity for adverse costs is akin to a form of insurance. However, a number of other considerations — including the size of the litigation funding market, that it is not integral to the overall stability of the financial system, and the intensity of promises made[14] — together all suggest that litigation funding does not warrant full-scale prudential supervision by APRA.

Given the 'regulatory ground' is shifting, the Commission does not consider it appropriate to nominate a particular agency at present. However, the appropriate licence conditions should be determined by a proper consultation process regarding draft licence regulations. Once a licence is developed, responsibility for administering the licence scheme should be clearly allocated to a single regulator to avoid any confusion as to overlapping regulatory responsibilities.

RECOMMENDATION 18.2

The Australian Government should establish a licence for third party litigation funding companies designed to ensure they hold adequate capital relative to their financial obligations and properly inform clients of relevant obligations and systems for managing risks and conflicts of interest.

- Regulation of the ethical conduct of litigation funders should remain a function of the courts.
- The licence should require litigation funders to be members of the Financial Ombudsman Scheme.
- Where there are any remaining concerns relating to categories of funded actions, such as securities class actions, these should be addressed directly, through amendments to underlying laws, rather than through any further restrictions on litigation funding.

[14] 'Intensity' refers to a combination of the inherent difficulty of honouring promises, the difficulty in assessing creditworthiness of promisors and the adversity caused by breaching promises (Wallis 1997).

A new market — litigation funders and lawyers competing

At present, litigation funders and lawyers offer different services — unlike lawyers who only forego their own fee, litigation funders usually pay the full costs of litigation (including disbursements), manage cases financially and provide indemnity for adverse costs.

As a result, funding provided by lawyers and litigation funders tends to diverge based on the size and type of claim. The Law Council noted that most personal injury and workers compensation claims are funded on a 'no win no fee' basis by lawyers rather than by third parties (Grave et al. 2012). Some firms are capable of pursuing class actions on a 'no win no fee' basis without third party funding. In the 18 months to June 2014, only 7 of the 27 class actions filed were backed by third party litigation funding, though, based on promotional material, third party funded actions appeared to be the largest by class size and claim value (King & Wood Mallesons 2014).

Some cases are too large for law firms to risk bearing the associated cost, for example Maurice Blackburn had considered the viability of pursuing a bank fees class action without third party involvement:

> … but had determined that, amongst other things, a number of cases against the major banks would create a drain on the financial resources of the firm. It was not until funding became available that these cases became a realistic option to pursue. (sub. DR302, p. 3)

If lawyers were permitted to charge damages-based fees, as recommended by the Commission, there is likely to continue to be some degree of specialisation. However, there will be areas where the two converge, leading to increased competition in the market for litigation funding. Maurice Blackburn expected that this would create downward pressure on prices:

> … it must increase transaction costs to have two parties, each of whom need to make a profit, involved in the transaction, and each of whom need to take some premium for risk in the way in which arrangements are structured. At a practical level what we do know is that in funded class actions the percentage commission paid to the litigation funder will be between 30 and 40 per cent and that legal fees will on average be about 12 per cent. It is plain that a contingent fee of 35 or 30 or 25 would be a cheaper outcome for consumers. (trans., p. 640)

Other participants, such as Allens (sub. DR232) and the Australian Shareholders' Association (trans., p. 714), highlighted the benefits of maintaining separation between funders and lawyers. Bentham IMF, while conceding that allowing lawyers to charge damages-based fees would likely improve access to justice, said that:

> Third party litigation funding can reduce the agency problem by ensuring that the lawyer is remunerated regardless of the outcome to the litigation and by introducing a sophisticated and skilled repeat litigant whose interests are aligned with the claimant's but who does not suffer the same level of information disadvantage as the claimant. (sub. DR204 p. 4)

While the Commission agrees that third party funding provides benefits, particularly in relation to supervising the lawyer on behalf of the client, these benefits come at a premium to consumers. If the two services are available side by side, it is up to litigation funders and lawyers to promote the relative value of their services and for consumers to decide.

Nevertheless, it is pertinent to consider whether lawyers using damages-based billing and litigation funders should be subject to the same regulatory treatment, particularly given that these create similar risks for consumers — such as the potential for conflicts of interest or unfair commissions. Several participants suggested that, where lawyers charge damages-based fees, they should be held to the same regulatory standards as funders.

The first question is whether there should be a limit on the percentage of damages paid to litigation funders (similar to the limits recommended for lawyers above). While there is likely to be some overlap, litigation funders provide a different service to lawyers — they provide funding and manage claims on behalf of clients rather than providing legal advice. As noted above, current commissions charged by funders appear commensurate to the services offered. Further, if a limit is imposed on lawyers using damages-based billing, then to some degree funders' fees will become constrained, as they would have to differentiate their service offering to justify charging higher amounts, a point noted by Maurice Blackburn (trans., p. 641).

Therefore, the Commission considers that there is no need to place a limit on the fees of litigation funders.

The second question is whether, where lawyers charge damages-based fees, they should be required to pay for disbursements and indemnify clients against adverse costs. Several participants considered lawyers should be subject to such requirements:

> Anyone who funds an action on behalf of another (including lawyers on a no-win no fee basis or contingency fee) should be responsible for an adverse costs order so that the interests of the litigant and funder are aligned. (Negocio Resolutions, sub. DR198, p. 10)

> … we suggest that close consideration be given to exposing lawyers who charge on a contingency fee basis to express regulatory requirements that they incur the risk of an adverse costs order, meet and/or contribute to security for costs and be subject to prudential requirements. As contingency fees give the lawyer a share of the proceeds of litigation in the event of success, it would be unjust if they may be able to escape liability for costs in the event of failure. (Allens, sub. DR232, p. 4)

> The position, knowledge and sophistication of the consumer does not change as a consequence of where they receive their funding. 'Damages based billing' is, simply put, litigation funding under a different name. If a litigation funder is to be subject to licensing, ethical standards and monitoring by ASIC and the Courts, and also be exposed to adverse costs orders as a consequence, those requirements and consequences should be applied to any lawyer providing that same service. (Johnson & Johnson Family of Companies, sub. DR239, pp. 6–7)

In terms of its incentive characteristics, damages-based billing is similar to conditional billing for lower value claims, but in the case of high value claims, it takes on more

characteristics of litigation funding.[15] Accordingly, the regulation of damages-based billing should vary with the claim value (and type) to ensure competitive neutrality in relation to both.

In line with this, formally requiring indemnity for adverse costs in large claims has prima facie appeal as it transfers the risk to the party that is better able to assess the risk. However, litigation funders are not required by legislation to cover disbursements or indemnify for adverse costs, they typically (but not always) choose to do this as part of their business practice — a practice that has become common in the face of the possibility that courts have discretionary power to award costs against non-parties to litigation, such as litigation funders (as was the case in *Gore v Justice Corporation*). This discretion has emerged through the development of common law, and as such can be subject to some uncertainty. To avoid this, Bentham IMF submitted that the power to award costs against lawyers charging damages-based fees:

> … should be expressed in legislation or rules of the court, rather than left to the development of the common law. Subject only to this clarification, the courts' discretion as to whether to award costs against a funder or lawyer should remain unrestricted in all cases. (sub. DR204, p. 9)

To preserve freedom of contract, there should be no upfront requirement for either lawyers or funders to indemnify for adverse costs. However, court rules should be amended such that, where lawyers charge damages-based fees, the courts are able to treat them in the same way as funders for the purposes of ordering security for costs or adverse costs. While this may not be appropriate for matters with relatively small amounts at stake, it would be a valid consideration for many class actions. Amending court rules in this way would also require that damages-based agreements be disclosed to courts in a manner similar to litigation funding agreements.

The possibility that lawyers may choose to provide indemnity for adverse costs also raises the prospect that they be subject to the same licensing as litigation funders for capital adequacy requirements — lawyers are already subject to the courts and professional regulators in relation to their professional and ethical conduct.

Such simplification ignores the relative risks presented by their business models. Litigation funders focus their portfolios on higher value claims, while law firms will have a combination of income sources, encompassing both normal and damages-based billing, across a range of matters including complex litigation and simple transactions. As such, the Commission considers that case-by-case security for costs should be sufficient for law firms.

[15] For example, large firms specialising in high value claims might choose to include disbursements and adverse costs to compete with litigation funders, while smaller firms will not seek to bear this risk.

RECOMMENDATION 18.3

Court rules should be amended to ensure that both:

- the discretionary power to award costs against non-parties in the interests of justice; and
- obligations to disclose funding agreements

apply equally to lawyers charging damages-based fees and litigation funders.

19 Bridging the gap

Key points

- Disputes span all income levels. But even many relatively affluent Australians could not afford a lawyer if they had a serious legal issue. Legal assistance providers also indicated that those refused a grant of legal aid (on the basis of means) cannot necessarily afford to engage a private lawyer — there is a 'justice gap'.
- Many forms of information and legal advice are available free of charge, including helplines, limited up-front advice and self-help kits. Legal assistance providers note that these services are provided, in part, because of the recognised justice gap.
- The expanded use of complaints handling bodies and other informal dispute resolution mechanisms can help people — irrespective of their means — to resolve their disputes in a way that is proportional and appropriate to the dispute.
- Unbundling — a half-way house between full representation and no representation — is one way of expanding the options for those who miss out on legal assistance by making legal costs more manageable and predictable. Changes to professional conduct rules and some court rules are required to facilitate a shift towards greater unbundling of legal services.
- Legal expenses insurance (LEI) could make legal representation more accessible for middle income earners, but challenges on both the supply and demand side of the market for LEI (adverse selection problems, uncertainty over legal costs, lack of knowledge about risks of legal problems and lack of appetite for the product) limit the extent and coverage of such insurance.
- Some stakeholder raised the option of a legal expenses contribution scheme (LECS) — that is, an income contingent loan — as a tool for those on low and middle incomes to pursue cases of merit.
  - The Commission does not consider that LECS-style initiatives are suitable for those on very low incomes and that a better approach is to extend the means test for legal assistance services.
- The Commission has not found any barriers that impede the use of not-for-profit models of legal assistance. While valuable, such models are not likely to be viable on the scale necessary to significantly address unmet legal need.

Resolving a civil law matter can cost many thousands of dollars. Civil law matters are also often not predicted, and therefore not something that Australians routinely save or budget for. As Community Law Australia said:

> It is impossible to plan for when many legal issues might arise. People don't budget for legal fees for issues like marriage breakdown, unfair dismissal, eviction, discrimination, getting ripped off or debt problems … For a mother escaping a violent partner and trying to protect herself and her children with an intervention order and appropriate family law orders, or for

> grandparents whose retirement home, where they invested their life savings, has gone into administration, or for a pregnant woman discriminated against by her employer, the costs of paying for advice and taking action can be extremely prohibitive. (2012, p. 4)

Mounting a civil case also often requires meeting upfront costs, and when combined with the risk of an adverse cost order, this can be a significant barrier to access to justice for Australians who lack financial resources, but have a meritorious claim. As the Centre for Innovative Justice (CIJ) said:

> For a great many in the Australian population, the prospect of seeking professional help to resolve a civil legal problem can be too costly to contemplate. In fact, many people perceive professional assistance in some areas of the law to be out of reach to all but those with either the greatest, or the least, economic resources. (CIJ 2013, p. 7)

The market has responded to the 'justice gap' by offering alternative modes of billing that make meeting lawyers' fees more manageable (chapters 6 and 18). But despite this market response, a justice gap remains.

This chapter looks at options for addressing the justice gap where people who have a meritorious case that warrants the services of a lawyer are not eligible for legal assistance or able to afford legal advice or representation (commonly referred to as the 'missing middle'). Section 19.1 explores the dilemma of the 'missing middle', including the nature of their legal needs and what options are currently available. Unbundling of legal services is discussed in section 19.2. Two complementary funding approaches — legal expenses insurance and a legal expenses contribution scheme — are examined in sections 19.3 and 19.4. Finally, section 19.5 examines the Salvos Legal Model, a legal assistance model involving the not-for-profit sector.

19.1 A 'missing middle'

Disputes or legal problems span all income levels. But the Commission heard that the high costs of legal services mean that many Australians are unable to pay for a lawyer to represent them (box 19.1). Legal aid commissions (LACs) reported not being able to assist many low income Australians because of tightened eligibility criteria (chapter 21). For example, the Northern Territory Legal Aid Commission said:

> Centrelink recipients fall within the Commission's mean test, however, there are many other people who are 'working poor' with significant expenses who are not eligible for legal aid. (sub. 128, p. 12)

Box 19.1 **Participants point to a 'missing middle'**

The New South Wales Society of Labor Lawyers:

> Faced with an overwhelming demand for legal assistance, CLCs [community legal centres] have been forced to limit eligibility for legal assistance to the most disadvantaged clients. This has led to a growing 'middle ground' of people who do not qualify for the assistance of either Legal Aid or the services provided by CLCs, but who are nevertheless unable to afford legal [representation] on a commercial basis. (sub. 130, p. 19)

Prue Vines:

> It would seem that the legal profession may be pricing itself out of the market, in that a very large part of the middle class finds fees far too large to contemplate … (sub. 17, p. 2)

Community Law Australia:

> The high price of legal services means that many Australians would find it difficult to pay for a lawyer for anything but the most basic legal issues. When people who can't afford a lawyer turn to government funded legal assistance services, they find that due to chronic funding shortages, ongoing help is often restricted to those on the lowest incomes, and then only for a limited range of mainly family law and criminal law issues. Unlike the health and education system in Australia, there is no universal safety net for legal help. (2012, p. 3)

National Legal Aid (NLA) also said that being refused a grant of legal aid does not mean that you can afford to pay for a private lawyer:

> When a person is refused a grant of aid on the basis of means, it does not mean that they can afford to engage a private practitioner as tests are stringent and market rates are markedly different to legal aid rates. There is consequently a significant justice gap. (sub. 123, p. 22)

Indeed, the Law Institute of Victoria (LIV) recognised that:

> … a significant proportion of middle [income] Australians are precluded from pursuing access to justice because their income level is insufficient to meet the financial costs of legal services at the time it is required. (sub. DR221, p. 53)

The Public Interest Advocacy Centre spoke about a 'U-shaped' relationship between income and lawyer use — that is, people eligible for legal aid and those with high incomes are more likely to use lawyers than middle income groups:

> The impact of cost is mitigated for those on lowest incomes with problems where there is low or no cost assistance available from legal aid or community legal centres, indicating the success of those programs in broadening the accessibility of legal services. Lawyers are used most often by those on higher incomes. (sub. 45, p. 40)

Surveys undertaken in New Zealand, Canada, the Netherlands and the United Kingdom (countries with established legal aid schemes) all point to a 'U-shaped' distribution. In countries with little in the way of legal aid, the relationship between income and lawyer use is 'almost linear' (Legal Services Research Centre 2011, p. 1).

Using the *Legal Australia-Wide (LAW) Survey*, Pleasence and Macourt (2013) found that in Australia lawyers are most often used by those on higher incomes. To some extent this

could reflect the greater monetary value of the issues faced by those on higher incomes (although the analysis did control for problem severity). Lawyer costs appear to be mitigated for Australians on the lowest incomes in areas of legal need where assistance is available from LACs and community legal centres (CLCs) at little or no charge (such as family problems). Pleasence and Macourt said the findings:

> … point to the potential difficulty faced by those on lower-middling incomes in obtaining legal services, and suggest the existence of a 'U'-shaped relationship between income and lawyer use in the case of family problems. To the extent that this is driven by cost concerns, financial assistance and alternative payment mechanisms may be effective in broadening access to legal services. (2013, p. 4)

However, the evidence also suggests that when it comes to the use of lawyers, problem type tends to outweigh other considerations. For example, Kritzer (2008) drawing on data across seven jurisdictions (the United States, England and Wales, Canada, Australia, New Zealand, the Netherlands and Japan), found that the decision to use a lawyer was more a function of the nature of the dispute and was dictated by an evaluation of the costs and benefits of hiring a lawyer.

It is not just the costs of legal representation that represent a barrier to the missing middle. Kritzer noted that the potential cost of losing and having to pay the other side can hinder access to justice, and that:

> The downside risk is most important for the middle class because it does not pose a risk to those with no wealth because they have nothing to pay to the other side if they lose and those with substantial wealth can afford to take risks, at least in relatively typical kinds of cases. …
>
> The middle class gets squeezed by both sides of the cost equation: they cannot afford really to go out and hire lawyers without depriving themselves of life's necessities, and they cannot afford the downside risk of losing if they do pursue a case with any significant risk of losing. (2005, pp. 258–9)

What is available for the missing middle?

As discussed in earlier chapters, many forms of information and legal advice are available to *all* Australians, including websites, helplines, information sheets, community education sessions, self-help tools (often provided by LACs and CLCs). Legal Aid NSW said these services are provided, in part, because of the recognised justice gap:

> While the priority of Legal Aid NSW is the provision of legal assistance to the disadvantaged, it provides a wide range of services including information, referral, community legal education and legal advice and minor assistance to the broader community. In part, these services are provided in recognition of the 'justice gap' for a large section of the community including the so called 'working poor'. (sub. 68, p. 11)

Middle income Australians are more likely to have higher levels of education and therefore greater capacity to navigate the legal system (chapter 5). Appropriate and timely

information about possible options (including the costs of the various options) can go some way to help those in the missing middle address their legal problems.

The Legal Services Commission of South Australia noted that:

> While the cost of litigation is beyond the means of most people, timely advice can help to counsel against unnecessary legal action and reduce costs. (sub. 93, p. 15)

In recent years, significant effort has gone into expanding the use of informal dispute resolution mechanisms and complaint handling bodies (such as ombudsmen) to help Australians resolve disputes in a way that is proportional and appropriate to the dispute (chapters 2, 6, 7 and 8). As NLA said:

> The reality for Australians with legal needs is that the various forms of dispute resolution available through a variety of forums are more likely to offer a pathway which will offer an acceptable outcome for all parties. (sub. 123, p. 24)

Courts and tribunals have also sought to simplify processes so that it is easier for people to navigate their way without the need for assistance from a lawyer (chapters 10 and 11).

In addition, there are a number of publicly accessible but limited litigation assistance schemes that offer financial assistance for the payment of disbursements and/or legal representation fees in civil law matters. The majority of these schemes only give financial assistance for the payment of disbursements and, hence, may only improve access to justice in conjunction with pro bono representation (chapter 23).

That said, the Commission is aware of at least one litigation assistance scheme that seeks to address the justice gap. The South Australian Litigation Assistance Fund, a charitable trust established by the Law Society of South Australia, aims to assist plaintiffs (both individuals and businesses) to proceed with civil litigation where they would otherwise be unable to afford to proceed (The Law Society of South Australia 2014). Assistance is only available for civil matters (not family matters) and covers inheritance claims, personal injury and professional negligence claims and commercial disputes. To qualify an applicant:

- can have a gross household income of up to $130 000 and assets such as a house and a car, of 'reasonable value' (this is considerably more generous than the means test for LAC grants of legal aid), and
- must pass a merit test — the merit of cases are considered by a panel of three experienced legal practitioners.

The Fund is made viable by deducting 15 per cent of the damages awarded or settlement received where cases are fully funded. In cases where only disbursements are funded, the disbursements are repaid together with a 100 per cent uplift fee (The Law Society of South Australia 2014).

There are a number of other ways — unbundling legal services, legal expenses insurance, legal expenses contribution schemes and non-profit legal assistance models — that could

potentially improve access to justice for the missing middle. These are explored in the following sections.

19.2 Unbundling legal services

Unbundling of legal services — a half-way house between full representation and no representation — is one way of making costs more manageable and predictable for consumers. 'Unbundling' separates the package of legal services that may be required to handle a dispute into components, and the client and lawyer agree to what parts of the package the lawyer will provide.

Unbundling is also known as 'discrete task assistance or provision', or 'limited scope representation'. Lawyers can offer the unbundled component for a fee or pro bono.

There are three broad categories of unbundled legal assistance:

- general counselling and legal advice
- preparation or assistance with drafting of documents or pleadings
- limited appearances before the court (QPILCH 2010).

Unbundling is not new. LACs and CLCs have provided unbundled assistance to disadvantaged Australians for some time (as a way of rationing limited budgets), and unbundling is growing in some sectors of corporate practice. But it has not been widely employed — or marketed — as an option for legal services to individuals in Australia (CIJ 2013).

Impacts of unbundling for consumers and lawyers

Offering unbundled services can mean the difference between some level of legal assistance, or none at all. The cost of legal representation and/or the unavailability of legal aid are among the main reasons why Australians self-represent (chapter 14). If someone can afford say $5000 towards litigation but no more and the costs of taking action exceed this, the only real options are to proceed unrepresented or abandon the litigation. In an unbundled market for legal services, $5000 could buy a set of discrete legal services, improving their accessibility. As Beg and Sossin observed:

> Unbundled services would soften the harshness of the 'all or nothing approach' by being a midway point between full representation and no representation. This model would also allow the informed litigant to 'play to her strengths' — purchasing representation to assist with the identification of arguments or the preparation of materials or the oral advocacy, but not necessarily all three. …
>
> Unbundling, in other words, is a way of ensuring that the perfect does not become the enemy of the good. Or, as Tracey Tyler succinctly put it, 'lawyers could be cheaper *a la carte*'. (2012, pp. 199–200)

Unbundling offers more than just cheaper options. As the CIJ said:

> … in giving potential consumers access to services from which they would otherwise be excluded, this approach also gives consumers greater control over an otherwise disempowering legal process – electing not just where, but how to spend what limited funds they have. (2013, p. 31)

Other potential benefits of unbundling — especially when considered against a baseline of no representation at all — include:

- simplified litigation proceedings — partial representation could make it easier for courts to determine the relevant points in a litigant's case
- increased fulfilment of demand for legal services — unbundling could see more consumers receiving the assistance of lawyers
- consumers being better informed about costs — while it can be difficult for consumers to predict the costs of a contested divorce proceeding, it is likely to be easier to predict the cost of drafting a statement of claim or a separation agreement. Unbundling could also make it easier for clients to compare lawyers' rates with respect to limited retainers, allowing clients to be better informed consumers of legal services
- increased quality and effectiveness of court and tribunal submissions — litigants who, in the absence of unbundling, would have been without legal advice are likely to be better equipped to navigate the complexities of their legal problem (Beg and Sossin 2012).

Evidence from a number of pilot projects offering limited scope representation in the United States suggests that many of these potential benefits are realised in practice. For example, citing an evaluation of a pilot project undertaken in Massachusetts, Judge Cohen said:

> Judges reported that as a result of limited assistance representation, they saw better pleadings from self-represented litigants, the litigants were more realistic about their cases, the filing of frivolous motions was reduced and the litigants understood the process better. (cited in Eaton and Holtermann 2010, p. 39)

Seventy five per cent of the lawyers who responded to a survey about the Massachusetts pilot project reported a high level of satisfaction with representing clients on a limited basis. Cohen described Massachusetts' experience with limited representation as a 'win-win for the bar and self-represented litigants' (cited in Eaton and Holtermann 2010, p. 39).

Another limited representation pilot project in Kansas found that lawyers were seeing more cases than prior to the pilot (Eaton and Holtermann 2010).

But unbundling is not without its drawbacks. For example, the Law Society of Tasmania questioned whether unbundling would be appropriate in a large range of legal matters, or only a select few 'simple' cases:

> 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. (sub. DR227, p. 26)

While the Commission considers that unbundling is not suited for every matter, this should not prevent it from being available where appropriate, subject to the judgment of the lawyer offering the service, and the informed consent of the client. Further, it should not be assumed that a matter that begins as an unbundled one necessarily concludes in the same form. If new issues or complications are found, the lawyer could — and should — inform the client and discuss the best options, be they further unbundled services, subsuming the already provided service into a more 'traditional' representation, or abandoning the action.

Even for those matters where it is appropriate, unbundling can disrupt the norm of a comprehensive lawyer-client relationship, which also raises a number of concerns:

- the on-again, off-again nature of the representation could lead to inconsistencies and oversights
- there often is no neat division between different stages of a proceeding
- it can decrease consideration of a legal problem as a whole (Beg and Sossin 2012).

An additional issue that can hinder unbundling is conflict of interest rules, particularly when firms (or lawyers) provide segmented assistance to multiple parties in a dispute. While conflict of interest rules are important to prevent lawyers acting where they have a *real* conflict (that is, actual knowledge of two parties' conflicting legal matters), overly strict application of the rules can affect access to important legal advice where there is only a *perceived* conflict:

> … it is reasonable to ask whether there are certain situations in which the current provisions are simply overkill. If these rules mean that parties are denied initial, early advice on the merits of their dispute, for example – advice that CLCs often provide regardless of a party's means – these same parties are propelled unnecessarily towards the private legal market, or are forced to proceed with the matter themselves. (CIJ 2013, p. 31)

This issue is heightened in the 'thin' legal markets in rural and regional communities, where there are few legal firms:

> … conflict of interest rules can significantly impact on a person's ability to access discrete legal advice and assistance. … one of the key findings of the [recent research project by Deakin

> University School of Law] was that 69% of regional lawyers surveyed regarded the potential for 'conflict of interest' as an issue which adversely impacted on their ability to provide services to regional clients. (Legal Aid NSW, sub. DR189, p. 30)

The Commission does not consider the risks posed by unbundling to be insurmountable, as evidenced by the fact that some Australian law firms are currently providing discrete task assistance. Affording Justice is one example (box 19.2). Others formed a similar view:

> Limited scope retainers for legal services already exist and an increased use of such retainers can increase access to justice for many clients. (Law Council of Australia, sub. DR266, p. 82)

> … I've never quite understood the opposition to unbundling services. I know there are circumstances where it's inappropriate. I know often circumstances when it's difficult, but we do it, we are practitioners. We don't come up against ethical difficulties in relation to how we do it. It assists them, it assists the courts. Our duty lawyer services are basically unbundled services, so I'm not all that sympathetic to opposition to that. It's a way of conducting your business to meet your clients' needs with the resources you have. I think some firms are actually starting to provide those unbundled services. (Legal Aid New South Wales, trans., p. 179)

> While unbundling is not without risks both to litigants and to lawyers, and while further data will be needed before any empirical conclusions become possible, our view is that, at this stage, the potential benefits outweigh the potential downsides. … While only one piece of a massive puzzle, unbundling, in our view, represents a significant and positive step toward a more accessible civil justice system. (Beg and Sossin 2012, p. 221)

> I think all you can do is encourage market structures that will improve competitiveness within the market for legal services … Greater information, encouraging unbundling of legal services, which is … I think very important enabling people to say, "Well, all I want you to do is draft the statement of claim. I can do the rest," or, "All I want you to do is take me up to this point, and I want a quote for this amount" … (Martin CJ, trans., p. 596)

Barriers need to be addressed to pave the way for greater unbundling

In order to maximise the potential benefits (for both providers and consumers) of unbundled legal services and encourage its appropriate use, a number of barriers need to be addressed.

From the consumer perspective, information asymmetries mean that they may find it difficult to discern the components of matters where they need assistance. That said, these concerns arise in any lawyer-client relationship and are intended to be addressed (at least in part) by professional rules of conduct and fiduciary duties at law requiring lawyers to act in their client's best interests.

Box 19.2 **Affording Justice**

Affording Justice is a law practice that aims to be 'an affordable and independent first step for everyone'. It gives step by step guidance to people who cannot afford full legal representation.

Affording Justice offers three main services:

- Legal Diagnosis — advice about how the law applies to a person's situation and the processes available to solve the problem
- Legal Advice — advice about a person's best options and how to take the next step
- Legal Task Help — writing documents and letters, negotiating, and step-by-step guidance for procedure.

Where a person can resolve the matter themselves, they can elect to use the Legal Advice and Legal Task Help services. The defined tasks have fixed prices.

Services are provided by staff over the phone, by web-conference and by email. Affording Justice states that 'our services are particularly useful to people who:

- need to know where to start with using the law to solve a problem, or
- need an affordable alternative to the traditional way of engaging a lawyer for full representation'.

The firm is Queensland-based and as such provides assistance on matters occurring within that state, but also assists with federal law matters (family law, consumer law, dealing with Centrelink and bankruptcy).

According to the Centre for Innovative Justice:

> Initial concerns from the firm's insurer about liability for discrete task assistance were alleviated by consultation with the insurer, and by the development of standard form advices. The CIJ was told that the practice does not go on the court record. (2013, p. 30)

Sources: Affording Justice (nd); CIJ (2013); and Shearer Doyle (sub. 21).

Providers seeking to offer unbundled services also face barriers. For example, the Law Institute of Victoria, while generally supportive of unbundling, noted the impact of court rules:

> … current court rules are inflexible to the notion of [unbundling] as once a lawyer/firm is on the record as acting for a client, they remain on the record. In this regard, court rules should be amended to allow for the flexibility for a firm/lawyer to indicate that they are acting in a limited scope (sub. DR221, p. 13)

As an example, courts have noted that, without leave being granted, the duty owed by the practitioners to the court can demand that they continue to perform certain functions — beyond the limited scope that the client agreed to — in order to satisfy the proper administration of justice (CIJ 2013).

Unbundling could also have implications for lawyers' exposure to liability. For example, recent changes to federal immigration law, which provide for costs awards against practitioners who represent a client in matters with no reasonable prospects of success, could place lawyers offering unbundled assistance in a precarious position given the

heightened possibility that the lawyer may not be privy to all the relevant information in a matter, and thus be less able to judge the true prospects of success (CIJ 2013).

The lack of guidelines adds to the uncertainty for lawyers about the extent of their exposure:

> While a number of states in the USA have facilitated unbundling of legal services through revised ethical and procedural rules, so far Australian professional and civil procedure rules have largely ignored these services. This unresolved issue can lead to reluctance by some lawyers to undertake pro bono discrete task assistance due to concerns of liability and thus limits the assistance which may be provided. (QPILCH 2010, p. 1)

> We fundamentally agree that the idea of unbundled legal services is probably a wise thing to think about. The problem that seems to arise in [unbundling] is insurance, so the idea of doing a bit of a job but not all of a job gives rise to risk. If there is legislative protection for lawyers to do that, then that is viable, if there is not, risk considerations may stand in the way. (Law Society of South Australia, trans., p. 401)

> One of the challenges to that — because we are not talking about obstacles — will be that in terms of professional indemnity insurance, there will certainly have to be a significant level of dialogue with our … insurer where firms are in and out or in a limited scope retainer issue … (Law Institute of Victoria, trans., p. 659)

Experience from overseas suggests that amending professional conduct rules provides both lawyers and their clients with greater confidence when entering into unbundled agreements.

In the United States, the American Bar Association has developed Model Rules which specially permit lawyers to limit the scope of their representation. Around 40 states have adopted amendments to their professional conduct rules to implement the Model Rules.

> Broadly, these amendments address such issues as:
>
> - whether the client's consent to limited representation should be in writing
> - what disclosure is required when a lawyer prepares a document but does not appear
> - how a lawyer withdraws from a case when he or she makes a limited scope appearance
> - how practical issues are addressed, such as communications with opposing counsel
> - how to protect clients from unscrupulous lawyers offering limited scope representation. (CIJ 2013, p. 28)

In the United Kingdom, the Law Society has also released a Practice Note on unbundling which includes consideration of relevant case law. The Practice Note provides guidance on: duty of care to clients; clearly defining and staying within the retainer's limits; professional conduct duties to the client and the court; professional indemnity insurance and fees; suggested schedules of services provided and not provided; and limited representation at court as a 'McKenzie friend'.

In 2011, the Law Society of Upper Canada also updated its rules to include a general requirement for written confirmation of the limited scope retainer (with some exceptions), with changes also dealing with matters such as interpretation, professionalism and duty to clients (The Law Society of Upper Canada 2013).

A number of participants have called for similar reforms within Australia. Following the draft report, participants including the Queensland Law Society (sub. DR267) and Shearer Doyle (sub. DR165) pointed to Professional Conduct Rule 1.2 of the American Bar Association Model Rules as a model for amendments to the Australian Solicitors Conduct Rules to facilitate unbundling. Rule 1.2 provides that:

> … a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent. (sub. DR165, p. 3)

The Law Council of Australia (sub. DR266, p. 83) also suggested a similar form of words.

The Commission considers that reforms to the Australian Solicitor Conduct Rules, along with certain Court rules would provide the clarity and the certainty necessary to allow for greater use of unbundling. Shearer Doyle provided a 'road map' for the required reforms:

- A minor amendment to the Australian Solicitors Conduct Rules that recognises unbundling in a similar way to the American Bar Association Model Rules for Professional Conduct Rule 1.2
- Professional associations developing guidance and resources to assist lawyers to offer unbundled services including a range of risk management tools
- Amendments to court rules that recognise unbundling and allow lawyers to be removed from the court record without the leave of the court. A good example is Family Law Rule 8.04.
- Professional association[s] and lawyers taking more steps to increase community awareness about the availability of unbundled legal services. (sub. DR165, p. 3)

The reformed Rules could also usefully address conflicts of interest, restricting them to *real* conflicts in recognition of the more limited lawyer-client relationship in the case of unbundled services. As some participants noted, this would be consistent with approaches used in North America:

> The rule should provide that a lawyer can provide a discrete legal service unless the lawyer has actual knowledge of confidential information that could give rise to a conflict. Such a rule would be consistent with current law. It would also be consistent with international approaches to limited legal representation and conflict of interest that have been in place in Canadian provinces and various states of the United States for some time. (Legal Aid NSW, sub. DR189, p. 31)

The Commission considers that professional associations could improve awareness of unbundling among their members through guidance documents. The guidance should include examples where it is clear that unbundling is appropriate. These examples should serve as a starting point for practitioners. They should not be prescriptive in nature and should in no way seek to limit the scope of unbundled services. In addition, professional bodies could work with legal and non-legal referral agencies to publicise the availability of unbundled services within their jurisdiction.

In addition to these reforms, the Queensland Public Interest Law Clearing House (QPILCH 2010) also suggested the development of model consent forms and that statutory immunity should apply so as to exempt legal service providers from liability where clients have agreed by informed consent to limited representation. However, QPILCH subsequently revised its position on the latter:

> Since publishing the paper to which the Commission has referred, we consider that a minimalist approach — one that does not limit a practitioner's liability — is preferable at this time. (sub. DR247, p. 40)

The Commission agrees and considers that, rather than explicit statutory immunity for providers of unbundled services, normal liability rules should apply within the boundaries of the unbundled service provided by the lawyer. Importantly, the boundaries of the service should be clearly known to the lawyer, the client (through genuine informed consent) and the courts.

Feedback received by the Commission relating to insurance suggests that the insurance industry should also be consulted during the reform process to ensure that there is effective guidance available for indemnity insurers to understand the nature of unbundled services and the extent of the limited liability, an idea supported by the Insurance Council of Australia (sub. DR193).

A further benefit of unbundled services, when used in conjunction with technology that allows for remote service delivery, is increased provision of discrete elements of legal services (such as initial advice or completed forms) to clients potentially hundreds of kilometres away. Remote service provision can be of particular importance in 'thin' regional and rural markets by introducing alternative sources for legal advice, thus reducing conflict of interest concerns. In the assistance sector, the National Children's and Youth and Law Centre's *Lawmail* service (discussed in chapter 5) is one example of electronic provision in practice. Given the potential to deliver unbundled services across jurisdictional borders, the rules for unbundling should be developed, and applied, nationally.

RECOMMENDATION 19.1

The Law, Crime and Community Safety Council should establish a working group to develop a single set of rules that explicitly deal with unbundled legal services for adoption across all Australian jurisdictions, to be implemented by 30 June 2016. Draft rules should be released for public consultation no later than 30 June 2015.

In addition to government officials, the working group should include representatives of the Judicial Conference of Australia, the Law Council of Australia, the Insurance Council of Australia, appropriate consumer groups and legal services regulators.

These rules should draw on those developed in the United States, Canada and the United Kingdom, and should address:

- amending rules, including the Australian Solicitor's Conduct Rules, to allow lawyers the ability to define the scope of retainers. The new rules should be based on Rule 1.2 of the American Bar Association's Model Rules of Professional Conduct
- consequential impacts on the liability of legal practitioners
- inclusion and removal of legal practitioners from the court record
- conflicts of interest arising from actual knowledge of confidential information
- disclosure and communication with clients, including obtaining their informed consent to the arrangement.

In order to assist the operation of these rules, legal professional bodies should:

- produce guidance for practitioners as to how the new rules affect their obligations including example situations in which unbundling would be appropriate
- work with legal and non-legal referral agencies to publicise the availability of their unbundled services.

19.3 Legal expenses insurance

Legal expenses insurance (LEI) is another option for making legal services more accessible to the 'missing middle'. The Law Society of South Australia said legal insurance:

> … enables those caught in the gap — who are either not sufficiently wealthy to pay their own fees or are so underprivileged that they have entitlement to legal aid — to access the justice system.
>
> It is time that we started thinking smartly about our options rather than risk diluting our excellent standard of law and justice in this country. Legal insurance is one such idea. (sub. 131, pp. 1–2)

LEI operates like other types of insurance — customers pay a premium based on insurers' assessment of risk, and when required are provided with funding for legal services.

It is difficult for anyone to anticipate their need for legal assistance (and as such they are unlikely to save for such an event). The fact that legal expenses are often unpredictable, and have the potential to be very large (in some cases 'catastrophic'), points to the need for a mechanism that pools the risk of legal costs.

LEI spreads the risk of legal contingencies and provides protection against the costs of bringing or defending legal action to resolve a dispute. There are 'before-the-event' and 'after-the-event' legal expenses insurance policies. Before-the-event insurance policies, as the title implies, cover legal expenses of events that are yet to occur, while after-the-event policies cover legal expenses (including any adverse costs orders) of disputes where the issue in dispute has occurred but proceedings have either not commenced or are not well advanced.

After-the-event policies are likely to only be available for cases where the chances of winning are high (otherwise an insurer will not be prepared to accept the risk). Also, because of the substantially higher likelihood of costs being incurred (compared to before-the-event insurance), the cost to consumers of after-the-event insurance is typically higher. After-the-event policies can be taken out in conjunction with 'no win no fee' arrangements. Under such policies, the insurance company pays for disbursements and the other party's costs if the claim is unsuccessful (CIJ 2013). Similar services are provided by litigation funders (chapter 18).

What do LEI schemes typically cover?

LEI providers usually offer customers a telephone help line for legal information, advice and referral to other services. Policy holders are typically referred for further legal assistance (such as letter writing and making phone calls) or legal representation, subject to a deductible (excess), a waiting period and/or an assessment of the merit of the case by the providers' lawyers (Canadian Bar Association nd).

LEI coverage varies by policy type. However, LEI typically covers civil disputes (employment, tenancy, neighbour disputes and driving offences), but not family law matters. As an example, in Canada, DAS Legal Protection Insurance offers access to a hotline for advice on common legal problems and a lawyer if the client needs to go to court. DAS has several different plans to choose from. One example is the 'living' option which includes employment disputes, contract disputes, property protection, injury, tax protection, employee legal defence and court attendance expenses (DAS Canada nd).

Providers can have in-house lawyers or they may contract with law firms. Some providers of LEI allow policy holders to consult a lawyer of their own choice to be reimbursed at a later date (Canadian Bar Association nd). Some providers also refer policy holders to law firms for services not covered in the policy (with guaranteed reductions in rates charged).

Availability of LEI

LEI schemes are in place in Europe, the United Kingdom, the United States and Canada.

LEI has a long history in Europe — having been available since 1905 in France and since 1928 in Germany (Kilian 2003). About half the population in Germany are holders of LEI, accounting for around 25 per cent of lawyers' fees. Most LEI plans in Germany are stand-alone polices. In Sweden, it is estimated that around 90 per cent of households have LEI policies as it is included with most household insurance policies (Millan 2009).

In the United Kingdom, around 60 per cent of people have some form of legal protection insurance which is mostly sold in the form of an add-on to home contents or motor vehicle insurance, but is also available as a standalone product.

Policies in the United States are mainly pre-paid legal service plans for predictable and specific events that are low cost, routine and relatively high frequency (Regan 2001). They typically exclude monetary claims with such claims handled under 'no win no fee' arrangements. Around 30 per cent of the population are estimated to have a pre-paid service plan. LEI has only recently been introduced in Canada and has mainly taken hold in Quebec (around 10 per cent of Quebec residents have insurance cover) (Canadian Bar Association nd; Choudhry, Trebilcock and Wilson 2012).

There have also been attempts to establish LEI in Australia. A standalone legal insurance scheme established by the Law Foundation of NSW and the GIO operated in NSW between 1987 and 1995 but did not prove viable. Initially, the scheme was designed to improve access to legal services for those on low to middle incomes, but over time it was also developed for specific groups of workers (such as childcare workers) (Regan 2001).

Uncertainty over legal costs and a lack of appetite by Australians for LEI are said to have inhibited uptake in NSW. According to the Australian Law Reform Commission:

> A barrier to LEI in Australia has been the uncertainty over legal costs. The success of European LEI schemes, such as those in Germany, has been linked to their more predictable, fixed litigation costs. … A further challenge for providers of LEI in Australia has been the marketing of the product. … if LEI is to enhance access to justice for low to middle-income earners, it must provide a broad, general coverage at an affordable cost, and remain commercially viable. Commercial viability requires bulk savings and risk spreading. (ALRC 2000, pp. 316–317)

The Law and Justice Foundation of NSW similarly noted that it was difficult to design LEI benefits and premium levels in the absence of fixed fee schedules or predictable litigation costs (Goodstone 1999). The inquisitorial nature of proceedings employed in many European countries is thought to lend itself to more predictable costs, meaning that insurers and legal assistance schemes are better able to manage risk. As Goodstone said:

> In Europe the inquisitorial or dossier system, in which judges are charged with the responsibility of gathering facts and questioning witnesses, tends to better define the length of court hearings, and provides a fairly tightly structured legal costs system. The unpredictability of legal fees and court costs in Australia hampers legal expense insurers' ability to offer modest

premiums, and results in a legal expense insurance market that is regarded as unattractive by insurers. (1999, p. 15)

The Law Society of South Australia, however, has run a legal fees insurance scheme for members of the Public Service Association of South Australia since 1991. Users of the scheme are provided with legal assistance for a variety of matters including family law, motor vehicle, personal and consumer protection, minor criminal matters (sub. 61). The majority of assistance provided is advice and mediation with few cases proceeding to court.

Regan noted that the legal fees insurance scheme in South Australia is significant because it demonstrates that it is possible to establish well-designed and targeted legal fees insurance in Australia. But the success story 'has had a weak demonstration effect — it has not resulted in other trade unions or other organisations establishing similar schemes'(Regan 2001, p. 296). The Law Society of South Australia also said:

> Uptake has been limited in other jurisdictions, mainly due to issues relating to the size of the premium pool, difficulties in convincing consumers of the benefits of legal fees insurance, brokers and agents' unfamiliarity with the product and the public's wide misconception that they are eligible for legal aid.
>
> While the Society acknowledges that the uptake of legal fees insurance has experienced difficulties in other jurisdictions, we remain optimistic about its potential and suggest further exploration, including quantitative and qualitative analysis about how legal fees insurance could be a commercially viable product that is available to ordinary Australians for a low premium. (sub. 61, p. 19)

Present day challenges presented by LEI

Adverse selection is a challenge of LEI (as it is with all forms of voluntary insurance) — that is, people who take out legal insurance cover are likely to be those with the highest risk of having a legal problem. Adverse selection problems can be reduced by adding legal expenses insurance to other types of insurance (for example, as an add-on to home insurance or motor vehicle insurance as in the United Kingdom).

Another challenge, moral hazard, refers to the tendency for insurance protection to change the behaviour of policy holders to be less vigilant in preventing disputes from occurring. For example, a policy holder could be less careful checking contract details knowing that they have LEI and therefore will not bear the full cost of any legal action. Also, once insured, individuals may have an incentive to engage in litigation and to pursue a claim at much greater intensity than a self-financed person (Bowles and Rickman 1998). This can result in LEI being expensive.

Asymmetric information is also an issue. Bowles and Rickman (1998) stated that asymmetries of information are 'endemic':

> The insurer has imperfect information about the work being done by the law firm and about the insured's preferences and riskiness. The lawyer has imperfect information about the insured's position. The client has imperfect information about the work being done on her behalf by the lawyer. … Unless some sort of control is built into the contract, there is a significant danger that the lawyer and the client will collude against the insurer, since both the client and the lawyer may see it as being in their interest to invest more legal inputs in a case than the insurer would wish or would be efficient. (p. 199)

Evidence from Europe suggests that insurers have found ways to overcome such problems and include ceilings on the amount of coverage, the exclusion of certain types of matters (including family law matters), co-insurance (where some of the risk is passed back to consumers) and merit tests.

An essential requirement for risk to be insurable is that an insurer has a sufficiently large pool of policy holders over which to spread risk. As Schepens (2007) put it:

> … an insurer must have a sufficient volume of business. In insurance terms this means that he must be able to group a sufficiently large number of policyholders in a risk-pool. This allows him to diversify risk and become a more efficient risk bearer - which is essential for insurance to be feasible. (p. 27)

This was corroborated by Legalwise Australia which indicated that:

> In Australia, anybody doing this [LEI] as one company would need at least 10 000 customers in a short space of time. (trans. p. 521)

As noted earlier, the Law Foundation of NSW and the GIO insurance scheme failed in part because Australians did not see the value of insuring against legal events. Goodstone said:

> Convincing potential consumers of the benefits of legal expense insurance was a major challenge. … Potential consumers largely failed to perceive the benefits of purchasing legal expense insurance. Brokers and agents lacked familiarity with the product and did not promote it strongly. The public's perception of the general availability of legal aid resulted in there being reduced interest in LEI. (1999, p. 2)

Some of these same perceptions appear to still be at play. For example, Legalwise Australia outlined four factors contributing to current perceptions among Australians that LEI was not needed, namely:

- the very stringent regulation of the private sector, which reduces the risk of consumer 'abuse'
- the existence of an extensive ombud network that further reduces consumer abuse
- the existence of a comprehensive network of organisations providing free legal services
- a perception by the public that the State will look after their legal needs (sub. DR155, pp. 2-3).

With the tightening of legal aid to Australia's most disadvantaged people this may change. Public education campaigns could increase public awareness about the potential benefits of LEI.

The price of LEI (and coverage) will also affect demand. And, there is a trade-off between making premiums attractively priced and ensuring that the premium is sufficient to make the scheme viable. Legalwise Australia indicated that using a business model whereby claims are initially processed by in-house paralegals would help guard against over-servicing (trans. p. 522). This in turn, would assist in keeping premiums in check.

Where does that leave us?

Studies from both Canada and the United Kingdom have recently recommended LEI as a way of improving access to justice (Choudhry, Trebilcock and Wilson 2012; Jackson 2009a; Trebilcock 2008; Young 2012) and it has similar potential in Australia. LEI would allow risk-averse Australians to insure against the possibility of high legal expenses, and potentially improve access to justice for the missing middle in Australia. However, a key question is whether the coverage of LEI could be expanded.

Some of the information gaps that made it difficult to design legal expenses benefits and premium levels in the past have been, or are being, addressed. Australia-wide surveys of legal need now provide important information on the propensity of different groups to experience legal problems. Other reforms proposed in this report, such as implementing fixed scales for cost awards, could also contribute to more predictable claim costs which may make the business case for reintroducing LEI viable. More broadly, the insurance market has adopted more sophisticated methods for pricing risk since the inception of the original LEI back in 1987.

But even if information gaps could be addressed, and LEI offered, some parties might not take full advantage of risk-spreading opportunities because they do not accurately perceive the existence of risk or because they are unfamiliar with the market's potential for addressing the risks they face.

As there appears to be no legislative barriers to offering LEI, whether there is a viable market for such products in Australia is largely up to the insurance market to decide. Reflecting the reality that Australians are unlikely to take up LEI as a standalone product, the Law Institute of Victoria indicated that it was exploring how LEI might be added as an additional option to existing home and contents insurance (trans. p. 665).

19.4 Contingent loans for legal expenses

Publicly financed contingent loans have been proposed by stakeholders as an alternative funding option to address the 'justice gap'. Contingent loans provide upfront financial assistance for certain activities. Repayment is only made under a defined set of circumstances — for example, when income reaches a certain level or when an asset is sold (Denniss 2014).

The Australian Government already utilises contingent loan schemes in education and the provision of income support. The Higher Education Contribution Scheme (HECS, now called the Higher Education Loan Program (HELP)) is the most prominent example in Australia of an *income* contingent loan (box 19.3). In contrast to HELP, the Australian Pension Loan Scheme provides an *asset* contingent loan for people of pension age who do not qualify for an Age Pension. The scheme pays up to the equivalent value of the Age Pension with the debt repaid when the recipient's house is sold or from their estate.

In the absence of a well-functioning market for LEI, a Legal Expenses Contribution Scheme (LECS) has been been put forward as one way of addressing the financial constraints faced by low-middle income Australians who are not eligible for grants of legal aid, but who cannot afford to pay for legal advice or representation.

Box 19.3 Income contingent loans for higher education in Australia

Income contingent loans have been available to Australian university students to pay for course fees since 1989 through the Higher Education Contribution Scheme (HECS).

Repayments are triggered once the recipient's income reaches a pre-determined threshold (originally based on average earnings) and are designed to be progressive (that is, the higher the income, the higher the repayment percentage).

In 2005, the Australian Government reformed parts of the system and renamed it the Higher Education Loans Program (HELP). As part of these changes, university fees were partially deregulated (fees could increase by a maximum of 25 per cent) and restrictions were imposed on the amount of time students were able to study. Some loans, such as for full fee paying courses, also had a surcharge imposed as a loan fee to cover administration costs.

The 2014-15 Budget proposed a number of changes to the design and operation of HECS-HELP, including:

- debts would no longer be indexed at the Consumer Price Index but will increase according to the Australian Government 10-year bond rate (up to a maximum of 6 per cent per annum)
- repayment thresholds would be reduced to just over $50 000 (compared to average income levels of $75 000)
- university fees would be fully deregulated.

The success of Australia's income contingent loan scheme for higher education has resulted in its adoption by a number of other countries, including New Zealand, South Africa, Hungary, Thailand, South Korea and the Netherlands. In some of these countries, income contingent loans have been extended to cover living expenses as well as education fees.

Sources: Australian Government (2014a); Chapman (2014); Deloitte Access Economics (2011).

How might a LECS operate?

The Australia Institute (Denniss, Fear and Millane 2012) suggested that a LECS *might* operate on the following basis.

- If someone did not qualify for legal aid under a means test, they would have the option of applying for LECS support.
- LECS applicants in certain income tax brackets would be able to qualify for an income contingent loan to cover some or all of their legal expenses, depending on where their income sits in the tax scale.
- Applications would continue to be subject to a merit test conducted by qualified lawyers to determine eligibility. Only legal matters with a declared 'reasonable prospect of success' would attract LECS funding.
- The merit test for LECS funding would be expansive enough to incorporate a range of situations in which people encounter problems that can only be solved through pursuing civil legal action (for example, against governments or corporations).
- Following the conclusion of a matter, the recipient pays the Australian Government a percentage of their income over the length of the loan, with payments set at a higher rate for recipients on higher incomes. Recipients would also have the option of repaying the loan immediately in a civil action with an advantageous and sufficient award of damages.
- Where a matter ends badly for a LECS recipient (they find themselves in jail or facing a substantial damages bill), they would be shielded from extreme poverty or bankruptcy and have the opportunity to recover, and continue to contribute to the community while paying back their loan.

Similar arrangements already operate within some LACs, however, the proposed LECS scheme would apply to a larger group of Australians and to a wider range of legal matters (including civil law matters). The Australia Institute observed:

> The fact that such schemes are already in place suggests that a LECS-style initiative is not a radical departure from current arrangements, but rather an extension of a proven concept. (Denniss, Fear and Millane 2012, p. 27)

That said, evidence from LACs suggest that the capacity of recipients of legal aid to repay such debts can be limited. Information from annual reports indicates that some LACs are carrying substantial outstanding client contribution balances (chapter 21). Given that these loans are often provided on a no or low interest basis, LACs are effectively constraining the amount of legal aid they can provide in the future by subsidising clients with deferred contributions. As such, the Commission is not convinced that these arrangements are working in the best interests of either LACs or their clients.

Is a LECS worth pursuing?

Some benefits of the proposed LECS are that it would:

- apply to civil matters that are currently only 'thinly covered' by LACs

- allow a longer period for applicants to make contribution payments (by spreading payments over a longer period of time, the immediate financial burden is reduced)
- lessen adverse selection risks (relative to measures such as LEI) since individuals would be subject to sufficient personal risk for there to be a disincentive to pursue unnecessary legal action (and the application for the loan takes place after the event)
- improve equity (by providing another avenue for those who miss out on government funded legal assistance to pursue cases of merit that do not involve monetary claims).

These benefits would not come without costs. To the extent that individuals do not pay back the full cost of the loan, governments must subsidise the shortfall. This shortfall can arise for two reasons:

- individuals pay interest on the loan at a rate that is lower than the cost to government of borrowings (effectively an interest rate subsidy)
- some proportion of the loan is never repaid.

This is a particularly relevant consideration given that the scheme is intended to assist low and middle income earners, whose incomes are not anticipated to rise in the same way that graduates utilising HECS would. As Chapman observed:

> We also knew from all our other modelling of these kind of applications that you can't take the HECS parameters because typical citizens don't earn what graduates do. Their incomes over their lifetime are substantially lower … (trans., p. 67)

Ultimately, the magnitude of these costs are determined by scheme design. Design features such as eligibility criteria, interest rates, caps on borrowings and surcharges can minimise these costs. Chapman has undertaken some indicative modelling that demonstrates the importance of design features for scheme costs. He found that:

> If the debts are not so big — like $20 000 — and you use the surcharge, even giving it to relatively old people is not a big deal … Once the debts get over about $25 000, it starts to be a bigger deal but even with a surcharge of 25 per cent, your bottom line is an aggregate situation, an average subsidy across the board of about 5 per cent or something like that. (trans., p. 71)

However designed, a LECS would also give rise to administration costs, including the costs associated with collecting payments and screening applicants (such as determining whether they have a meritorious case). While Australian Taxation Office estimates put the collection costs of the government for HECS at around $40 million (2013 dollars) per year (Chapman 2014), the screening process required under a LECS is not required for HECS, and may substantially increase the administration costs of a LECS.

Is LECS a second-best fix?

Stakeholder responses to the LECS proposal were mixed. While most agreed a LECS would increase access to justice, the support was not without reservations. For example, the Consumer Action Law Centre and the Consumer Credit Legal Centre NSW noted that:

> Although a Legal Expenses Contribution Scheme would provide clear benefits to access to justice we have concerns about how it would be funded and administered. The best way forward to evaluate a LECS would be a feasibility study. (sub. DR202, p. 4)

Other stakeholders were cautiously supportive:

> … the LIV [Law Institute of Victoria] supports the proposition that the introduction of LECS may result in increased access to justice. However, a caveat to the introduction of LECS is that it should not be available to low income earners to avoid further disadvantaging low income earners with a debt owed to the government. (sub. DR221, pp. 53–54)

While *illustrative* modelling suggests that it is feasible for those on very low incomes (as low as $20 000) to make repayments, there is a question about whether an income contingent loan is the most appropriate mechanism to assist these individuals or whether they would be more appropriately assisted through government funded legal assistance.

Legal assistance providers and representatives of the profession widely supported the view that increased government funded legal assistance was preferable to a LECS. Reflecting this and its own analysis, the Commission considers that a more appropriate and direct way of assisting those on very low incomes is to extend the means test for legal assistance services — this proposal is discussed in more detail in chapter 21.

The Commission has not undertaken the detailed analysis that would be required to assess the costs and benefits of a LECS for those people who do not pass the means tests for legal aid (appendix H).

19.5 Legal assistance models involving the not-for-profit sector

The Salvos Legal Model

The Salvos Legal Model is an example of a legal assistance model involving the not-for-profit sector.

Salvos Legal is an incorporated commercial and property law practice. It acts for corporate, government and not-for-profit clients. Fees on commercial and property transactional law (less expenses) are used to fund the operation of the 'legal aid' sister firm — Salvos Legal Humanitarian. Salvos Legal Humanitarian is a full service firm offering free services for the disadvantaged and marginalised in NSW and Queensland. Both Salvos Legal and Salvos Legal Humanitarian are solely owned by the Salvation Army.

Salvos Legal Humanitarian offers assistance in areas such as criminal law, children's and family law, debt, housing, Centrelink and refugee law. Clients of Salvos Legal Humanitarian are almost all on government support or have low incomes (but have not

qualified for Legal Aid). According to Salvos Legal 'certainly none of these people could afford a lawyer to act on their behalf and in most cases without one, they would very likely be unable to properly fight for their rights in Court' (box 19.4).

Box 19.4 Salvos Legal — means and merit test

Salvos Legal Humanitarian is a free legal service that aims to provide access to justice through full-time representation to those who could not otherwise obtain it.

When assessing the level of assistance to provide in each particular case, Salvos Legal Humanitarian considers three things:

1. **Can the client afford to pay for legal representation or is there another, more suitable, service available to the client who we can refer them to?** Salvos Legal Humanitarian offers preliminary assistance to all clients but those who have sufficient income or assets to enable them to afford legal representation will not generally be considered for full-time representation.
2. **Can we make a difference in this person's life?** Salvos Legal Humanitarian aims to represent those clients who have a genuine desire to deal with the broader issues in their lives that have brought them into conflict with the law. If they feel they are unable to achieve any form of positive outcome for a client, then they are unlikely to provide full-time representation.
3. **Is it consistent with the mission of the Salvation Army to act in this matter?** Salvos Legal Humanitarian is a service provided through The Salvation Army and as such, operates the service within the parameters of The Salvation Army's own social and mission objectives. Salvo Legal Humanitarian's discretion to act in each particular case is exercised in accordance with The Salvation Army's desire to achieve equality, oppose discrimination and fight for social justice.

Source: Salvos Legal (nd).

Salvos Legal Humanitarian provides a holistic approach to helping clients with legal needs — recognising that clients often have other complex problems, clients are also helped to engage in other Salvation Army social and pastoral services, such as drug and alcohol recovery, employment assistance, welfare, counselling, financial management and aged care.

Salvos Legal Humanitarian currently funds over 200 free Humanitarian cases each week, employing 26 people (18 lawyers) and having over 150 volunteer solicitors, migrant agents and paralegals across 10 offices in New South Wales and Queensland.

A number of participants upheld the Salvos Legal Model as a good one but did not see it being universally applied. For example, QPILCH considered that while the Salvos Legal model has proven successful, the viability and practical benefit to be gained by adoption of this model on a broader scale is limited.

> Part of the success of the Salvos Legal model is undoubtedly due to the widespread knowledge of, and goodwill held by, the 'Salvos' name. It is unlikely that this model would be viable for lesser-known organisations. (sub. DR247, p. 41).

The Attorney-General's Department said that, while there was not an evaluation of Salvos Legal, it considered that:

> … the underlying concept of collocating various services and facilitating referrals for clients to address their different needs best facilitates the delivery of holistic, 'joined-up' services'. (sub. 137, p. 20)

The CIJ suggested that it might be feasible for the LACs to:

> … investigate the development of a fee for service model on a wider basis — in which clients with moderate means, who would otherwise be ineligible under Legal Aid guidelines, can elect to pay for representation by a legal aid lawyer, or a private lawyer who conducts legal aid work, on the basis of the relevant statutory scale. (2013, p. 35)

However, Victoria Legal Aid cautioned that models where legal services are provided on a commercial basis to fund legally aided services are not 'scalable or appropriate for mainstream legal aid' (sub. 102, p. 9).

While the Commission considers that there are no regulatory impediments to the development and implementation of non-profit legal assistance service providers, these services are specialised and unlikely to be widely adopted as a way of delivering legal assistance services that would be viable at the scale necessary to meet unmet legal demand.

20 The legal assistance landscape

Key points

- Government-funded legal assistance is an integral part of ensuring that the justice system is accessible to all.
- There are four main government-funded legal assistance service providers: legal aid commissions (LACs), community legal centres (CLCs), Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS).
- While all four providers offer a mix of services from legal education to casework for individuals and groups of clients, the targets for their services differ, as do their size.
  - LACs are the largest providers, with almost $580 million in government funding in 2012-13. They prioritise their services to disadvantaged people and primarily service criminal (including family) law needs.
  - CLCs are smaller (with $68 million in government funding in 2012-13) and work alongside LACs to fill civil and family law gaps, mainly for disadvantaged people.
  - ATSILS and FVPLS focus on meeting the legal needs of Aboriginal and Torres Strait Islander Australians. ATSILS (with $68 million in 2012-13) have a heavy focus on criminal law matters. FVPLS (with $19 million in 2012-13) focus primarily on family violence matters.
- All four employ mixed service delivery models, with a focus on holistic services.
- The Australian Government and state and territory governments are the primary funders of the four providers. In 2012-13, government funding totalled almost $735 million.
  - About a third was provided by the Australian Government.
  - Different models determine the funding allocations for each of the four providers.
  - Indigenous-specific providers generally only receive Commonwealth funding.
- Real government funding for the legal assistance sector has been increasing over the last decade. But the picture at a provider level is more mixed.
  - Some sources of funding (such as those from solicitors' trust accounts) have declined, contributing to recent falls in per capita funding for LACs.
  - Both total and per capita funding has increased for CLCs, but some states and centres have fared better than others.
- Real funding for FVPLS has grown more quickly than the population of Aboriginal and Torres Strait Islander people, seeing an increase in per capita funding for this service. Funding for ATSILS, while steady, has failed to keep pace with Indigenous population growth leading to a decline in per capita funding.

Government-funded legal assistance services play a key role in improving the accessibility of the justice system for many Australians with limited means to pay for legal services.

This chapter is the first of three chapters focussing on legal assistance services. It describes the legal assistance landscape across a number of dimensions commencing with an outline of the economic rationale for publicly funded legal assistance services (section 20.1). It then goes on to outline the main providers, their services, eligibility criteria, the main areas of law on which they focus, service delivery models, governance arrangements and funding sources and trends (sections 20.2 to 20.9). The key policy-related questions are identified in the concluding section (section 20.10). These questions are then explored in the following two chapters:

- reforming the legal assistance landscape (chapter 21)
- assistance for Aboriginal and Torres Strait Islander people (chapter 22).

Unless otherwise stated, the facts presented in this chapter are sourced from unpublished administrative data provided to the Commission by the Commonwealth Attorney-General's Department (AGD) and the Department of Prime Minister and Cabinet (PM&C).

20.1 What is the rationale for publicly-funded legal assistance services?

Legal assistance is an integral part of ensuring that the justice system is accessible to all. As discussed in chapter 4, government involvement in legal assistance services can be justified (at a conceptual level) on a number of grounds:

- positive spill-over or flow on effects to the wider community from providing legal assistance services. Legal assistance services can prevent or reduce the escalation of legal problems, which in turn can mean reduced costs to the justice system and lower costs to other taxpayer funded services (in areas such as health, housing and social security payments)
- market failures. These include information gaps, asymmetric information, and thin markets (especially in rural and remote areas)
- 'equity' or 'fairness' in terms of accessing the justice system. It is generally agreed that Australians should not be denied an opportunity to seek justice because of an inability to pay, a lack of personal capabilities or because of where they live. But the reality is that some are not able to afford legal advice or representation. Others — such as people with intellectual or mental health disabilities, or poor English skills — can lack the personal capabilities and skills to understand legal processes or defend a case.

The 'public good' nature of information and education — and the importance of understanding the justice system to access it — means that governments also have a clear and important role to play in providing general public information and community education about the law and the legal system. Further, as outlined in chapter 5, information and early advice can also help people to acquire the knowledge and skills to enable them to

prevent legal problems from occurring or cases from escalating and giving rise to legal problems that are more expensive to solve.

20.2 Who are the main players?

Government-funded legal assistance providers are a key component of government policies which respond to these rationales for intervention in the market for legal services. Throughout Australia, there are four key legal assistance providers, with each providing specialised but complementary roles:

- legal aid commissions (LACs)
- community legal centres (CLCs)
- Aboriginal and Torres Strait Islander legal services (ATSILS)
- family violence prevention legal services (FVPLS) (figure 20.1).

Together, these providers received almost $735 million in government funding from the Australian and state and territory governments in 2012-13 for legal assistance services.

Alongside these four providers, the Australian Government provides considerable support to help families resolve their family law disputes. For example, in 2012-13 the Australian Government spent $153 million on the Family Support Program family law services stream (covering counselling, family dispute resolution, children's contact services and relationship and parenting education services) to assist separating parents and their children and minimise the use of the more formal parts of the family law system (ACG 2014a). These services — delivered through Family Relationship Centres and other service delivery models — are discussed in chapter 24.

The private sector also plays a relatively small, but nonetheless important, role in assisting those with limited means to access legal services largely through the provision of pro bono services (chapter 23).

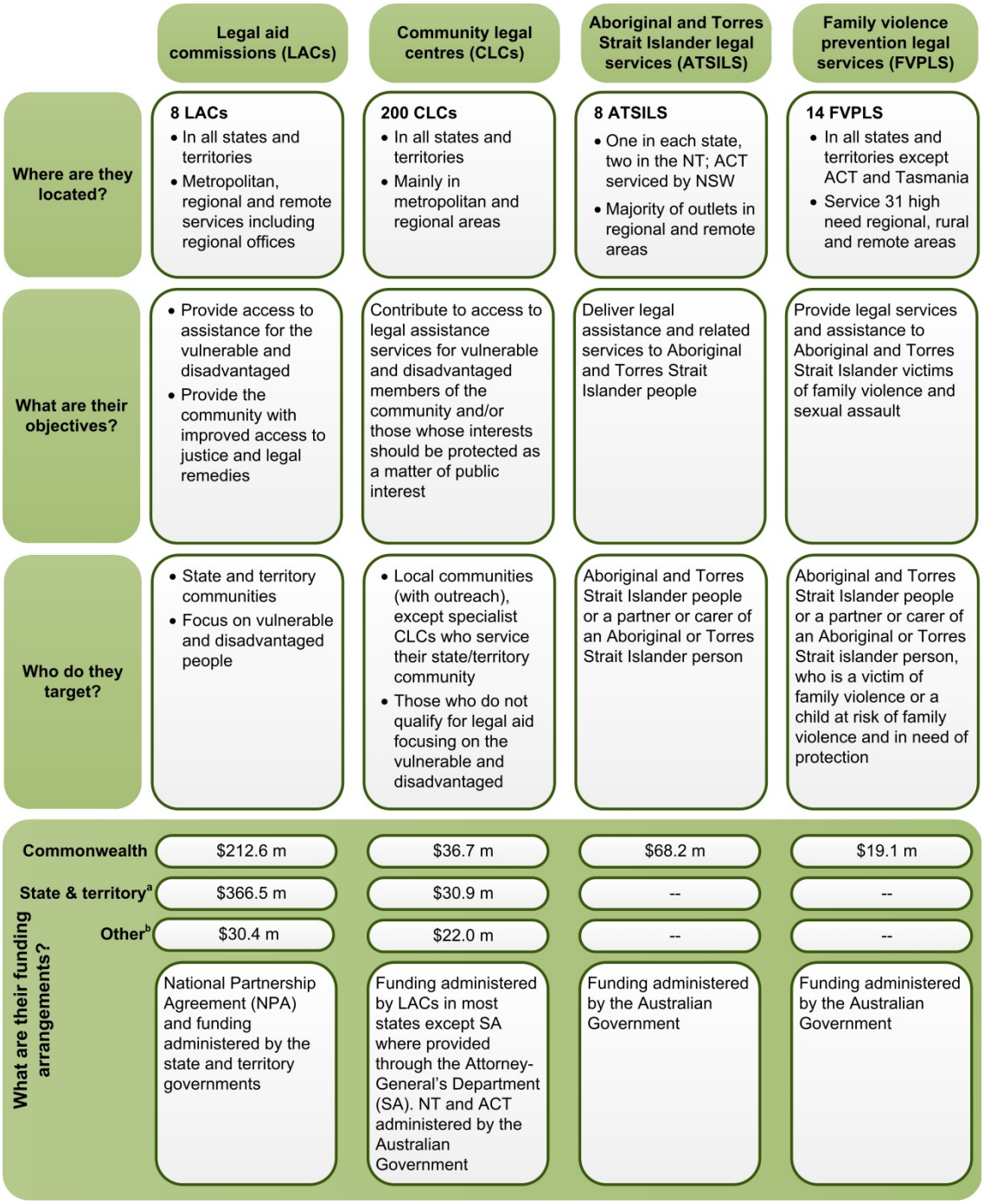
LACs are the main providers of legal assistance services

LACs service most Australians who receive publicly-funded legal assistance. They also receive the majority of public funding. LACs are independent statutory authorities (established under state or territory legislation). They provide legal assistance services in criminal, family and civil law matters.

LACs focus on providing legal assistance for disadvantaged Australians. As the Law Council of Australia said:

> LACs are the central pillar of the legal assistance sector and a primary mechanism through which disadvantaged Australians are likely to obtain legal assistance. (sub. 96, p. 15).

Figure 20.1 **The four government funded legal assistance providers**
2012-13



a Includes contributions from public purpose funds. **b** For LACs, 'other' comprises self-generated income. For CLCs, 'other' includes fee income, philanthropic donations and other government funding sources but does not include the value of pro bono or volunteer contributions. Providing information on 'other' non-Community Legal Services Program income is not compulsory and is likely to be underestimated for 2012-13. Unpublished financial data showed considerable variation in this type of income from around $25 to $80 million over the previous three financial years. A portion of this income may also include unspent monies from previous years.

There are eight LACs in Australia, one in each of the states and territories. With the exception of the Australian Capital Territory (ACT), the LACs provide services through a number of regional offices and remote communities (through outreach and by attending circuit court visits and providing legal educational programs). Legal Aid NSW, for example, delivers services across New South Wales through its 21 offices and 164 regular outreach locations (Legal Aid NSW, sub. 68).

CLCs work alongside the LACs

CLCs are community-based not-for-profit organisations with a number of defining features (Federation of CLCs Victoria, sub. DR226). They play a distinct role in the legal assistance landscape assisting Australians who cannot afford a private lawyer but who are unable to obtain a grant of legal aid, either because the person is not eligible or because the LAC has a conflict of interest (NACLC, sub. 91). As community-based organisations they also seek to embed their services within their communities (PCLC, sub. DR192) and many work in partnership with other local groups and establishments (CLC NSW, sub. DR213). Their use of volunteers and pro bono services (see below) is another characteristic feature of CLCs.

CLCs provide mainly civil and family legal assistance. CLCs prioritise their services towards those on low income and otherwise disadvantaged individuals and groups in the local community, as well as those with special needs and whose interests should be protected as a matter of public interest. As the Law Council of Australia noted:

> They are a key component of Australia's legal assistance system, and provide services which complement and extend the services provided by [LACs] and the private profession. (sub. 96, p. 122)

CLCs are diverse organisations — some CLCs seek to meet the general legal needs of a given geographic community, while other centres specialise in particular areas of law (such as child support, credit and debt, environmental law, welfare rights, mental health, disability discrimination, tenancy, immigration and employment law) or in meeting the needs of a particular client group (such as children and young people, women, refugees, prisoners and homeless people) where they typically service a broader geographical area (NACLC 2013a). There are also 'hybrid' CLCs that offer both generalist and specialist services. For example, as well as servicing the legal needs of its local Indigenous and non-Indigenous community, Redfern CLC offers a specialist service for international students in New South Wales (trans., pp. 282–283).

There are around 200 CLCs operating across Australia (NACLC 2013a). Of these, around 131 receive Australian Government legal assistance program funding.

ATSILS and FVPLS focus on the needs of Aboriginal and Torres Strait Islander communities

ATSILS are normally incorporated Aboriginal associations with Indigenous management committees. They focus on providing legal services to Aboriginal and Torres Strait Islander Australians in criminal, family and other civil law matters. There are eight ATSILS — two in the Northern Territory and one in every other state (with one for the ACT and New South Wales). The vast majority of service outlets are located in regional and remote areas.

FVPLS specialise in family violence law matters involving Aboriginal and Torres Strait Islander people, primarily in regional and remote areas. Their aim is to prevent, reduce and respond to incidents of family violence and sexual assault. They provide culturally appropriate legal assistance in a safe environment to adults and children who are victims of family violence, including sexual assault/abuse, or who are at immediate risk of such violence. FVPLS will fund and arrange counselling services for their clients as required (AGD, sub. DR300). In 2012-13, there were 14 service provider units servicing around 5000 clients in 31 'high-need' geographic locations in regional and remote areas across all states and territories except Tasmania and the ACT.

20.3 What type of services do they provide?

Providers offer a broad mix of similar services …

All four legal assistance providers offer a wide spectrum of services across criminal, civil and family law matters, including:

- online, telephone and face to face legal information and resources
- community legal education (CLE) and other prevention and early intervention services
- initial legal advice and legal and non-legal referrals
- minor assistance services
- duty lawyer assistance
- case work
- advocacy, law reform and policy development.

In addition to these 'baseline' services, some legal assistance providers offer some more specialist services. For example, some LACs and CLCs are registered family dispute resolution providers, while FVPLS offer counselling for the victims of sexual assault.

… but the scale of their service offerings differ

In 2012-13, Australia's LACs provided:

- 16 million information/referral services, CLE, publications, and website page reviews
- 374 000 instances of legal advice and minor assistance
- 382 000 duty lawyer services
- 137 000 grants of legal aid for legal representation
- 8000 family dispute resolution conferences involving at least two parties (National Legal Aid, sub. 123).

Although CLCs provided services on a much smaller scale, as shown in section 20.5, virtually all of their work is focused on civil (including family) law matters. In aggregate, in 2012-13 CLCs provided:

- 172 600 information services
- more than 4200 CLE projects
- 253 200 advice services
- opened around 53 000 cases. Of these around two per cent were test and public interest cases.

Nationally, ATSILS delivered services relating to around 196 000 matters in 2012-13. Total service activities in 2012-13 were split between advice matters (44 per cent), case matters (42 per cent) and duty matters (14 per cent). No information on the number of CLE activities or projects is available for ATSILS.

The scale of services provided by FVPLS is much smaller — consistent with the extent of their government funding (section 20.8). They also have a much stronger focus on non-legal services. Nationally FVPLS delivered around 2400 legal advice services, 11 100 non-legal advice services and opened approximately 2100 cases in 2012-13. Around 560 non-case work projects were initiated during 2012-13 and of these, 41 per cent were for CLE, 15 per cent for early intervention and prevention and 5 per cent related to law reform and legal policy.

20.4 Who are casework services targeted at?

Access to information, basic advice and CLE services is generally made available to all (chapter 5). In contrast, eligibility for individualised services, such as case work, tend to be targeted at vulnerable and disadvantaged individuals, as well as those with special needs.

Eligibility for a grant of legal aid is tightly targeted

Grants of legal aid are targeted at those who do not have sufficient financial means to obtain legal representation before a court (or to initiate a court proceeding).

Eligibility for a grant of legal aid for legal representation is based on an applicant's means (based on income and assets); the merit of the matter; and the priority given to the case given competing demands on resources (box 20.1). Any special circumstances that might be relevant to an applicant's capacity to self-help are also taken into account (National Legal Aid, sub. 123). Within this broad framework each LAC has developed their own criteria for legal aid funding grants (these are discussed in detail in the following chapter) and a summary of each LAC's means test is in appendix H.

These eligibility criteria sit within the broad framework of the National Partnership Agreement (NPA) — an agreement between the Australian Government and each state and territory government, which sets out the broad objectives and priorities of legal aid services for Commonwealth law matters (box 20.1, NPA Schedule A and B).

CLC eligibility criteria are more flexible

CLCs generally determine their own eligibility criteria for case work and advice. Most criteria act as a guide only, with inbuilt flexibility. Criteria are typically based on the extent of economic, social or cultural disadvantage and broader life circumstances of those that are affected by a legal problem. According to the Federation of Community Legal Centres Victoria (FCLCV):

> Each CLC has different eligibility guidelines as to who they can help, what legal issues they can help with and how much help they can provide. As a general rule, when assessing eligibility, a CLC will look at issues including:
>
> - the type of legal matter;
> - the availability of other assistance (private lawyer or legal aid);
> - the merits of your matter (whether it has a good chance of success);
> - your ability to help yourself; and
> - the capacity of the centre to assist. (FCLCV nd)

Eligibility criteria for ATSILS differ from those used by LACs

Access to individualised assistance provided by ATSILS is also subject to a means, matter and merit test. Individuals seeking help must also be an Aboriginal or Torres Strait Islander person or the partner or carer of an Aboriginal or Torres Strait Islander person.

Box 20.1 Who is eligible for a grant of legal aid?

While each state and territory has specific eligibility criteria, applications for legal aid are generally assessed against three broad criteria:

- *a means test* — the means test is used to determine the financial eligibility of an applicant to receive a grant for legal representation. It has two parts — an income test and an assets test. If a person does not satisfy the assets component of the financial eligibility test they may still be eligible for legal aid if they cannot reasonably be expected to borrow against their assets (for example, age or disability pensioners with significant equity in their property). In such cases, a legal aid commission can determine whether it is appropriate to impose a client contribution and/or secure a charge over the property, to allow recovery of the contribution upon sale or transfer of the property
- *a merits test* — the legal aid commission must be satisfied that an applicant has reasonable prospects of success and that the matter is an appropriate expenditure of public legal aid funds (that is, that the costs of the proposed proceedings do not outweigh the potential benefits). Where the matter has no reasonable prospects of success, legal aid is refused
- *a matter test* — applications for legal aid are assessed under the applicable state or Commonwealth guidelines. Legal aid is available for criminal, family and civil law. It is not normally provided for: business or commercial matters; buying property; building contracts and disputes; defamation; intellectual property law; pay disputes and work injuries; and wills and deceased estates.

Most LACs also have a general 'availability of funds' test which effectively operates as a fourth eligibility test after means, merit and matter.

Special/exceptional circumstances

The specific guidelines can be waived in cases involving special or exceptional circumstances. These can include hardship — financial or otherwise — to the applicant if legal assistance were not provided; or emergency situations in which the liberty, livelihood, possessions or physical and mental wellbeing of the applicant and any dependents are threatened. Indeed, most LAC CEOs have the discretion to exceed a funding ceiling or cap in exceptional circumstances.

Funding caps/'cost ceiling'

For some legal issues there are caps on the amount of legal aid granted. Where a case is identified to be an 'expensive criminal case', no aid or extension of existing aid beyond set funding caps will be granted.

Sources: COAG (2010); National Legal Aid website; AGD's *Expensive Commonwealth Criminal Cases Guidelines*.

Guidelines for income tests appear to be somewhat more generous than for the LACs, while the guidelines for assets tests appear to be somewhat less generous than for LACs. For example, table 20.1 compares the income and assets tests for all ATSILS with those used by Legal Aid NSW. That said, the income and assets tests of LACs vary between jurisdictions, hampering the accuracy of generalisations in this area.

Table 20.1 **Comparison of means tests: ATSILS and Legal Aid NSW**

	ATSILS[a]	*Legal Aid NSW*
Income test	All applicants for legal casework assistance must satisfy one or more of the following requirements: • under 18 years of age or • main source of income comes from Community Development Employment Projects participant wages or Centrelink (or equivalent) benefits or • gross personal income is under **$46 000 per annum** (AGD 2011b).	Applies a threshold of around **$16 500 per year** based on the applicant's net assessable income (which comprises gross assessable income less allowable deductions such as income tax, housing costs, allowances for dependants and child care costs) (Legal Aid NSW 2010b).
Assets test	The ATSILS assets test sets out the level of net assets below which services are provided free of change and those above which an applicant is not entitled to receive free legal assistance services. The assets of any financially associated person also forms part of the applicant's assets test. Although some assets are not included, the test allows for the value of assets above certain thresholds to be included. For example, **equity in a family home above $146 000 or equity in a car above $16 000 is included in the ATSILS assets test**. Where net assets are valued between a lower and an upper threshold (for example, $870 and $3 970 for single households), client contributions are payable according to a scale ranging between $20 to $1 580. For those with assets above the top threshold, contributions are payable on a dollar for dollar basis (AGD 2011b).	To obtain a grant of legal aid without an asset-based contribution, an applicant's net assessable assets[b] must be less than $100. The value of assets above certain thresholds are included as net assessable assets, for example **equity in a family home above $521 100 or equity in a car above $15 100**. Above this amount, the amount of contributions payable depends on the value of assets. Those with net assessable assets above $3 000 are required to contribute $1 724 plus 100 per cent of their net assessable assets over $3 000 (Legal Aid NSW 2010a, 2010b). However, grants of legal aid are refused when the contributions imposed exceeds the estimated cost of proceedings. For example, as the Legal Aid NSW grants management system uses a figure of $1 475 as the 'cost of proceedings', an applicant who is assessed to pay a $1 500 contribution will be ineligible for legal aid unless discretion is exercised (Legal Aid NSW, pers. comm., 21 March 2014).

[a] The means test on income also takes into account the number of people in the applicant's household who are dependent on the applicant's income, as well as the income of any financially associated person that forms part of the applicant's gross household income. [b] Net assessable assets are the applicant's gross assessable assets less the value of excluded assets above given thresholds. Examples of threshold values of excluded assets are: home equity above $521 100 (or above $260 550 for Commonwealth family law matters where there has not been a property settlement); motor vehicle equity above $15 100; or assets above $1310 for a single person (Legal Aid NSW 2010a).

Sources: AGD (2011b); Legal Aid NSW (2010a), (2010b) and pers. comm., 21 March 2014.

FVPLS do not have means or merit based eligibility criteria

There is no means or merit test for FVPLS; the only eligibility test is that the applicant must generally be of Aboriginal and/or Torres Strait Islander descent, identify as such, and they must not be a perpetrator of family violence (AGD 2010).

Services can be made available to the partners or carers of Aboriginal or Torres Strait Islander people, but may only be provided to a non-Aboriginal or non-Torres Strait Islander person where such services will provide a direct and substantial benefit to an Aboriginal or Torres Strait Islander person.

All four providers mainly service disadvantaged people

Most users of LACs' services are disadvantaged (table 20.2).

Table 20.2 **Demographic profile of legal aid clients**[a]
2012-13

	New South Wales	*Victoria*	*Queensland*[e]	*Western Australia*	*South Australia*[h]
	%	%	%	%	%
Receiving benefits/pension	50[b]	55	na	na	na
Has a disability (including mental)	na	19	na	na	12
Culturally and linguistically diverse	14[c]	22	6	na	20
Lives in a rural or remote location	43[d]	30	7[f]	34[g]	na
Aboriginal and Torres Strait Islander	10	3	14	na	5

[a] No data for missing jurisdictions. [b] Commonwealth benefits only. [c] Born in non-English speaking countries. [d] Includes Wollongong and Newcastle. [e] Of legal aid applications approved. [f] 'Rural and remote'. [g] 2011-12, includes non-residents of WA. [h] Grants of aid, advice appointments and duty lawyer services.

Sources: Legal Aid NSW (2013); VLA (2013a); Legal Aid Queensland (2013), Legal Aid Western Australia (2013); and Legal Services Commission of South Australia (2013).

The profile of intensive users differs from the average user of LAC services. For example, Legal Aid NSW profiled the fifty highest users of their legal assistance services over a five year period from mid-2005. This showed intensive users of legal aid services tended be relatively young — around 80 per cent were aged 19 years and under and 82 per cent had their first contact with Legal Aid NSW by the time they were 14 years of age — and all required assistance to deal with a criminal matter. They also shared a common history of mental health issues, exposure to domestic violence, time spent in correctional facilities, low levels of educational attainment, and poor behaviour while attending school. Compounding this history were a range of factors such as weak attachment to the labour force, dependence on income support, relative income poverty and exposure to community dysfunction (van de Zandt and Webb 2013).

A recent analysis of their client data over a ten year period (2003 to 2013) by Victoria Legal Aid (VLA) revealed a similar story. It showed that 1 per cent of their users were

identified as frequent or high contact users and that these users were more likely to: have had early (that is, prior to 18 years of age) contact with VLA; have started criminal offending between 10 and 17 years of age; have a psychiatric issue, acquired brain injury or a cognitive disability; identify as an Aboriginal or Torres Strait Island person; and to have seen VLA for a child protection or family violence issue before the age of 18 (Jolic 2014).

These frequent users also require disproportionately more resources to service their needs. For example, according to the VLA study:

> While these users represent 1.2 per cent of our total clients, they have used 12 per cent of our services during that period. (Jolic 2014, p. 2)

The majority of CLC clients were also from disadvantaged groups. Commission analysis of the Australian Government's administrative data for CLCs revealed that in 2012-13:[16]

- the most common CLC client is one with low income (78 per cent of clients earned less than $500 per week) or on government payments (representing 43 per cent of clients in 2011-12). This is consistent with ACOSS' (2013) estimate that close to half of CLC clients were reliant on income support
- around 6 per cent of CLC clients were of Aboriginal and Torres Strait Islander origin, with the Northern Territory and Western Australia having the highest proportions of clients identified as Aboriginal and Torres Strait Islander Australians
- around 5 per cent of clients spoke little or no English
- about 16 per cent of clients indicated they had a disability
- almost 5 per cent of clients were classified as being at risk of homelessness (in 2011-12)
- about 17 per cent of clients were single parents.[17]

However, the extent of disadvantage among CLC users is not uniform. As discussed in the following chapter and appendix I, those CLCs located in 'better off' areas tend to serve 'better off' clients.

ATSILS clients are overwhelmingly Aboriginal and Torres Strait Islander Australians — only 0.2 per cent of matters in 2012-13 were for people who were non-Indigenous Australians. The majority of clients were also facing financial disadvantage — most of the aid given for case matters in 2012-13 was awarded on the basis of the client being a Centrelink beneficiary (85 per cent).

16 The Commission notes that the quality of administrative data is mixed, with high levels of missing data.

17 Based on 2011 census data, 3 per cent of the population were Aboriginal or Torres Strait Islander Australians, 3 per cent spoke little or no English, 5 per cent were disabled, 0.5 per cent were homeless and 10 per cent of families were one parent families (ABS 2014; Homelessness Australia 2012).

While the eligibility criteria for FVPLS may not be technically as 'strict' as for other services, the nature of the services provided means that all clients generally display a number of indicators of disadvantage — namely people of Aboriginal and Torres Strait Islander origin experiencing, or at risk of, family violence. In 2012-13, around 90 per cent of clients were female and just over two thirds were aged between 18 and 49 years. Many (around half) were ongoing clients. The proportion of active clients that were ongoing clients in 2012-13 was largest in the Northern Territory, with two of the three FVPLS in that jurisdiction indicating that almost 80 per cent of active clients were ongoing.

20.5 What areas of law do providers target?

LACs, CLCs and ATSILS provide assistance across a range of criminal, family and other civil matters, while FVPLS specialise in family violence matters. In practice, however, a number of factors affect the ability to service need in these different areas of law.

LACs focus on criminal and family matters

For LACs, a major consideration is the need to devote resources to represent those with an indictable offence and who are unrepresented. In *Dietrich v R.* (1992) 177 CLR 292, the High Court held that when a person charged with an indictable offence cannot afford legal representation, the right to a fair trial means that the court should only proceed in exceptional circumstances. In practice, this means trials where there is a high risk that an individual faces imprisonment may be put on hold until LACs make resources available. In Victoria, duty lawyers only represent traffic matters if they assess that it carries a real risk of imprisonment (VLA, trans., p. 753).

Another is the NPA, which provides guidance to LACs about the legal matters that should attract Commonwealth funding. Priority matters include those relating to the wellbeing of children or people who have experienced, or are at risk of, family violence. Commonwealth funding is to be used only for Commonwealth law matters. Commonwealth funded civil law priorities include matters relating to social security benefits, consumer law, employment law, equal opportunity and discrimination cases. Commonwealth criminal matters largely relate to currency and customs offences.

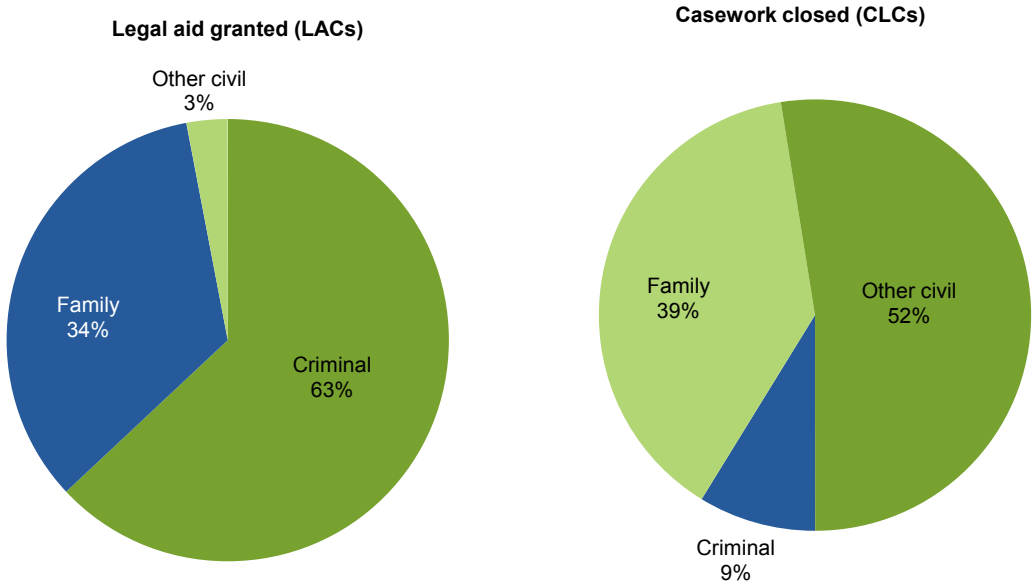
Of the 30 000 or so Commonwealth-funded grants of legal aid approved in 2012-13, 94 per cent were for family law matters while only 4 per cent and 2 per cent were for criminal and other civil matters respectively. In other words, the Australian Government funded around 600 non-family related civil grants of legal aid in 2012-13.

Funding for state law matters comes from state or territory governments. However, legal representation where matters are a mix of Commonwealth family law and state or territory family violence or child protection matters, and preventative and early intervention services, can attract Commonwealth funding.

LACs also have the flexibility, subject to funding, to provide civil law assistance relevant for acute situations, for example, providing legal assistance to the public as part of natural disaster recovery (National Legal Aid, sub. 123).

More than 60 per cent of legal aid approvals in 2012-13 were for criminal matters. Just 3 per cent of aid granted was for other civil matters compared with 34 per cent for family matters, including family dispute resolution services (figure 20.2).

Figure 20.2 **Aid granted and cases closed by law type — LACs and CLCs**
2012-13



Data sources: AGD unpublished data (CLSIS); NLA website (2014a).

More generally, the LACs focus their efforts on areas of civil law where private practitioners are not providing services. National Legal Aid (NLA, sub. DR228) noted that in spite of resource constraints some LACs maintain highly targeted civil law practices. For example, Legal Aid NSW said their civil law division:

> … specialises in areas such as consumer law, employment, government law, access to services, insurance, mental health and issues affecting homeless people, older persons, prisoners and veterans. These areas of law are not commercially viable for private practitioners because they are:
>
> - often in no cost jurisdictions
> - do not involve a dispute (and therefore costs from an opposing party)
> - impact on people who cannot afford to pay a private solicitor to assist them. (sub. 68, p. 79)

Moreover, due to the size of LACs relative to CLCs, the number of civil law assistance services (across both Commonwealth and state matters) provided by LACs can be greater

than the corresponding service count for CLCs within the same jurisdiction (Legal Aid NSW, sub. DR189).

CLCs focus on family and other civil law matters

CLCs' primary focus is in family and other civil matters. Many of their clients, whilst disadvantaged, miss out on legal aid. In 2012-13, around 91 per cent of CLCs' casework was for civil (including family) matters and 9 per cent for criminal matters. Of civil matters, around 42 per cent focused on family law matters (figure 20.2). Within the civil (including family) law area, assistance was provided for a broad range of disputes (figure 20.3).

ATSILS focus heavily on criminal matters

ATSILS main focus is on criminal law matters. In 2012-13, around 83 per cent of ATSILS matters were in (typically state-based) criminal law matters. Further, over 90 per cent of casework and duty matters were in criminal law in 2012-13.

Civil (including family) law services made up less than 18 per cent of matters in which ATSILS provided assistance (11 per cent in civil law matters, 5 per cent in family law matters and 1 per cent in violence protection matters) in 2012-13.

The mix of family and other civil and criminal matters varies by state. ATSILS in Tasmania, the Northern Territory and Queensland deal with relatively greater proportions of civil (including family) matters (62, 26 and 21 per cent, respectively). The lowest proportions of civil (including family) matters are observed in New South Wales (4 per cent) — reflecting a service focus on criminal law and children's care and protection law in that state — and Victoria (5 per cent).

The mix also varies within states with family and other civil law services only available in some offices — mainly those located in major metropolitan centres. Similarly, only some provide more specialised services such as mental health legal services, financial counselling services, prisoners' legal services or suicide prevention programs (NPBRC 2009a).

FVPLS focus primarily on family violence matters mainly in regional and remote locations

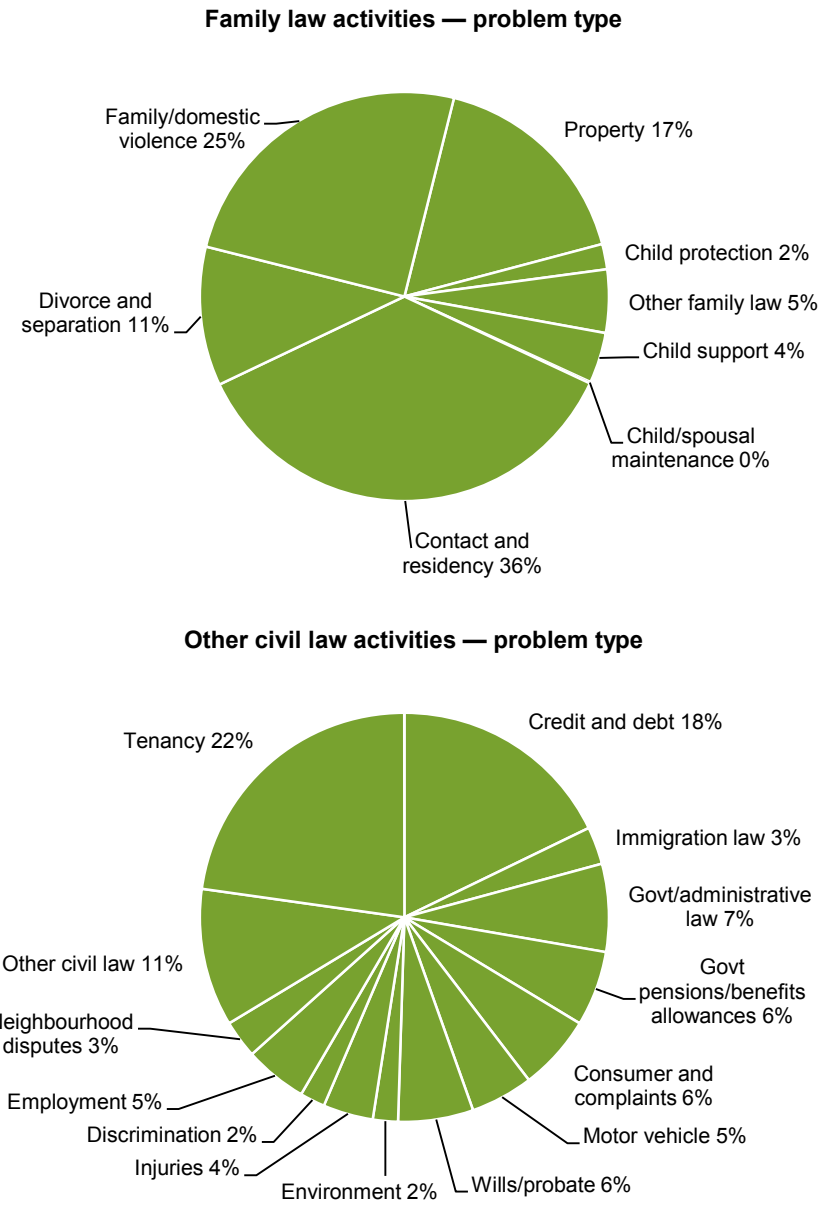
Consistent with their focus on family violence, FVPLS deal with a limited range of legal matters. These include:

- family violence restraining orders

- child protection, including legal assistance to children and mandatory reporting requirements
- victims' compensation
- family law including child support (where it relates to family violence).

In order to provide an holistic service to their clients, FVPLS also cover a variety of civil law matters (AGD, sub. DR300).

Figure 20.3 **CLCs family and other civil law activities by problem type**
2012-13



Data source: NACLC (sub. 91, p. 19).

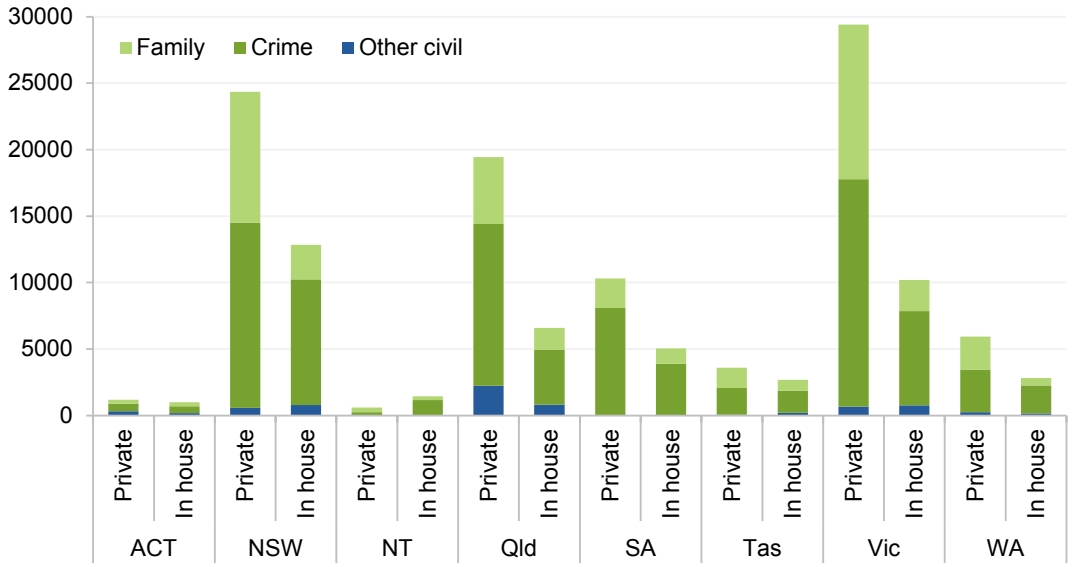
20.6 What do their service delivery models look like?

LACs employ a mixed service delivery model

LACs use a mixed service delivery model — that is, they use both in-house lawyers and private practitioners to deliver legal aid services.

At a national level around 70 per cent of LACs' services are provided by private practitioners and 30 per cent by LAC in-house lawyers (National Legal Aid, sub. 123). However, the use of private practitioners varies across the LACs and by law matter (figure 20.4).

Figure 20.4 **Legal aid approvals by type of practitioner[a] and jurisdiction**
2012-13



[a] Excludes a small number of unknown practitioner types.

Data source: NLA website (2014b).

CLCs employ a diverse mix of service delivery models

Many CLCs also employ a mixed service delivery model, but do so by harnessing pro bono and volunteers rather than paid private practitioners. The National Association of Community Legal Centres (NACLC) stated that:

> … the extent of volunteer involvement that CLCs are able to garner sets them apart from all other legal assistance providers and significantly increases their capacity and extends their

areas of expertise. In addition, CLCs are most effective at gaining significant pro bono contributions from private law firms. (sub. DR268, p. 4)

Based on a survey undertaken by NACLC (2012 and 2012b), the Commission estimates that the net contribution of pro bono and volunteers across the CLCs in 2012 was nearly 440 000 hours per year — around 225 full time equivalent employees per year.

While legal services are generally provided in-house by an employed solicitor or by a volunteer, service delivery models differ across CLCs. Examples include night advice clinics (often staffed by private lawyers providing pro bono services), partnerships with universities to deliver clinical legal education and other pro bono partnerships, and outreach clinics (delivering advice and CLE).

Some CLCs provide statewide or national services primarily via telephone and email. These types of service delivery models are common in specialist services, such as in the areas of consumer credit, environment and welfare.

Community support underpins the ATSILS service delivery model

Each ATSILS serves regional and remote locations through a combination of regional offices and outreach services, including court circuits and bush courts. Services are provided by in house lawyers but can be briefed out in exceptional circumstances.

Field officers with an understanding of Aboriginal and Torres Strait Islander culture and communities — generally Aboriginal and Torres Strait Islander people or those with significant community connections — play an important role in the ATSILS' service delivery model. While precise duties differ across organisations, field officers generally assist clients to access legal services and with issues related to their legal problems, including through client communications and relationship building (NPBRC 2009a).

FVPLS employ two distinct service delivery models

The FVPLS program is delivered through one of two models — regionalised provision and auspice arrangements. Regionalised models involve a single provider servicing multiple service areas. The auspice model involves provision across a single service area through an intermediate organisation, which provides business support to the FVPLS provider at arms-length.

Of the 31 high need areas currently serviced, 24 areas are serviced by seven regionalised providers. The remaining seven high need areas are each serviced by an auspiced provider.

As with the ATSILS model, services are generally provided by in-house solicitors but can be briefed out as funds permit. Providers typically deliver a proportion of their services

through outreach, including by following bush court circuits. Some providers deliver almost all of their services in this way.

All four providers emphasise an holistic approach to services

The objectives and priorities for LACs are based on the *Access to Justice Framework* (AGD 2009). This framework promotes inclusive, preventative and holistic service delivery as a means to enhance access to justice. Indeed, one of the outcomes to be achieved by LACs under the NPA includes increased collaboration and 'joined up' services for clients to help them address their legal and other problems.

CLCs also seek to adopt an holistic approach to service delivery. According to NACLC, CLCs typically view the legal problems of clients in conjunction with other factors affecting the client. Indeed, NACLC considered that CLCs 'have been at the forefront of developing both targeted and integrated models of service delivery' (sub. 91, p. 3). Examples of integrated legal and non-legal services include consumer credit and financial counselling. CLCs also seek to collaborate with other community service providers to provide 'wrap around' legal services in locations such as homeless shelters, shopping centres and community centres.

ATSILS and FVPLS providers also seek to provide holistic services with a culturally competent focus. The North Australian Aboriginal Justice Agency (NAAJA) provided a number of case studies to demonstrate their work with other community services to achieve holistic and effective outcomes for their clients and said:

> In our experience, meaningful access to justice for our clients comes through understanding and responding to Aboriginal peoples' disadvantage in a holistic and practical way. (sub. 95, p. 12)

The FVPLS model is designed to provide holistic and culturally appropriate services which engender trusting relationships with Aboriginal and Torres Strait Islander people and their communities. Counselling is also provided alongside legal assistance services (QIFVLS, sub. 46; National FVPLS Forum, sub. 97; and Aboriginal FVPLS Victoria, sub. 99).

20.7 What are their governance arrangements?

Governance arrangements for LACs are relatively straightforward

The NPA — a four year agreement between the Australian Government and each state and territory government (effective from 1 July 2010) — was established to support an holistic approach to the reform of the delivery of legal assistance services by LACs, CLCs, ATSILS and FVPLS. The NPA has subsequently been extended by one year to 1 July 2015 (Parliamentary Library 2014).

However, its primary focus is on setting out the broad objectives and priorities of legal aid services for Commonwealth law matters (box 20.2).

Directors/Chief Executive Officers of each of the LACs combine at a national level to form National Legal Aid (NLA), and one of their number is, on a rotational basis, elected as Chair. The NLA has also formed an alliance with the Legal Services Agency of New Zealand to facilitate the sharing of information, the showcasing of initiatives, and contribute to the development of best practice (NLA 2011).

At the provider level, while there are some differences between individual state and territory legislative arrangements, LACs are independent statutory bodies whose broad policies and strategic plans are generally established by a board and have employees who are state or territory government public servants.

Governance arrangements for CLCs are more complex

Governance arrangements for CLCs are varied and complex; operating at the government, industry and centre level (see also NACLC sub. DR268).

Some CLCs report directly to a Commonwealth program manager, others report to state program managers based in LACs, and in South Australia, CLCs report to the South Australian Attorney-General's Department. While CLCs are not directly funded by — or governed by — the NPA, the Community Legal Services Program (CLSP) (box 20.3) does form part of the NPA. The small number of CLCs (estimated to be around 24) who are not funded under the CLSP remain outside of this governance framework.

At the industry level, NACLC (sub. DR268) has established a national accreditation scheme with a view to improving service delivery and promoting good practice. Accreditation coverage is near universal — by being members of NACLC, CLCs obtain reduced indemnity insurance premiums.

At the centre level, CLCs are governed by a management committee and CLSP funding guidelines require them to be incorporated.

Box 20.2 The National Partnership Agreement on Legal Assistance Services

The National Partnership Agreement (NPA) on Legal Assistance Services is an agreement between the Commonwealth of Australia and the state and territory governments aimed at finding better ways to help people resolve their legal problems. The objective of the NPA is:

> A national system of legal assistance that is integrated, efficient and cost-effective, and focused on providing services for disadvantaged Australians in accordance with access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness. (COAG 2010, p. 4)

The outcomes to be achieved by legal aid commissions providing efficient and cost-effective legal aid services for disadvantaged Australians include:

> a) earlier resolution of legal problems for disadvantaged Australians that, when appropriate, avoids the need for litigation
>
> b) more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing, social exclusion
>
> c) increased collaboration and cooperation between legal assistance providers themselves and with other service providers to ensure clients receive 'joined up' service provision to address legal and other problems
>
> d) strategic national response to critical challenges and pressures affecting the legal assistance sector. (COAG 2010, p. 4)

The objectives and outcomes of the Agreement are to be achieved through:

> a) legal assistance providers increasing the delivery of preventative, early intervention and dispute resolution services
>
> b) comprehensive legal information services and seamless referral for preventative and early intervention legal assistance services within each State and Territory
>
> c) delivery by State and Territory legal aid commissions of efficient and cost effective legal aid services (consistent with the access to justice principles of accessibility, appropriateness, equity, efficiency and effectiveness), including:
>
> i) preventative legal services such as community legal education, legal information and referral
>
> ii) early intervention legal services such as advice, minor assistance and advocacy other than advocacy provided under a grant of legal aid
>
> iii) dispute resolution services, duty lawyer services, litigation services and post resolution support services. (COAG 2010, pp. 4–5)

Source: COAG (2010).

ATSILS and FVPLS have similar governance arrangements

Both ATSILS and FVPLS report directly to the Australian Government.

At the 'industry' level, seven of the eight ATSILS are members of a peak body, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS). FVPLS also have a national forum — the National Family Violence Protection Legal Services Forum (NFVPLSF) — but not all FVPLS are members.

Box 20.3 Community Legal Services Program (CLSP)

The CLSP commenced in 1978 with national funding of $175 000. Funding was provided on a grants-based arrangement with little or no performance reporting obligations. Today, CLCs funded through the CLSP receive funding via a single joint service agreement (with common accountability and administrative requirements) between the Australian Government, the relevant state government and each funded CLC.

There is a memorandum of understanding between the Australian Government and each of the LACs (or Attorney-General's Department in the case of South Australia) setting out the purchasing arrangements for the provision of state program manager services.

CLSP-funded CLCs may not duplicate the work of LACs.

CLCs normally receive funding on a recurrent basis from the CLSP, subject to satisfactory performance under the service agreement. Additional funding from governments may be provided on a one-off basis. CLCs are also allowed to carry over up to 15 per cent of funding (except for one-off funding) between financial years. At the beginning of each three-year contract, CLCs must submit a CLSP Plan that includes annual service delivery targets.

Most CLCs funded under the CLSP receive both Commonwealth and state or territory government funding. However, some only receive state government funds and others only receive Commonwealth funds.

The reporting requirements of CLCs include a triennial CLSP Plan, annual report, budget and service targets, biannual progress report, quarterly funds report and monthly data report.

Source: ACG (2014b).

Many ATSILS and FVPLS are also members of NACLC (the CLC national peak body). Those that are members, are undergoing the same accreditation process as CLCs.

At the provider level, operating guidelines require ATSILS and FVPLS to be incorporated associations. In providing culturally competent services they are also community-controlled organisations (NATSILS, sub. 78). For ATSILS, the boards of management comprise local Aboriginal and Torres Strait Islander representatives and they may have a specialist director who provides guidance on finance and corporate governance.

At the provider-level, FVPLS governance arrangements differ depending on whether they are regional or auspiced units. Under the regional model, a unit is an incorporated body which operates with one main coordinating office and a series of regional offices. Where units operate under the auspices of another organisation, there is a memorandum of understanding with a steering committee, which makes recommendations to the auspice unit's board but it has no day-to-day involvement.

Among ATSILS, three are incorporated under the *Corporations Act 2001* (Cth) and hence regulated by the Australian Securities and Investments Commission (ASIC) while the balance are registered associations under state or territory legislation and regulated by the relevant state or territory authorities (AGD, pers. comm., 21 March 2014). In contrast, most FVPLS providers are incorporated under the *Corporations (Aboriginal and Torres*

Strait Islander) Act 2006 (Cth) and are regulated by the Office of the Registrar of Indigenous Corporations (ORIC) while the balance (three) are regulated by ASIC (PM&C, pers. comm., 24 March 2014).

Coordination is facilitated by the Australian Legal Assistance Forum

All four national peak bodies — the NLA, the NACLC, the NATSILS and the NFVPLSF — are members of the Australian Legal Assistance Forum (ALAF) along with the Law Council of Australia. ALAF was established to:

- promote cooperation between service providers
- regularly disseminate information and promote communication among service providers
- inform governments on the needs of clients and practical delivery of legal assistance services
- assist governments in the development of policies to enhance access to justice (ALAF nd).

20.8 How are they funded?

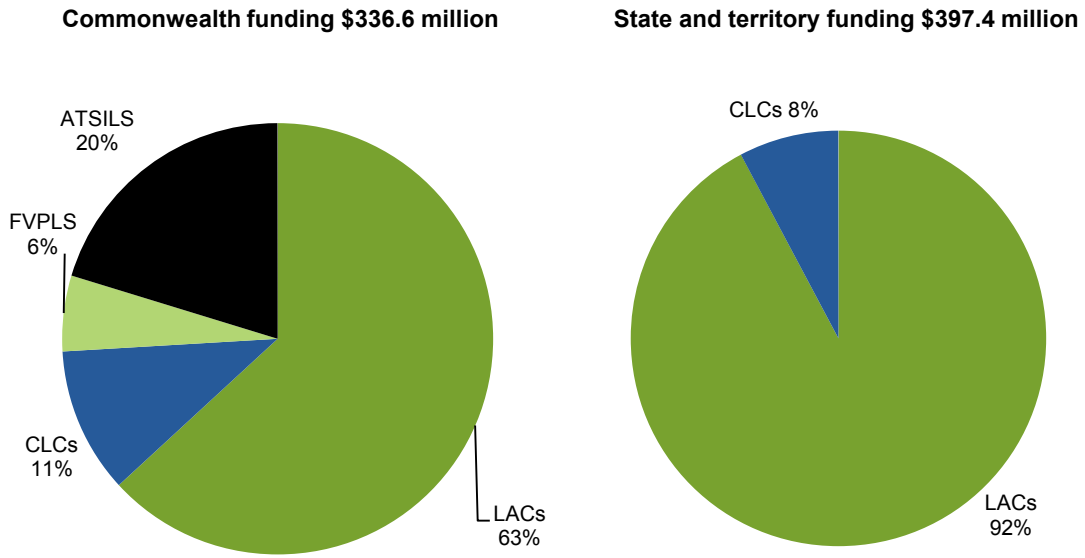
Governments are the primary contributors and their funds are mainly directed towards the LACs

Across all four providers, Australian Government and state and territory government funding sources dominate. Government funding contributions are set out in a series of funding agreements.

The Australian Government contributed about $336 million in funding to legal assistance services in 2012-13. State and territory governments contributed almost $400 million (including interest on solicitors' trust accounts), primarily to LACs and CLCs (figure 20.5).

The relative importance of supplementary funding sources (such as contributions from the interest on solicitors' trust accounts, fee revenue, cost recovery and in-kind contributions from pro bono services and volunteers) varies markedly for each of the four providers and between jurisdictions.

Figure 20.5 **Distribution of Commonwealth[a, b] and state and territory[c] payments to main legal assistance providers**
2012-13



[a] Excludes $56.9 million in Commonwealth funding provided to Other justice services excluding courts ($13.6 million), Other Indigenous justice services ($13.5 million) and Stronger Futures in the NT ($28.8 million). [b] Around $14.5 million in payments to LACs was reported in AGD's Portfolio Budget Statement. Another $198 million was reported in the Australian Government's Final Budget Outcome for 2012-13 in payments to states and territories for legal assistance services. This amount totalled $212.6 million, of which a small percentage is withheld to fund program improvements. This total is slightly different to the total of $211.3 million in 2012-13 reported on National Legal Aid's (NLA) website. [c] Includes public purpose trust fund contributions from state and territory governments. In 2012-13, these amounted to $90.4 million to LACs. State-based Public Purpose Fund contributions to CLCs were unable to be separately identified and are included in state and territory government funding contributions.

Data sources: AGD Portfolio Budget Statements (various); unpublished administrative data; NLA website (nd).

Government funding for LACs is relatively structured

The LACs total income in 2012-13 was around $625 million. The states and territories were the primary contributors (46 per cent). Funding from the Australian Government represented just over one third of funds (table 20.3).

The allocation of Commonwealth funding for the states and territories to deliver legal aid services through LACs is based on a legal aid funding distribution model.

The model uses measures such as population size, demographic characteristics and socioeconomic variables (for example, divorces involving dependent children per capita, single parent payment recipients per capita and a socioeconomic composition factor designed to measure disadvantage) to distribute Australian Government legal aid funding.

Table 20.3 **LACs income by funding source, 2012-13**

$ million

State/territory	*Commonwealth grants*	*State grants*	*Spec. Trust & statutory interest*	*Self-generated income*	*Total income*
New South Wales	66.3	99.6	39.8	11.1	216.8
Victoria	46.9	75.3	25.7	8.1	156.0
Queensland	45.1	45.3	18.9	4.0	113.4
South Australia	15.7	19.6	2.8	3.0	41.0
Western Australia	23.0	34.3	1.1	5.0	63.4
Tasmania	6.0	5.9	0.8	0.4	13.0
Northern Territory	3.9	3.6	0.0	1.6	9.0
ACT	4.5	6.0	1.4	0.4	12.3
Total	**211.3**	**289.5**	**90.4**	**33.8**	**625.0**

Source: NLA website (nd).

In some states, government funding is bolstered by income from 'special trust and statutory interest' (also known as solicitors' trust accounts or public purpose funds (PPFs)):

> … these funds receive interest earned on deposits in solicitors' trust accounts, and are administered by a body that allocates grants to organisations such as Legal Aid Commissions, community legal centres or other justice and legal-related organisations. (NACLC, sub. 91, pp. 43–44)

In 2012-13, income from PPFs represented around $90 million, or almost 15 per cent of total income of LACs.

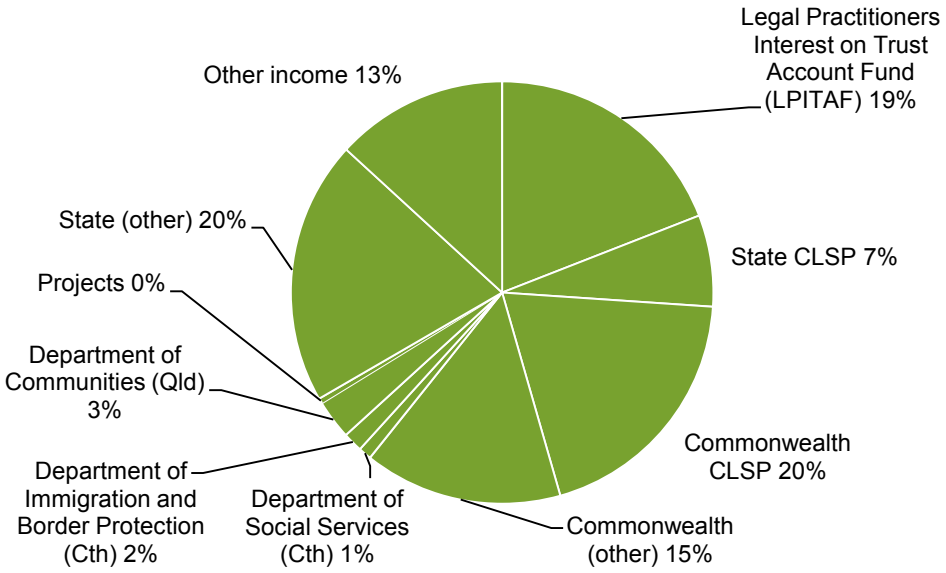
Many people who receive legal aid are required to pay a contribution towards the cost of legal representation (based on their income and assets) — termed 'self-generated income'. Certain cases are exempt. At the conclusion of the case or the legal aid grant, LACs may recover the total costs of a matter when the applicant has recovered a sum of money or other assets or there is a substantial improvement in their financial circumstances. In 2012-13, self-generated income was around $34 million, representing around 5 per cent of LACs revenue in that year.

Funding for CLCs is less structured and comes from a wider range of sources

Funding for CLCs varies markedly. Some CLCs receive sizable proportions of their revenue from government funding, while others receive very little or no funding and are largely or entirely staffed by volunteers. Those CLCs that receive government funding, can do so from a wide variety of government departments and agencies (figure 20.6).

Figure 20.6 **A wide range of funding sources — Queensland CLCs example[a]**

2012-13



[a] Based on self-reported data from a range of Queensland CLCs to the Queensland Association of Independent Legal Services. Given that centres' audited financial reports can classify income in different ways, some centres may have reported CLSP funding administered by Legal Aid as income from 'State (other)', some income streams are reported by project, rather than by funding source and some centres report 'miscellaneous grants'.

Data source: NACLC (sub. 91, p. 43).

CLCs attracted over $32 million in Commonwealth CLSP funds during 2012-13. Commonwealth funding is provided through application-based grants under the CLSP. Under these grant arrangements, Commonwealth funding is typically allocated to CLCs on an historical basis and includes an indexation factor. In contrast with the systematic approach for allocating Commonwealth funds to LACs and ATSILS, there appear to be no metrics for allocating Commonwealth funding to CLCs.

The split of Commonwealth funding across jurisdictions delivers the largest proportion to New South Wales (26 per cent) followed by Victoria (22 per cent), Queensland (15 per cent) and Western Australia (14 per cent).

State and territory government funding of CLCs amounted to around $30 million in 2012-13. The extent of state and territory government contributions to the CLSP varies across jurisdictions. In 2012-13, Victoria accounted for almost 40 per cent of the total $30 million funding envelope, followed by New South Wales (27 per cent), Queensland (22 per cent), Western Australia (9 per cent) and South Australia (3 per cent). Tasmania, the ACT and the Northern Territory governments did not contribute any funding.

The state and territory government funding contribution includes funds from the PPF. Outside of Queensland and New South Wales (where contributions from the PPF amounted to around $8 million in 2012-13), states and territories tend not to separate out this contribution.

CLCs are also able to access funding from other sources, including fee income, fundraising, philanthropic donations, seeking contributions from clients[18] and other government funding outside of the CLSP.[19] In 2012-13, contributions from these sources was estimated to be around $22 million. As mentioned earlier, in-kind funding through volunteers and pro bono contributions can be significant for some CLCs. As NACLC stated:

> [CLCs'] capacity to attract, train, utilise and retain large numbers of quality volunteers is a major feature that sets them apart from other legal service providers. (sub. 91, p. 48)

Funding for ATSILS is structured and is sourced solely from the Australian Government

The Australian Government has a formula-based approach to allocating the ATSILS' funding envelope between 37 Aboriginal and Torres Strait Islander regions. This model considers differences in the need for services, alongside factors influencing the cost of supply. Proxies for need in a given region include rates of unemployment, school completion, income, stolen generation status and single parent families. Metrics on the supply side include language needs and remoteness. The model aims to provide an equitable level of service in each of the 37 regions, irrespective of disadvantage and remoteness. Both the NT-based ATSILS also receive funding as part of the *Stronger Futures* (formerly the NT Emergency Response) initiative. No ATSILS receive state or territory funding to assist in the delivery of Commonwealth legal assistance services.

FVPLS receive Australian Government funding according to a 'bottom-up' model

Each of the 14 FVPLS has a three year standard funding agreement with the Australian Government.

The Australian Government's initial funding model for the FVPLS was an input-based approach where funding was provided for core positions of coordinator, two solicitors and one Aboriginal support worker or counsellor for each FVPLS provider plus office accommodation and other costs. Funding was equally distributed to the 31 high need areas.

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[18] Under the guidelines for Commonwealth funding, any CLC policy to seek contributions from clients for legal services must not cause clients to be excluded from assistance if they are not able to contribute financially.

[19] In 2006-07, Commonwealth funding to CLCs outside of the CLSP represented around 6 per cent of total funding to CLCs and affected 12.5 per cent of CLCs (Australian Government 2008).

Subsequently there has been some minor funding variations between services.[20] These variations are based on qualitative information from service providers (individual unit budgets are assessed during three yearly applications for continued funding and agreed with the department) and family violence-related and demographic data. Many providers now rely on other service providers for counselling assistance (AGD, sub. DR300).

Any unspent funds may be recovered by offsets and redistributed to other organisations with a greater need. Each FVPLS is able to request additional funding, with requests assessed on the basis of need, priority and available funding.

20.9 How have funding levels changed over time?

Government funding for legal assistance has been increasing

In real terms, government funding for the four main legal assistance services has increased by around 40 per cent between 2000-01 and 2012-13, some 3.1 per cent per annum in real terms (figure 20.7).

However, while Commonwealth funding for legal assistance services increased in the last Australian Government budget (see Parliamentary Library 2014), these headline funding figures mask some volatility in allocations between providers together with a reduction in anticipated funding growth. For example, in the 2013-14 Australian Government Budget, additional funding of $30 million over two years was provided to LACs. However in late 2013, following the Federal election and a change in government — as part of the Mid-Year Economic and Fiscal Outlook (MYEFO) Statement — LACs funding was reduced by $6.5 million over four years. This cut was intended to remove funding support for policy reform and advocacy activities (Australian Government 2013b). Subsequently, as part of its 2014-15 Budget, the Australian Government announced a further $15 million reduction in funding to LACs (Australian Government 2014b). A similar 'revolving door' of Commonwealth funding is observed across all four legal assistance providers (table 20.4).

[20] At the commencement of the program in 1998-99, an equal amount of funding was provided to each of the 13 FVPLS providers. Refinement has occurred over the years, including through regionalisation.

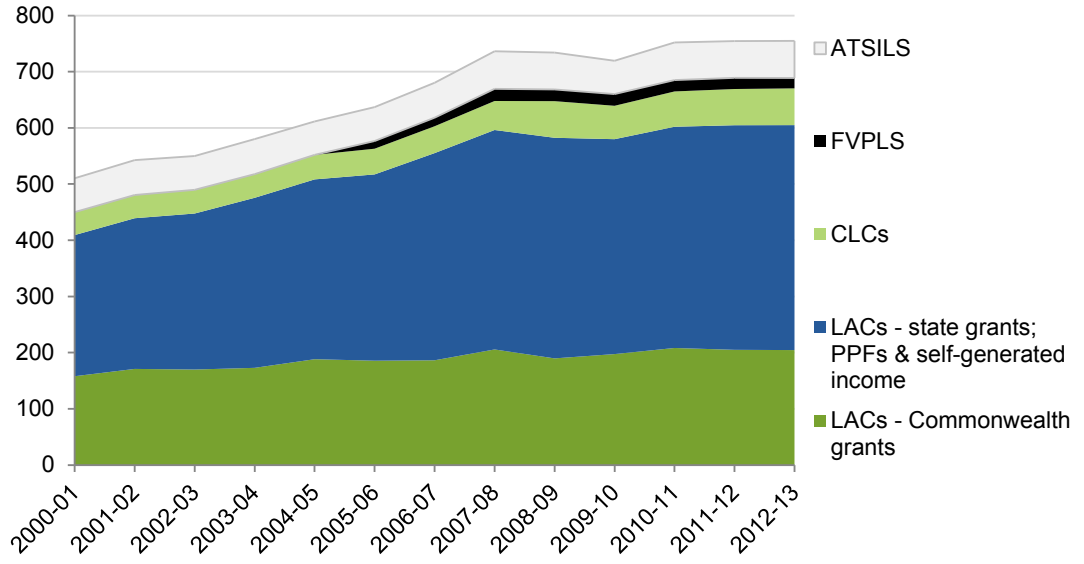
Table 20.4 **Recent changes in Australian Government Budget and portfolio transfers to legal assistance providers: an overview**
2013-14 to 2017-18

	2013-14	*2014-15*	*2015-16*	*2016-17*	*2017-18*
	$m	$m	$m	$m	$m
Legal Aid Program (LAP)[a]					
Base LAP funding[b]	10.8	3.7	3.8	3.9	3.9
Additional funding in 2013-14 Budget	15.0	15.0			
MYEFO 2013-14 savings measure	-3.5	-1.0	-1.0	-1.0	-1.0
2014-15 Budget savings measure		-15.0			
Total LAP funding[c]	22.3	2.7	2.8	2.9	2.9
Community Legal Services Program (CLSP)					
Base CLSP funding[b]	35.7	35.8	36.4	37.0	37.6
Additional funding in 2013-14 Budget	2.5	2.6	2.6	2.7	2.7
Transfer from Family Relationship Services Program (FRSP) and one off funding	7.3	6.8	6.8	6.8	
MYEFO 2013-14 savings measure	-0.9	-3.5	-7.6	-7.6	-7.6
Total CLSP funding[c]	44.6	41.6	38.1	38.9	32.7
Indigenous Legal Assistance Program (ILAP)					
Base ILAP funding[b]	68.3	69.2	71.8	73.1	74.3
Additional funding in 2013-14 budget	6.0	6.0			
Royal Commission funding	0.8	0.8	0.8		
MYEFO 2013-14 savings measure	-0.2	-1.6	-6.0	-5.5	-5.5
Total ILAP funding[c]	74.9	74.3	66.6	67.6	68.8
Family Violence Prevention Legal Services (FVPLS) Program[d]					
Base FVPLS Program funding	19.6				
Transfer from FRSP	1.2				
Royal Commission funding	0.2				
Savings measures subsequent to transfer from AGD to PM&C					
Total FVPLS funding	21.0				

[a] Excludes Commonwealth funding (of almost $800 million over the period 2010-11 to 2013-14) to LACs as part of the NPA on Legal Assistance Services. [b] Commission estimates derived from AGD Portfolio Budget Statements (PBS), MYEFO 2013-14 and information on within portfolio transfers provided by AGD. [c] Figures from 2014-15 onwards are based on AGD's 2014-15 PBS. [d] Following the transfer of FVPLS Program to PM&C and its amalgamation into the Indigenous Advancement Strategy (IAS), separate Budget appropriation figures for this program are not published after 2014-15 as they are included in the IAS' appropriation ($4 billion over 4 years).

Sources: Australian Government *Budget Measures, Budget Paper No. 2* (various years); Australian Government (2013b) *MYEFO Statement 2013-14*; AGD PBS (various years); AGD, pers. comm., 22 August 2014; PM&C, pers. comm., 26 August 2014.

Figure 20.7 **Legal assistance funding — 2000-01 to 2012-13**
Millions, expressed in 2011-12 dollars[a]



[a] Funding series for FVPLS begins in 2005-06. Deflated using wage price index.

Data source: Commission estimates based on unpublished AGD data: ABS (Wage Price Index, Australia, Jun 2014, Cat. no. 6345.0).

Some LAC funding sources have been in decline …

Real government funding to LACs has grown steadily over time. By contrast, funding contributions from PPFs and self-generated income has been variable (figure 20.8).

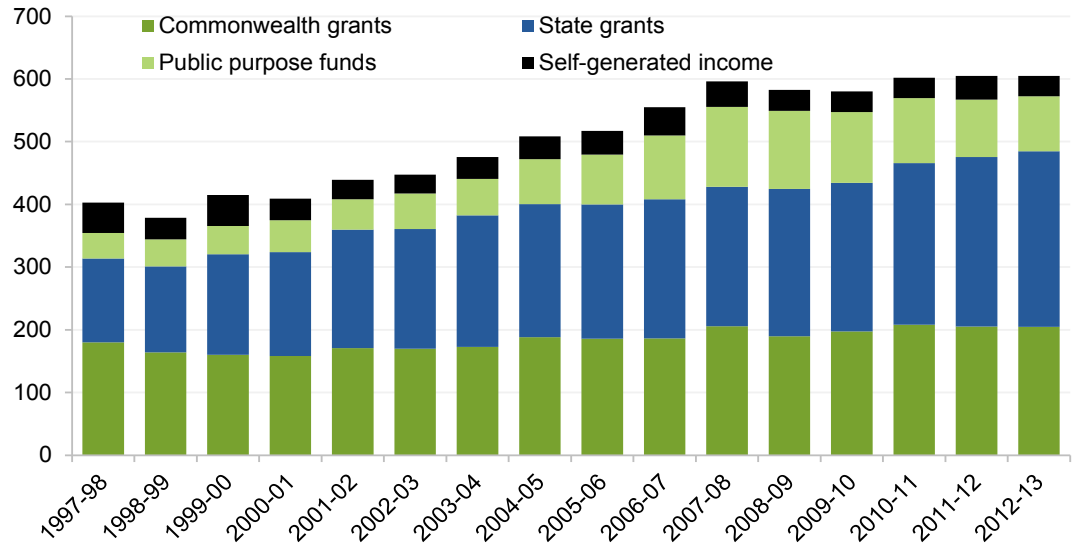
In real terms, the annual contribution from PPFs to LACs was about $41 million in 1997-98. By 2008-09, it had reached $124 million but it has been falling gradually since that time (with lower interest rates). In 2012-13, the contribution to LACs from this source was around $87 million.[21] Most state and territory governments appear to have largely underwritten these declining PPF contributions since 2008-09.

The relative importance of self-generated income to LACs revenue base has also declined in real terms over time. In 1997-98 self-generated income was around $48 million and by 2012-13 it was $29 million, reaching a high of $49 million in the intervening period.[22]

21 Expressed in 2011-12 dollars.

22 Expressed in 2011-12 dollars.

Figure 20.8 **Funding growth to LACs by source of funding**
1997-98 to 2012-13, expressed in 2011-12 dollars[a]



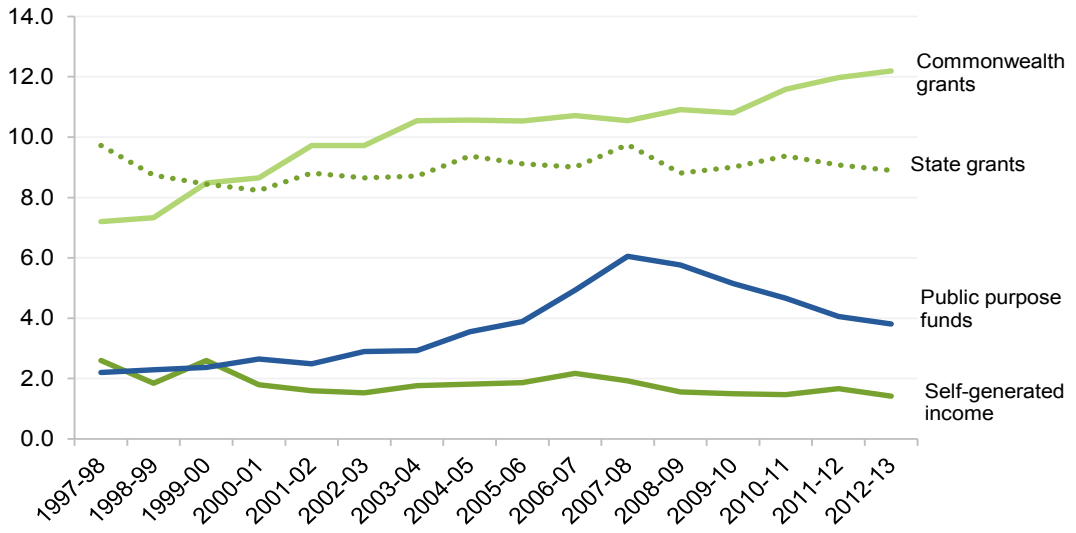
[a] Deflated using wage price index.

Data sources: Commission estimates based on NLA website (nd); ABS (*Wage Price Index, Australia, Jun 2014*, Cat. no. 6345.0),

… leading to recent falls in per person funding

In per person terms, real government funding has grown steadily, increasing by around 21 per cent since around 1997-98. However, since 2007-08, the level of per person funding has declined marginally (from $28.30 to $26.30 per person), largely as a result of the decline in the contribution from PPFs (figure 20.9).

Figure 20.9 **LACs funding per person by source of funding**
1997-98 to 2012-13, expressed in 2011-12 dollars[a]



[a] Based on Australian Government and state and territory government payments deflated by the wage price index and divided by estimated resident population.

Data sources: Commission estimates based on NLA website (nd); ABS (*Wage Price Index, Australia, Jun 2014*, Cat. no. 6345.0), and ABS (Australian Demographic Statistics, Dec 2013, Cat. no. 3101.0)..

However, as outlined in box 20.4, documenting changes in funding over time can be contentious.

The trend in per capita funding in each state and territory broadly tracks national trends, however, in some states and territories, such as the Northern Territory, the fall has been more pronounced (figure 20.10).

Funding for CLCs has been increasing

Real funding for CLCs from both the Australian Government and state and territory governments (including from PPFs) increased steadily until 2012-13. At various points in time (notably in 2008-09) one-off funding by the Australian Government has provided a noticeable boost (left hand panel, figure 20.11). As noted earlier, while Commonwealth funding to the CLSP increased in the latest budget, its anticipated growth was reduced.

Commonwealth funding has not grown as quickly as other funding sources and so its share as a proportion of all government contributions (including from PPFs) has fallen over time, from around 70 per cent in 1996-97 to around 54 per cent in 2012-13.

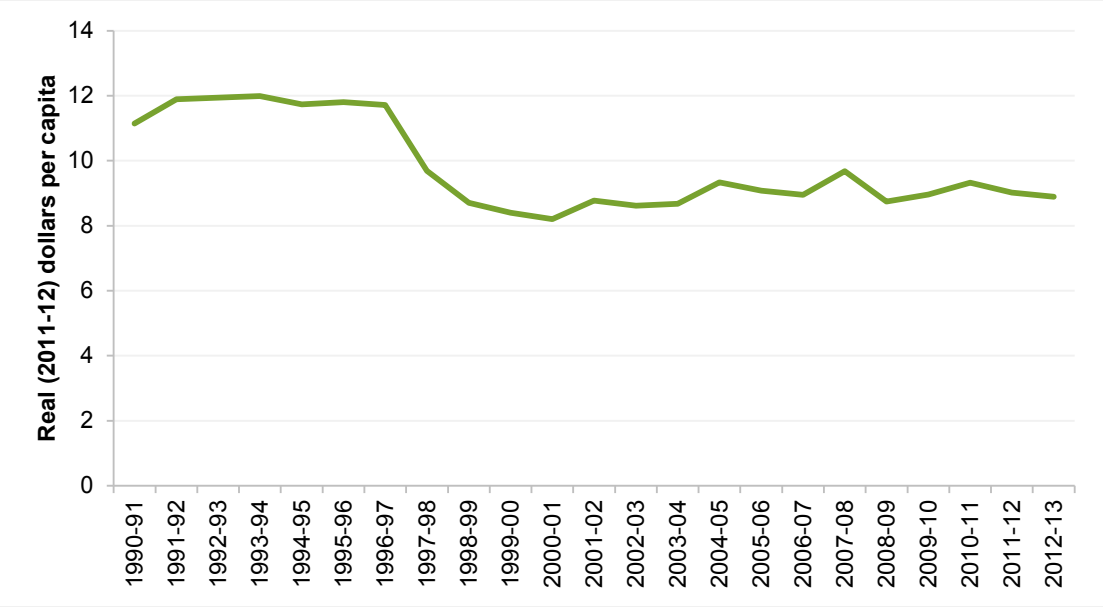
Box 20.4 Documenting changes in funding can be contentious

Some participants expressed concerns around the presentation of Commonwealth funding to LACs in the draft report — especially in terms of the reference year against which funding changes were measured. For example, the Law Council of Australia argued that measuring Commonwealth funding changes per capita from 1996-97 (as opposed to 1997-98) was more relevant in understanding changes to funding:

> … 2000-1 was the year in which Commonwealth funding reached its lowest point, at $7.80 per capita. At that point, it had fallen dramatically from its earlier 1996 level of $10.59 per capita — an extraordinary and crippling 26 per cent reduction in Commonwealth spending on legal aid. It is seriously misleading to ignore this part of the picture when attempting to describe the state of legal assistance funding, as these services still have not recovered to their pre-1996 levels. (sub. DR266, pp. 87-88)

The Commission has used the period 1997-98 to 2012-13 in real, per capita terms on the grounds that this is a sufficiently long period of time to observe changes in funding to LACs, rather than to address arguments around the historical allocation and share of LAC funding by different levels of government. The chart below shows real, per capita Commonwealth funding for LACs from 1990-91 to 2012-13.

Real per capita Commonwealth funding for LACs[a]



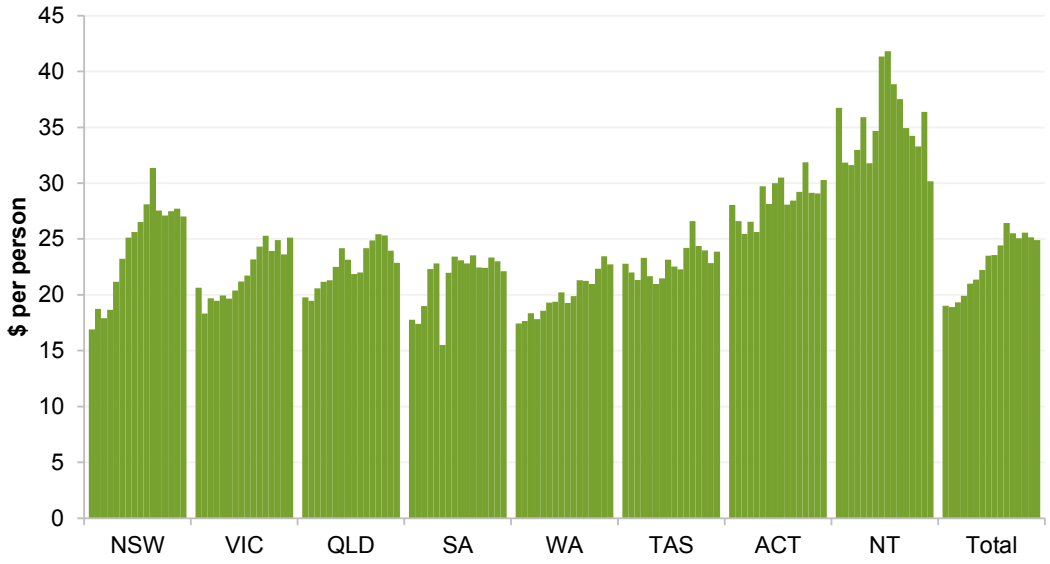
a Deflated using the wage price index (post 1996-97) and award rates of pay index (pre 1996-97) as there is no consistent wage price index that covers the entire period.

Data source: Commission estimates based on unpublished data from AGD; ABS (*Wage Price Index, Australia, Jun 2014*, Cat. no. 6345.0); ABS (*Award Rates of Pay Indexes, Australia, Jun 1997*, Cat. no. 6312.0); ABS (*Australian Demographic Statistics, Dec 2013*, Cat. no. 3101.0).

However, this series does not include other funding by the Australian Government such as for CLCs and for family-related law services (for example, family dispute resolution and other family-related early intervention services in Family Relationship Centres). If these were to be included, then the amount of per capita funding would be greater over the 2000s-onwards. This serves to highlight the difficulty of measuring long run changes in funding, as the composition of programs designed to assist people with legal problems has also changed over time.

Figure 20.10 **LACs funding per person by state and territory**

1997-98 to 2012-13, expressed in 2011-12 dollars[a]



[a] Based on Australian Government and state and territory government payments (including PPFs) deflated by the wage price index, divided by estimated resident population. Note that the data in this chart are not consistent with those of figures 20.7 to 20.9, as the data used in this figure come from a different data source that allows disaggregation at the state level.

Data sources: Commission estimates based on NLA website (nd); ABS (*Wage Price Index, Australia, Jun 2014,* Cat. no. 6345.0), and ABS (*Australian Demographic Statistics, Dec 2013*, Cat. no. 3101.0)

With population growth broadly keeping pace with CLSP funding, real funding per person was relatively flat over the early 2000s, up to the one-off funding boost in 2008-09. Subsequently it has fallen back to around trend growth (right hand panel, figure 20.11).

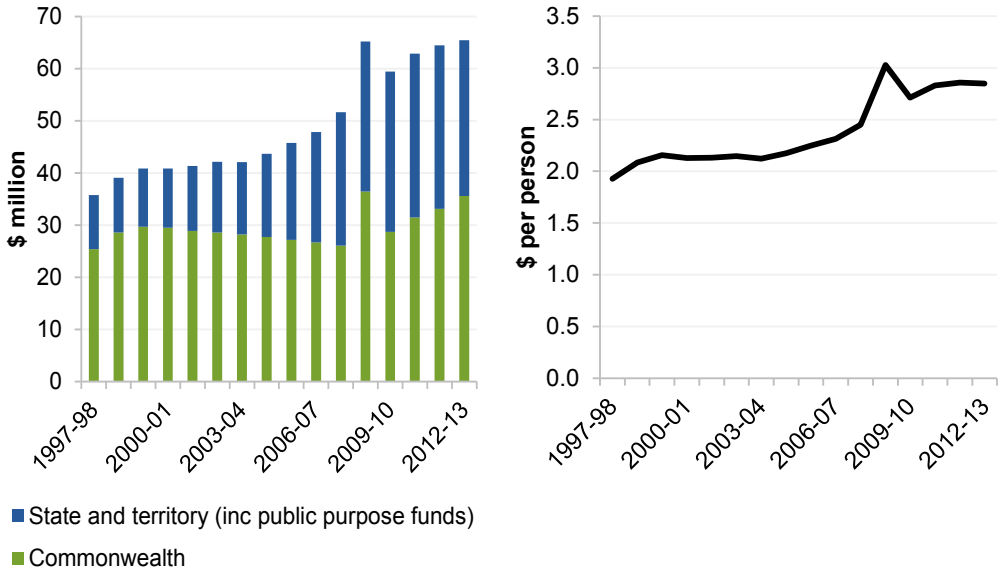
But the picture varies at the state and territory and centre level

A different pattern of CLC funding is evident at the state and territory level (figure 20.12).

There are substantial differences in the level of funding per person between the states and territories, with the Northern Territory receiving relatively high levels of per person funding. The pattern of per person funding growth also differs between states. In part this reflects the extent to which some jurisdictions rely on funding from the PPF. As NACLC argued:

> A significant proportion of state funding for community legal centres in Queensland and NSW is derived from the interest on solicitors' trust accounts, so global factors, such as declining economic activities and market fluctuations, can have a significant impact on funding for legal assistance services through this funding … (sub. 91, p. 44)

Figure 20.11 **Government funding to CLCs — growth and distribution**
1997-98 to 2012-13, expressed in 2011-12 dollars[a]



[a] Deflated using wage price index.

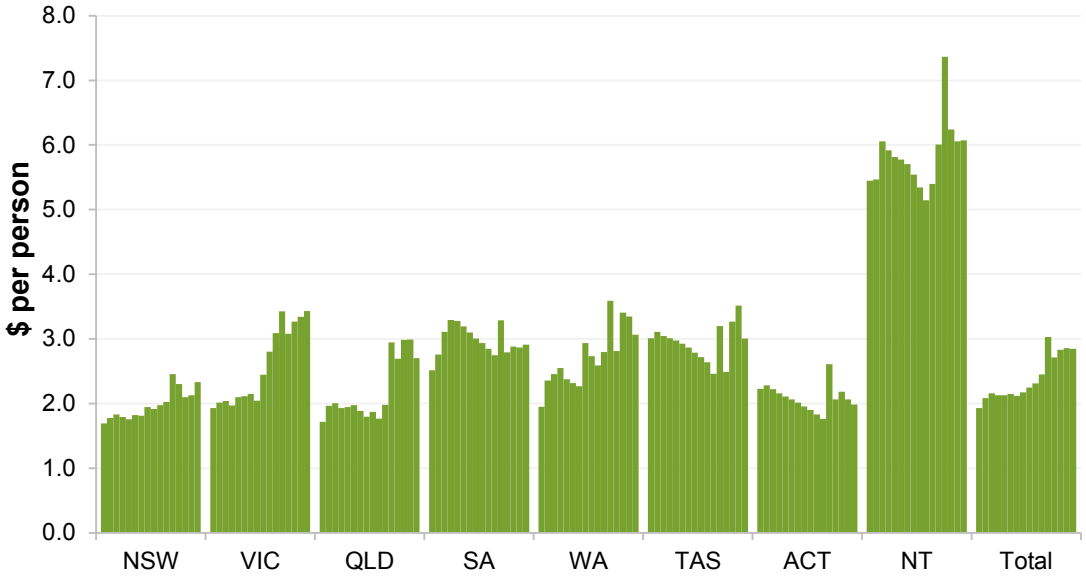
Data sources: Commission estimates based on unpublished AGD data, ABS (*Wage Price Index, Australia, Jun 2014,* Cat. no. 6345.0), and ABS (*Australian Demographic Statistics, Dec 2013*, Cat. no. 3101.0)

Increases in funding — particularly one-off boosts and cuts — have not been spread evenly across centres. For example, alongside the Australian Government's $10 million funding boost to the CLSP in 2012-13, around $10 million over four years (resulting from the transfer of uncommitted funds from the Family Relationship Services Program) was directed to Environmental Defender's Offices (EDOs). However, this additional $10 million in funding for EDOs was subsequently removed in 2013-14 (table 20.4). In addition, to achieve the required savings in the CLSP at the time, their longstanding annual payment of around $90 000 was also cut, resulting in the Australian Government de-funding all EDOs from 1 July 2014 (Arup 2013; and AGD, pers. comm., 14 August 2014).

Moreover, the number of CLCs has been growing, with funding dollars being spread across a larger number of providers.

Figure 20.12 **Community Legal Services Program funding per person by state and territory**

1997-98 to 2012-13, expressed in 2011-12 dollars [a]



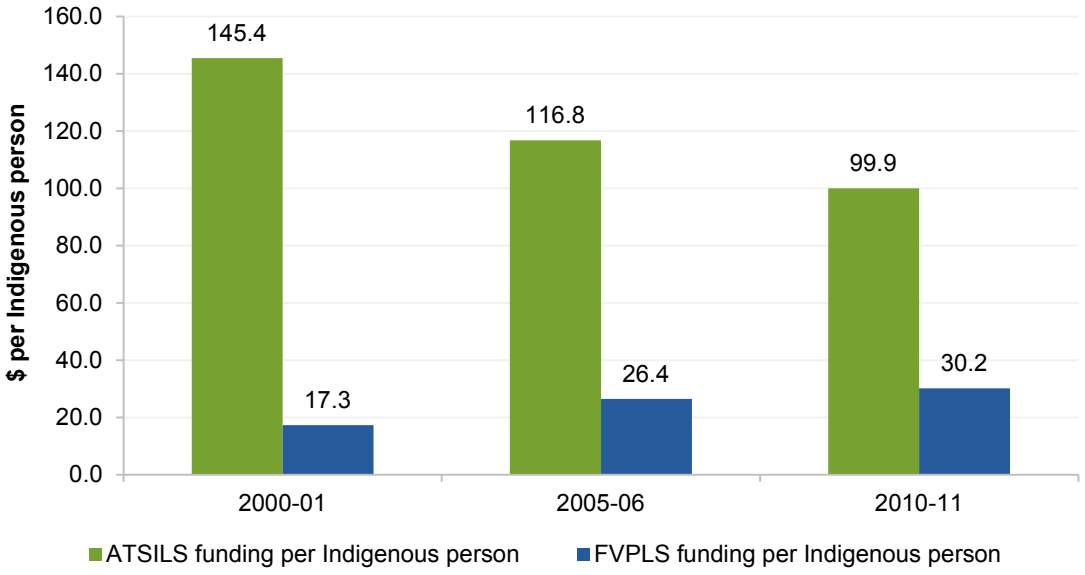
[a] Based on Australian Government and state and territory government payments deflated by the wage price index and divided by estimated resident population.

Data sources: Commission estimates based on unpublished AGD data; ABS (*Wage Price Index, Australia, Jun 2014,* Cat. no. 6345.0); and ABS (*Australian Demographic Statistics, Dec 2013*, Cat. no. 3101.0)

Per capita funding for ATSILS has fallen but has grown for FVPLS

Real government funding to ATSILS has remained relatively steady over time, while the funding for FVPLS increased from around 2007-08 (when the program was expanded) and has remained steady since then (see chapter 22). At the same time, the Indigenous population has grown relatively strongly (in part due to the greater number of individuals identifying as an Aboriginal or Torres Strait Islander person). Australia's total population has increased at an average annual rate of 1.5 per cent in the decade to 2011, while the growth in the Aboriginal or Torres Strait Islander population increased at 5.3 per cent per year over the same period. Hence real funding per person for ATSILS fell markedly but increased for FVPLS (figure 20.13). When funding is aggregated across both providers real funding per person declined by about 20 per cent between 2000-01 and 2010-11.

Figure 20.13 **Real funding per Indigenous person for ATSILS and FVPLS**
Expressed in 2011-12 dollars[a]



[a] Deflated using wage price index.

Data sources: Commission estimates based on AGD portfolio budget estimates (various); ABS (*Estimates of Aboriginal and Torres Strait Islander Australians, June 2011,* Cat. no. 3238.0.55.001).

20.10 Where to from here?

While the purpose of this chapter has been to provide an overview of the legal assistance landscape, it gives rise to a number of questions:

- are there grounds for having four separate providers, and if so, is the current division of responsibilities appropriate?
- are the right types of services being provided?
- what areas of law should be prioritised?
- who should have access to government funded legal assistance?
- are legal assistance services available in the 'right' locations?
- how effective is the 'mixed model' of service delivery?
- are the current governance arrangements fit for purpose?
- is the level and distribution of legal assistance funding appropriate and is the PPF a sustainable funding source?

These questions are explored in the following two chapters — chapter 21, which considers reforms to LACs and CLCs, and chapter 22, which examines legal assistance services provided to Aboriginal and Torres Strait Islander Australians.

21 Reforming legal assistance services

Key points

- Providing legal advice and representation for people who do not have the financial or personal capability to deal with legal problems can lower the costs of a dispute to the affected individual, the justice system and other government services.
- There is a strong qualitative case for government funded legal assistance and this is the most important basis for policy change. A lack of data has prevented the Commission from undertaking a comprehensive quantitative assessment of benefits.
- Legal Aid Commissions (LACs) and Community Legal Centres (CLCs) both target disadvantaged Australians, but the eligibility criteria for grants of aid are different. LACs means tests are stringent and need to be eased, while those used by the CLCs are less strict. Eligibility principles employed by LACs and CLCs need to be made more consistent.
- The mixed model of legal assistance service provision (using in-house and private lawyers) is successful, but the sustainability of the model is in question. Financial incentives will be required to attract private practitioners to perform essential legal assistance work, particularly in rural and remote areas. Legal assistance providers should have the freedom to use in-house lawyers where it is more efficient and effective to do so.
- CLCs play an important role in the legal assistance landscape but there is scope to enhance aspects of their performance, particularly with respect to scale. Rather than 'directing' CLCs to change, they (along with LACs) should face incentives to improve.
- While LACs' service models are informed by mapping of legal need, the positioning of CLCs in some jurisdictions is largely historical. A more systematic model is needed for determining the placement and funding of CLCs. The Western Australian model provides a template.
- The National Partnership Agreement on Legal Assistance Services is not working. It should establish an overarching vision of how the sector will operate, involve commitments from both the Commonwealth and the states and territories, and articulate national priority areas of law, priority clients and eligibility principles. Funding provided should be broadly related to the costs of meeting these priorities.
- Given the number and type of cases they see, legal assistance providers are uniquely placed to identify systemic problems affecting disadvantaged Australians. Addressing systemic problems can be an efficient way to use limited funding.
- Civil law matters are the poor cousin in the legal assistance family. Australia's most disadvantaged people are particularly vulnerable to civil law problems and adverse consequences resulting from the escalation of such disputes. Additional funding of $200 million per year is required to address the most pressing needs. Additional data should be collected to inform decisions about long-term resourcing requirements.
- Funding for legal assistance services is on an unsustainable course, with interest on solicitor trust accounts likely to continue to fall into the future. Governments need to plan for this decline now.

Legal assistance is an integral part of ensuring that the justice system is accessible to all. As discussed in chapter 20, government involvement in legal assistance services is justified (at a conceptual level) on a number of grounds. These include positive spill-over or flow on effects to the wider community from providing legal assistance services, asymmetric information, thin markets (especially in rural and remote areas) and equity or fairness in terms of accessing the justice system.

While there are in-principle grounds for government involvement in providing legal assistance, this does not of itself justify particular policy responses. In an environment of constrained resources, it is important to establish that legal assistance providers are providing the 'right' mix of services, to the 'right' clients, in the 'right' areas of law and in the 'right' locations. Decisions about how to spend limited legal assistance dollars, and who should receive them, should be based on a comparison of benefits relative to costs. That way, resources are deployed where legal needs are greatest and legal problems have the most significant consequences.

Directing resources to those areas and individuals where the returns are highest is one way of ensuring that taxpayers get value for money. But choice of provider, the incentives they face, the service delivery models they adopt, and their relationships with government, clients, and other providers of legal services also influence whether taxpayer dollars are being used to best effect.

This chapter examines:

- what types of services legal assistance providers should offer (section 21.1)
- what types of matters and individuals should attract government-funded legal assistance (section 21.2)
- how the service delivery model can be improved (section 21.3).

Having explored the nature of the service offering, the chapter concludes by considering how to address gaps in service coverage in the short term (section 21.4) along with how best to ensure the sustainability of the legal assistance sector over time (section 21.5). Finally, section 21.6 examines the benefits from a well-functioning legal assistance sector.

The Commission considers that there are grounds for culturally tailored services to meet the civil law needs of Indigenous Australians. While these services are discussed in the next chapter, many of the reforms outlined in this chapter are also relevant for providers of culturally tailored services.

21.1 What types of services should be offered?

A range of services helps target interventions …

Individuals have different capabilities and face different legal problems and so the nature and extent of assistance they require varies.

In line with the differing needs of clients, Legal Aid Commissions (LACs) and Community Legal Centres (CLCs) provide a continuum of services covering information, community education, minor assistance, dispute resolution, duty lawyers, representation in courts and tribunals, and advocacy. Providing a range of responses helps to ensure responses are proportionate to need and, where possible, that problems are identified and addressed early.

In terms of the number of services provided, information, community education and minor assistance are most common (chapter 20). These services are less costly than grants of legal aid, and so are not generally subject to eligibility tests. There are good grounds for these services, since they assist in building the knowledge and capability of the public to navigate the civil justice system. However, the Commission considers that there is scope to improve the way in which they are delivered, including by encouraging greater coordination within the sector. The Commission's recommendations for improving the efficiency and effectiveness of these services are outlined in chapter 5.

While the provision of information, education and minor assistance services can help many within the community to resolve their disputes, they are generally not considered appropriate as a standalone service for disadvantaged individuals. As Legal Aid NSW observed:

> … Australian and international research has consistently identified that the most vulnerable are less likely than others to have the skills and psychological readiness to achieve legal resolution on their own or with minimal assistance. These clients will require more intensive support beyond information, education, advice and minor assistance. (sub. 68, pp. 58–59)

In terms of costs, duty lawyer services represent a middle ground, costing around $205 per session (chapter 14). Operating on a drop-in basis at many courts and tribunals, duty lawyers provide short, timely interventions — completing documents, seeking adjournments and appearing on behalf of individuals. Eligibility for duty lawyer assistance depends on the provider. Services are generally rationed according to a combined assessment of the needs of individuals, the type of matter at hand (and the organisation's ability to assist), as well as a 'first come first served' principle.

Other court and tribunal based assistance services, such as the self-representation scheme run by the Queensland Public Interest Law Clearing House (QPILCH), adopt a different approach, seeking to assist individuals before they reach the court door. The service offers assistance at all stages of litigation including drafting and amending pleadings, advice on

disclosure and evidence, settlement, negotiation and preparation for trial. In contrast to duty lawyer services, providers of self-representation schemes do not generally appear on behalf of individuals.

Both schemes offer a number of advantages, including diverting inappropriate cases away from courts and tribunals by providing a 'reality check' for clients and assisting courts to function more efficiently. The relative merits of these two approaches are discussed in chapter 14.

Dispute resolution services are a more intensive form of assistance and are generally provided by the LACs, the most common being lawyer assisted negotiation. Lawyer assisted negotiation is often used in family law disputes — having access to a lawyer to explain the implications of any agreements assists the drafting of appropriate consent orders on the day of the mediation (Legal Aid NSW, sub. 68). Dispute resolution services can be adapted to accommodate vulnerable individuals and are regarded as a 'user friendly' mechanism to resolve complex family legal problems. They may involve the use of 'shuttle' conferencing techniques or telephone attendance, which assist victims of family violence to resolve their family issues in a safe environment. The average cost of a family dispute resolution conference delivered by Legal Aid Queensland (LAQ) was around $2000 in 2013-14 (chapter 24).[23]

In the absence of dispute resolution assistance (and other forms of early legal advice), family disputes at the more complex end of the spectrum — such as those that deal with parenting arrangements where the parties are highly conflicted or there are family violence issues — can quickly escalate, which in turn can result in large costs to families, the justice system and society. Family law disputes are the subject of a standalone chapter (chapter 24).

Litigation services cover legal representation in court and tribunal proceedings for which an application for legal representation has been granted. These services are an intensive form of assistance and are 'core business' for the LACs — in 2011-12, the average cost of a grant of legal aid provided by the LACs ranged from just under $4000 in family law matters to around $8600 for other civil matters (ACG 2014c).[24] Grants of legal aid are considered in more detail throughout this chapter.

… but more information is needed on the relative merits of the various service types

The Commission considers that there are good grounds both for a continuum of services and for each of the individual components offered by legal assistance providers. However, in order to promote better targeting of services over time, providers need to improve their

[23] This figure is based on grant of aid fees payable and is net of overheads.

[24] This represents the average cost for a Commonwealth grant of aid.

understanding of the costs of delivering each of the service types (particularly where services are delivered in-house) and the outcomes associated with their use.

Some providers, such as Legal Aid Queensland and Legal Aid NSW, have already taken steps to better understand service *costs*. For example, Legal Aid NSW is undertaking an activity based costing pilot in the second half of 2014, with the aim of augmenting its service planning processes and demonstrating that its services are delivered in an effective, efficient and economical manner (NSW Legal Aid, pers. comm., 19 August 2014). Legal Aid Queensland has a more developed understanding of its costs, as in-house lawyers face notional income targets (box 21.1).

Box 21.1 Understanding in-house costs — the Queensland experience

Legal Aid Queensland (LAQ) utilises a mixed service delivery model in which legal services are provided by employed lawyers in its 'in-house' practices, and also by private lawyers. LAQ purchases almost 80 per cent of legal representation services from private lawyers.

To ensure the efficiency of its 'in-house' practices, LAQ develops annual performance targets for its employed lawyers. The targets are developed at an individual level and then accumulated to form team, divisional and organisational targets.

The performance targets are expressed in terms of 'income' to be earned. Utilising the same fee rates payable to private lawyers for undertaking the same work, 'income' refers to the imputed amount of income raised on casework files, legal advice and duty lawyer attendances.

To support the development and measurement of targets, lawyers are required to record time spent working on particular activities, including on particular types of grants of aid. The time recording is entered into LAQ's business system.

LAQ monitors the achievement of the performance targets throughout the year, including at monthly executive management team meetings where performance variances are assessed and remedial actions identified. Similar processes occur at team and divisional levels. In this way, the use of performance targets provides a sound basis for performance management of in-house lawyers.

Source: LAQ (pers. comm., 2 September 2014).

In contrast, the *outcomes* obtained for clients by legal assistance providers generally do not appear to be captured or recorded. A lack of data on outcomes undermines the ability of legal assistance providers to target their resources effectively, as they are unable to identify what types of services are providing the greatest benefit (relative to costs) to their clients and the wider community.

Measuring the effect of legal assistance on outcomes for clients is more common in overseas jurisdictions. For example, legal assistance providers in England and Wales systematically capture client outcomes data. Outcomes recorded for finalised matters vary by problem type and include a range of possible results, such as clients receiving a settlement or damages, having a debt reduced or written off, or receiving an apology. Some of these outcomes are defined for measurement purposes as amounting to a 'substantive

benefit' for the client — providers are generally required to provide a 'substantive benefit' in a certain share of cases as part of their key performance indicators under funding agreements (Legal Services Commission 2012).

Measuring the outcomes arising from legal assistance may be particularly informative when combined with a broader longitudinal survey of legal need in society. Again, England and Wales provide a useful example of this approach through the English and Welsh Civil Justice and Social Research Survey. By comparing outcomes obtained by those who receive legal assistance with the experiences of the wider population, the consequences and potential benefits of providing legal assistance can be better identified.

Not only will an improved understanding of outcomes enable providers and governments to better direct resources, it may make providers less vulnerable to excessive tightening in times of fiscal restraint by allowing them to demonstrate the benefits (including to government) of the services they provide. The benefits of providing legal assistance are discussed in more detail in section 21.6.

Addressing systemic issues

While duty lawyer services, mediation and litigation or casework focus on meeting the needs of individuals, LACs and CLCs also provide services that seek to address the needs of entire groups within the community. They do so by identifying and acting on systemic issues. This can take the form of strategic advocacy, law reform activities and public interest litigation.

These activities can benefit people directly affected by a particular issue, and, by clarifying or improving the law, they can also benefit the community more broadly and improve access to justice (through positive spill-overs). For example, addressing an underlying problem that has led to many disputes can free up the resources of affected parties, legal assistance providers, private lawyers, courts and governments.

Strategic advocacy, law reform and public interest litigation are areas where there are few incentives for private lawyers to act. Private lawyers are focused mainly on achieving outcomes for individual clients. They are less interested in achieving broad-based reforms that could result in positive outcomes for the wider community. There are good reasons for this. Where individuals are the principal beneficiaries of services, private lawyers can charge for the work that they undertake. But lawyers are unlikely to be able to charge for work that benefits the entire community. Victoria Legal Aid summed up the situation:

> The private market alone has neither the infrastructure nor the incentive to prevent legal problems (reducing need for its own services) or undertake important preventative work … despite these being inexpensive and cost effective ways to reduce demand on justice services. (sub. 102, pp. 5–6)

Legal assistance lawyers, on the other hand, are uniquely placed to identify systemic issues, particularly those affecting disadvantaged Australians:

> … the daily experience of legal aid lawyers assisting high volumes of disadvantaged clients is harnessed to identify systemic issues and provide input into law reform processes. (Legal Aid NSW, sub. 68, p. 95)
>
> … legal assistance service providers are often the best placed to provide valuable and early feedback in relation to policy and legislation, in order to increase the efficiency and effectiveness (and therefore savings) of the justice system … (Women's Legal Services Australia, sub. DR207, p. 13)

While LACs are particularly well placed to identify systemic issues given the high volume of individuals that they see, many CLCs are also actively engaged in law reform activity to advocate for changes to laws, policies and procedures that are unfair or impede access to justice for their client groups.

> We want to emphasise that not only do we believe that CLCs play a key role in identifying and acting on systemic issues … and have a long track record of doing so for the benefit of consumers … these activities are an efficient use of limited resources. (Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202, p. 35)

Some of the smaller CLCs have a more limited capacity to undertake advocacy work. But even here, there are examples of CLCs working with LACs (box 21.2).

While legal assistance providers have a long history of providing strategic advocacy and law reform activities, both these activities have recently become a source of contention, with some concerned that they might displace frontline services. Reflecting these concerns, funding for strategic advocacy and law reform was cut by around $40 million over four years as part of recent Commonwealth budget measures (chapter 20), although a decision to reduce funding for family violence prevention legal services (FVPLS) was later reconsidered (appendix H).

However, the Commission considers that in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources. As noted by Legal Aid NSW:

> Law reform and strategic advocacy makes a significant contribution to reducing demand and consequently the costs on the justice system. (sub. DR189, p. 38)

Indeed, as Victoria Legal Aid pointed out, limited funds do not allow them to focus solely on legal representation for single cases.

> Strategic advocacy is increasingly utilised by the sector as a necessary means to stretch the value of finite funds to maximise benefits to the community. … the finite Legal Aid Fund will never meet all unmet legal need, requiring innovative approaches to expand our reach and impact. (Victoria Legal Aid, sub. 102, p. 5)

Box 21.2 Some strategic advocacy examples

The National Bulk Debt Project

This joint project between Legal Aid NSW, Victoria Legal Aid and West Heidelberg Community Legal Service assisted disadvantaged clients in long-term financial hardship by negotiating with creditors for waiver of their debts. Rather than negotiating for individual clients, lawyers negotiated for clients in bulk by convincing the creditors that there was no commercial value in pursuing the debts. To date, over $15 million in debt has been waived and providers are working with banks, debt collectors and credit providers to develop a sustainable solution for people in long-term financial hardship who are unable to repay their debts (Legal Aid NSW, sub. 68; Victoria Legal Aid, sub. 102).

Systemic issue identified relating to loan applications

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

Joint representations were made to the bank by Legal Aid NSW and the Australian Security Investments Commission. The bank subsequently advised that there were about 120 loans affected by this conduct. The bank agreed to send each of these borrowers a letter, asking them to contact the bank and suggesting that they seek advice from Legal Aid NSW. Legal Aid NSW was able to negotiate an appropriate resolution for most of these customers without needing to commence any proceedings in court (sub 68).

Flood legal help response

In late 2010 and early 2011, Queensland experienced heavy rains and cyclones causing severe flooding. The resulting natural disaster was one of Australia's largest in recent memory, with more than 2.5 million people affected and three-quarters of Queensland declared a disaster zone. The flooding had tragic consequences with lives lost and homes, businesses and possessions destroyed.

Individuals' experiences of insurance claims handling arising from the floods highlighted numerous issues with the insurance sector including:

- widespread community misunderstanding as to flood and storm coverage
- multiple and diverse definitions of flood
- many policies not covering flood
- problems with claims handling.

LAQ's Flood Legal Response team successfully helped clients to recover more than $15 million in insurance payouts. LAQ also contributed to the Queensland Floods Commission of inquiry, the Australian Government Natural Disaster Insurance Review and an inquiry into the insurance industry undertaken by the House of Representatives Standing Committee on Social Policy and Legal Affairs, which generated a number of recommendations including for improving consumer protections (LAQ, pers. comm., 2 September 2014).

While strategic advocacy can help stretch legal assistance dollars further, its benefits are not limited to the civil justice sector. Victoria Legal Aid went on to note that strategic advocacy can also have significant impacts on other government agencies:

> When done effectively, strategic advocacy can create significant savings not simply for the legal assistance sector but also a cascading impact on other agencies. This includes improving primary decision making providing government with the advantages that flow from getting a decision right the first time and short-circuiting the duplication and delay caused by poorly made decisions. (sub. 102, p. 6)

The Commission considers that strategic advocacy and law reform that seeks to identify and remedy systemic issues, and so reduce the need for frontline services, should be a core activity of LACs and CLCs (particularly peak bodies and the larger CLCs). Participants in this inquiry expressed strong support for this proposition (for example, see Legal Aid NSW, sub. DR189; Peninsula Community Legal Centre, sub. DR192; Consumer Action Law Centre and Consumer Credit Legal Centre NSW, sub. DR202; Kingsford Legal Centre, sub. DR242; QPILCH, sub. DR247; Women's Legal Services NSW, sub. DR257; Women's Legal Service Victoria, sub. DR259; National Association of Community Legal Centres (NACLC), subs. DR268 and DR301).

While the role of Aboriginal and Torres Strait Islander legal services (ATSILS) and FVPLS is discussed in the following chapter, they too are involved in strategic advocacy and law reform activities. By advocating on issues relating to matters such as racial discrimination and child protection, their activities can also reduce the need for frontline services (trans., pp. 1036-1037; Hunyor 2012).

Strategic advocacy and law reform for environmental matters

Not all strategic advocacy and law reform activities arise from problems experienced by disadvantaged Australians. Strategic advocacy and law reform (along with public interest litigation) in relation to environmental matters is one such example. Typically, such activities are undertaken by Environmental Defenders Officers (EDOs) — a network of CLCs across Australia that specialise in environmental law.

The rationales for government support for environmental matters are well recognised. The impact of activities or actions that cause environmental harm typically extend beyond a single individual to the broader community. For example, inappropriate developments by governments or the private sector that reduce air quality, water quality or the amenity of an area can impose costs on all residents in that area. Costs might include poor health outcomes or decreased land values.

As a result of negative environmental externalities, the social benefits for a community in raising environmental matters are more likely to exceed the private benefits for a single individual. If the costs of litigation are high and/or there are substantial costs to coordinating community interests, this can lead to situations where there may be environmental matters that are justiciable by the courts but individuals or communities are

unwilling or unable to raise them. In a study commissioned by the European Commission to examine the socioeconomic effects of changes to access to justice in respect of the environment, the Maastricht University Faculty of Law stated:

> [There are] many reasons why private enforcement of environmental standards may not work: the damage may be too widespread, resulting in low damage amounts to individual victims even if the totality of the damages is very high. These circumstances produce … a 'rational apathy' on the part of the individual victims. Therefore, none of them are motivated to take on the expense of litigation. … Moreover, collective litigation does not always follow either, since the transaction costs for the group to get organized can in some cases be high. This may be an argument in favour of allowing a lower threshold for *locus standi* in case of environmental harm and even allowing the development of so-called environmental Public Interest Litigation. (2013, pp. 55–56)

In their submission to this inquiry, the Australian Network of Environmental Defender's Offices (ANEDO) has also expressed the view that:

> … potential litigants are often unable or unwilling to expend their own funds or to risk losing their own financial security in pursuit of a remedy on behalf of the public interest. Ensuring that adequate legal resources are available to allow each side to present well-reasoned and clearly articulated arguments is essential if justice is to be done, and to be seen to be done. (sub. DR293, p. 2)

As with strategic advocacy and law reform more broadly, the benefits of providing these services are not confined to the individuals immediately involved or to the civil justice sector.

> Advice and casework undertaken by EDOs allows us to identify systemic problems which prevent the regulatory framework from effectively securing a healthy environment. Amending or clarifying laws to address these issues can reduce litigation, improve transparency (and therefore community confidence) and minimise future economic costs associated with addressing poor health and rehabilitating affected ecosystem values. (ANEDO, sub. DR293, p. 3)

Unlike other CLCs who recently experienced a reduction in Commonwealth funding for strategic advocacy and law reform, funding for Environmental Defender's Offices (EDOs) was withdrawn entirely. The Commission notes that the EDOs do not focus solely on these activities. Only around one quarter of total EDO activities relate to law reform, with the remainder involving advice and education, and conducting public interest environmental litigation (ANEDO, sub. DR329). As stated by ANEDO:

> EDOs undertake a significant amount of community legal education work and endorse the Draft Report's support for the importance of this work. ANEDO considers that funding should be directed to ensuring that clear, practical resources are available to assist the community to understand laws that affect them, and how best to exercise the opportunities afforded to them by those laws. (sub. DR293, p. 3)

Such community education work includes the production of a community guide on mining laws and a farmers' guide on environmental laws by the Tasmanian EDO (trans., p. 969).

A key consideration for the EDOs in deciding whether to undertake public interest litigation is whether such litigation is likely to be successful. The EDOs note that they undertake a rigorous assessment of prospects (often in consultation with an experienced barrister). Most cases in which EDOs are involved achieve some change in outcome, whether a complete reversal of the decision being challenged, changes to permit conditions or orders requiring some remediation action. In the past five years, no cases in which EDO offices were engaged have been dismissed on the basis that the case was frivolous or vexatious (ANEDO, sub. DR329).

Funding should be provided to address systemic issues

The Commission considers that there are strong grounds for the legal assistance sector to receive funding to undertake strategic advocacy, law reform and public interest litigation including in relation to environmental matters.

Irrespective of the Australian Government's ultimate position on whether strategic advocacy and law reform should attract government funding, the Commission considers that some restoration of funding is appropriate. While the situation varies by provider, the quantum of the funding cuts exceeds the quantum of resources that had been dedicated to providing these services. Legal assistance funding is discussed more fully in sections 21.4 and 21.5 and appendix H.

RECOMMENDATION 21.1

The Australian, State and Territory Governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.

21.2 What individuals and matters should attract government-funded legal assistance?

What factors currently determine who gets access to grants of aid?

While information and education services are freely available, access to relatively intensive and ongoing assistance such as grants of legal assistance is more closely targeted to Australians experiencing, or at risk of experiencing, economic or other forms of disadvantage.

Eligibility for a grant of legal representation through a LAC is based on an applicant's means (based on income and assets), merit of the matter, and competing priorities in an

environment of limited funds. Any special circumstances that might be relevant to an individual's capacity to self-help are also taken into account (NLA, sub. 123; chapter 20).

The National Partnership Agreement (NPA) on Legal Assistance Services (Schedule B), sets out the principles for assessing eligibility for a grant of legal aid (COAG 2010).

In general, the means test is satisfied where:

- a person receives the maximum rate of an income support payment or benefit administered by Centrelink as their total income; or
- income, with deductions in relation to the objectively referenced cost of housing and support for dependents, falls below a nationally standardised income threshold; and
- assets, excluding allowable exemptions such as equity in a principle place of residence, a used car and furniture, do not exceed a nationally standardised threshold (box 21.3), or an individual cannot reasonably be expected to borrow against assets.

A person not otherwise eligible but unable to afford private legal representation may still receive assistance provided they make a contribution towards legal costs, based on a sliding scale that takes into account the likely cost of the matter. (ACG 2014d, p. 108)

Despite efforts to standardise means tests, the different resources available to jurisdictions means that in practice they vary. The Allen Consulting Group (ACG) conducted a review of the National Partnership Agreement on Legal Assistance Services and concluded in relation to LACs that:

> While the broad components of the means and merits tests are consistent across jurisdictions, and generally result in grants of legal aid being restricted to those facing financial disadvantage, differences in income and asset thresholds, allowable deductions and required contributions can lead to different outcomes for individuals residing in different parts of Australia. Based on available information, eligibility does not appear to be measured based on nationally standardised income thresholds. (ACG 2014d, p. 110)

Criteria employed by CLCs are even more variable. While CLCs aim to target those people who do not qualify for a grant of legal aid but are among the most disadvantaged, in some jurisdictions centres largely determine their own eligibility criteria (box 21.4). As Redfern Legal Centre said:

> CLCs complement LACs as a more flexible option for receiving legal services for vulnerable clients. CLCs are not limited by the strict means and merits tests that restrict the provision of Legal Aid. (sub. 115, p. 33)

Box 21.3 National means test thresholds

In the mid-1990s, a working party comprised of representatives from all the LACs, developed a National Means Test to ensure that eligibility for grants of legal aid were determined with regard to the same factors and took account of an individual's capacity to pay. The income test starts with the applicant's total gross income and then subtracts allowable deductions (including income tax, housing costs, dependant allowances, child care costs and child support paid) up to allowed thresholds. The test then compares the balance with an amount considered reasonable for other living expenses. This amount is based on the Henderson Poverty Line (HPL). Any income above the poverty line is regarded as 'discretionary' income, which is available to pay for legal costs. The income test also sets a limit at which an applicant is eligible for aid with no contribution or with only a minimal contribution.

The asset test takes account of all assets other than 'excluded' assets. Assets such as home equity or motor vehicle equity are excluded up to a threshold. Ordinary household effects and tools of trade are excluded to a 'reasonable' level. Lump sum compensation payments may be excluded as assets, but assessed as deemed income.

While the actual dollar value varies across the LACs, the thresholds for allowable deductions and excluded assets are based on particular benchmarks, which are standardised nationally.

Source of national means test thresholds

Threshold	*Source*
Housing costs	Median rental of a two bedroom flat, from local real estate institute
Childcare costs	Rate of benefit payable for a child in care 50 hours per week, from Department of Human Services
Dependant allowance (first)	Difference between the HPL figures for 'Head in workforce, cost other than housing, single person,' and 'Head in workforce, cost other than housing, single person plus 1'
Dependant allowance (second and subsequent)	Difference between HPL figures for 'Head in workforce, cost other than housing, single person plus 1' and 'Head in workforce, cost other than housing, single person plus 2'
Child support allowance	As for dependant allowance
Home equity	Median price of established home in capital city, from local real estate institute
Motor vehicle equity	Average price of a five year old six cylinder car, from local automobile association
Farm or business equity	Current allowance applied by Centrelink
Non-contributory income level	100 per cent of HPL, 'Head in workforce, cost other than housing, single person'.

Source: Legal Aid NSW (pers. comm., 21 March 2014).

Box 21.4 Some insights into how CLCs prioritise clients

A number of CLCs provided information on how they prioritise potential clients.

Women's Legal Service (WLS) (Queensland):

> WLS makes difficult daily choices about which women to assist and prioritise our casework and representation to women who:
>
> - are declined legal aid (which can often be due to lack of evidence);
> - experience significant safety issues due to domestic violence; and
> - have urgent matters and urgent drafting of material is required; and
> - are vulnerable due to their cultural background, physical or mental disability, or age. (sub. 117, p. 2)

Redfern Legal Centre (RLC):

> Legal assistance is outside the price range of many people who need it. Within this group of people who are financially disadvantaged within the legal system, there are particularly vulnerable groups of people who are further disadvantaged in accessing justice by reason of a particular attribute. RLC prioritises this sub-category of clients in our service delivery: Aboriginal and Torres Strait Islander (ATSI) clients, people from culturally and linguistically diverse (CALD) backgrounds, people living with a disability, international students, victims of domestic violence, and homeless persons. RLC's most disadvantaged clients often fall in more than one of these categories, and often experience significant and multiple legal issues. (sub. 115, p. 11)

Hunter Community Legal Centre (HCLC):

> The HCLC does not apply any strict criteria for providing legal advice and assistance to its clients. The level of advice and assistance provided will depend largely on the client's resources and capacity for self-help. The HCLC attempts to educate and empower its clients by providing them with the information they need to manage their legal problem independently. The HCLC will provide a greater level of ongoing assistance to those disadvantaged individuals who, for whatever reason, lack the resources or capacity to effectively self-represent. (sub. 26, p. 9)

LACs' resources are tight, so means tests are too mean

While the LACs' income and assets tests are based on the national means test thresholds, the reality of fixed budgets means that the LACs have not been able to keep updating the thresholds to keep pace with inflation. The cut off levels applied by the LACs therefore are set as a percentage of the national means test thresholds. For example, Legal Aid NSW said that it had not been able to increase its means test income limits since 2008 (sub. 68). This has meant that the NSW income limit has fallen in real terms.

A number of Legal Aid Commissions remarked that the tightening of eligibility criteria meant that many disadvantaged Australians are not eligible for grants of legal assistance. As National Legal Aid (NLA) remarked:

> Funding constraints result in restrictions on the availability of legal aid services so that some people who need legal assistance but cannot afford to engage a private legal practitioner will not receive either a grant of legal aid for legal representation or the level of assistance that they need. (sub. 123, p. 3)

Northern Territory Legal Aid Commission (NTLAC) said:

> The means test is out of step with the economy of the NT and many people who are refused legal aid according to the means test are unable to afford their own legal representation. (sub. 128, p. 12)

Other participants in this inquiry echoed these concerns. For example the Law Council of Australia made a number of observations about the stringency of the LACs' eligibility criteria:

> … restrictions on legal aid are now so severe that, in many jurisdictions, a substantial proportion of those living below the Henderson poverty line … will not satisfy the means test for legal aid eligibility. …
>
> Currently, the vast majority of people that qualify for legal aid are receiving a government benefit. Implicit in this figure is that funding restrictions on LACs have resulted in the setting of a means test that eliminates all but the very poorest of society. (sub. 96, pp. 38, 121)

The working poor (low-income earners) were identified by a number of participants as being a group that misses out on grants of legal aid but cannot afford to pay for legal services (Law Council of Australia, sub. 96). Legal Aid NSW (sub. 68) noted that its current means test income limit was 52.4 per cent of the minimum weekly wage in 2012-13 — down from around 60 per cent of the minimum weekly wage in 2007-08. Some scenarios for individuals with relatively limited means, but whose income and/or assets would exceed the relevant thresholds based on LAC's means tests in NSW, Victoria and Queensland, are outlined in box 21.5.

Client profile data from LACs confirms the welfarisation of legal aid. For example, Victoria Legal Aid (sub. DR252) submitted that 96 per cent of those who received a grant of legal aid in 2012-13 were either receiving government benefits or had no income at all and Legal Aid NSW (sub. 68) also noted that over 88 per cent of people applying for aid in NSW in 2012-13 were on a Centrelink benefit. Data from Legal Aid Queensland suggests welfarisation of assistance extends to both advice and grant of aid clients. In 2013-14, around 60 per cent of clients receiving advice or grants of aid indicated that they received a benefit, while 18 per cent of advice and 16 per cent of grant of aid clients indicated that they received a single parent payment. Just over two-thirds of advice and grant of aid clients were unemployed. Of those who were unemployed, close to 17 per cent did not receive a benefit.

Box 21.5 Some means test scenarios

New South Wales

Sarah is a 43 year old woman who has separated from her husband, she was a victim of domestic violence during her marriage and is subject to ongoing harassment by her estranged husband. She lives with her two children aged 13 and 10 and is seeking family law orders to define the time the children spend with their father.

Sarah does not own a home and pays $500 rent per week. She has a car worth $10 000 and $200 in cash. She has no other assets. She is employed full time and earns $1050 per week and pays $195 tax per week. She also receives the Family Tax Benefit and Rent Assistance, totalling $306 per week (this is not included as income in the means test). Sarah's eligibility for legal aid is assessed on her income after tax of $855 per week. She is allowed a deduction of $200 per week for her dependent children and $320 per week for rent. Her weekly assessable income for the Legal Aid NSW income test is $355, which exceeds the upper limit of $318 per week.

Angela is a 35 year old single mother to Jack, aged 11. She is currently studying and working part-time. She is seeking legal aid for a serious credit and debt matter. Angela's weekly income is $400 per week and she pays $75 per week in board as she lives with her parents. Angela has $6000 in an incentive saver account (a small inheritance she received after the death of her grandmother a short time before her application for legal aid). Angela is not eligible for legal aid after not satisfying the assets component of the means test.

Victoria

Mariah's experience in her own words:

> My partner was on Workcover and also on Newstart. He was earning about $500 a week … [from Workcover]. I was only on Newstart. When I was evicted, because of this income, Legal Aid wasn't able to help me. The only other thing I could do was go to the Supreme Court and do an originating motion by myself. I'm only 30 years old and it was too hard to do on my own. In the end I had to lay down and roll over and I got bulldozed. I was kicked out of my house and I'm still homeless. I've spent more than $1000 on hotels and I'm still looking for a place. I've still got my things in storage and my animals in kennels. It was pretty much a nightmare and I'm still recovering from it. (sub. DR252, p. 3)

Queensland

A single person is hospitalised under an involuntary treatment order for a period of time. The Public Trustee is managing their affairs. During the period of hospitalisation the person has accrued savings of $5700. Technically the applicant would be financially ineligible for legal assistance. However, consideration of the person's multiple disadvantages and their need to re-establish themselves in the community following release could result in a determination of eligibility under the means test special circumstances guidelines.

A client with children has been the victim of long-term domestic violence and their partner recently committed suicide. The client does not work and is in receipt of a pension only. The client has a vehicle valued at $25 000 and is therefore financially ineligible under the assets test. If the car was sold the proceeds would be required to cover the client's debts.

Sources: Legal Aid NSW (pers. comm., 21 March 2014); Victoria Legal Aid, sub. DR252; Legal Aid Queensland (pers. comm., 2 September 2014).

It is difficult to accurately determine the proportion of all households eligible for grants of legal aid because the means test criteria for both income and assets varies between jurisdictions. That said, Commission estimates, based on an 'average' means test, indicate that around eight per cent of households would be eligible for a grant of legal aid without having to make a contribution. A further three per cent of households may be eligible to receive a grant of legal aid, subject to making a contribution towards the costs of the grant.

Those households with means that exceed these thresholds, even if only by a small amount, receive no assistance with casework, leading to substantial inequities at the margin. The Managing Director of Victoria Legal Aid commented:

> Our current system also tends to put someone who just qualifies on financial grounds very far ahead of a person who just misses out on financial grounds and who has no prospect of paying for a service. (Warner 2013, p. 3)

CLCs services are also targeted but assist some non-disadvantaged clients

As noted above, in contrast to the LACs, CLCs have much more flexibility in determining who to provide with grants of aid. While, on the whole, CLCs service disadvantaged individuals, analysis of unpublished CLC client data undertaken by both the Commission and ACG reveal similar results — that of those clients who disclosed their income, close to one in five clients were from middle or high income groups.[25] The share of clients in the middle or high income range was relatively consistent across jurisdictions except for in the Northern Territory, where it is was much higher at around 40 per cent (ACG 2014c).

Income is not the only measure of disadvantage, other factors — such as the presence of a disability or mental illness — might also be relevant considerations. Moreover, whether an individual experiences disadvantage is not the only relevant factor in considering whether it is appropriate to extend government-funded legal assistance. The consequences of not taking action (such as in cases where people are experiencing or at risk of family violence) might also be reasonably taken into account.

This point was also made by a number of CLCs:

> … in our triage you might see high income clients who normally, you would say, 'Oh, they should just go to a private solicitor.' … But there will be some clients there who are not working or have had to leave the family home no matter how much it's worth and are living in a refuge and things like that who, in the first instance, do require some legal assistance to be put on a pathway and they won't be eligible for Legal Aid because their name is on the family home, for example. (Women's Legal Centre (ACT and Region), trans., p. 11)

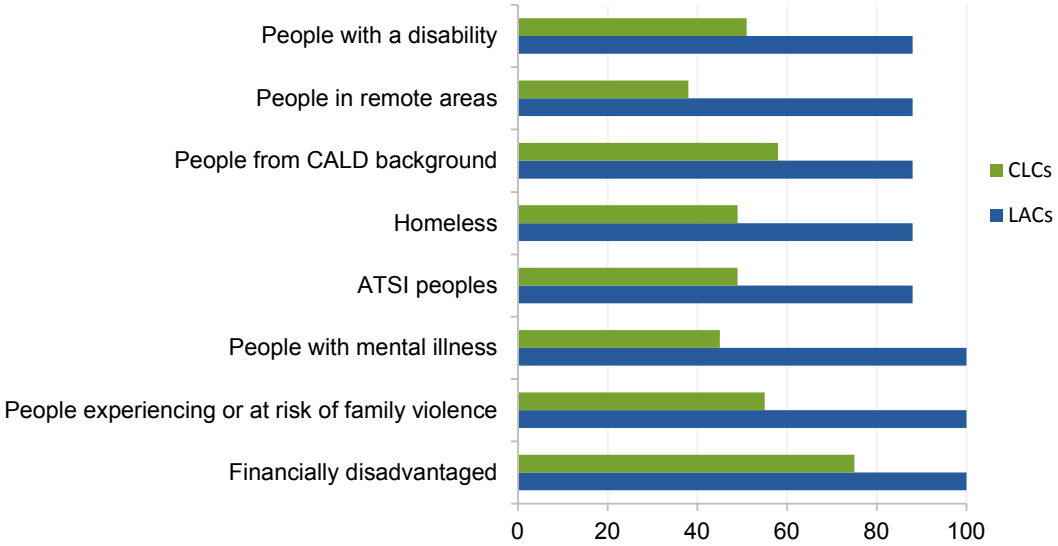
Even so, there appears to be some scope for CLCs to better target their services. As figure 21.1 reveals, one quarter of surveyed CLCs do not have processes in place to target

[25] Low income refers to those with incomes less than $26 000 per annum, while middle income refers to those with income between $26 000 and $52 000.

financially disadvantaged users. Further, only 55 per cent of surveyed CLCs target family violence and only half have processes in place to ensure that services are directed towards people with a disability or experiencing mental illness.

Figure 21.1 **Share of CLCs and LACs that have processes to ensure services are directed at disadvantaged groups**

Proportion of respondents[a]



[a] Based on responses by 53 CLCs and 8 LACs.

Source: ACG (2014c).

While it might not be appropriate for all CLCs (such as those who specialise in employment or consumer law) to target individuals experiencing family violence, it is not clear why other groups (such as Aboriginal and Torres Strait Islander people, those experiencing disability or mental illness or those who are financially disadvantaged) are not more actively targeted.

Since generalist centres only service particular geographic catchment areas, inconsistent targeting of disadvantaged individuals can give rise to horizontal inequities — with people living in different parts of Australia having access to different levels of services. According to a census of CLCs undertaken by NACLC, around 40 per cent of centres reported turning away clients who were outside of their catchment areas (NACLC 2014b).

Where to from here for eligibility?

Priority must be given to ensuring that the *most* disadvantaged Australians have access to legal assistance — this is not happening as well as it should at present. The Commission

considers that the LACs' financial eligibility test is probably too tight (and the CLCs' criteria are possibly too lax, albeit at the margin).

The Commission considers that eligibility principles should be agreed between the Australian and state and territory governments and clearly communicated to providers. Agreed eligibility principles should be set out in NPAs. LACs and CLCs would then be responsible for agreeing on their respective roles (and hence tailored eligibility criteria) within these parameters (the process for doing so is described in section 21.5). The aim would be to have — at least within a given jurisdiction — consistent and complementary, but not necessarily identical, eligibility criteria.

Both LACs and CLCs should retain flexibility to provide assistance to individuals who fall outside of the parameters agreed by governments where there are exceptional circumstances. Examples of situations when it might be considered appropriate could be where individuals face an immediate and real risk of violence. Information should be collected on how often, and the circumstances under which they do so. The Commission notes that many CLCs already collect information on the frequency with which they provide casework services to medium and high income earners and the nature of the services they receive. This practice should continue and the information collected should be analysed. This information should be used to identify any systemic gaps in coverage, prompt a system-wide assessment of impacts and — if the evidence suggests it is warranted — changes to eligibility criteria in the future. A byproduct of this arrangement is improved transparency in the use of public funds.

Financial eligibility criteria should be linked to an agreed measure of disadvantage and appropriately indexed so that they do not become more restrictive in real terms over time. As appendix H highlights, there is a range of measures of disadvantage each with their own benefits and drawbacks. Determining which measure to use will necessarily involve judgments on the part of governments.

While the Commission considers that, in principle, financial eligibility criteria should be consistent both between and across LACs and CLCs, it recognises that because funding arrangements are not open-ended and the funding efforts of state and territory governments vary, in practice, eligibility tests applied by LACs and CLCs will need to be flexible. This is consistent with the current approach. As Legal Aid NSW said:

> In times of financial constraint, Legal Aid NSW will apply its Availability of Funds test to types of legal matters that are of a lesser priority. The result is legal aid not being available for these types of matters until funds become available. (sub. 68, p. 24)

Even so, seeking agreement on eligibility principles and linking financial eligibility tests to an agreed measure of disadvantage encourages a more consistent approach and makes transparent where the LACs and CLCs eligibility tests sit relative to the agreed threshold.

Increased transparency is one way to encourage comparability of legal assistance funding efforts across states and territories. Another, more direct mechanism is through incentive-based funding arrangements. This is discussed in more detail in section 21.5.

In establishing financial eligibility criteria it is important to consider whether those who miss out are able to fund resolution of their legal problem in some other way. This is not the case now. The Commission considers that funding should be provided so that the means test for civil (including family) law matters applied by the LACs can be increased.

As an interim arrangement, the Commission considers that the means test for civil (including family) law matters applied by the LACs should be increased by 10 per cent, as such a policy would allow more individuals to receive the legal assistance that they require, but are manifestly unable to afford at present (section 21.4). Additional data should be collected to inform the appropriate level of access to legal assistance services over the longer term (section 21.5).

RECOMMENDATION 21.2

The Australian, State and Territory Governments should use the National Partnership Agreement on Legal Assistance Services to make eligibility principles for grants of legal aid for civil (including family) law cases consistent.

The financial limits for grants of legal aid for civil (including family) law matters provided by legal aid commissions should be increased, linked to a measure of disadvantage and indexed over time. These limits should be consistent with the priorities and funding identified in recommendation 21.7.

What matters attract grants of aid — the theory and the practice

The NPA on Legal Assistance Services provides some guidance on the nature of matters that can attract government funding. For its part, the Commonwealth specifies a number of priorities, including matters relating to social security and other Commonwealth benefits, Commonwealth consumer law, Commonwealth employment, equal opportunity and discrimination cases, and family law matters involving complex issues including family violence and matters necessary for the wellbeing of children.

It is not clear what, if any, guidance state and territory governments provide. That said, while states and territories have jurisdiction over a range of civil, including some family matters (such as child protection), it is generally accepted that their funding contributions are mainly used for criminal purposes.

Within these parameters LACs and CLCs have some discretion to determine which civil (including family) matters attract assistance.

The Civil Law Division of Legal Aid NSW has developed a problem-solving approach to civil law matters based around law for ‘everyday life’. The civil law program focuses on areas that have the most impact on people’s lives, including tenancy and housing issues, debt and social security. Legal Aid NSW exemplifies leading practice with its civil law

division and services. In other jurisdictions (and to a lesser extent in NSW), a lack of resources means that some disputes types are not covered or only covered 'thinly'. NSW Society of Labor Lawyers said:

> The services offered in the civil law space by different LACs are highly varied, with NSW the high water mark. … There is currently no benchmark for what civil law services should be offered by LACs and this variability means access to justice depends arbitrarily on state of residence. (sub. 130, s. 34)

Even where matters fall within the priorities set by government, service coverage can be incomplete:

> Current arrangements do not equip legal aid commissions to provide grants of legal aid to all disadvantaged clients in all matters within stated service priorities, nor do the eligibility principles and service priorities draw a clear line between the types of matters and clients that should attract Commonwealth funded legal assistance services, and those where services should not be provided, or should be provided through other mechanisms. (ACG 2014d, p. 113)

Areas of civil law identified by participants where legal assistance services are particularly thin include employment, housing, rights and consumer matters (Australian Federation of Disability Organisations, sub. 24; QPILCH, sub. 58; Law Council of Australia, sub. 96). Legal assistance for low value family law property matters, particularly where violence is a factor, is also considered to be lacking (chapter 24). Some of these same areas have been further affected by recent funding cuts (section 21.4).

The Commission considers that there are grounds for providing more comprehensive coverage of civil disputes, including in areas of law already identified by government as being a priority. Resources should be focused where disputes impact significantly on the lives of individuals or have the potential to escalate, imposing costs on society more broadly. The costs and benefits of providing more comprehensive coverage are explored in sections 21.4 through 21.6.

21.3 How can the service delivery model be improved?

While it is clear that some additional funding is required (section 21.4), it is equally important that current (and future) funding is put to its best use.

The current service delivery model for mainstream legal services involves a tripartite arrangement between LACs, private practitioners and CLCs. Each is intended to play a unique and complementary role in the delivery of legal assistance to the community.

There is strong support for outsourcing of legal representation by LACs

As noted in chapter 20, LACs employ a 'mixed model' — some services are delivered in house, while others are outsourced to the private profession.[26] Outsourcing of legal representation by LACs varies across jurisdictions (chapter 20). The jurisdiction with the lowest rates of outsourced legal work are Western Australia and the Northern Territory (ACG 2014d, p. 88).

For the justice system as a whole, the share of legal assistance services delivered by the private sector is substantial. For example, for Commonwealth funded activities alone, the private sector delivered casework services to the value of close to $79 million in 2011-12 (ACG 2014c). To put this in perspective, Commonwealth funding for CLCs (across all service types) is just under $37 million.

The LACs commented favourably on the mixed model describing it variously as 'key to the success of the Australian legal aid model' (Legal Aid NSW, sub. 68, p. 94), 'best practice' (Victoria Legal Aid, sub. 102, p. 8), 'the ideal structure' and 'internationally regarded as the ideal' (Northern Territory Legal Aid Commission, sub. 128, p. 23).

The mixed model offers a number of benefits. First, LACs can harness private sector expertise (such as in matters requiring court representation) and specialise themselves in areas where the private sector is unable or unwilling to provide services. This increases the pool of resources from which legal assistance providers can draw. As Legal Aid NSW observed, the mixed model:

> … leverages the spread and expertise of private practitioners across NSW, while the inhouse practice specialisation in welfare law and experience in assisting disadvantage people underpins the network of legal aid services. (sub. 68, p. 15)

Second, the mixed model provides flexibility. Victoria Legal Aid described the benefit this way:

> The design and active management of the mixed model allows for a constant evolution of service offerings, responding to a constantly changing justice system, burgeoning demand, new growth corridors and emerging legal need. Having multiple providers allows for greater flexibility in being able to meet these challenges. (sub. DR252, p. 9)

[26] Participants use the term mixed model in different ways. For example, Noone and the Federation of Community Legal Centres (Vic) uses the term to encompass LACs, CLCs, Aboriginal and Torres Strait Islander Legal Services and private providers. In contrast, Victoria Legal Aid uses the term to encompass LACs, CLCs and private providers. The Commission uses the term 'tripartite model' to encompass LACs, CLCs and private providers and the term 'mixed model' to describe the outsourcing of legal services (typically by LACs) to the private profession.

Third, the model allows those who qualify for a grant of legal aid to have choice of provider while avoiding the quality and information asymmetry issues discussed in chapter 6.

> Regardless of whether the client uses an LAC in-house lawyer or a lawyer in private practice, the LAC will ensure that the lawyer complies with appropriate standards. This is a highly evolved system which supports solicitor of choice on most occasions [and] quality … (NLA, sub. 123, p. 18)

Fourth, conflict of interest situations can be managed. For example, in the case of a family law matter, one client can be assisted by an in-house LAC lawyer while the other client can be assisted by a private lawyer. The LACs also work with the CLCs, ATSILS and FVPLS to ensure that conflict issues are appropriately addressed (NLA, sub. 123).

Fifth, the mixed model creates competition between public and private lawyers. For example, if LACs consider that private lawyers are too expensive, they can cost the case using in-house lawyers and threaten to withdraw the case from the private lawyer. NLA argued that 'affordability' is one of the important benefits of the mixed model and ensures that 'scarce public resources are deployed in the most responsible and effective manner possible' (sub. 123, p. 18).

Similarly, the Attorney-General's Department noted that the mixed model allows for some cost control:

> The department believes that the mixed model provides efficiencies in the delivery of legal assistance. It enables LACs to develop expertise in complex legal aid matters, and helps strike a balance between publicly funded legal services and the private sector, which in turn promotes control of costs. (sub. 137, p. 39)

These views are consistent with international evidence, which suggests that retaining some functions in-house helps to keep costs in check. A literature review (looking at evidence from the United Kingdom, Canada, United States, Australia and New Zealand) conducted as part of a United Kingdom Review of the Procurement of Legal Services found that public defender services are cheaper than private practice lawyers (Flood, Whyte and Bacquet 2005).

Similarly, a review of legal aid in New Zealand found that, where the volumes of work were sufficient, the Public Defence Service could provide services more efficiently than private lawyers, with no perceivable drop-off in quality (New Zealand Ministry of Justice 2009). The review also found that competition between public and private providers ensures quality of service and recommended the expansion of publicly provided services.

In order to fully exploit the benefits of the mixed model, LACs must have the capacity to identify where it is more efficient and effective to retain services in-house. The in-house costing model developed by Legal Aid Queensland potentially provides a template for other LACs (box 21.1).

Further, where it is more efficient and effective to deliver services in-house, LACs should not be 'forced' to outsource work to the private profession due to internal staffing restrictions. The Commission has heard that this is a problem in at least one jurisdiction.

RECOMMENDATION 21.3

State and Territory Governments should not subject legal aid commissions to staffing restrictions where the expansion of in-house services represents a more cost effective approach to delivering services than outsourcing to the private legal profession.

… but questions remain about the sustainability of outsourcing arrangements

While there is widespread support for the mixed model currently employed by LACs, questions have been raised about its sustainability. The LACs have argued that without an increase in fees paid to private practitioners, there is a risk that they will be unable to attract experienced private lawyers of sufficient skill and experience to do legal aid work, particularly in rural areas. The LACs spoke about a 'juniorisation' of private practitioners who are prepared to work for them. For example, Legal Aid WA said:

> Over a number of years there has been a 'juniorisation' of a significant proportion of the private practitioners who are prepared to accept work from Legal Aid WA at the prevailing legal aid rate of remuneration — currently $140 per hour. Legal Aid WA considers that this arrangement is not sustainable into the medium term. (2012, p. 33)

NTLAC also raised concerns about the sustainability of the current mixed model:

> Without the ability to appropriately remunerate suitably qualified professionals, there is a risk that the NTLAC panel will be reduced to inexperienced solicitors who are not able to provide the level of service which is required in the many complex matters which receive grants of aid. This poses a threat to the sustainability of legal aid operations under the mixed model. (sub. 128, p. 14)

> We found the mixed model of delivery to be the best around. We looked internationally, National Legal Aid have. But we feel that here in the Territory it's in danger of collapse because we've got fewer and fewer experienced lawyers who are willing to do our business for the amount that we're able to pay. (trans., p. 1001)

There is some evidence of private practitioners withdrawing from legal aid work in the Northern Territory. A letter from DS Family Law to NTLAC, for example, said:

> … it has been decided that the Darwin Office of DS Family Law will no longer be taking on legal aid referrals given the volume of work that is currently coming through our office and the vast difference between the Legal Aid rate and the hourly rate of our solicitors. We have avoided making this decision for some time due to our social conscience though we cannot avoid the financial reality any longer. (sub. 128, Attachment 3, p. 1)

Similarly, Terrill Associates stated that:

> I am seriously considering not taking on any more ICL [Independent Children Lawyers] work (and I do not take on clients on grants of aid except in exceptional circumstances). … For matters where I have billed NTLAC say $600, I would have been able to charge a private client at least $20 000 and that is on $360 per hour plus GST. The fees paid simply do not cover my operating expenses, let alone provide any profit margin. (sub. 128, Attachment 2, p. 3)

The Law Council of Australia suggested that absent an increase in remuneration the withdrawal of the private profession will continue:

> … if the rates offered to the private profession for accepting legal aid work do not increase significantly, the withdrawal of the private profession from the legal assistance sector will continue. This will threaten the viability of the mixed model for legal service delivery and the efficiencies that model achieves. (sub. DR266, p. 91)

The base hourly rate for fees paid to private lawyers in Commonwealth Legal Aid matters in New South Wales was increased to $150 (effective from 9 December 2013). But a remuneration gap remains. For example, the Law Council of Australia observed:

> In relation to family law proceedings, it is noted that hourly rates in the Canberra area range from around $300 per hour to around $650 per hour, depending upon the experience of the lawyer. Lawyers who agree to work at legal aid rates are paid a discounted rate of $160 per hour. (sub. DR167, p. 11)

Legal Aid NSW pointed to a slightly more modest differential:

> As there are no national fee scales to follow and no single accepted way of assessing costs it is difficult to express a view as to a single rate that would be appropriate, while having regard to the type and location of work. However, Legal Aid NSW submits that the legal aid rate should be closer to $250 than $150. (sub. DR189, p. 42)

Although, they went on to caution:

> … even that rate would be insufficient to attract the senior counsel and highly experienced private practitioners required to ensure effectiveness and efficiency in complex cases. (Legal Aid NSW, sub. DR189, p. 42).

Closing the gap

It is likely that some gap between legal aid rates and 'market' rates will persist. As distinct from the average consumer, LACs are experienced, significant, and repeat purchasers of private legal services. As noted above, they purchased close to $79 million of services in 2011-12 for Commonwealth matters alone. LACs are likely to continue leveraging their purchasing power for the benefit of disadvantaged Australians.

For their part, private lawyers may be prepared to take on cases at lower than market rates when there are a number of people they can represent at the same court on the same day (that is, lower rates for higher volume).

Moreover, while much focus has been on hourly rates, private providers make judgements based on the attractiveness of the 'overall package'. As noted by Legal Aid Queensland, factors such as the number of hours allocated to undertake tasks and the degree of support provided also influence the private sector's willingness to deliver legal aid services:

> In terms of unit cost, it's not just about the hourly rate. A lot of Legal Aid fees are capped fees or lump sum fees, if you like, and so it's the number of hours that are allowed … So for example, in Queensland we allow six hours per day when the matter is in court, some other states only allow five, and so while our hourly rate is a bit lower the total amount paid is actually okay.
>
> Another variable that affects the unit cost is whether you only fund a solicitor or you also fund the barrister, and there's differences across the jurisdictions about that … So it's the hourly rate, the number of hours and whether you only fund a solicitor or you also add on a barrister to help a solicitor out. If you fund a barrister, that really helps the solicitor because that means they can share the workload and the barrister takes on the burden of getting ready for court and appearing in court. (trans., p. 1139)

That said, the Commission recognises that private lawyers will not undertake legal aid work if they are not adequately compensated for it.

> Law firms are private — are businesses, and they have to make a profit. So they don't do legal aid work if it's going to make them go broke … (Legal Aid Queensland, trans., p. 1138)

The Commission considers that over the medium term, it will be necessary to narrow the gap between the legal aid rate and the 'market' rate so that experienced private lawyers continue to undertake legal aid work. The financial implications of doing so should be considered as part of a broader assessment of the appropriate level of funding for legal assistance services (section 21.5).

CLCs have an ongoing role but there is scope to improve their performance

CLCs comprise another element of the tripartite service model. As community-based organisations, they seek to embed their services within their communities and many work 'in partnership' with other local groups and establishments (chapter 20). The use of volunteers and pro bono services is another characteristic feature of CLCs (chapter 23). The precise focus of individual centres varies depending on whether they are generalist or specialist, but is overwhelmingly in civil law.

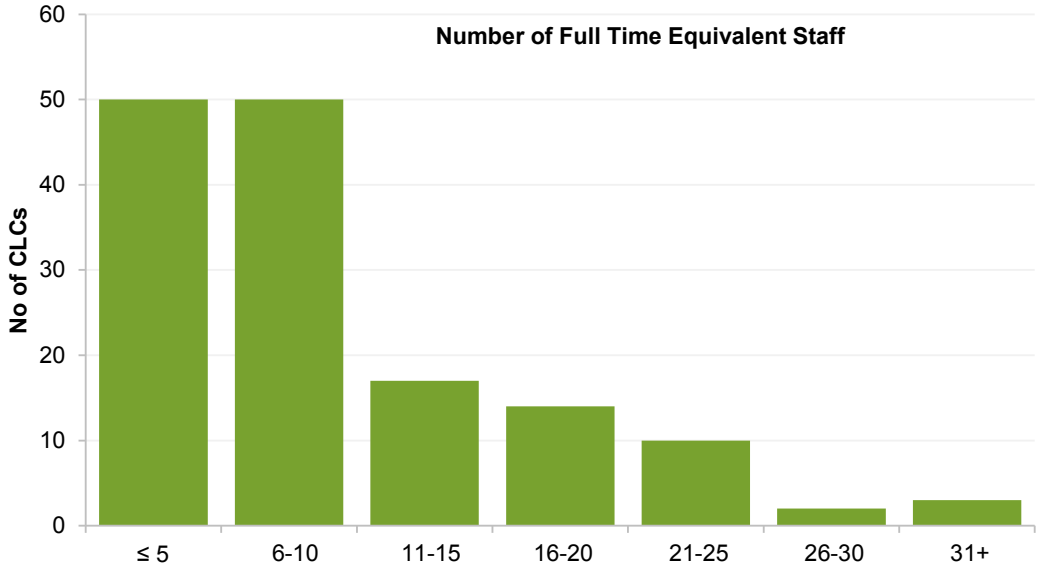
While the Commission considers that CLCs are an important component of the legal assistance landscape, some participants raised questions about the efficiency and effectiveness of their service delivery model. Several of their concerns stem from the relatively small scale of many CLCs and the historical way in which CLCs have evolved. As the pro bono partners who work alongside the CLCs observed:

> In my mind, there is a challenge with the fact that we have here in Victoria I think 51 community legal centres. I am not sure if we started again why we wouldn't look to have one

community legal centre of Victoria with 51 branch offices, or some other way of doing it. (Pro Bono Practices of Allens, Ashurst and Clayton Utz, trans., pp. 879–80)

As noted in chapter 20, there are around 200 CLCs. Commission analysis of CLC employment data confirms that the bulk are relatively small in scale. The majority of centres have ten employees or less (figure 21.2).

Figure 21.2 **Community legal centre staffing levels**
Based on full time equivalent employees



[a] Based on 146 CLCs that responded to questions on full time equivalent (FTE) staffing equivalents in a NACLC survey.

Source: Unpublished data from the National Census of CLCs undertaken in 2013 by NACLC.

The relatively small scale of CLCs gives rise to a number of problems. These were summarised by the pro bono practices of Allens, Ashurst and Clayton Utz:

> We consider that the ability of CLCs to assist clients and to retain experienced staff would be enhanced by increased scale. Currently most CLCs are small, autonomous organisations. The problems associated with their small scale include:
>
> - duplication of administrative resources
> - lack of career path for practitioners, insufficient resources to take on large numbers of matters or larger-scale casework …
> - where there is limited casework, advocacy becomes less informed by client experience, the centres do not function well when there are issues with staff or a role is vacant for a period of time
> - small, voluntary management committees are not well-placed to manage staff performance

- the small scale of the centres means that they rarely have human resources support to manage performance issues. (sub. DR224, pp. 8–9)

Administration costs appear relatively large

One of the more pressing limitations of a lack of scale is the disproportionate share of resources dedicated to administration. The pro bono practices of Allens, Ashurst and Clayton Utz described the problems of having a large number of small centres this way:

> The difficulty … is that it slices up the amount of work that's done, but it also means that there needs to be 200 separate volunteer management committees that [therefore lack the sort of] back of house operations in terms of having HR [human resources] policies and recruitment policies and funding programs and arrangements that are in place. There's a lot of duplication and a lot of time that's spent again and again and again, so that incredibly well intentioned and well meaning lawyers are often distracted by some of those sorts of issues. … Each of us works with numbers of community legal centres and we see up close the inconsistencies in resources and accordingly, inconsistency in procedures … not because anybody is not completely dedicated. They have to be dedicated to work in that environment, but they are small and accordingly there's inefficiencies. (trans., p. 880)

While the share of expenditure on services (as opposed to administration) varies significantly across CLCs, on average, it is lower than for LACs. This suggests that CLCs dedicate more resources to administrative functions. Around 11 per cent of CLCs surveyed reported that less than half of expenditure goes towards service delivery, while no centre reported that more than 90 per cent of expenditure goes towards services (ACG 2014c).

Staffing provides another measure of the resources dedicated to administration. A national census of CLCs conducted in 2013 provides insights into the 'position descriptions' of paid staff (NACLC 2014b). Commission analysis of the data suggests that over 40 per cent of positions were involved in non-legal service delivery activities.

The national census also reveals that centres can have up to 18 volunteers on their management committee or board. Although the range is large, the average (and median) number of members is 8 with just over half of centres having between 7-9 members on their management committee or board (NACLC 2014b). Further to this, each state and territory has its own representative organisation, as well as a national association.

A lack of scale can impact on service delivery and resourcing …

Smaller CLCs can lack the expertise or capacity to deliver services across the full gamut of civil (including family) law matters. A lack of relevant expertise and resources were among the common reasons cited by CLCs for having to turn away clients (figure 21.3).

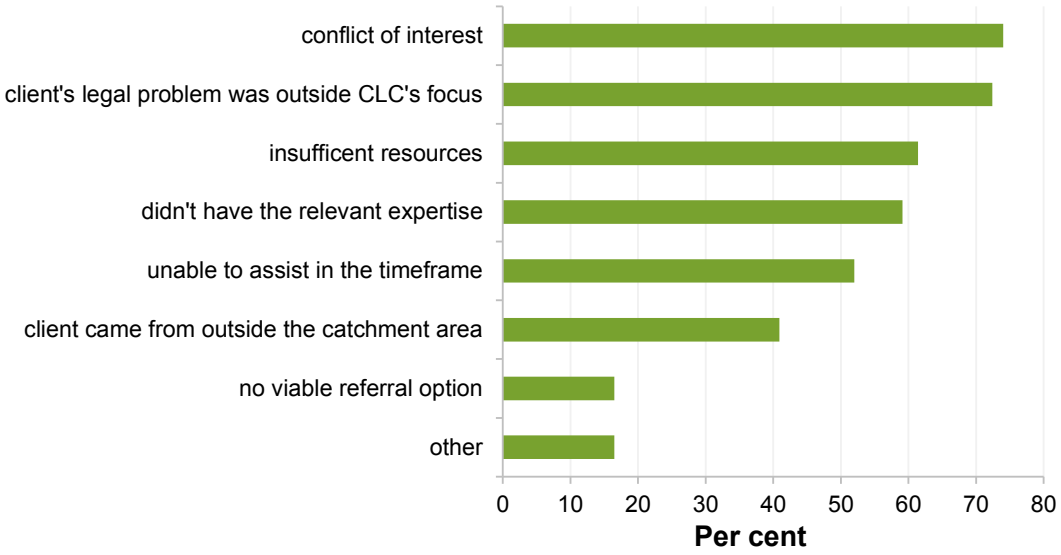
However, concerns about a lack of capacity and expertise do not apply to all CLCs:

> Redfern is of a sufficient size that it can employ a specific employment lawyer, someone who can specialise in that area, and so its capacity to therefore expand assistance is much, much

greater in employment law than anybody who's at a general CLC that may have one or two legal staff. (Allens, Ashurst and Clayton Utz, trans., p. 880)

Figure 21.3 **Reasons centres turned away clients**[a]

Multiple answers possible, percentage of centres



[a] Based on the responses of 90 CLCs.

Source: NACLC (2014b).

The relatively small scale of some CLCs also makes it challenging to recruit and retain staff. Providing access to professional development opportunities, including mentoring, was seen to be a major constraint, as was a lack of career progression opportunities.

Some jurisdictions, such as Western Australia, collaborate to offer 'reciprocal training and mentoring opportunities' as a way of overcoming these constraints (Community Legal Centres Association (WA), sub. DR214, p. 29). This includes the Country Lawyers Program developed by Legal Aid Western Australia that is based on a model of cross-rotations across legal assistance providers with portable conditions, subsidised housing in remote localities, and professional development and networking opportunities. The Director of Legal Practice Development at Legal Aid Western Australia, who was instrumental in developing this program, stated:

> [Through] a model which allowed portability of cross-rotations, through community legal centres through Aboriginal Family Violence Prevention Services through Legal Aid Commissions and through Aboriginal Legal Service, so that you had portability of your conditions, the same salary and government housing … our experience was that … we could fill all of the gaps in Western Australia and did while the program was in full flight. (trans., p. 572)

… and to attract and provide ongoing support for volunteers and pro bono support

Volunteer and pro bono support significantly increases the capacity of CLCs to provide legal assistance services to disadvantaged Australians. The ability to leverage volunteers is seen as a defining feature of CLCs. As NACLC stated:

> [CLCs]' capacity to attract, train, utilise and retain large numbers of quality volunteers is a major feature that sets them apart from other legal service providers. (sub. 91, p. 48)

Many CLCs utilise volunteers and pro bono support. NACLC's survey of CLCs revealed that around 95 per cent of respondents reported that they used volunteers in 2012 (NACLC 2012). Across those CLCs, over 3600 volunteers contributed around 8300 hours per week. While slightly fewer CLCs used volunteers in 2013 (88 per cent), those that did reported much higher levels of volunteering. Across these CLCs, around 4600 volunteers contributed more than 24 000 hours per week (NACLC 2014b).

Use of pro bono legal services was also common among CLCs, with around 60 per cent of respondents reporting that they had a pro bono partnership (NACLC 2014b).[27] However, most of the pro bono hours contributed in the 2013 survey were concentrated in a small number of CLCs. Just under 20 per cent of CLCs contributed around 80 per cent of pro bono hours and the top two centres alone recorded almost 35 per cent of the total hours — 10 000 hours and 7500 hours respectively. These centres are specialist in nature and conduct casework (including test cases) and extensive law reform and advocacy work, including in collaboration with large law firms and legal counsel (NACLC, pers. comm. 1 September 2014).

CLCs also report that effective volunteers and pro bono providers require induction, training and ongoing supervision. It can be difficult for smaller CLCs to utilise volunteers because they do not have the capacity to train and support them. As the North West CLC in Tasmania (which employs less than 3 FTE lawyers) remarked:

> We would like to have volunteers and they would certainly allow us to reach more clients and advocate for changes in the law, but we're stretched to capacity and simply do not have the time to provide the necessary supervision and training to volunteers to make them effective and responsive to the needs of the community. (cited in NACLC 2012, p. 6)

Where to from here?

There is a broad recognition among CLCs and their representative bodies that scale was an issue:

[27] In the National Census of CLCs conducted in 2013, NACLC asked CLCs to provide information about their pro bono partnerships. A pro bono partner was defined as a professional or firm that, as a business, has formally committed to allocating resources and making a contribution to a CLC and/or its clients, free of charge. In total, 154 CLCs completed the Census, of these, 148 responded to the question about pro bono partnerships.

> In some types of matters, the much larger and resourced LACs may provide greater efficiencies in running some matters, especially if there are a number of similar matters. However, NACLC emphasises that this is not to say that this can or should be extrapolated to mean that this is always the case … (NACLC, sub. DR268, p. 17)
>
> This is not to say that there are not opportunities that can and must be gained in greater collaboration, streamlined data collection, improved economies of scale and higher levels of integration. (CLC Association (WA), sub. DR214, p. 1)

Indeed, NACLC (2013b) argued that 'to operate efficiently, effectively and safely', no CLC should be smaller in scale than '5 Effective Full Time workers' — a centre manager, principal solicitor, solicitor, community worker/educator and finance officer/administrator. As figure 21.2 reveals, many CLCs fall short of this threshold.

It appears that the crux of the debate is not about whether a lack of scale can frustrate service delivery in some centres, but rather how any improvements in scale are achieved. There are a range of options for doing so. NACLC (2013b) identified funding as an avenue by which scale could be increased — arguing that governments should provide existing centres with minimum funding of $626 357.

However, some CLCs have sought to amalgamate in order to realise some economies of scale. The Commission heard that such amalgamations occurred without centres losing their connections with local communities. It also enabled them to shift resources more easily into areas of high population growth in surrounding areas while continuing services to disadvantaged people in some increasingly gentrified areas (VLA, trans., p. 758). For example, VLA (which administers the CLC program) has supported a project to help four CLCs in the west of Melbourne (including in Wyndham, Newport and Footscray) to join-up services to better meet the needs of that broader area. VLA is also supporting a number of similar projects to help 'remedy the duplication and gaps in CLC service delivery' (VLA, sub. DR252, p. 13).

The Commission supports amalgamation as a way of reducing administrative costs and freeing up resources for front line services and sees a voluntary approach, rather than one dictated as part of a funding agreement, to be preferable. That said, the importance of achieving such scale efficiencies across the CLC sector is a priority.

21.4 Addressing pressing need

While there is some scope to improve the way in which legal assistance funds are used, a common theme from submissions was that the quantum of funding for legal assistance services is inadequate to meet demand. For example, the Victorian Council of Social Services said:

> … it remains clear that community legal services and legal aid commissions do not have the resources to provide sufficient response to meet the critical needs of the community. (sub. 132, p. 9)

The Law Council of Australia also argued that:

> … the legal assistance sector is not meeting market demand. … LACs have, reached a point where further 'efficiencies and economies' cannot reasonably be expected to address the yawning gap in legal need. It is therefore a question of injecting appropriate funds into the system to enable the LACs to implement their charter, to provide appropriate legal assistance for disadvantaged members of the community. (sub. 96, pp. 120)

Evidence points to a lack of adequate resourcing for civil law needs

Participants pointed to a number of indicators of unmet legal aid needs. Some of these indicators have already been canvassed in this or other chapters. They include:

- increasingly tight eligibility criteria used by the LACs and gaps in civil law coverage (section 21.2)
- an inability to remunerate suitably qualified professionals (resulting in concerns about the sustainability of the mixed model) (section 21.3)
- rates of self-represented litigants, including in family law matters (chapters 14 and 24).

There are also a range of other factors that point to a lack of adequate resourcing for civil law needs, including:

- high turn away rates of legal assistance services and a lack of services for some disadvantaged groups
- the fact that Australia is one of the lower funding nations of legal assistance services (on a per capita basis)
- reductions in resourcing against a backdrop of existing unmet legal need.

High 'turn away' rates

Many participants pointed to the results of the Australian Council of Social Services Community Sector Survey, which found that community legal services had one of the highest 'turn away' rates of any of the community services surveyed as evidence of inadequate funding (ACOSS 2013). The survey results showed that:

- 63 per cent of legal service providers were not able to meet demand for services (legal services ranked second highest among community service providers in terms of inability to meet demand)
- 20 per cent of all clients in need of assistance from surveyed community legal services were turned away in 2011-12 (the highest turn away rate across all service types)
- 85 per cent of legal services reported targeting their services more tightly or limiting service levels to meet demand

- 67 per cent reported being underfunded and 59 per cent said they had increased waiting times for services
- 76 per cent of services asked staff and volunteers to work additional hours in attempting to meet demand.

A number of service providers also told the Commission that they were regularly turning people away because of a lack of resources.

> WLS [Women's Legal Service Queensland] provides services to over 3000 women every year, and we know that there are a further 16 000 requests for assistance that we are unable to meet. … In our experience, the last 12 months has seen a doubling of the number of women trying to access our evening advice service and on average [we] turn 5-7 women away each night as we don't have capacity to see them. (Women's Legal Service Queensland, sub. 117, pp. 1–2)

Many participants were of the view that legal assistance services were insufficient to support services in rural and remote areas, and there were gaps in services for a number of disadvantaged groups, including Australians with a mental illness or disability and those experiencing homelessness (QPILCH, sub. 58; Allens, sub. 111). Also, several participants indicated that more assistance is needed to help Australians with multiple and complex needs (Coumarelos et al. 2012).

Australia is a relatively low funding nation

Participants also noted that Australia is one of the lower funding nations of legal assistance services on a per capita basis (NLA, sub. 123). While England, Wales, Northern Ireland and Scotland have comparable legal systems to Australia, per capita funding for legal aid in those countries is considerably higher than Australian levels — for example, funding in England and Wales is around 3.6 times Australian levels, while in Scotland it is around 2.9 times (UK Ministry of Justice 2011). The legal aid schemes in England and Wales, however, are currently being scaled back following a review that found the schemes were too generous, though not to levels as low as exists in Australia.

Service cut backs

Perhaps the most compelling evidence of inadequate resourcing for civil law needs is the quantum and nature of services that have had to be scaled back due to a lack of funds.

NLA (sub. 123) said that the constrained funding position of LACs is reflected in changes in output levels, with the number of grants of aid falling from 8.17 per 1000 Australians in 2006-07 to 5.97 in 2012-13. NTLAC noted they had cut back or ceased services in a number of areas in recent years due to funding constraints:

> NTLAC once had an in house civil law practice; however this was cut some years ago due to national funding cuts to Legal Aid Commissions. NTLAC does not have an in house civil casework practice. … NTLAC is currently establishing a 2 year pilot Minor Assistance Civil Service to assist priority clients in civil law matters, primary employment law, consumer, credit

> and debt matters in order to arrest financial problems evolving into larger legal problems. … NTLAC previously conducted duty lawyer services in Child Protection proceedings and matters before the Mental Health Review Tribunal relating to involuntary detention and treatment. These services ceased in 2010 due to funding constraints. NTLAC will trial the reinstatement of [a] duty lawyer service before the Mental Health Review Tribunal for a period of 6 months as of 1 January 2014. (sub. 128, pp. 4–5)

Service cut backs have become more pronounced due to recent decisions taken in the Commonwealth's 2013-14 Mid-Year Economic and Fiscal Outlook (MYEFO) Statement and 2014-15 Budget, which reduced funding to LACs and CLCs. Culturally tailored services were also affected by the cuts. As detailed in section 21.1, the reductions in funding from MYEFO totalled around $40 million over four years, and were designed to limit policy reform and advocacy activities.

However, a number of stakeholders have suggested to the Commission that the funding amounts ostensibly cut from law reform activities do not reflect the actual amounts spent by legal assistance providers on law reform work. Many also submitted that law reform work was generally not undertaken using dedicated staff or resources, comprised a small but important aspect of their work, and could not easily be disentangled from frontline service provision. As such, cuts aimed at removing advocacy funding would largely impact on frontline services delivered by providers.

Some CLCs and ATSILS provided examples of frontline services which may be affected by the removal of funding (table 21.1). The Commission was advised, in public hearings, that as a result of the Commonwealth funding cuts to EDOs, there is a significant likelihood that a number will cease operating (trans., pp. 57, 964).

Funding for the LACs was further reduced by $15 million in the 2014-15 budget for that financial year — a year earlier than originally planned. These funds had been used in a variety of ways, including expansions in existing services or grants, expansions in outreach programs to rural and remote clients, and the establishment of pilot programs into particular areas of civil law where services were not previously provided. Many of these activities are likely to be discontinued following recent announcements (table 21.2). While these services are likely to have ceased anyway, given that funding was only ever provided on a temporary basis, they still serve to highlight the nature of service gaps.

Quantifying the immediate assistance gap

While participants to the inquiry have shed light on those areas where there are 'mismatches' between the demand for legal assistance and the services that are available, quantifying the extent of underfunding in the legal assistance sector is not straightforward.

The reality of the current funding arrangements for LACs and CLCs is that each jurisdiction has its own budget limitations and, as such, funding is rationed by each jurisdiction making (their own unique) adjustments to one or more of:

- the criteria governing eligibility (by offering legal aid to fewer people)
- coverage of services (by offering legal aid on fewer matters)
- conditions of service use (through partial assistance or contribution requirements)
- the remuneration of the private profession.

Table 21.1 **Selected CLC and ATSILS services affected by recent changes to funding**

Based on some of the testimony at hearings and in submissions

Service	*Funding change*	*Frontline services affected*
Women's Legal Centre (ACT and Region)	• Lose $100 000 ($50 000 per year over two years)	• Expect to lead to loss of a 0.6 FTE frontline solicitor (from a staffing level of 2.8 FTE)
Consumer Action Law Centre	• Lose last two years from expected extra funding over four years	• Telephone advice service
Queensland CLCs	• 11 centres having funding redirected from them • 6 from regional centres • 3 from outer suburban • 2 statewide services (Welfare Rights Centre and Tenants QLD)	• Sunshine Coast CLC — specialist family lawyer • Gold Coast CLC — duty lawyer service for domestic violence applications and additional family law services • Townsville — family law services • South-west Brisbane CLC — child protection duty services and youth justice services
Women's Legal Service Tasmania	• Lose $200 000 from expected funding over the next two years	• Used to roll out an app nationally for young women • Will likely lose one solicitor (out of six FTE staff)
Western Australia CLCs	• Lose $2.1m in total over two years	• Bunbury CLC — solicitor to support Domestic Violence Court Outreach • Kimberley CLC — family law matters for Aboriginal and Torres Strait Islander people • Pilbara CLC — solicitor to assist with civil (including family) matters • Wheatbelt CLC — solicitor to provide enhanced family law services
ATSILS in each state and territory	• $13.3m cut from the Indigenous Legal Aid and Policy Reform Program; 2013-14 to 2016-17	• National body defunded • Offices to close in Nhulunbuy, Warwick, Cunnamulla, Chinchilla, Dalby and Cooktown • Legal assistance services in family law will cease • Reduction in legal assistance services for criminal and civil law matters • Duty lawyer schemes will cease • Assistance to Parole Boards will cease • Reduction in community legal education programs

Sources: Raggatt (2014); Women's Legal Centre (ACT and Region), trans., p. 17; National Aboriginal and Torres Strait Islander Legal Services, sub. DR327; Queensland Association of Independent Legal Services, trans., pp. 1196–1197; Consumer Action Law Centre, trans., pp. 853–854; Women's Legal Service Tasmania, trans., pp. 900–901; Legal Aid Western Australia, pers.comm.,1 September 2014.

Table 21.2 **LACs' services in doubt following changes to funding**

Based on testimony at hearings and subsequent communications

State	*Amount cut*	*Frontline services affected*
New South Wales	$4.6 million	• Family mediation services for Aboriginal people • Information and referral services linking rural, regional and remote clients to family law casework services • Improving private practitioner standards for independent children's lawyers • Employment law and mortgage hardship services • Early intervention in social security matters • Working with children who have complex needs • Service to support legal assistance needs arising from the rollout of the National Disability Insurance Scheme
Victoria	$3.5 million	• Expansion of existing services related to family law and family violence
Queensland	$3.0 million	• Civil law regional network to provide minor assistance and representation services in Commonwealth civil law areas, predominantly consumer, discrimination, employment and social security
Western Australia	$1.5 million	• Independent children's lawyers • An Aboriginal Liaison Officer to service the Kimberley
South Australia	$1.15 million	• Independent children's lawyers • 2 year pilot program for family dispute resolution in small family property matters • 2 year pilot program for representation in Administrative Appeals Tribunal • Pilot project for advice and minor assistance with consumer disputes and personal credit disputes at the Magistrates Court • Funding for representation in court for Indigenous clients
Tasmania	$444 000	• Independent children's lawyers • Family dispute resolution • Advice and minor assistance for consumer credit
ACT	$400 000	• Aboriginal and Torres Strait Islander Dispute Resolution Project Officer • 0.5 FTE Aboriginal and Torres Strait Islander Client Support Officer • Helpdesk paralegal for a period of six to twelve months
Northern Territory	$400 000	• Minor assistance civil service

Sources: Legal Aid NSW, trans., pp. 174–176; VLA, trans., p. 743; LAQ, trans., pp. 1127–1128; Legal Aid Western Australia, trans., pp. 575–576; Legal Services Commission of South Australia, trans., pp. 373–375; Legal Aid Commission of Tasmania, trans., pp. 916–917; Legal Aid ACT, pers. comm., 2 June 2014; NTLAC, trans., pp. 1002–1004.

Measuring the size of the gaps across each of the dimensions and across each of the different jurisdictions is plagued by a lack of data. For example, even where information is available on the rates at which legal aid providers turn away clients, this offers little insight into the extent of existing service gaps — it captures clients who are denied assistance because they lack a meritorious claim, and fails to capture those who are discouraged from applying for assistance in the first place. Measuring the cost associated with bridging the gap is further compounded by a lack of data on the costs of providing individual services.

Given the dearth of data, and having regard to the pressing nature of service gaps, the Commission considers that an interim funding injection in the order of $200 million —

from the Australian, state and territory governments — is required per year. The Commonwealth's contribution would be in the order of 60 per cent. This funding injection would enable legal assistance services providers to address the most pressing needs, including to:

- maintain existing frontline services of the LACs, CLCs and ATSILS that have a demonstrated benefit to the community and that have been affected by the recent funding decisions described above
- relax the means test applied by the LACs and so allow more households to be eligible to receive grants of legal aid
- provide grants of legal aid in areas of law where there is little assistance being currently provided, either by LACs or other legal assistance services.

In practical terms, the relaxation of the means test employed by LACs would increase the number of people eligible for grants of aid in civil (including family) matters by around 400 000. Around 10 per cent of households would become eligible for legal aid services in civil and family matters — a proportion that more closely matches the share of households experiencing disadvantage. Such a shift would also move the eligibility requirements closer towards the means tests applied to some other government benefits.

Providers of legal assistance services would also be in a position to offer services in areas of law already identified by government as priorities to disadvantaged people (many of whom would qualify under the current means test). These include family violence, tenancy, housing, debt and social security matters. This would account for the bulk of additional costs (appendix H).

Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. But, as discussed throughout the chapter, underfunding of legal assistance services can lead to increased costs in other areas of government spending. Providing adequate funding for legal aid may initially appear expensive but, as former Chief Justice Gleeson commented:

> The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid. (Gleeson 1999, cited in Law Council of Australia, sub. 96, p. 114)

While an injection of funds would help meet some of the more immediate legal needs, the Commission considers that a range of reforms are required to put legal assistance on a more sustainable footing over time and that future funding levels should be determined with reference to a comprehensive assessment of legal need. These are discussed in greater detail below.

Some hypothecation of resources is required

All four legal assistance providers play a role in meeting criminal as well as civil legal needs. While criminal matters make up a relatively small share of all legal disputes, they attract a large proportion of legal assistance resources. Priority is given to criminal law issues not just because of the consequences these matters have on people's lives, but also because of the discipline imposed by the courts to do so. Criminal courts can, and do, stay proceedings involving indictable offences where parties are unrepresented. No such discipline exists in the civil space.

Because of the nature of the competing demands on legal assistance providers' budgets, civil matters will always be vulnerable to being 'squeezed out' or put down the priority list. In the draft report, the Commission recommended that funding for civil (including family) law matters should be determined and managed separately from funding for criminal law matters.

Some LACs — notably Legal Aid WA and Victoria Legal Aid — were not supportive of the earmarking of existing funds for civil law matters because they considered that it could detract from criminal law assistance (trans., pp. 568–570; sub. DR252). However, the Commission has not been asked to examine the adequacy of legal assistance funding for criminal matters and has made no recommendations to change the level of funding in that area.

Other LACs saw some merit in earmarking funds, for example, Legal Aid Queensland argued:

> I think having a little bit of protection for civil law funding is really good, because that way the board can say, 'Look we want to invest some money in civil law and the government is saying we should, so we're going to put some money into it,' and I think … that the demarcation between the Commonwealth and the state money is actually helpful in terms of managing our service delivery portfolio. Because if you just put it all in one bucket, there is a risk that the expenditure on criminal law could just grow to dominate everything … So it's kind of nice having a boundary. (trans., p. 1140)

Legal Aid NSW was also supportive of separately funding civil law matters, given additional funding:

> In relation to [the] demarcation of funds, we welcome draft recommendation 21.1 that the civil law, including family law, funding be divided from the enormous amount the Commissions across the country pay, but it certainly couldn't happen under current budgetary arrangements; there is simply not enough funding there. … but we are very supportive, in principle, of having dedicated funds, as long as there is some mechanism to ensure that any criminal law over-expenditure doesn't then impact on the family and civil law. (trans., pp. 172–173)

The Commission considers that there are gains to be made by allowing legal assistance providers greater flexibility when it comes to allocating resources, but the existing requirement to service criminal matters ahead of important civil (including family) matters means that additional guidelines to quarantine funding for the latter are necessary. As

Victoria Legal Aid (sub. DR252) observed, earmarking civil matters is worthwhile from a community-wide perspective because additional assistance in these areas can prevent the costly escalation of disputes, including into criminal matters.

RECOMMENDATION 21.4

To address the more pressing gaps in services, the Australian, State and Territory Governments should provide additional funding for civil legal assistance services in order to:

- better align the means test used by legal aid commissions with that of other measures of disadvantage
- maintain existing frontline services that have a demonstrated benefit to the community
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding.

The Commission estimates the total annual cost of these measures to the Australian, State and Territory Governments will be around $200 million. Where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance.

21.5 Improving legal assistance over the longer term

Many of the problems facing the legal assistance sector stem from the way in which resources are determined and allocated. Funding for each of the four legal assistance providers is determined independently and inconsistently. The total quantum of funds allocated is not sufficient to achieve governments' stated priorities, nor are funds allocated across providers so as to maximise coverage of geographic areas or particular dispute types.

Establishing a link between legal needs and funding

A number of the LACs expressed frustration with the mismatch between need and government funding. NTLAC said:

> It is … frustrating that even where there is strong evidence, funding decisions are made without reference to these. For example, the Indigenous Legal Needs Project of the NT found the predominant legal issue faced by indigenous people in the NT was housing and tenancy concerns. However, the resourcing of legal services in the NT still does not enable these needs to be met. (sub. 128, p. 17)

Legal Aid NSW also said:

> The factors determining the volume of current funding for legal assistance are largely historical and based on a fixed pool of funding rather than assessed legal need. (sub. 68, p. 100)

As the Attorney-General's Department (sub. 137) stated, the volume of Commonwealth funding for legal assistance services is determined through the Budget process and there is no link between the volume of funding and the cost associated with providing specified services. Funding is indexed annually using 'Wage Cost Index 1', which is based on 75 per cent of a wage cost factor and 25 per cent of consumer price index.

As a consequence of the disconnect between legal need and funding, LACs have to perform a balancing act between managing the volume of clients, types of matters and private practitioner fees:

> … volume is the result of the gateways you put in … [place for example] means test and guidelines, and … we have to operate within a limited funding envelope. If you increase volume through lifting the means test, then the Legal Aid Commission boards within a limited funding envelope have to make adjustments elsewhere. So they might have to change their guidelines to further narrow — or they might have to reduce the unit cost, or if the unit cost is lifted we've got to drop the volume by increasing the means test. So it's like a steam engine with all these things popping out everywhere. (Legal Aid Queensland, trans. p. 1139)

This balancing act is made more difficult by the fluid nature of the external factors that impact on demand. For example, policy and legislative changes can significantly impact on the demand for legal assistance services. The *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) is a recent example of a policy change that has resulted in increased demand for legal assistance services. NTLAC said that 'service demands are difficult to predict and plan for' (sub. 128, p. 11). Victoria Legal Aid also noted:

> Far from being static, the justice system is in fact dynamic and constantly changing. The demand for legal assistance is directly affected by the pace of legislative reform, policy change and resourcing commitments to other actors in the system. The legal landscape and associated legal need can look very different from one period to the next … (sub. 102, p. 5)

The Commission considers that a comprehensive assessment of legal need (by both civil law type and geographic area) is required in each jurisdiction. The assessment should be forward looking, taking into account likely population and other demographic changes. As the Attorney-General's Department said:

> Legal intervention programs … need to be delivered to those areas where the services available are unable to meet the level of demand or legal need. Accurate data on legal need, drawn from Australian Bureau of Statistics' population research or from legal assistance services themselves, can help to target programs and services. The LAW Survey is also valuable here, as it looks at characteristics of high needs groups who access legal assistance to help address their problems. (sub. 137, p. 19)

This analysis should be used, in conjunction with the costs and benefits of providing specific services, to inform decisions by Australian governments on service priorities within the legal assistance landscape. Legal Assistance Forums in each jurisdiction should be consulted in setting these priorities.

The global funding envelope provided to legal assistance providers by Australian governments should be broadly related to the costs associated with meeting these priorities. Where a mixed model is employed, funding should broadly reflect the most efficient and effective way of delivering services — be that in-house or through outsourcing arrangements with the private profession.

In order to make any funding shortfalls more transparent, the Australian and State and Territory Governments should publicly report annually on the extent of any failure to meet agreed coverage and priorities. Funding should be stable enough to allow for longer term planning and flexible enough to accommodate the anticipated reduction in other sources of funding (particularly Public Purpose Funds or equivalents) in coming years. The importance of the latter two objectives are discussed in detail later in this section.

RECOMMENDATION 21.5

For the medium and longer term, the Australian, State and Territory Governments should agree on priorities for legal assistance services and should provide adequate funding so that these priorities can be broadly realised. Such funding should be stable enough to allow for longer term planning, and flexible enough to accommodate the anticipated reduction in other sources of funding (particularly Public Purpose Funds or equivalents) in coming years. On an annual basis, the Australian, State and Territory Governments should publicly report on the extent of any failure to meet agreed coverage and priorities.

In determining legal assistance priorities, governments should consult with the Legal Assistance Forums in each state and territory.

Improving the allocation of funding across states and territories

The quantum of funding for LACs and CLCs is determined via budget processes, but funds are distributed using different approaches.

The amount of funding allocated to LACs is determined in consultation with the states and territories as part of the NPA, although, as noted above, it is unclear what factors are taken into account when this *quantum* of funding is chosen. The total funding is then allocated to the states and territories using a funding allocation model (FAM), which takes into account relative differences in the cost of providing, and risk of needing, legal aid services. The model also accounts for specific Commonwealth priorities in allocating funding, as well as the relative populations in each state and territory (ACG 2014d; COAG 2010).

The risk factors associated with demand for legal services, where applicable, under the FAM comprise of three, equally weighted factors:

- the proportion of divorces involving children
- the proportion of Single Parent Payment recipients

- socio-economic composition (derived from the ABS Index of Relative Socio-Economic Disadvantage (IRSD)).

Supply factors include location-related costs and scale-related administrative costs.

The distribution model is complex, but it provides a transparent way of attempting to allocate a given funding envelope across the jurisdictions according to some relative measure of legal need and the cost of providing services. The model aims to ensure that each state and territory has the funds to provide a similar level of service delivery based on the funds provided.

While a systematic approach to the allocation of funds is preferable to an historical-based approach (as is typically employed to determine CLC funding, discussed below), the Commission considers that there is scope to improve the FAM.

The risk factors outlined above were chosen on the grounds that they were (at the time) associated most clearly with the demand for family law matters, which is where the bulk of the Commonwealth funding for LACs is allocated. However, more recent (and more comprehensive) information is now available on the risk factors associated with the demand for legal services.

The *Legal Australia-Wide (LAW) Survey*, which provides a more detailed insight into legal need, indicates that, while the risk factors employed in FAM are associated with a greater likelihood of experiencing a family problem, the weighting of these factors may be inappropriate. For example, the *LAW Survey* indicates that the factors most strongly associated with experiencing a family legal problem are (in descending order of importance) being in a single parent family, having a disability, living in disadvantaged housing, receiving government benefits as the main source of income, being unemployed and living in a regional area (relative to a major city).

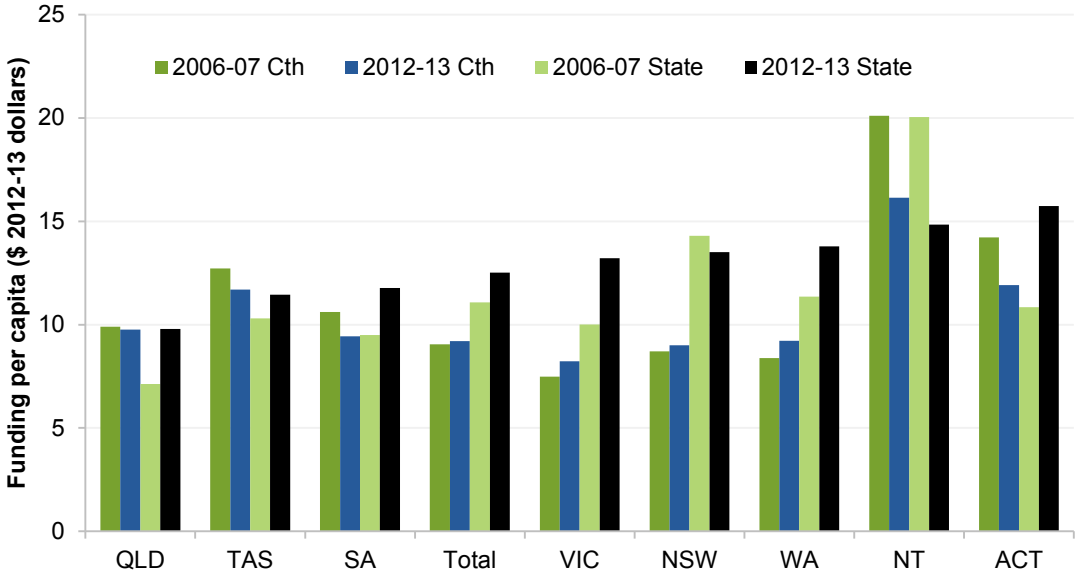
There is no clear basis to include factors such as the skill level of employment, owning a car, education status, and access to the internet as is the case in the present model (through the inclusion of the IRSD). The *LAW Survey* indicates that the greatest weighting should be given to prevalence of single-parent families, disability status and disadvantaged housing. Moreover, inclusion of single-parent payment recipients appears to be too heavily weighted, since this factor is also captured as part of the IRSD.

A second concern with the FAM is that no risk factors are applied to civil law funding. Instead, the model assumes that demand for legal assistance in (non-family) civil law matters is uniform across states and territories. Again, the results of the *LAW Survey* suggest that this is not the case.

A third concern with the FAM is that it does not take account of state and territory funding efforts. In contrast to funding for other government services, the Commonwealth's approach to funding legal services provides no incentives for relatively low-funding jurisdictions to increase their contributions. As noted above, it is not clear how the states

and territories determine their LAC funding contributions and the quantum varies significantly by jurisdiction. Queensland has the lowest state per capita funding of LACs in Australia at just under $10 per person, while the ACT has the highest at around $16 per person (figure 21.4).

Figure 21.4 **State funding contributions for LACs differ**
Per capita contributions



Sources: Commission estimates based on NLA (nd), ABS (Wage Price Index, Australia, Jun 2014, Cat. no. 6345.0), and ABS (Australian Demographic Statistics, Dec 2013, Cat. No. 3101.0).

The Commission considers that there is potential to improve the way in which Commonwealth funding for LACs is allocated between jurisdictions to:

- reflect a more contemporary understanding of the risk factors for family law disputes
- include some risk weighting for other civil law disputes
- provide some incentive for relatively low-funding states and territories to increase their contributions.

The model used to allocate ATSILS' funding is similar to that used to allocate LAC funding and would also benefit from revision.

Distribution of CLC funding — largely historical rather than needs based

In contrast to funding arrangements for the LACs, there is no systematic approach for allocating funds for CLCs under the Community Legal Services Program (CSLP). Rather, funding for CLCs is largely allocated on an 'historical basis' through application-based grants (chapter 20). CLCs servicing similar communities and facing the same cost

structures may not attract the same funding. Many of the CLCs are the same ones that were funded 10-20 years ago. It is only under exceptional circumstances that CLCs do not have their funding or contracts renewed.

There are jurisdictional differences in CLC funding partly reflecting some more 'savvy' CLCs, the variety of sources of funding, as well as differences in the size and availability of public purpose trust fund accounts and one-off grants. As QPILCH put it:

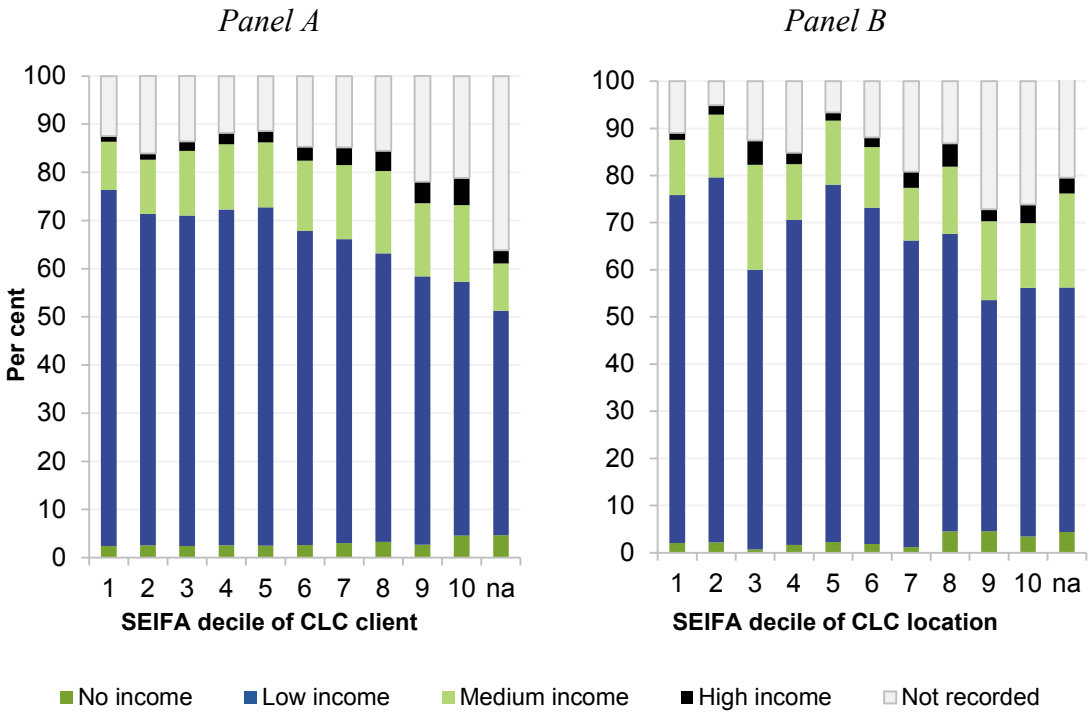
> … funding of CLCs in Australia is uncoordinated, fragmented and inequitable. Funding is provided from a variety of sources including the Community Legal Services Program (CLSP), one-off grants from both the Commonwealth and State governments, philanthropic sources and statutory and non-statutory financial assistance schemes. Funding by the States is not uniform with larger states such as Queensland and Western Australia facing greater demands to service far-flung clients but not receiving additional funding to do so. (sub. 58, p. 59)

While more recent decisions about how to allocate any *additional* funds have mostly attempted to take into account the incidence of unmet need, the legacy of past funding decisions means that there is a disconnect between legal need and funding. Indeed, Commission analysis revealed that only around one fifth of CLCs are located in areas in the bottom three deciles of the Socio-Economic Indexes for Areas (SEIFA) — an indicator of geographic disadvantage developed by the ABS. Over two-thirds are located in the top three SEIFA deciles (appendix I).

A number of CLCs considered that this was not problematic, as there can be pockets of disadvantage even within relatively affluent areas. However, analysis undertaken by the Commission also found that the average income of CLC clients located in advantaged areas was higher than clients from disadvantaged areas (figure 21.5, panel A). Similarly, CLCs located in higher SEIFA deciles were found to serve a smaller proportion of low income clients than those in lower SEIFA deciles (figure 21.5, panel B).

Figure 21.5 **Reported income of CLC clients and CLC locations[a]**

By decile, 2011-12



[a] 'na' of SEIFA decile refers to those localities linked to postcodes for post-office box purposes only. Income is defined in CLSIS as no income, low income ('under $500 per week or $26 000 per year'), medium income ('between $500 and $1000 per week or $26 000 to $52 000 per year'), high income ('$1000 per week or over or $52 000 per year or over'), not applicable or not stated.

Sources: Commission estimates based on unpublished CLSIS data and ABS (*Census of Population and Housing: Socio-Economic Indexes for Areas (SEIFA), Australia, 2011,* Cat. no. 2033.0.55.001).

A number of participants also pointed to the legacy effects of past funding decisions. For example, the pro-bono practices of Allens, Ashurst and Clayton Utz noted:

> We consider that CLC funds (and funding for the legal assistance sector generally) should be distributed on the basis of demographic evidence of economic and legal need. The location of CLCs is largely a result of historical small group activism. They are there, because that's where their pioneering founders established them 30 or 40 years ago, and not because their locations necessarily reflect the greatest areas of unmet legal need.
>
> Currently in Sydney, for example, 18 specialist or generalist community legal centres (or almost half the total number of community legal centres in the state [NSW]) are within 10 km of the GPO. Only one CLC or Legal Aid office (Mt Druitt CLC) is situated in the top 41 postcodes in NSW by level of disadvantage. (sub. DR224, p. 8)

NLA acknowledged that this was an issue:

> NLA accepts the principles of allocative efficiency, and appreciates that some CLCs are not in places where they would ideally be placed now. (sub. DR228, p. 7)

A new funding allocation model for CLSP funding is required to better reflect need. The Commission considers that it is better to approach this issue systematically rather than continue to rely on a 'bottom up' approach which depends on a motivated individual or group of individuals first identifying need and then applying for a grant to the CLSP. The model should be used to determine the CLSP funding envelope for each state and territory. The process for allocating CLSP funds within jurisdictions is discussed in the following section.

RECOMMENDATION 21.6

Commonwealth funding for the providers of legal assistance services should be allocated:

- according to models that reflect the relative costs of service provision and indicators of need
- to encourage funding participation by States and Territory Governments.

Funding allocation models currently used to determine legal aid commission and Aboriginal and Torres Strait Islander legal services funding should be updated to reflect more contemporary measures of legal need.

Maximising coverage within jurisdictions

Determining civil (including family) law priorities and the funds required to meet them, along with a transparent and systematic process for allocating funds *across* jurisdictions, will go some way to improving the legal assistance landscape. However, further reforms are required to the way in which funds are allocated *within* individual states and territories in order to maximise the reach of services.

As Victoria Legal Aid observed, ideally:

> The model should be structured in a way to leverage the particular skills and expertise of each provider, maximise geographical coverage across the state and promote a balance between private and salaried providers that promotes quality benchmarking and cost efficacy. (sub. DR252, p. 9)

One of the objectives of the NPA was to 'realise opportunities for using resources more effectively and efficiently between service providers'. The LACs, CLCs, ATSILS and FVPLS all spoke about co-operative arrangements to ensure that legal assistance services are available to disadvantaged Australians. NLA, for example, said:

> LACs … work with the community sector including the CLCs, and the ATSILS to ensure services are stretched as far as possible and that issues such as conflict are appropriately addressed. Representatives of legal assistance providers meet as needed to discuss co-operative legal services delivery with a view to closing the justice gap as far as possible. (sub. 123, p. 15)

As part of the NPA, each LAC was required to set up a forum to look at opportunities for improved coordination and targeting of legal services. A number of submissions pointed to the legal assistance forums (LAFs) as playing an important co-ordinating role in the legal assistance sector (NSW Bar Association, sub. 34; Legal Aid NSW, sub. 68; NLA, sub. 123). The Queensland Flood and Cyclone Legal Help, for example, was established as an initiative of the Queensland Legal Assistance Forum, incorporating Legal Aid Queensland, Queensland Association of Independent Legal Services, QPILCH, Queensland Law Society, the Aboriginal and Torres Strait Islander Legal Service and the Bar Association of Queensland (NLA, sub. 123).

But the LAFs — as they currently operate — do not appear to remedy some existing service duplications, and there appears to have been opportunities missed for the legal assistance providers to work together more cooperatively. For example, the Commission identified opportunities for the CLCs to leverage more off the LACs (in terms of information and helplines) to eliminate duplication and improve efficiencies (chapter 5). And NACLC (sub. DR268) noted that participation in the LAFs varied across jurisdictions, with some of the more remotely located CLCs finding it difficult to become involved.

The Commission considers that there needs to be a clearer understanding across the four main legal assistance providers of their respective roles in addressing the priorities articulated by government. The LAFs should be used to facilitate such an understanding.

An integral part of maximising service coverage is ensuring that the funding and placement of CLCs accords with the governments' agreed priorities and the division of responsibilities established in the LAF. NLA identified the Western Australian model as their preferred approach for allocating CLSP funds:

> NLA would prefer a negotiated approach involving co-design of service placement and delivery including to address those areas where a real issue of location has been identified. This would help retain beneficial community connections including volunteer contributions from practitioners at after-hours legal advice sessions and management committee members. NLA suggests that a collaborative approach such as that used in WA to conduct the CLC Review in 2003, and then in updating the WA Review in 2009, could be used as a model for allocating funds under the [Community Legal Services Program]. (sub. DR228, p. 8)

Support for the Western Australian model was observed in NACLC's submission:

> The collaborative approach in WA which involved collaboration between Legal Aid WA, Commonwealth and state representatives and CLC representatives may provide a useful model for determining priorities and principles for appropriate allocation of funds under the CLSP at a state and territory level. (sub. DR268, p. 33)

The Western Australian model represents a natural extension of the service priority process outlined above. Priorities were informed by a localised assessment of need and disadvantage, in conjunction with an extensive consultation process (Kadmos 2009). Priorities were identified collaboratively with input from Commonwealth and Western Australian Governments, Legal Aid Western Australia and the local CLC association.

Service priorities were then endorsed by the Commonwealth and State Attorneys General (Legal Aid WA, pers. comm. 29 August 2014). Once service priorities were agreed, submissions were invited from potential providers (to avoid conflicts of interest, the local CLC association did not participate in assessing submissions). Successful providers were subject to a performance reporting framework, which includes a service plan with agreed objectives, strategies and outcomes along with client satisfaction surveys, service standards and biannual progress reports. Agreed service targets and other performance measures are monitored by the LAC on an ongoing basis (Legal Aid WA, pers. comm. 21 August 2014).

Adoption of the Western Australian model is likely to require changes to existing governance arrangements in most states and territories. In both Western Australia and Victoria, the LAC administers their jurisdiction's component of CLSP funding and CLCs report to the relevant LAC (VLA, sub. DR252; Legal Aid Western Australia, pers. comm., 21 August 2014). Different arrangements apply in all other jurisdictions (chapter 20).

RECOMMENDATION 21.7

Legal Assistance Forums in each state and territory should be used to reach an agreement between the four main legal assistance providers as to their respective roles in addressing the service priorities articulated by government.

The allocation of Community Legal Services Program funds within jurisdictions should be determined by representatives from the Australian Government and the relevant State or Territory Government, the relevant legal aid commission and a representative from the relevant community legal centre association.

Allocation decisions should be informed by assessments of legal need and the efficiency and effectiveness of service providers.

Revamping performance reporting

One of the factors that has precluded the Commission from identifying longer-term legal assistance service priorities (and hence funding requirements) is a lack of comprehensive and comparable data on the costs and benefits of delivering legal assistance services. Knowing what works well and what is less effective can help to better target resources across the spectrum of civil need.

Performance measures can also help to identify the best ways in which to assist individuals. For example, the service delivery focus of CLCs spans less formal methods of advocacy, negotiation and mediation as well as seeking to provide people with the support and skills to resolve their own problems and to avoid similar problems arising in the future (NACLC, sub. 77). Without adequate data, however, it is difficult to tell which of these 'tools' are the most efficient and effective, and the circumstances under which they are best applied.

The allocation of service priorities across the four providers has been similarly thwarted by a lack of reliable data. The NPA — which specifies what Commonwealth funding is to cover and the objectives and outcomes that are to be achieved — was designed to consolidate agreements and disparate reporting requirements. However, as Warner (2013) highlighted, there is a disconnect between the separate agreements (and reporting and funding arrangements) of the CLCs, ATSILS and FVPLS and the NPA objectives.

While differences in program objectives, client needs and contextual factors complicate comparisons across providers (akin to other types of human services) the Commission considers that there is still a role for performance reporting. Wherever possible, measures of costs and outcomes should be standardised. Where data cannot be standardised, careful interpretation is preferable to avoiding comparisons altogether.

In order to achieve some standardisation of performance measures and improve comparability more broadly, the Commission considers that the reporting of costs, outputs and outcomes would be subject to negotiation with the sector. Ideally, when undertaking such benchmarking, the contribution of volunteer and pro bono (in kind) service inputs would be considered (and, where possible, measured). Chapter 25 and appendix J discuss in more detail the nature of data that would be required. As noted in chapter 8, data collected should also extend to alternative dispute resolution services.

Once suitable benchmarks have been agreed these should frame the administrative data collection. Ongoing training and comprehensive manuals are required to ensure that providers understand data requirements and report in a consistent fashion.

RECOMMENDATION 21.8

The Australian, State and Territory Governments, in consultation with providers of legal assistance services, should:

- establish service delivery targets for all four providers of legal assistance services
- develop and implement robust benchmarks to enable better measurement, and comparison, of performance between individual providers and different types of providers. These agreed benchmarks should be a consideration in framing administrative data collection.

Getting off the funding merry-go-round

It is not just the adequacy and allocation of legal assistance funding that has been lacking — funding has also been uncertain. As discussed above, Commonwealth funding for LACs and CLCs has been less than stable in recent years as additional funding is provided to the sector, only to be cut back shortly thereafter. Funding for culturally tailored services has been similarly affected (chapters 20 and 22). For some providers, recent announcements have amounted to a reversal of previous funding expansions, rather than a contraction in

their funding below long-term levels. But even in these cases, there are significant implications for the way in which providers can effectively plan out future service provision and capital expenditure.

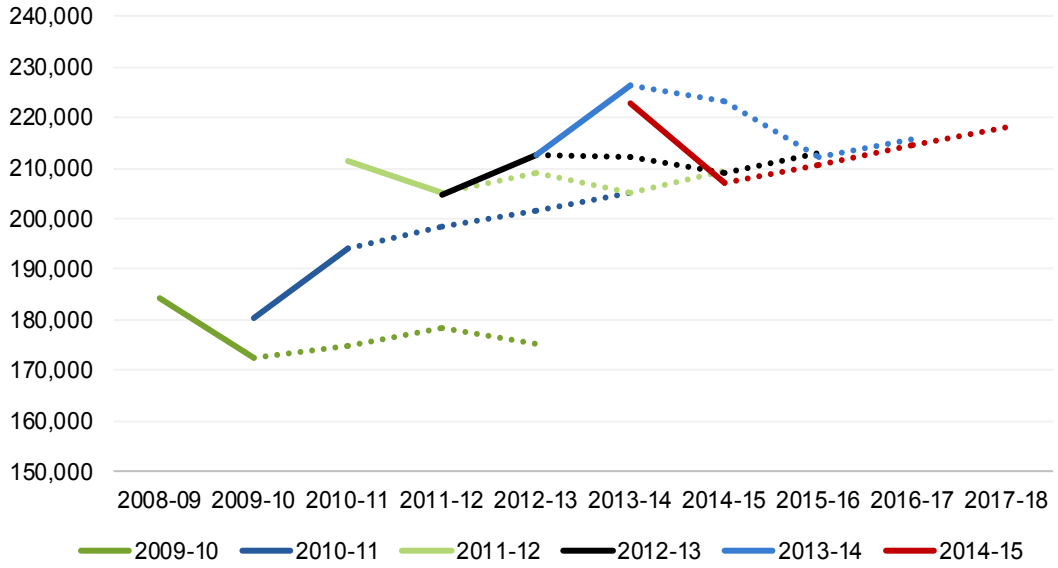
The National Aboriginal and Torres Strait Islander Legal Services characterised the impacts of uncertain funding this way:

> The lack of information as to how the announced funding cuts are going to be implemented is causing a great deal of concern amongst ATSILS. Without information as to how the funding cuts are going to be implemented, ATSILS are unable to appropriately plan ahead and provide staff with direction and employment certainty. ATSILS around the country are already losing staff as a result of the uncertainty in employment security created by the announced cuts. Furthermore, in order to avoid being left in a situation where they have to undertake strategic decision-making 'on the run' at the last moment, our members are being forced to make difficult decisions without the necessary information to safeguard the future of their services. (sub. DR327, pp. 2–3)

Legal Aid WA noted that the lack of funding predictability was particularly problematic in rural and remote areas where providers face recruitment difficulties and private services are limited. Some CLCs, having successfully recruited solicitors to service rural and remote communities are now faced with the prospect of terminating their services (pers. comm. 26 August 2014).

The figures below show, for each Commonwealth budget, the amount that was paid for the previous financial year, the amount budgeted in the current financial year (unbroken line), and the forward estimates beyond that (dotted), for LACs (figure 21.6) and CLCs (figure 21.7). These figures illustrate the high degree of inconsistency in funding allocations.

Figure 21.6 **Commonwealth funding for Legal Aid Commissions[a]**
Nominal ($000s)



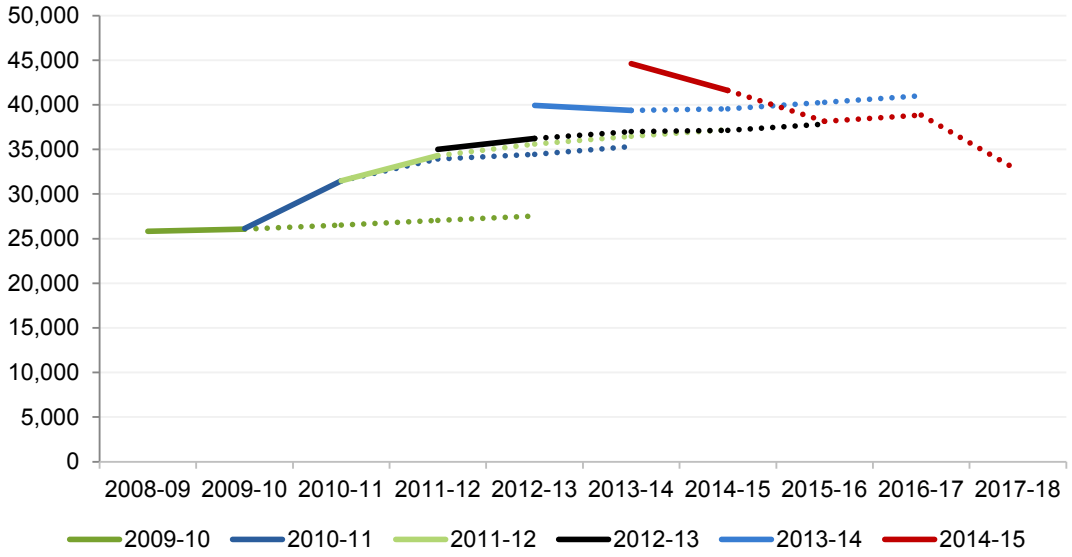
[a] Unbroken lines indicate actual funding and budgeted funding for the subsequent year (e.g. the 2009-10 budget showed that $185 m funding was provided for legal aid in 2008-09, and that $171 m was budgeted for 2009-10. The 2010-11 budget showed that the actual amount that occurred in 2009-10 was closer to $180 m, and that $195 m was budgeted for 2010-11 (and so on)). Dotted lines indicate the forward estimates for each budget vintage.

Source: Commission estimates based on Commonwealth Budget Papers (no. 3, various years) and Agency Portfolio Statements (Attorney General's Department, various years).

In many other (though not all) critical government expenditure areas, people can be guaranteed to get benefits that do not vary significantly depending on where they live or when in the year they might apply. The age pension, family tax benefits, the disability support pension and other government income support arrangements are paid at the same rates (with a few exceptions) wherever people are in Australia. These payments do not change suddenly from year to year and they are not budget-capped (that is, if more people become unemployed, they will still be able to get unemployment benefits at the same rate as others) (PC 2011).

While the Commission is not advocating that funding for legal assistance services be uncapped, it does consider that greater predictability of funding is required. This would enable providers to better plan their services, avoid 'break costs' associated with the unexpected reversal of programs and would provide some consistency for service users. Establishing a base amount of funding for a five-year period would give the sector much needed stability and certainty of funding.

Figure 21.7 **Commonwealth funding for Community Legal Centres**
Under the CLSP program, nominal ($000s)



Source: Commission estimates based on Commonwealth Budget Papers (no. 3, various years) and Agency Portfolio Statements (Attorney General's Department, various years).

Moving away from unsustainable sources of funding

Given the relatively limited resources available for legal assistance and the immediate problems that this gives rise to, there has been relatively less focus on the sustainability of future funding streams. But here too, there are problems that need to be addressed.

Own source income

Contributions are required from clients who receive legal aid grants and are assessed as being able to afford to pay some component of their costs. As noted above, however, most LAC clients are either receiving government benefits or have no income. As a result they have limited ability to contribute.[28]

The contribution of self-generated income to LAC funding is small relative to funding from different levels of government (figure 20.9), but in recent years it has been particularly small. As LACs have further tightened their eligibility requirements, they have increasingly focused on a client base that has less capacity to make a contribution towards funding their legal work. In short, a reduction in government funding has also contributed to a decline in the capacity to self-finance.

[28] Eligibility for duty lawyer services are typically not as strict and for this reason the Commission considers that the use of a co-contribution could be explored in this area (chapter 14).

Clients are faced with the prospect of being made to make a contribution that they are ill-equipped to afford because the means tests for eligibility are so restrictive. LACs are particularly accommodating in this respect, in that many allow clients to pay their fees in instalments, or attach the fees instead to some asset (such as a car or a house) to be recovered when that asset is sold. In the former case, this leaves LACs with a loan 'on the books' that may or may not be paid back. In the latter case, there is the added surety of an asset attached, but it can take substantial time for the debt to be repaid (for example, in Western Australia, contributions take on average 8 years to be repaid (Legal Aid WA 2013)). In either case, this represents a deferred fee payment scheme by the LACs — essentially a subsidy from LACs to their clients. Table 21.3 demonstrates the different extent that contributions make to total income, and the proportion of deferred contributions as a share of total assets.

Table 21.3 **Self-generated income and the weight of client contributions on the balance sheets of legal aid commissions**
2012-13

	Self-generated income	*Self-generated income as a share of total income*	*Net receivables from client contributions*[a]	*Outstanding non-current client contributions as a share of total assets*
	$ '000s	%	$ '000s	%
NSW Legal Aid	5 498	2	2 784	3[c]
Victoria Legal Aid	5 157	3	18 028	36
Legal Aid Queensland	2 390	2	889	2
Legal Services Commission of South Australia	483	9	6 148	22
Legal Aid Western Australia	2 434	4	6 697	16
Legal Aid Commission of Tasmania[b]	169	1	460[b]	11
ACT Legal Aid	209	2	65	1
NT Legal Aid Commission	604	5	209	6

[a] Net of provisions for bad debts and discounting, where applied by the relevant legal aid commission. [c] This figure is artificially low as NSW appears to manage some funds on behalf of the other states. Excluding this current asset, the ratio is closer to 25 per cent. [b] Includes civil law disbursement fund loans.

Source: Commission estimates based on 2012-13 annual reports.

It is not clear to the Commission whether a user-pays principle is appropriate for grants of legal aid provided by LACs. Typically, contributions of this kind are intended to ration services by setting a price signal above a certain means-test threshold. While such a signal could serve as an incentive to nudge users towards non-legal means to remedy their problems, it could also create unmet legal need. The evidence provided by various LACs as part of the inquiry clearly suggests that it is more of the latter than the former. When

dealing with individuals with extremely limited means (and often other dimensions of disadvantage), a price signal can cause more harm than good.

RECOMMENDATION 21.9

Legal aid commissions should only seek a contribution from their clients where there is a strong likelihood of an award of damages against which the commission's costs can be defrayed. The practice of allowing deferred payments, especially unsecured deferred payments, should be phased out.

Public purpose funds

As discussed in chapter 7, lawyers' trust accounts are used to hold money on behalf of a client in connection with the provision of legal services, including holding the proceeds of a court action. Interest from these accounts is used for a variety of purposes, including for funding legal assistance services.

The extent to which states and territories rely on these funds, often referred to as Public Purpose Funds (PPFs), varies but has been declining. Technological change, along with persistently low interest rates, have led to less funds flowing towards legal assistance. Recent reductions have been especially pronounced. Of the real per capita decline in funding to LACs since 2007-08, most of the decline has come about from a reduction in the PPF contribution (chapter 20).

Funding from PPFs is also mistimed by the nature of the scheme — it yields resources in times of economic growth (when legal need is likely to be less) and withdraws them in times of economic downturn (when legal need is likely to increase).

The Commission has recommended that regulatory requirements for lawyers' trust accounts be reviewed, including consideration of the appropriate use of the net earnings of trust accounts (recommendation 7.4). Irrespective of the outcome of this review, it is likely that PPFs will continue to decline as a share of legal assistance funding and therefore all Australian governments need to plan for, and offset, this reduction.

21.6 What about the benefits?

The costs of providing legal services are concentrated among governments. What is less visible are the substantial benefits delivered by legal assistance services, both to the individuals that they serve directly, and more broadly to the community as a whole. These benefits are intrinsically difficult to measure because they are often large avoided costs to individuals and the community through time, rather than an immediate, tangible benefit

(appendix K). The dollar spent on providing legal services is well accounted for; the dollars of benefit gained from provided these services are less so.

Accordingly, to make sound evidence-based policy, there needs to be more effort made to understand the benefits of providing these services, in order to be consistent with the focus made upon their costs. Being able to measure the wider impacts on the community of providing legal assistance services is an important component of this. Building the evidence base to allow for such broader quantitative analysis (as well as employing more sound cost-benefit techniques) would provide for a better informed view of what services should be funded and by how much.

The wider community can benefit from legal assistance

The primary beneficiaries of legal assistance are the individuals who receive services. Legal assistance can help resolve their legal problems, reduce the financial costs and stress they experience, and prevent further hardship from the escalation of unresolved problems. While hard to measure, these impacts can be significant for the individuals concerned.

Providing legal assistance to individuals with civil legal problems can also deliver benefits to the wider community, including:

- ensuring legal rights are enforced across the community
- preventing the escalation of civil disputes, including into criminal matters
- avoiding the costs of other government services
- improving the efficiency of court proceedings.

Ensuring legal rights are enforced across the community

As noted throughout this report, an important function of the civil justice system is to shape the behaviour of parties (such as individuals, employers, businesses and government bodies) by enforcing legal rights and deterring breaches of the law. Providing legal assistance to lower income Australians can help ensure this deterrence, even where parties may be unable to afford legal representation. As Denniss, Fear and Millane said:

> Knowing that the other side can fight as well as you can would have the direct effect of encouraging otherwise dominant litigants to engage in earlier negotiation, settlement and general preventative behaviour. (2012, p. 4)

Some stakeholders have also argued that providing legal assistance to Australia's most disadvantaged people is necessary for ensuring equitable access to the justice system (Australian Lawyers Alliance, sub. 107; Law Council of Australia, sub. 96; Slater & Gordon Lawyers, sub. 56). As NLA put it:

> … but for the presence of legal assistance service providers the capacity of society to provide access to justice — itself an essential feature of the rule of law and civil society — will be diminished. (sub. 123, p. 17)

There is some evidence that the provision of legal assistance is regarded by many as a social norm. As part of a recent survey, Australians were asked who should receive government funded legal aid. Just 4 per cent of respondents said that everyone should have to pay for their own lawyer if they needed one. Other results from the survey were that:

- around one-quarter of respondents (26 per cent) said only the very poor should receive government funded legal aid
- 44 per cent said everyone, except the rich
- 19 per cent said everyone, regardless of wealth (Denniss, Fear and Millane 2012).

Preventing the escalation of disputes, including into criminal matters

As discussed, priority is given for criminal law issues because of the consequences on people's lives. But broader civil law problems, if left unresolved, can also have a big impact on the lives of the most vulnerable Australians. A number of submissions also pointed to a link between the most disadvantaged members of the community (including the homeless) and high rates of civil legal matters.

Unmet civil legal needs (family breakdown, fines and debt) can escalate into more serious civil problems, and in some cases, can lead to crime. Examples of the latter provided by NLA (sub. 123) include:

- the breach of a civil violence restraining order resulting in prosecution in the criminal jurisdiction with serious consequences, including a period of imprisonment
- children who have been or are involved in child protection proceedings, also involved in juvenile justice proceedings, and ultimately, adult criminal law proceedings (this cycle of disadvantage is commonly seen by LACs)
- unpaid traffic infringement notices that result in a licence suspension order, with the flow on effect of criminal penalties if the individual concerned is detected driving (the penalties for this offence can include imprisonment).

Commenting on the impact of unresolved fines, the [then] NSW Attorney-General and Minister for Justice, the Hon. Greg Smith, said:

> The impact of fines on vulnerable people can be crippling. Almost two thirds of licence suspensions in NSW are for fine defaults. This can in turn lead to secondary offending and ultimately imprisonment. Aboriginal people are particularly vulnerable to this cycle. (Smith 2013, p. 15)

Avoided costs in other areas of government service provision

Not providing legal assistance for civil matters can be a false economy where the costs of unresolved problems are shifted to other areas of government spending such as health care, housing and child protection. The Attorney-General's Department, pointing to analysis undertaken by the Citizen's Advice Bureau, said:

> If left unmet, legal needs can potentially spiral into other non-legal problems and result in additional costs to government, as the affected individuals will require more intensive and costly interventions from a wider variety of services in an attempt to address their complex needs. (sub. 137, p. 7)

Participants provided many examples of problems spiralling when legal assistance was not provided, leading to additional costs to government. For example, cases of clients with multiple infringements (for example, for travelling on public transport without a ticket) was common. Infringements increase because added fees and penalties exacerbate the seriousness of the infringements. The result is increased time and cost to administer the infringements and resolve the matters legally. Allens said the stress from such situations frequently results in or exacerbates mental illness, jeopardises employment, leads to substance abuse, and 'ultimately cost society both in dollar terms and in quality of life' (sub. 111, p. 1).

Efficiency of processes in the justice system

Access to lawyer advice and representation can also reduce the number of self-represented litigants, who may take up more of the courts resources than represented litigants (chapter 14). As the report on the *Economic Value of Legal Aid* said:

> There is a direct relationship between the efficiency of the court and the provision of legal aid. Efficiency is achieved through the provision of information, advice, legal assistance, dispute resolution, and representation for matters that would otherwise be self-representing. Costs to the justice system are also avoided because cases are diverted from court rather than needing a hearing or decision by the court. (PwC 2009a, p. 25)

However, as noted in appendix K, the extent of any efficiency improvements to the courts from providing representation is still poorly understood and has not been quantified in a rigorous or transparent fashion.

Quantifying the magnitude of these benefits is challenging

There is also a growing body of work that seeks to analyse and measure the costs to government and the wider community of unresolved civil justice problems. Doing so is complicated by a lack of reliable evidence and so rests on assumptions about:

- what would happen to an individual if legal assistance were not provided?
- how much does receiving legal assistance affect legal outcomes for a party?

- does obtaining a favourable legal outcome avoid adverse outcomes 'outside the courtroom'?
- what are the costs of the adverse social outcomes legal assistance aims to avoid?

An overview of the existing literature and a discussion of measuring the benefits of legal assistance services can be found in appendix K.

The Commission also considered the cost to government of unresolved civil justice problems, focussing on the benefits arising from legal assistance that can be tangibly quantified. The costs of other government services that are avoided through the delivery of legal assistance can provide a particularly useful starting point for measuring these benefits.

For some dispute types, these avoided costs will exceed the costs of providing legal assistance services. For example, the Commission has estimated that providing duty lawyer assistance to victims of family violence seeking an apprehended violence order may, on average, generate savings for government of approximately $450 per case (noting that this figure may range between $200 and $840 depending on the assumptions adopted). These savings are likely to more than offset the cost to governments of providing duty lawyers in these matters. Further, the avoided costs to the community as a whole, particularly victims, from providing such services are likely to exceed, on average, $1700 per case. While this analysis provides an illustration of the benefits that legal assistance can potentially provide, the results of this analysis should not be extrapolated to other types of legal problems and legal assistance services.

Other intangible benefits outlined above — such as the 'rule of law', and satisfying social norms regarding equal access to the law — may still be regarded as important outcomes to be pursued by government. However, in the absence of objective measures, they cannot be weighed against the costs of providing services, and thus should be qualitatively assessed separate from any quantitative evaluation of legal assistance services.

While the Commission has provided some illustrative examples of the benefits of providing legal assistance, improvements in the collection of data and evidence, especially relating to the tangible outcomes obtained for clients of legal assistance providers, are necessary in order for rigorous and accurate quantitative assessments of benefits to be undertaken (chapter 25).

22 Assistance for Aboriginal and Torres Strait Islander people

Key points

- Aboriginal and Torres Strait Islander Australians often have complex legal needs and face substantial barriers in accessing legal assistance. The nature and complexity of their civil law needs means that specialist legal assistance services remain justified.
- Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS) provide specialised, culturally tailored services for Indigenous Australians.
  - Most ATSILS focus primarily on criminal law needs, with relatively few resources dedicated to servicing civil and family law needs. FVPLS specialise in helping victims of family violence.
- Unmet need is experienced across a wide range of matters, including in interpreter services. Some unmet civil needs may escalate to criminal behaviours and the line between civil and criminal needs is not always clear.
- Earlier and more proactive engagement by government agencies could help reduce some disputes. Evidence on the cost-effectiveness of this strategy is required.
- A range of culturally tailored alternative dispute resolution services (including family dispute resolution services) is also needed to help Aboriginal and Torres Strait Islander Australians better resolve disputes before they escalate.
- Indigenous interpreter services help some Indigenous people to communicate their needs and understand their legal rights and responsibilities. Longer-term investments are required to ensure the ongoing supply of these services.
- The need to build trust between Indigenous communities and legal assistance providers warrants longer-term models of engagement between governments and these specialised service providers.
- Improvements in the measurement and benchmarking of performance, alongside periodic market testing, will encourage providers to deliver services efficiently and effectively.
- Although legal assistance services generally target people and areas of high need, some reallocation of funds is warranted. Even so, additional resources are necessary to address unmet need.
- As state-based criminal matters predominate the services of ATSILS, state and territory governments should have a stake in funding these services. This would have the added benefit of enabling many of these service providers to redirect existing Commonwealth funds to better meet the family and other civil law needs of Indigenous Australians.

Aboriginal and Torres Strait Islander people comprise about 3 per cent of Australia's population (ABS 2013b). While individual situations are diverse, on average general circumstances and characteristics increase the likelihood of needing, and reduce their ability to access, legal assistance.

This chapter focuses on strategies to address the unmet family and other civil legal assistance needs of Aboriginal and Torres Strait Islander Australians. In doing so, it builds on the material presented earlier in this report (chapters 20 and 21). The chapter starts by examining the main barriers in accessing justice faced by Aboriginal and Torres Strait Islander Australians (section 22.1). This is followed by a discussion of the grounds for specialised legal assistance services for Indigenous Australians (section 22.2). Section 22.3 goes on to outline the gaps in the coverage of specialised services. How these gaps affect the wellbeing of Indigenous Australians is summarised in section 22.4. The chapter concludes by identifying a range of proposals to fill these gaps and ameliorate the consequences of unmet need (section 22.5).

22.1 Aboriginal and Torres Strait Islander people face significant barriers in accessing justice

Indigenous Australians' access to civil justice is made difficult not only by the multiplicity and complexity of legal problems that they experience (chapter 2), but also by the significant barriers they face in seeking to resolve their disputes. The two are often related. For example, with respect to consumer disputes, NSW Fair Trading observed:

> Indigenous communities are at particular risk of unfair trade practices because of factors such as geographic isolation, lack of choice and competition, language barriers, a lack of financial literacy and restricted access to services. (2011, p. 1)

Many of these same factors make it more challenging for Indigenous people to resolve, or to seek assistance to resolve, their disputes.

Lack of awareness

Consultations with organisations representing Indigenous people and submissions to this inquiry indicated a persistent lack of awareness by Indigenous people about family and other civil law (ILNP, sub. 105; ALSWA, sub. 112; Redfern Legal Centre, sub. 115; ILNP and VALS, sub. 125; NTLAC, sub. 128). This is magnified by the lack of familiarity among some staff in various support and referral agencies about what civil law covers or the options for redress available (Allison et al. 2012).

Lack of awareness of family and other civil law has two dimensions. First, Indigenous people may not recognise some issues as having a legal dimension. For example, Indigenous Australians commonly view racial discrimination as just a 'fact of life', rather than something unlawful that gives rise to rights of redress (QIFVLS, sub. 46).

Second, Indigenous people may not be fully aware of the potential remedies available to resolve their disputes, which gives rise to an unrecognised need. For example, the Indigenous Legal Needs Project (ILNP, sub. 105) suggested that the areas of victims' compensation and wills were areas of unrecognised need due to a lack of knowledge of the potential benefits of legal solutions in these areas.

Communication barriers

While nearly 90 per cent of Aboriginal and Torres Strait Islander people speak English at home as a first or only language (SCRGSP 2011), in a number of very remote Indigenous communities, English is a second, third or fourth language (HRSCATSIA 2012). Further, many Indigenous people also speak Aboriginal English — a recognised separate dialect of English — which can be difficult for others to understand, as it incorporates Indigenous words, and some English words that have different meanings (NATSILS, sub. 78; Judicial Council on Cultural Diversity, sub. 120). The lack of a common language can compromise understanding between client and lawyer. Schwartz and Cunneen reported that:

> … 13% of ATSILS practitioners experience difficulty in understanding what their clients are saying 'very often/often'; a further 50% 'sometimes' experience such difficulties. Practitioners also reported that their clients often struggle to understand what they are trying to convey, either because of the client's shyness or discomfort (65%), a disability that hinders communication (51%), an inability to communicate adequately in English (40%), or because clients do not understand the legal process (77%). (2009b, p. 2)

The use of interpreters may not overcome communication barriers since not all communication is verbal. The use of body language, such as hand gestures and movement of the head and eyes, is an integral part of communication for many Aboriginal people. The presence of elders can also influence the effectiveness of communication with Indigenous people and the justice system (Kirke 2010). Further, many legal terms and concepts are not only culturally foreign, they may be uninterpretable. As the Legal Services Commission of South Australia noted (in relation to criminal matters):

> A very able court interpreter has given evidence on many occasions in South Australian courts that the words of the police caution are untranslatable into Pitjantjatjara, containing as they do propositions put in the alternative, and abstract concepts such as 'rights', which are divorced from immediate experience. (Legal Services Commission of South Australia 2012)

Some Indigenous people may also adopt a strategy of agreeing or saying what they think the person in authority wants them to say, regardless of the truth of the matter, when in a position of powerlessness, or when confronted by alien institutions and authority figures. Indirect approaches, such as allowing the person to 'tell their story', can be used to avoid such 'gratuitous concurrence' (Hunyor 2007; Legal Services Commission of South Australia 2012; Roberts 2007).

Finally, a number of characteristics related to socioeconomic disadvantage — such as low literacy and numeracy skills and hearing loss arising from ear disease — also create

communication barriers. These issues exacerbate the challenges of communicating other than in person (Allens, sub. 111).

Socioeconomic disadvantage and geographic isolation

As is the case for a number of groups within the community, socioeconomic disadvantage directly impacts on the ability of Indigenous people to access justice. Socioeconomic disadvantage among Aboriginal and Torres Strait Islander Australians is widespread and multifaceted: various analyses show that, on average, Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health and housing. Often disadvantage is cumulative, with Indigenous Australians who experience one type of disadvantage also experiencing other kinds of disadvantage (SCRGSP 2011). For example, as the National Family Violence Prevention Legal Services Forum observed:

> As well as family violence driven homelessness, many of our clients live with intergenerational trauma, removal of children, discrimination, poverty, mental health issues, disability, lower levels of literacy and numeracy, as well as a range of other cultural, legal and non-legal issues. (National FVPLS Forum, sub. DR194, p. 2)

Socioeconomic disadvantage is linked to geographic isolation, which in itself can represent a barrier in accessing justice. For example, in relation to remote communities, Billings stated 'judicial review is, in every respect, a distant option for most Aboriginal people in remote communities' (2010, p. 173).

Similarly, the Law and Justice Foundation of NSW said:

> Importantly, the problem of distance and poor service infrastructure in RRR [regional, rural and remote] areas is compounded by the fact that disadvantaged groups such as Indigenous Australians are more highly concentrated in RRR areas (Australian Bureau of Statistics (ABS) 2010, 2011). Thus, some RRR areas are microcosms of legal need, embodying the 'double whammy' of poor service infrastructure and populations with high vulnerability to legal problems. (Pleasence et al. 2014, p. 32)

Other evidence indicated that remotely located Indigenous respondents to the *LAW Survey* were less likely to take action, or to consult legal advisers when they did take action (relative to their metropolitan and regional counterparts) (Iriana, Pleasence and Coumarelos 2013).

Differences between traditional law and the Australian legal system

Some barriers faced by Indigenous Australians in accessing justice — such as the divergence between traditional law and the Australian legal system — are fundamental in nature.

> Indigenous people were guided by a highly sophisticated system of justice based on principles of rights and responsibilities … which formed the basis of traditional law (lore) [(Cunneen and

> Schwartz 2009)] … Indigenous lore not only governs relationships with country, but also determines family and kinship ties, the resolution of disputes and numerous details of everyday life. (QIFVLS, sub. 46, pp. 6–7)

Indigenous traditional law continues as a real and controlling force in the lives of many Indigenous Australians. In contrast, the Australian legal system is relatively recent and, as indicated by a number of inquiry participants, has been externally imposed on Indigenous Australians (NCAFP 2013; QIFVLS, sub. 46; Australian Inquest Alliance, sub. 62; ALRM, sub. 126; and Port Augusta FRC, sub. DR211).

Mistrust by Indigenous Australians of the justice system — and government agencies more generally — reinforces the divide between the two systems (AIJA nd). The Judicial Council on Cultural Diversity put to the Commission:

> The imposition of colonial law and the dismantling of Indigenous 'Lore' has resulted in significant mistrust of the legal system by many within Indigenous communities across the country. (sub. 120, p. 1)

Conceptual differences between the two systems also mean that some Indigenous Australians tend not to distinguish between the criminal and civil arms of the justice system. The legal system as a whole is associated with incarceration, deaths in custody and the removal of children (NATSILS, sub. 78; ILNP, sub. 105). For example, the Northern Territory Government's (2010) report of the Board of Inquiry into the Child Protection System acknowledged the current lack of trust in, and acceptance of, child protection systems stemmed from previous experiences with child removal policies.

And in the words of the Queensland Indigenous Family Violence Legal Service (QIFVLS):

> Studies have found that Indigenous people mistrust the justice system and more generally, government agencies. This mistrust acts as a major hurdle in building better relationships between the people in the justice system and Indigenous people … The mistrust of the justice system, and the 'government' in general, affects all aspects of the interaction between Indigenous Australians and access to justice. (sub. 46, pp. 7–8)

The disjunct between the Australian legal system and traditional laws and customs plays out on many levels, including relationships with government agencies (QIFVLS, sub. 46).

It also influences solicitor-client relationships, including the disclosure of information. As QIFVLS observed:

> … there may be more than one clan represented within a single community meaning the relevant lores and customs which pertain to certain tribes will differ between clients. This may affect the ability of the client to disclose information to a lawyer of the opposite sex or affect the way in which a particular client views their relationships with others, including victims and third parties who are affected by domestic or family violence. (sub. 46, p. 7)

This disjunct also affects how services, such as alternative dispute resolution (ADR) services, are portrayed to clients. For example, the Federal Court of Australia said:

> Some Indigenous practitioners identify their practice as 'peacemaking' or use other terms in describing what they do which embrace a deeper level of healing and renewal of relationships. (2009, p. xiii)

22.2 There are good grounds for specialised services

The barriers that many Aboriginal and Torres Strait Islander people face in engaging with the Australian legal system, and the lack of trust in the system, have led to the creation of Indigenous-specific legal assistance bodies — Aboriginal and Torres Strait Islander legal services (ATSILS) and family violence prevention legal services (FVPLS).

ATSILS have a long history, having been active since 1971. They deliver legal assistance services to Indigenous people, primarily in criminal matters. One exception is the North Australian Aboriginal Justice Agency (NAAJA) which devotes around 40 per cent of its activities to servicing civil matters (trans., p. 1025).

FVPLS (which commenced in 1998) are a more recent and specialised service, providing legal assistance and related support for victims of family violence, primarily in regional and remote areas (chapter 20).

The importance of culturally tailored services is broadly recognised. The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted:

> The critical aspect of ATSILS service delivery that sets them apart from other legal assistance services is their focus on, and ability to, provide culturally competent services to Aboriginal and Torres Strait Islander peoples. … Cultural competency is much more than awareness of cultural differences, as it focuses on the capacity to improve outcomes by integrating culture into the delivery of services, it requires commitment to a 'whole of organisation' approach. (sub. 78, pp. 13–14)

The National Pro Bono Resource Centre (NPBRC) argued:

> Indigenous legal services play a critical role in helping indigenous people access the legal system. Research indicates that Indigenous Australians rely on [Indigenous legal services] and are relatively less likely to seek help from mainstream providers to resolve their legal issues due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers. (2009b, p. 17)

While most legal services are provided to Indigenous Australians through these two government-funded bodies, Indigenous Australians are also significant users of legal assistance services provided by legal aid commissions (LACs) and community legal centres (CLCs). For example, in 2012-13, around 12 per cent of all approvals for legal aid were granted to Indigenous Australians and around 6 per cent of CLCs' casework clients identified as Aboriginal and Torres Strait Islander Australians.

A diverse range of services and projects aimed at enhancing access to legal assistance services among Aboriginal and Torres Strait Islander people are undertaken by LACs and

CLCs (see, for example, Legal Aid NSW, sub. DR189 and Women's Legal Services NSW, sub. DR257). These types of services are particularly important in areas that are not serviced by ATSILS and FVPLS, or when an ATSILS or a FVPLS is unable to represent a client due to a conflict of interest.[29]

While Indigenous legal service providers supported the ability of CLCs and LACs to provide services to disadvantaged people with complex needs, most argued that they were better placed to meet the needs of Indigenous people. For example:

> … all legal assistance services play an important role in the delivery of efficient and effective legal services to a range of people, particularly people who experience multiple disadvantage and who present with high and complex need. As an Aboriginal and Torres Strait Islander Service, [Central Australian Aboriginal Legal Aid Service (CAALAS)] has particular expertise in delivering legal services in a culturally appropriate and effective manner … (CAALAS, sub. 89, p. 20)

The Commission considers both ATSILS and FVPLS face a number of distinctive needs and service delivery challenges emanating from the cross-cultural issues, remoteness and language barriers of their clients. Together with Aboriginal and Torres Strait Islander peoples' well documented socioeconomic disadvantages and over-representation in the criminal justice system (SCRGSP 2011), these challenges create a distinctive service delivery environment for ATSILS and FVPLS. These unique circumstances warrant the continuation of specialised Indigenous-specific legal assistance services. Strong support for this view was contained in responses across a range of participants to the draft report (Legal Aid NSW, sub. DR189; National FVPLS Forum, sub. DR194; Aboriginal FVPLS Victoria, sub. DR212; Law Institute of Victoria, sub. DR221; Law and Justice Foundation of NSW, sub. DR231; NATSILS, sub. DR256; and the Law Council of Australia, sub. DR266).

That said, it would neither be feasible nor necessary that all Indigenous legal needs are met by Indigenous specific services. CLCs and LACs should remain important providers of legal assistance services for Aboriginal and Torres Strait Islander Australians, particularly in regional and metropolitan areas.

FINDING 22.1

Specialised legal assistance services for Aboriginal and Torres Strait Islander people remain justified.

[29] Conflict of interest rules state that a lawyer acting for a party in a case must not act in the case for any other party who has a conflicting interest. In the context of ATSILS and FVPLS, the former can represent the alleged perpetrator(s) of family violence while the latter represents the victim(s).

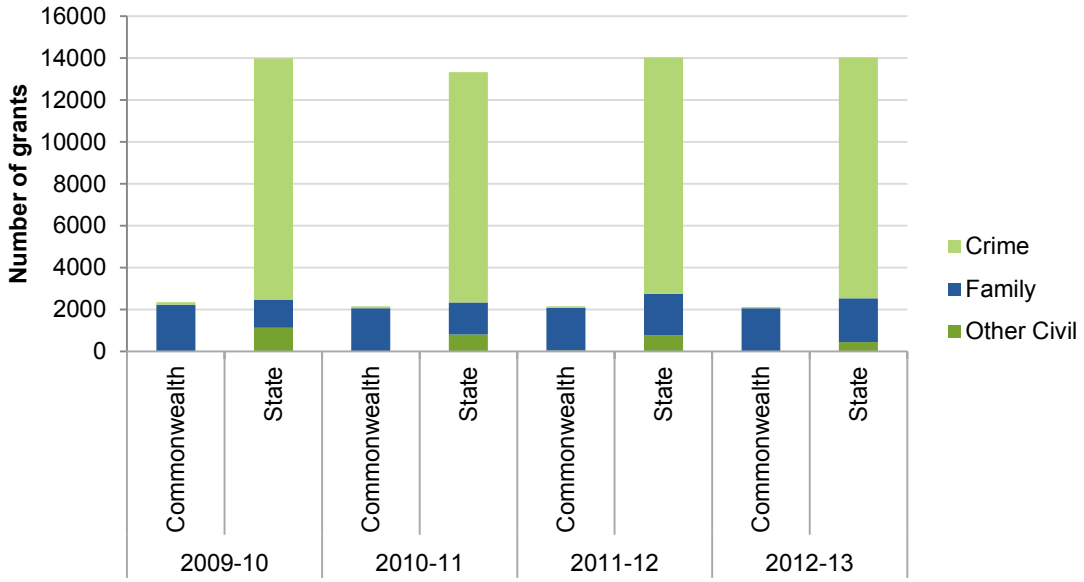
22.3 There are gaps in the coverage of specialised services

Gaps in coverage for family and other civil law matters

Indigenous Australians are significant users of legal assistance services. For example, in 2012-13 over 16 000 grants of legal aid by LACs were to Aboriginal and Torres Strait Islander people, mostly in state-based criminal matters (figure 22.1).

Figure 22.1 **Approved grants of legal aid for Indigenous Australians[a]**

By legal aid commissions by type of matter and funding category, 2009-10 to 2012-13



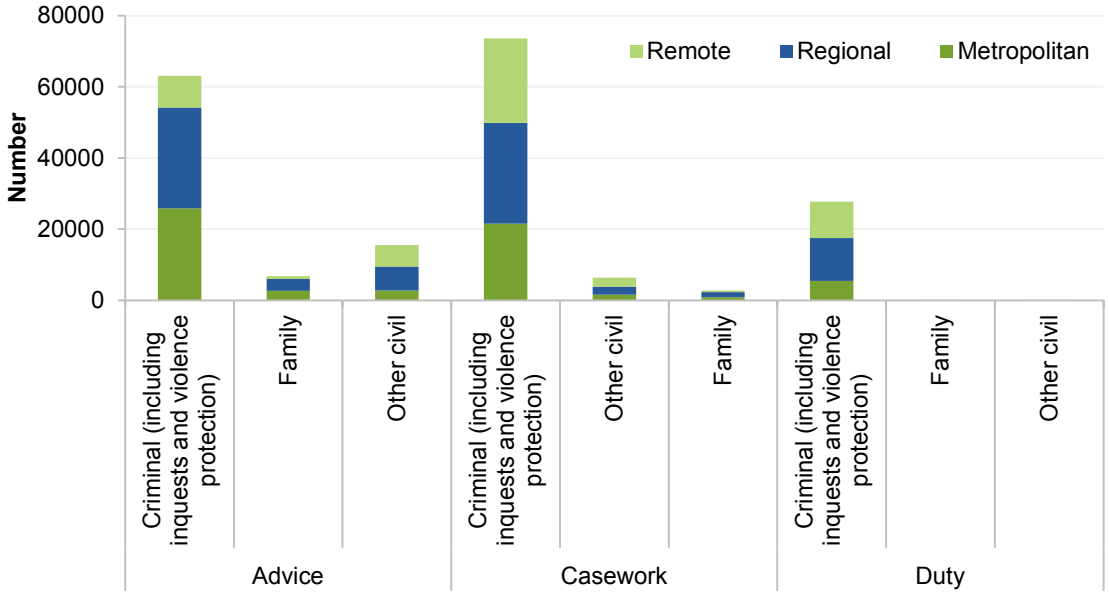
[a] The data excludes where the Aboriginal and Torres Strait Islander status, type of matter and funding category is unknown. Combined state/Commonwealth matters are also excluded.

Data source: National Legal Aid website (nd).

Similarly, ATSILS' services are mainly provided in relation to criminal law matters, with family and other civil law matters receiving less attention (figure 22.2). Reflecting their specialist nature, FVPLS' casework focuses almost entirely on family violence and related matters (such as child protection and injury) (figure 22.3). FVPLS can only participate in criminal matters through court support (AGD, sub. DR300).

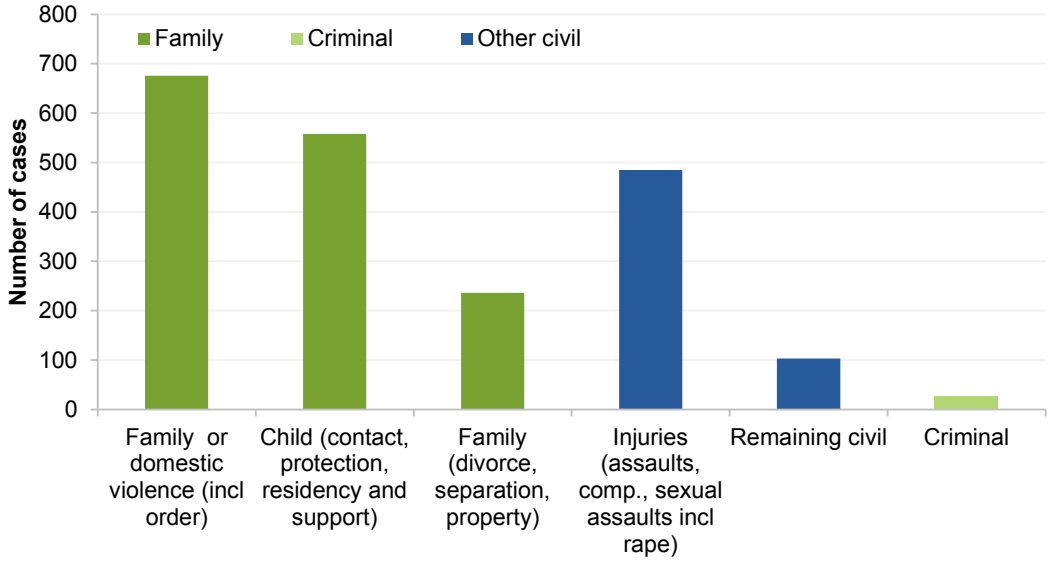
With the priority afforded to criminal and family violence matters, some family and other civil law needs go unmet. Addressing legal need can be made more difficult by conflict of interest rules, which mean that ATSILS may only be able to represent one party in a civil dispute (such as domestic violence cases) (Law Council of Australia, sub. DR266).

Figure 22.2 **Numbers of advice, casework and duty lawyer services by law type and region, ATSILS**
2012-13



Data source: unpublished data provided by AGD (IRIS).

Figure 22.3 **Casework by legal problem type, FVPLS**
2012-13



Data source: Unpublished data provided by the Department of Prime Minister and Cabinet (CLSIS).

Quantitative data on unmet need are inadequate …

Estimating the extent of unmet need in these areas is frustrated by a lack of reliable data. While some data on the legal need of Aboriginal and Torres Strait Islander people can be gleaned from the *Legal Australia-Wide Survey: Legal Need in Australia* (*LAW Survey*) (Coumarelos et al. 2012), this survey's ability to distinguish the legal needs of Indigenous Australians is limited. This is because:

> … the survey is likely to have underrepresented some marginalised groups who cannot be easily reached via landline telephones. Notably, the survey is likely to have underestimated the level of Indigenous disadvantage, because a considerable proportion of Indigenous people do not have landline telephone access, particularly in remote communities.(2013, p. 1)

That said, the LAW Survey indicated that when compared with non-Indigenous respondents, Indigenous respondents were:

- 30 per cent more likely to have multiple legal problems
- significantly more likely to have legal needs in the areas of government, health and rights
- significantly less likely to have their problem finalised (possibly reflecting the multiple nature of the problems).

To overcome this dearth of data, other reports have recommended that the Australian Government and state and territory governments fund a survey of demand and unmet need for legal assistance services for Aboriginal and Torres Strait Islander communities (SLCARC 2009). In response, the Australian Government (2010) noted this recommendation, intimating that data would be provided in the *LAW Survey* and a consultant's report of the workload of ATSILS which was expected to include data on the demand for Indigenous legal services. However, the Commission understands that due to difficulties that arose with sourcing the necessary data and the degree of variance across data sets that were available, the consultant's project was concluded without the completion of a final report (NATSILS, pers. comm., 7 August 2014).

… but qualitative data show unmet need across a wide range of matters

Other (qualitative) studies, such as the Indigenous Legal Needs Project (ILNP), have attempted to bridge this information gap. That project was based on a series of interviews with key stakeholders and separate male- and female-based focus groups held across a range of urban, rural and remote locations. It identified a number of areas of unmet legal need. Based on its assessment of the impact of the problem and whether the problem affected sizable numbers of people, the research specified the following as priority areas:

- child protection (including the removal of children)
- tenancy (such as repair and maintenance, rent, overcrowding and eviction)
- discrimination

- social security (underpayments or overpayments)
- credit and debt
- consumer law (mostly mobile phone contracts and car purchases and repairs)
- neighbourhood disputes (mostly identified by Indigenous women and mostly in relation to noise, fences or boundaries and animals)
- victims' compensation and wills (in relation to wills, the issues centred largely on superannuation, burial and child custody arrangements) (ILNP, sub. 105).

Many of these same areas were raised in submissions and during consultations.

For example, in relation to child protection matters, the Aboriginal Legal Rights Movement (ALRM) argued:

> By a process of de facto triage, ALRM is only able to represent parents, yet in the circumstance of extended Aboriginal kinship systems other family members may well be entitled to representation and may have a legitimate interest in the outcome; but they are not represented because ALRM only acts for parents. … ALRM is concerned that these people, who should be represented parties in the litigation may be brought to court, be provided by the Crown Solicitor with a bundle of court documents, but whilst they may have access to an interpreter, they will have no access to legal representation. ALRM does not presume to say that their cases are or are not meritorious; it simply says it is unsatisfactory that potential parties who have *locus standi* in Child Protection litigation, do not receive representation due to inadequate resources and inability to brief them out at short notice. (sub. 126, p. 9)

NATSILS (sub. 78) also identified unmet legal need in disputes over the custody of children.

Family violence matters — which were excluded from the ILNP study — were also identified by the National Congress of Australia's First Peoples (NCAFP 2013) and NATSILS (sub. 78) as a relatively complex area of legal need. These matters overlap legal systems covering family law, criminal justice proceedings, applications for personal protection orders, victims of crime assistance applications and potentially child protection proceedings (chapter 24). They also co-exist with a cultural bias towards non-disclosure (QIFVLS, sub 46).

In addition, the NCAFP (2013) drew attention to the need for legal assistance to help with employment matters and stolen wages (see also Gunstone 2014).

The Northern Territory Legal Aid Commission predicted continued need for legal assistance in housing and tenancy matters (sub. 128, Attachment 1).

Wills and estates are a further area of unmet legal need. NATSILS stated:

> The value of having a will for clarifying other posthumous wishes (such as burial place, guardianship of children or transfer of intellectual property rights) may not be well understood.

> Complex extended family relationships and cultural obligations can further complicate matters. (sub. 78, p. 12)

Finally, the Australian Inquest Alliance (sub. 62) identified a need for more legal help to assist family members to appear at coronial inquiries.

Gaps in geographic coverage

ATSILS service large geographic regions

There are eight ATSILS — two in the Northern Territory and one in every other state (with one for the Australian Capital Territory (ACT) and New South Wales). Their focus, in terms of service types, varies considerably. Some ATSILS focus more on advice than casework and vice versa. For example, Queensland-based ATSILS appear to focus more on advice and duty lawyer work while Northern Territory-based ATSILS appear to focus more of their effort on casework than on advice (table 22.1).[30]

Table 22.1 **ATSILS share of advice, casework and duty lawyer services relative to share of funding by jurisdiction**
2012-13

	Share of advice	*Share of casework*	*Share of duty*	*Share of funding*
	%	%	%	%
New South Wales & ACT	16.2	23.5	12.6	25.7
Queensland	45.9	22.8	44.9	24.0
Western Australia	5.0	16.8	21.1	18.3
Northern Territory	6.7	19.2	15.4	17.1
Victoria	9.9	5.4	0.2	5.6
South Australia	12.6	10.6	5.6	6.5
Tasmania	3.7	1.8	0.3	2.8
Total	100.0	100.0	100.0	100.0
Total matters	85 406	82 700	28 169	

Source: Commission estimates based on unpublished AGD data. These data include criminal matters.

Most ATSILS offices are located in regional and remote areas and it is here where they focus their efforts. For example, administrative data show that the proportion of civil to criminal advice is higher in rural areas. Similarly, levels of case work services in family and other civil law matters were higher in rural and remote areas than in metropolitan areas. Administrative data also revealed that when duty lawyers were provided in civil

30 Grant of aid approvals by LACs for Indigenous clients also differ across states and territories. For example, of all legal aid grants approved for Indigenous clients in 2012-13, almost 60 per cent were granted in New South Wales and Queensland. That said, almost one quarter of all grants of legal aid approved by the LACs in the Northern Territory and in Western Australia were to Indigenous clients.

matters they were much more likely to be present in regional and remote locations than in metropolitan areas. This pattern of service provision by ATSILS partly reflects the wider range of alternative service provider options (for example, LACs, CLCs and pro bono lawyers) available to metropolitan-based Indigenous Australians relative to those living in regional and remote areas.

Even so, qualitative evidence suggests that the level of unmet need appears to be highest in more remote locations. For example, the ILNP stated:

> The further away Indigenous communities are from urban (and to a lesser extent, regional) centres, the less likely they are to access legal assistance and information. … In a number of Indigenous communities visited by the ILNP, the only legal assistance provided is criminal law-related and any outreach is provided to correspond with the timetabling of the (criminal) circuit court. (sub. 105, p. 7)

Family violence services do not always reach high need areas

In contrast to ATSILS, FVPLS service narrowly defined geographic areas. In 2012-13, there were 14 FVPLS providers servicing 31 locations in regional and remote areas across all states and territories, except Tasmania and the ACT.

With catchment areas being more targeted, much rests on focusing services on the 'right' areas. But not all areas considered to be high need are being serviced by a FVPLS. An unpublished report by the Nous Group drew on a variety of ABS and other data in conjunction with mapping and statistical analyses to predict the demand for Indigenous family violence protection services in each local government area and ranked each according to need. They then examined how this ranking compared with service provision.

The analysis indicated that coverage in remote areas was very limited, often consisting of one to two days of service provision per month and that several locations of high need were serviced through long-distance outreach services. Examples include Ngaanyatjarraku (serviced from Alice Springs, around 1000 km away), Meekatharra (serviced from Geraldton, around 500 km away), and Kunbarllanjnja (serviced from Darwin, around 300 km away). In these locations there are no alternative service providers. Hence FVPLS provide a vital, if limited, service (AGD, sub. DR300).

Further, six of the 30 local government areas predicted to have the highest incidence and proportion of Indigenous family violence were not nominated in funding agreements to be serviced by a FVPLS — Anmatjere and Yugul Mangi (Northern Territory), Yarrabah and Woorabinda (Queensland) and Central Darling and Dubbo (New South Wales). In some cases, needs in these local government areas were being serviced from nearby existing FVPLS (namely in Queensland and the Northern Territory).

This is consistent with the findings of an unpublished evaluation of FVPLS by the Allen Consulting Group (ACG), which suggested under-servicing in high demand areas

(including areas outside of boundaries). The evaluation also found over-servicing by providers in some locations of limited demand:

> One of the issues in the SFAs [Standard Funding Agreements] is that the [Attorney-General's Department] specifies towns to be serviced, rather than broad regions. This results in some over-servicing of locations where there is limited demand. (2012, p. 40)

Local government areas do not necessarily align with Indigenous regions, so some local area knowledge is also required to assess community need. Some providers furnished the Commonwealth Attorney-General's Department (AGD) with additional data to illustrate need at a finer local level. However, as the department currently administering FVPLS stated:

> … none of the data provided changed the general picture that the highest incidence of Indigenous family violence occurs in the north-western interior of Australia, coastal regions around the Gulf of Carpentaria, and Western [New South Wales] and Queensland. (Department of Prime Minister and Cabinet (PM&C), pers. comm., 21 January 2014).

The Commission notes that these are the same broad areas that the ATSILS funding model identifies as being 'at risk'.

Further, the National FVPLS Forum (sub. DR194) asserted that other high need rural and remote areas were not among the 31 locations serviced by FVPLS. These included 'the Torres Strait, Shepparton in Victoria, Halls Creek in [Western Australia] and the Anangu Pitjantjatjara communities in South Australia' (p. 10).

The disconnect between need and service availability indicates that the current funding arrangements are deficient, and, irrespective of the size of the funding envelope, the Commission considers that there are grounds for revisiting the process by which funds are allocated to FVPLS. Any such allocation of funds should be based on a combination of need (based on the incidence of family violence) and service delivery costs, rather than the modified fixed funding per provider, as is currently the case (section 22.5). This conclusion was also reached in 2012 by ACG in its unpublished *Review of Family Violence Prevention Legal Services Program*.

Gaps in early intervention

There are gaps in early intervention provided by legal assistance providers

Reflecting their prioritisation of criminal and family violence matters, which tend to involve 'reactive' responses, ATSILS and FVPLS have a lesser focus than LACs and CLCs on early intervention services, including community legal education (CLE).

Most ATSILS considered that investing in information and CLE can help to reduce the demand for more costly services later on and, in some cases, stop civil problems evolving into criminal matters. For example, NATSILS said:

> [CLE] plays a key role in prevention and early intervention as it provides people with the necessary information and skills to prevent the development of civil and family law issues and/or advice and information about ways to resolve such issues where they have developed. It can also play a significant role in preventing relatively minor civil issues from escalating into criminal matters. Civil issues such as debt, driver's licenses and social security issues are increasing bases for Aboriginal and Torres Strait Islander peoples' contact with law enforcement, including arrest, detention and ultimately sentencing. (sub. 78, p. 16)

While many ATSILS agree on the value of early intervention only a few providers appear to dedicate resources to these services. For example, unpublished information provided by AGD showed that two providers dedicated approximately 5 and 8 per cent of their service delivery budget to CLE while three others devoted only around 1 per cent (AGD, pers. comm., 13 March 2014). In contrast, expenditure by LACs on preventative services (including CLE) comprised around 9 per cent of total expenditure in 2011-12 (ACG 2014c). Further, ATSILS guidelines prevent the provision of advice in certain areas (for example, assistance on how to make a will) that may help avert subsequent burial disputes (see below).

Similarly, there are relatively few examples of early intervention being employed by FVPLS. Some examples directed to women include the Aboriginal FVPLS Victoria's Sisters Day Out, Dilly Bag and Sisters Serenity Retreat programs (box 22.1; AFVPLS Victoria, sub. DR212). Another example directed primarily to men is a recent partnership between the North Australian Aboriginal Family Violence Legal Service (NAAFVLS) and the Australian Football League in the Northern Territory to encourage and support non-violent behaviour (NAAFVLS 2013). The Commission heard that as a result of this partnership three players had not been allowed to participate in the Northern Territory's Remote All Stars team because of domestic violence convictions recorded against them. Tony Lane, CEO of NAAFVLS, said:

> … we are of the opinion that that sends a very strong message out to the communities and out to the young men that having a domestic violence order can have certain ramifications on your sporting career life. (trans., pp. 1066–1067)

A lack of resources was seen as constraining early intervention efforts by both ATSILS and FVPLS (NATSILS, sub. 78; CAALAS, sub. 89). Indeed, funding for early intervention is no longer part of the FVPLS program:

> … $4.5 million over four years was removed from the National FVPLS Program's early intervention and prevention activities in 2012. (AFVPLS Victoria, sub. DR212, p. 2)

Interventions such as CLE can be effective in preventing less complex disputes and/or minimising their impacts and there appears to be scope for these interventions to be used more widely by providers specialising in servicing Indigenous Australians. However, strategies such as CLE have some limitations as standalone responses to complex problems or for disadvantaged individuals (chapter 5). Hence, greater use of early intervention strategies needs to be well-targeted and based on evidence about what works (chapter 25).

Box 22.1 The 'Sisters Day Out' program — talking about family violence

The Sisters Day Out program is run by the Aboriginal Family Violence Prevention and Legal Service (FVPLS) Victoria. It targets Aboriginal and Torres Strait Islander women in communities across that state.

Each workshop includes a range of wellbeing activities as well as a presentation and general discussion about family violence issues. Women experiencing family violence can privately consult the Aboriginal FVPLS Victoria solicitors or counsellors during the day.

The workshop also provides an opportunity for local community agencies, both mainstream and those specific to Aboriginal and Torres Strait Islander people, to set up information booths and engage with participants in a relaxed and supportive environment. According to the Aboriginal FVPLS Victoria:

> … this interaction assists to break down some of the barriers that prevent Aboriginal and Torres Strait Islander women from accessing services.
>
> The day succeeds in strengthening and facilitating cultural and wider intergenerational family ties, while simultaneously educating people about what constitutes family violence and what help is available — from both mainstream agencies and Aboriginal-specific services (sub. 99, p. 13).

The Sisters Day Out program was developed by Aboriginal FVPLS Victoria six years ago. Eighty events have been delivered in 38 locations across Victoria with over 5500 Aboriginal women attending the program.

Source: AFVPLS Victoria (sub. 99).

Some gaps in early intervention by government agencies are also observed

As noted above (section 22.3), Aboriginal and Torres Strait Islander Australians often have disputes with government agencies — primarily in relation to child protection and removal, housing and tenancy, and social security payments. But government agencies that deal with at-risk Indigenous clients in these three areas could be more proactive and intervene earlier.

First, while Aboriginal families and communities are increasingly involved in general child protection systems (see, for example, Victorian DHS 2012), several participants in this inquiry conveyed dissatisfaction with the handling of child removal in Indigenous communities by various governments (NATSILS, sub. 78; ILNP and VALS, sub. 125; ALRM, sub. 126).

There are good grounds for governments to continuously improve processes — not only to reduce the incidence of disputes, but to improve outcomes. For example, Aboriginal and Torres Strait Islander children:

- are around eight times more likely than non-Indigenous children to be in out of home care (AIHW 2014a)
- face a strong likelihood of having been notified to a child protection service by the time they are 16 (Arney, Chong and McGuinnes 2013)

- who experience family violence or have been in child protection are more likely to need frequent help from legal aid as adults when compared with other users of legal aid (Jolic 2014).

Second, in relation to housing and tenancy, most Aboriginal and Torres Strait Islander people do not tend to seek legal advice when housing problems occur. The ILNP and the Victorian Aboriginal Legal Service (VALS) suggested this was due to:

> … shame, lack of knowledge of rights, and fear of repercussions from housing authorities or other agencies (such as child protection). (sub. 125, p. 12)

This is consistent with Indigenous people's low levels of appearance at tribunals that deal with tenancy matters, which means that tribunals often make decisions without evidence from the tenant (ILNP and VALS, sub. 125).

As Indigenous Australians are more likely to rent their homes and are six times more likely to live in social housing when compared with other Australian households (AIHW 2014b), it is desirable that governments adopt culturally tailored strategies when engaging with this client group in relation to housing and tenancy disputes.

Third, in relation to social security matters, while Australian Government agencies providing services and payments to individuals have programs that seek to ensure customer compliance with their obligations in order to minimise the risk of debts (see, for example, DHS 2013), arrangements which work well for most clients work less well in the circumstances facing many Indigenous people, especially those in remote areas:

> It is the practice of some Government departments and agencies … to require individuals to complete standard forms to authorise legal representatives to speak on their behalf. This can be difficult when clients are located in remote areas. Providing written authorisation forms should not be necessary; a simple notice in writing or a verbal instruction from the client, informing the department or agency of the lawyer-client relationship and the lawyer's authority to act, should suffice. Verbal authorisation will reduce difficulties associated with obtaining written correspondence from clients in remote communities, where scanning and internet facilities may not be available and mail may be interrupted by the wet season. (QIFVLS, sub. 46, p. 20)

A small proportion of Centrelink customers are Indigenous. However, the Australian National Audit Office (ANAO 2014) estimated that around 45 per cent of Indigenous Australians were Centrelink customers. At the same time, however, Indigenous customers were observed to have relatively low rates of social security and related disputes (ACG 2014b). This may reflect 'the lack of awareness amongst Aboriginal and Torres Strait Islander communities in regards to civil law rights' (NATSILS, sub. 78, p. 4). The ANAO report went on to conclude that while the Department of Human Services (DHS) had:

> … developed a reasonable approach to improving its focus on supporting the delivery of services to Indigenous Australians … there is scope to apply key elements of the approach more consistently across the department. … with some areas demonstrating considered

> approaches while other areas adopted a more minimalist approach with little explicit consideration of Indigenous matters. (ANAO 2014, pp. 15–16)

Gaps in alternative dispute resolution

Aboriginal and Torres Strait Islander people also face gaps in relation to ADR services (including family dispute resolution (FDR) services). NATSILS (sub. 78) referred to a lack of dispute resolution services as an everyday occurrence. The Federal Court of Australia stated:

> … in many areas, the necessary services to offer timely, responsive and effective dispute management processes are nonexistent. Where these services exist, they often face uncertain funding and inflexible institutional arrangements which impede their ability to deliver reliable and competent services. (2009, p. xv)

In relation to FDR services, the Family Law Council said:

> It is clear that many Aboriginal and Torres Strait Islander peoples have no or limited access to legal, relationship support, family dispute resolution and court services. Consultations and submissions indicated that this is particularly acute in the more remote parts of Queensland, the Torres Strait, Western Australia, New South Wales, Northern Territory and South Australia, where there is no federal family law courts circuit and the publicly funded legal services that service those areas have limited capacity to provide family law support. (2012, p. 43)

Similarly, recent research on family law services undertaken as part of the Australian Government's Family Support Program identified service gaps in addressing the needs of Aboriginal and Torres Strait Islander people (ACG 2014a). Although Aboriginal and Torres Strait Islander clients represented around 4 per cent of all family law service users, ACG noted that their needs may be higher than other population groups and that metropolitan users tended to be higher users than their regional or rural counterparts. Underscoring this is the very low use of the family relationship advice line (the main form of non-face to face service delivery) among Aboriginal and Torres Strait Islander service users (ACG 2014a).

That said, the Northern Territory Legal Aid Commission (NTLAC) indicated that in 2012-13, 34 per cent of approved grants in their FDR program were to Indigenous Australians but acknowledged that 'the program could be made more culturally appropriate' (sub. DR255, p. 5).

However, even if ADR services are known and available to Indigenous Australians, they are often reluctant to engage in them. This reluctance can stem from differences between Indigenous and non-Indigenous customs and values (such as the neutrality of the mediator, confidentiality issues and voluntary attendance). As touched on earlier, Aboriginal and Torres Strait Islander Australians also face communication barriers, financial constraints, transport difficulties and 'time and place' issues. Trust — which takes time to build up — also engenders engagement between providers and Indigenous Australians (Kaspiew et al. 2009).

The complexity of some disputes (such as those involving multiple parties with overlapping issues which have evolved over a long period), and the absence of any ADR services in remote areas, can also affect their usage by Indigenous people (NADRAC 2006; NATSILS 2010 and sub. 78). For example, in the absence of culturally tailored ADR, unresolved disputes about the burials are generally determined in supreme courts. As Christopher Charles (ALRM) said:

> What we say is that culturally-specific, culturally-trained mediators who are able to deal with these very distressed families, obviously, because there has been a death and to get them to come to a solution which they would find acceptable is obviously much better than an unfortunate Supreme Court justice having to make an impossible decision. I mean, it is really the Judgment of Solomon …
>
> I suspect that having regard to the demand that we get at the moment, you could just about have a full-time highly qualified ADR person to resolve the South Australian disputed funerals. … Not all of them get into the Supreme Court but we are getting them in the office quite frequently. … we can deal with it partly but if we were given the means to do more about wills, that would help. (trans., pp. 465, 471)

Intractable family law disputes typically require access to a family law court. Where a dispute relates to a parenting matter, disputants must first obtain a certificate from a Family Relationship Centre (FRC) or other accredited FDR practitioner stating that the disputants have genuinely attempted to resolve their dispute through FDR (unless they qualify for an exemption) (chapter 24). However, NATSILS said that:

> … such centres are often not culturally appropriate or accessible to people in remote and regional Australia, Aboriginal and Torres Strait Islander peoples can be discouraged from accessing them, and hence are obstructed from accessing the Family Court … (2010, p. 12)

Further, the Port Augusta FRC stated:

> Whilst the Port August FRC is a well-respected and well-known service provider in the Aboriginal communities in that region that does not necessarily mean that Aboriginal families may see it as a relevant option to assist them in their family disputes. It is still the case that many Aboriginal families choose to sort out their disputes amongst themselves rather than seek the assistance of organisations like the FRC which they may view as non-Aboriginal. (sub. DR211, p. 3)

Gaps in interpreter services

While most Aboriginal and Torres Strait Islander people in non-remote areas speak English as their main or only language, interpreter services enable many Indigenous Australians in remote communities to communicate their needs and to understand the legal advice they receive and the law itself. The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA) observed:

> It is in the courts, however, where the lack of adequate interpreting services is most visible. … Accessing interpreters in remote areas is even more difficult. (2011, p. 206)

Both the Australian Government and state and territory governments are responsible for ensuring interpreters are available to assist speakers of Indigenous languages accessing services and in contact with the justice system. The Australian Government has made a substantial funding contribution to Indigenous interpreting services since 2000 and in 2014-15 is funding over $6 million in initiatives to improve the supply of Indigenous interpreters in the Northern Territory, South Australia, Western Australia and Queensland. The Northern Territory makes a substantial contribution to Indigenous interpreting and the South Australian and Western Australian Government have made contributions, with South Australia introducing a policy framework on the use of Indigenous interpreters. The Commonwealth's funding for Indigenous interpreting in 2015-16 is still being developed in the context of broader decision making about the Indigenous Advancement Strategy and is also the subject of discussions with state and territory governments (PM&C, pers. comm., 25 August 2014).

Shortages in Indigenous interpreter services have been highlighted by a number of stakeholders (NATSILS, sub. 78; CAALAS et al. 2014; NCAFP 2013). Others have commented on the variable quality of interpreters (HRSCATSIA 2012). Sourcing trained interpreters who can remain impartial can also be challenging (ACG 2014a; Port Augusta FRC, sub. DR211).

One of the challenges to addressing these shortages is the limited pool of available individuals with the necessary skills. The vast majority of Indigenous language interpreters accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) are at the para-professional level (which is suitable for general conversation or non-specialist situations). However, professional level interpreters are recommended for legal and health assignments where the consequences of inadequate interpreting can be significant for the non-English speaker. As the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA) stated:

> In the justice and health areas, interpreters require extensive training on the use and understanding of specialist English terminology and finding equivalents in their Indigenous language. Jobs in these sectors are complex and continuous professional development is required beyond accreditation at the para-professional level. (HRSCATSIA 2012, p. 172)

Significant challenges in recruiting and retaining interpreters are also present. The Commonwealth Ombudsman (2011) drew attention to:

- poor literacy and numeracy skills among those with the requisite Indigenous language skills
- the presence of competing and conflicting cultural obligations
- more attractive employment options (when compared with the irregular nature of interpreting work) (see also Central Land Council (2011))
- the relatively high number of Indigenous languages and the decline in the number of fluent speakers of these languages
- the lack of accreditation at the professional level by NAATI.

In 2011, three (Indigenous language) speakers were accredited at the professional level for Djambarrpuyngu — a Yolngu Matha language (HRSCATSIA 2012) — and 262 interpreters were accredited at the para-professional level in 51 Indigenous languages (NAATI 2011). In 2013, over 30 000 hours of Indigenous interpreting occurred in Australia undertaken by over 300 Indigenous interpreters (PM&C pers. comm, 25 August 2014). However, a significant shortfall remains (see National FVPLS Forum, sub. DR194).

22.4 Service gaps can have severe consequences

Unmet legal need can escalate into serious problems for Aboriginal and Torres Strait Islander people. The Shoalcoast Community Legal Centre (sub. 18) set out how something as commonplace as speeding tickets could, without legal assistance, escalate into ever more difficult circumstances for an Indigenous person (box 22.2).

Box 22.2 The intensifying effects of unmet civil law needs: a stylised case study

The Shoalcoast Community Legal Centre illustrated the escalating effect of unpaid traffic infringements:

> An Aboriginal client in an isolated regional Aboriginal village receives a fine for a traffic offence in the mail but their cousin was actually driving at the time. Our client believes they do not have to pay the fine because they were not driving. However, as there are no free legal services in the area at the time, they simply do not pay and hope it just goes away. Roads and Maritime Services cancels their licence — however the client has not received this notification as the mail often goes astray in the village. The client is then fined for unlicensed driving when on their way to work. This not only adds to the now large fines debt but it is now virtually impossible for them to maintain their casual work without a licence as there is no suitable public transport in the area. The client becomes depressed with the lack of work and the inability to travel to look for work or even go to town to get groceries. They are no longer eating properly, have lost interest in outdoor activities with friends and as such are not exercising and have started drinking every day. It won't be long before they will be facing homelessness as they cannot afford to keep paying the rent and are in a state of mental health where they really do not seem to care anymore. The risk of suicide has become real. (pp. 5–6)

Source: Shoalcoast Community Legal Centre (sub. 18).

As well as affecting the wellbeing of Indigenous people, unmet legal need can trigger larger and more complex legal problems and place unnecessary pressure on the civil justice system, particularly at the more formal (and costly) end of the system. In the words of the ILNP (sub. 105):

> … legal problems in civil, family and criminal law areas interact so as to intensify Indigenous legal need through a form of 'snowballing'. Indigenous people may therefore be facing multiple legal issues, simultaneously, compounding need. (sub. 105, p. 3)

A range of reports have found that inadequate provision of culturally suited services in relation to the protection and removal of children can have profound consequences for the

wellbeing of Indigenous children, families and communities (Carmody 2013; Cummins, Scott and Scales 2012; HREOC 1997; Libesman 2011; Mulligan 2008). Participants in this inquiry also highlighted the substantial, adverse impacts on Aboriginal and Torres Strait Islander individuals, families and communities from inappropriate service provisions (NATSILS, sub. 78; ILNP and VALS, sub. 125; ALRM, sub. 126).

Access to adequate housing is a key foundation of individual wellbeing. However, a sizable proportion of Indigenous people identified housing and tenancy as an area where problems — including homelessness — can arise due to unmet legal needs (ILNP, sub. 105; ALSWA, sub. 112). For example, among participants interviewed in Victoria as part of the ILNP:

> Most tenancy issues related to public or community-based housing. ... losing public housing tenancies, including by way of eviction for a range of reasons, may be particularly problematic for Indigenous tenants, given problems with accessing other types of tenancies and housing.
>
> A major problem of secondary homelessness was also identified whereby other family and community members may be obligated to take in Indigenous homeless people. This can have negative impacts particularly on the elderly and vulnerable, and can lead to further problems such as eviction of the principal tenant and debt (where utility bills, for instance, are high due to overcrowding). (ILNP and VALS, sub. 125, p. 11)

Inadequate support for vulnerable Centrelink customers (such as many Aboriginal and Torres Strait Islander people) in navigating systems when they have a problem can result in financial hardship as well as long periods waiting for a review if they do not agree with a decision (Commonwealth Ombudsman 2014). Further, the Ombudsman noted that the impact of service delivery problems for vulnerable customers can be disproportionately large, especially for customers who are unable to take advantage of Centrelink's digital service delivery innovations. Many rural and remote Indigenous Australians fall into this category.

Shortages in the supply and quality of interpreter services also affects access to justice (HRSCATSIA 2012).

Unmet needs may escalate to criminal behaviours

One of the more serious ramifications of unaddressed civil law needs is the potential for it to escalate into criminal behaviours. For example, the Aboriginal Legal Service of Western Australia (ALSWA) submitted:

> ALSWA is aware of a very large number of instances where Aboriginal families have been evicted from Homeswest housing without having access to legal advice or representation and have become homeless. Homelessness increases the risk of criminal offending and, in turn, incarceration. (sub. 112, p. 3)

More broadly, the ILNP identified five areas in which family and other civil law issues can escalate into criminal matters (box 22.3).

Box 22.3 Escalation pathways in the Indigenous Legal Needs Project

Five distinct civil law areas, which can escalate into criminal matters were identified by Schwartz and Cunneen (2009a).

1. *Care and protection orders.* The breakdown of family ties, in part caused by long distant placements, is one risk factor for juvenile offending. Increases in child protection orders may ultimately lead to higher levels of juvenile detention, which is a well-documented stepping stone to the criminal justice system (NCAFP 2013).
2. *Tenancy matters.* Feelings of power inequality between the landlord and tenants in public housing contribute to the low levels of advice sought to remedy such disputes. In addition, over-crowded tenancies (as a result of inadequate supply of housing) are a risk factor for criminal matters such as sexual assault and domestic violence. Finally, there is a correlation between homelessness and criminal offending (and re-offending among recently released prisoners).
3. *Discrimination.* Pent-up anger and resentment to ongoing discrimination may spark a reaction which is criminal in nature. (See also Allison, Schwartz and Cunneen 2013).
4. *Credit and debt.* The non-payment of fines can lead to the suspension of a drivers' licence, which may result in serious criminal offences when the cancellation is not understood or not observed. The accumulation of fines can reinforce low incomes, which increases the risk of contact with criminal justice. Thus: 'the line between debt and crime can be quite direct' (Schwartz and Cunneen 2009a, p. 20). (See also Beranger, Weatherburn and Moffatt 2010; LRC WA 2005.)
5. *Education.* There is a strong connection between schooling (or lack of it) and the rate of juvenile offending. Racism or discrimination by teaching and other staff was cited as a factor leading to suspensions and/or to some parent's 'giving up' sending their children to school — rather than seeking early intervention through mediation or administrative law avenues.

As two participants in a study of Indigenous legal needs in New South Wales said:

> [It's] sheer desperation, as far as family and civil matters go. They have nowhere to go for any legal advice … [Family law matters] end up becoming criminal matters because they don't know how to deal with those family law matters, the only way they know how to deal with it is go out and have a big punch up … They don't realise what their rights are in civil law; they don't even know what it is. (*Legal support worker Wagga*)
>
> If the family and civil problems aren't addressed they turn into a criminal problem. They always do. Especially when it comes to the family stuff, about the kids, then it turns into someone is going to flog someone else. (*Legal Aid Commission Indigenous staff member*) (Cunneen and Schwartz 2009, p. 744)

Unmet need for culturally tailored FDR services can also escalate to criminal behaviours. In a report to the Commonwealth Attorney-General on *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*, the Family Law Council indicated that while there was generally a lack of understanding about family law systems among Indigenous Australians, the past history of forced removal of Aboriginal children meant there was also a resistance to voluntarily engage with, and even fear of, family law system services. As a consequence, '… post-separation problems are often left unaddressed until a

point of crisis, perpetuating conflict and sometimes resulting in family violence' (2012, p. 4).

The inevitable consequence of these unmet legal needs is a further cementing of the longstanding over-representation of Indigenous Australians in the criminal justice system (Schwartz and Cunneen 2009a).

22.5 Multi-faceted responses are required to help bridge the gaps

A number of participants in this inquiry highlighted the benefits from improving access in the civil including family law space. For example, ALRM said:

> Much can be said of … ensuring easier access to civil remedy, thereby enhancing and properly recognising civil law rights is likely to lead to increasing confidence in the legal system, and alleviate social disadvantage and perhaps thereby a decrease in criminal law matters overall. (sub. 126, p. 2)

Similarly, the ILNP suggested there were a range of social benefits from improving access to civil law assistance for Indigenous people, indicating that it:

> … is likely to build resilience in individuals and communities, to reduce offending and to contribute to increased levels of Indigenous social inclusion. (sub. 105, p. 2)

The notion that improving access to justice is generally beneficial to the community is relatively uncontentious; the policy challenge is how this might best be done.

Earlier and more proactive government intervention

As observed above, three key areas of unmet legal need in relation to disputes between Indigenous Australians and governments are child protection and removal, housing and tenancy, and social security. The consequences of unmet needs in these areas are often deleterious for wellbeing. Gaps in early intervention activities by government agencies in these priority areas suggest that governments could do more to prevent disputes with Indigenous people.

Child protection and removal

Culturally competent and appropriately trained mediators and family group conferencing facilitators can help resolve highly sensitive matters relating to child protection and removal, thereby either preventing or helping to address legal need. In 2010, the Victorian Law Reform Commission (2010) noted that family group conferencing had been systematically adopted in more than 150 jurisdictions worldwide. Today most Australian jurisdictions have introduced or piloted the adoption of ADR (typically in the form of

family group conferencing) in child protection matters (Petrie and Kruger 2014). For example, the Victorian Department of Human Services (DHS) observed that a pilot program of Aboriginal Family Decision Making, which incorporated culturally competent and trained mediation, had been seen as very positive and highly regarded by the Victorian DHS's Child Protection services, the local Aboriginal co-operative and Aboriginal family members (Victorian DHS 2012). An Australian Institute of Criminology evaluation of ADR initiatives in the care and protection jurisdiction of the New South Wales Children's Court also suggested they were cost-effective (Morgan et al. 2012).

That said, as Arney et al. remarked:

> To date, most of the research on family group conferencing has focused on the process of the conferences rather than on long term outcomes. … What is less clear is how family group conferencing relates to longer term outcomes for children and young people and of the optimal models of conferencing for the families of Aboriginal children and young people. (2012, p. 8)

The Northern Territory, however, is one jurisdiction that has lagged in adopting family group conferencing processes for child protection matters (Petrie and Kruger 2014).

There is scope for family group conferencing-style programs, especially in the Northern Territory, to help reduce the need for the courts to resolve substantiated child protection matters. However, the programs must ensure that safety of children and young people is not unduly compromised.

Housing and tenancy

There would also be benefits from governments more proactively appraising Aboriginal and Torres Strait Islander Australians of their rights as tenants, and creating culturally-tailored avenues for dispute resolution.

NATSILS also suggested that a 'shift in culture around public housing management from policing housing to supporting tenants to maintain housing' (sub. DR256, p. 16) could be beneficial.

Social security

Improving engagement (including through interpreters) and monitoring remotely located Indigenous clients could help prevent some problems escalating. For example, NATSILS suggested that:

> … improvements could be made by significantly increasing the use of interpreters in the delivery of social security services, auditing remote files regularly and addressing small issues quickly and in consultation with the client before they escalate into major issues, and adapting processes to reduce unnecessary complexity. Many of the issues identified in NAAJA and CAALAS' social security law practice, for example, could be avoided or mitigated if government agencies administering the social security system had proactively explained the

client's obligations, engaged interpreters as required, and checked small errors and issues with Centrelink payments as they arose (rather than many years after the event). (sub. DR256, p. 16)

As with tenancy, there is also scope to improve Aboriginal and Torres Strait Islander people's awareness of their rights and entitlements around social security.

The Commission considers that governments should make greater efforts to evaluate the costs and benefits of a range of initiatives (such as government agencies engaging earlier and more proactively with Indigenous clients) in order to avert disputes before they occur or escalate. This should be in addition to the range of culturally tailored ADR mechanisms proposed below.

RECOMMENDATION 22.1

The Australian, State and Territory Governments should implement cost-effective strategies to proactively engage with at-risk Aboriginal and Torres Strait Islander Australians to reduce their likelihood of needing legal assistance to resolve disputes with government agencies, especially in areas such as child protection, housing and tenancy, and social security.

Increasing culturally tailored alternative dispute resolution

Increasing culturally tailored alternative dispute resolution (ADR) services is likely to enhance Aboriginal and Torres Strait Islander people's acceptance of, and compliance with, dispute resolution processes and outcomes. NATSILS stated that:

> … evaluations have shown that the presence of Aboriginal and Torres Strait Islander mediators and staff has led to usage by Aboriginal and Torres Strait Islander peoples of services which they had previously avoided. (2010, p. 10)

However, dispute management processes vary between cultures, including within different Indigenous cultures and communities. As the Federal Court of Australia's *Solid work you mob are doing* report observed:

> There is no single, immutable Indigenous culture, nor are there pre-existing 'traditional' dispute resolution processes which can be used as a formula to manage all conflicts involving Indigenous peoples. … effective dispute management practice is marked by an ability of practitioners to tailor and design processes, in collaboration with the disputants, to match the unique characteristics of each situation. (FCA 2009, p. 99)

Culture regarding land and kin can also differ markedly between and among Indigenous communities across Australia. Indigenous dispute management processes typically prioritise the preservation of relationships over the dispute itself and the resolution of outcomes, compared with many non-Indigenous processes (FCA 2009).

To enable effective dispute management among diverse Indigenous communities the Federal Court of Australia suggested a set of critical factors, that:

> … highlight the importance of parties' ownership of processes, of careful preparation, and of working with the parties to design processes which can meet their procedural, substantive and emotional needs. Critical factors also relate to the implementation and sustainability of agreements, and the attributes and skills of effective practitioners in the Indigenous context. (FCA 2009, p. xvi)

Indigenous-specific or mainstream ADR services?

Culturally tailored ADR services can be delivered by providers established specifically for Indigenous Australians, or via 'mainstream' services including LACs or FRCs.

Several groups have previously called for Indigenous-specific ADR services (Bauman 2006; FCA 2009; NADRAC 2009; NATSILS 2010). In response to the draft report a wide range of participants also expressed their support for the provision of culturally tailored Indigenous-specific dispute resolution services in high needs areas. For example, the National FVPLS Forum said:

> Many of our clients and their families do not relate to mainstream Family law or ADR services, but need assistance in resolving family law and parenting disputes in a culturally appropriate way. FVPLSs consider that there are likely to be a variety of models of ADR required given the diversity amongst Aboriginal Communities in Australia. (sub. DR194, p. 14)

However, the National FVPLS Forum expressed some reservations about the use of ADR in cases with histories of family violence.

Two case studies in support of culturally tailored ADR (one involving the Yuendumu community referred to below) were provided by PM&C as part of AGD's response to the Commission's draft report (sub. DR300). They demonstrate the range of potential benefits, which sit alongside some considerable challenges. The Commission notes that while the Mornington Island Restorative Justice (MIRJ) Project had high initial set up costs, its on-going costs appear to be modest (box 22.4) and its evaluation — which is expected to be completed in 2014 (AGD, sub. DR300) — should be used to inform any proposed expansion of culturally tailored ADR services among other communities.

Mainstream services also provide culturally appropriate ADR. During consultations the Commission heard that the Northern Territory's Community Justice Centre (CJC) had successfully incorporated a range of relevant Aboriginal cultural norms in developing a culturally effective mediation strategy (see also CJC 2013). For example, it ensures that the correct kinship and blood lines are present at community meetings (as a meeting without one party is not regarded as a quorate and agreements reached at such a meeting are considered non-binding).

Box 22.4 Mornington Island Restorative Justice Project

The Mornington Island Restorative Justice Project (the project) was established in 2008. Its objectives included: enhancing the capacity of the local Indigenous community to manage their own disputes; developing community ownership of the project; reducing adverse contact with the criminal justice system; and improving responsiveness of the justice system to the needs of the community.

How does it work?

Mornington Island Elders, the local community justice group Junkuri Laka, the Queensland Department of Justice and Attorney-General (DJAG) and the Department of Prime Minister and Cabinet (PM&C) developed and implemented the project in partnership.

- From 2008, over a period of 15 months, the initial focus was invested in consulting with the community, building a working alliance between the on-the-ground partners and developing the peacemaking model (termed 'kinship consultation'). This model included an eight step process and Elders rules for mediation, as well as circle conferencing, conflict coaching and shuttle diplomacy.
- From 2009 to 2011, mediations were initially facilitated by mediators comprising DJAG staff and local Elders.
- In 2011, the service began transitioning to the local management of Junkuri Laka.
- From February 2012, Junkuri Laka became formally responsible with support from DJAG.

How successful has it been?

Junkuri Laka conducts, on average, two to three peacemaking interventions each week. It continues to be supported by DJAG in practical terms to deliver a responsive service and work towards gaining greater family acceptance. Recent data indicated that 91 per cent of community on Mornington Island felt safer because of the mediations.

While an independent evaluation is currently underway, based on the evidence to date AGD submitted that the project:

> … appears to have provided a local early dispute intervention service that has: reduced disputes in the community; reduced escalation and the duration of disputes … ; reduced involvement of the local health and other emergency services; enhanced community safety; and increased community governance and social capital with a decreased reliance on police intervention. (sub. DR300, pp. 12-13)

Benefits have also flowed to the local school, with the introduction of peacemaking, which was recently recognised in the 2013 Australian Crime and Violence Prevention Awards.

However, as AGD noted, some challenges remain.

> While there is a core group of Elder mediators, it remains an ongoing challenge to strengthen local ownership with participation by a wider range of Indigenous Elders, including women Elders and emerging young leaders. (sub. DR300, p. 12)

What is the funding commitment?

The project is jointly funded by the Australian and Queensland Governments. Funding of around $1.2 million, which included establishment costs (plus considerable in-kind costs) was provided between 2007 and 2014. Local costs for on-going delivery was around $107 000 in 2012-13 and funding allocated for 2014-15 is $199 400.

Sources: AGD, sub. DR300; PM&C, pers. comm., 25 August 2014.

The Northern Territory's Department of Attorney-General and Justice also reported that:

> The [CJC] trained mediators located in Yuendumu, Lajamanu, Willowra and Alice Springs — in collaboration with [Northern Territory] Police, Courts, Central Desert Shire, Correctional services and FaCHSIA — played a leading role in successfully resolving a long-standing intra-family conflict in Yuendumu that had led to riots and a high number of incarcerations over two years. As a result of the continued peacemaking efforts, the community will return to holding its first sports weekend since 2011. (2013, p. 58)

The Women's Legal Services NSW provided another example of mainstream service collaboration with Indigenous clients:

> WLS NSW Indigenous Women's Legal Program (IWLP) combines culturally appropriate service delivery, employment of Indigenous staff and a state-wide program of outreach to regional, rural and remote communities with the expertise and resources of the general service to maximise the effectiveness of a relatively small Commonwealth grant. (sub. DR257, p. 8)

Many mainstream FRC providers (in line with their Operational Framework) have also adopted strategies to improve Indigenous people's use of their FDR services (ACG 2014a). Moreover, while additional funding has been provided to twelve FRCs to engage Indigenous Advisers to help develop their capacity to effectively service Indigenous families, another five have done so without this supplement (AGD, sub. DR300). Results take time as it can be challenging to earn the trust and confidence of Indigenous clients (Kaspiew et al. 2009). As the FRC Port Augusta said:

> Despite these challenges, the availability of family dispute resolution provides Aboriginal families with an access to justice in the Family Law. For the majority of families, travelling to the courts in Adelaide is not an option because of costs, transport, language difficulties, stigma associated with going to court, and the fact that many families have never travelled further south than Port Augusta. The Family Court is alien to them. The Port Augusta FRC provides a flexible model of mediation to families to assist them in making arrangements for their children. (sub. DR211, p. 5)

According to the Family Law Council (2012), the key elements of effective practice in delivering services (including dispute resolution) to Aboriginal and Torres Strait Islander peoples include: building partnership approaches to service delivery; developing trusting relationships; establishing mechanisms to involve Elders or community leaders in governance, processes and decision making; recognising and respecting cultural differences in approaches to ways of doing things; addressing the main barriers to accessing the service; and using practices and funding models that accommodate the complexities of dealing with cultural differences and/or multiple and complex disadvantages. The Family Law Council (2012) also identified a range of initiatives consistent with these principles, such as an Aboriginal-specific model of mediation (in Alice Springs), culturally tailored community legal education materials (in Port Augusta), and the creation of specialist units within mainstream family relationship services ('Jaanimili', the Aboriginal Services and Development Unit operating within UnitingCare Children, Young People and Families throughout New South Wales and the ACT).

Who should deliver culturally tailored ADR services?

The Commission sees merit in a mixed approach for developing culturally tailored ADR (including FDR) services. Providers of Indigenous-specific services would serve areas of high unmet need, while mainstream providers would be encouraged to facilitate greater access and use of their services by offering culturally tailored ADR or FDR. Any approach should also include measures to raise service awareness and professional support for practitioners.

The Commission recommended in chapter 8 that all government agencies — particularly those that deal regularly with disputes and do not already have dispute resolution management plans — should accelerate the development of such plans. These agencies should also consider the cultural appropriateness of their processes when engaging with Aboriginal and Torres Strait Islander clients and, where cost-effective to do so, modify their plans accordingly.

While the development of culturally tailored ADR services for Aboriginal and Torres Strait Islander people in high need areas received wide-spread support, little information on the costs of such a service was received by the Commission. However, the Law Council of Australia said:

> … culturally appropriate dispute resolution services may be relatively expensive to implement, due to the level of specialisation required. (sub. DR266, p. 99)

Implementing culturally tailored ADR services (whether Indigenous-specific or mainstream) are likely to face recruitment challenges. For example, the ACG (2014a) pointed to difficulties in recruiting Indigenous staff with the requisite skills for family law services. AGD (sub. DR300) also noted the human resource challenges in this area but pointed to some initiatives to assist Indigenous Australians to gain relevant qualifications, or to improve the cultural competency of existing professional FRC staff.

The Commission also received a range of views on the engagement model and governance arrangements for such a service. For example, the National FVPLS Forum said:

> We support the collaborative development of culturally specific ADR to enable culturally safe practices to be developed for Aboriginal people accessing legal services … members consider ADR/FDR services should be developed and delivered through Aboriginal community controlled agencies to ensure positive community impacts of processes and decisions and culturally safe practices. (sub. DR194, pp. 14–15)

While NATSILS put forward an engagement model and governance structure in NATSILS (2011), they reiterated that:

> … there will not be one single model that will work Australia wide, there will need to be a range of models in response to the different needs of different Aboriginal and Torres Strait Islander communities (sub. DR256, p. 15).

The Commission's view is that it would be sensible to use the existing legal assistance architecture. For example, ATSILS could work to develop culturally tailored ADR services through an auspicing arrangement. Any conflict of interest issues could be handled through governance arrangements. The Commission heard practical examples of how some providers manage conflict of interest so that they do not become an unnecessary barrier to accessing legal assistance (see, for example, Jonathan Hunyor, NAAJA, trans., pp. 1033–1035).

RECOMMENDATION 22.2

The Australian Government should:

- undertake a cost-benefit analysis to inform the development of culturally tailored alternative dispute resolution services (including family dispute resolution services) for Aboriginal and Torres Strait Islander people, particularly in high need areas
- subject to the relative size of the net benefit of such a service, fully fund these services
- encourage government and non-government providers of mainstream alternative dispute resolution (including family dispute resolution) services to adapt their services so that they are culturally tailored to Aboriginal and Torres Strait Islander people (where cost-effective to do so) and provide appropriate funding to support this.

Bolstering interpreter services

In 2008, the Australian Government committed to developing a national framework for the provision of Aboriginal and Torres Strait Islander interpreters as part of its *National Partnership Agreement on Remote Service Delivery* (COAG 2008).

The development of this national framework has been an ongoing challenge. For example, the Australian National Audit Office (ANAO), in its audit of the Remote Service Delivery NPA, noted that while the responsible department (now the Department of Social Services) had commenced work on the framework in late 2009, the framework had not been finalised as at February 2012. The department responsible had '… advised that development of the national framework has taken longer than expected due to complex issues associated with building an industry sector from a low base' (ANAO 2012, p. 93). Further, in response to the lack of progress in developing the framework, NATSILS sought to prompt action by outlining the need for interpreter services, the consequences of a lack of interpreters and the kinds of services that would meet these needs (NATSILS 2011 and sub. 78). Subsequently, NATSILS agreed to participate as part of the Australian Government's Stakeholder Reference Group to develop the proposed national framework. NATSILS (sub. 78) reported that while this process had been productive (with a draft national framework settled in 2013), some uncertainties remained.

The agreement to develop a national framework expired when the *National Partnership Agreement on Remote Service Delivery* ended on 30 June 2014.

In addition to these challenges, the National Accreditation Authority for Translators and Interpreters (NAATI) indicated that it was hampered by funding constraints from providing the same level of interpreting and translating service to Indigenous Australians as it does to other non-English speaking Australians (NAATI 2013; HRSCATSIA 2012).

While recognising the significant challenges in addressing unmet need for Indigenous language services, a number of reports have recommended the development of a national Indigenous interpreter service for Aboriginal and Torres Strait Islander Australians (see, for example, HRSCATSIA 2011 and 2012). Further, HRSCATSIA (2012) recommended that the Australian Government focus its immediate attention on improving access to Indigenous interpreting services in the health and justice sectors while the national service was being developed. The Commonwealth Ombudsman (2011) also recognised the need for more and better Indigenous interpreter services when government agencies interact with Indigenous clients, recommending agencies use its best practice principles (see Commonwealth Ombudsman 2009b).

In response to its information request, the Commission received no information on the level of funding required to expand interpreter services to meet some or all of the gap in Indigenous interpreter services. The Commission also notes that the demand for Indigenous interpreters would increase if culturally tailored ADR services were improved (see above). However, in terms of the relative size of expenditures elsewhere in the justice system, the amount of additional spending required to expand interpreter services is unlikely to be significant.

The Australian and Northern Territory Governments have agreed to work together to explore the feasibility, cost and service delivery issues involved in using the Northern Territory Aboriginal Interpreter Service as a platform for a National Indigenous Interpreter Service, funded by contributions from other governments. The Australian Government has asked the Queensland, South Australian and Western Australian Governments to join in the development of a without prejudice options paper on the cost and service delivery issues involved (PM&C, pers. comm., 27 August 2014).

RECOMMENDATION 22.3

The Australian, State and Territory Governments should continue to work together to explore the use of the Northern Territory Aboriginal Interpreter Service as a platform for a National Indigenous Interpreter Service funded by ongoing contributions from the Australian, State and Territory Governments. While this service is being developed governments should focus their initial efforts on improving the availability of Aboriginal and Torres Strait Islander interpreter services in high need areas, such as in courts and disputes in rural and remote communities.

Improving models of engagement between providers and government

Much like CLCs, ATSILS and FVPLS have many of the characteristics of not-for-profit organisations. They are established for a community purpose, rely heavily on government funding, deliver services to their members, and offer contributors opportunities to build a sense of self-worth, connection and influence.

Three broad models of engagement for service delivery between not-for-profit organisations and government have been identified: client directed, purchasing of service contracting, and joint ventures (PC 2010). In this framework, determining the appropriate engagement model for such organisations depends on the extent to which government is funding the service, the nature of the 'market' for the service and the extent to which users of the service are able to exercise meaningful choice over either the services they require or the provider.

Which model best suits the circumstances and features of ATSILS and FVPLS?

As most ATSILS and FVPLS clients are left with little real choice over the provider or the services required, a 'client directed' model is not suitable. This leaves two main options — 'purchase of servicing' and 'joint ventures'. However, a middle ground between these two might be more appropriate. Alford and O'Flynn (2012) in *Rethinking Public Service Delivery: Managing with External Providers*, identified three main types of arrangements which sit within this middle ground:

- classical contracting — characterised by incentives, penalties and competition
- negotiated agreements — characterised by flexible agreements (where a form of consensual and incremental decision making is the norm) and invitations to selected bidders with specific details agreed on through negotiation
- collaboration — characterised by trust, shared goals and mutual commitment.

The following features of ATSILS and FVPLS mean that a pure purchase of servicing (or 'classical contracting') arrangement is unsuitable. They are the:

- need for tailored services to achieve variable outcomes
- thin markets particularly in some rural and remote communities
- accumulated levels of trust — often built up over extensive periods of time — by Indigenous Australians in these two services
- likely 'public-spirited' motivational base of many staff in these services
- difficulty in unbundling services for Indigenous clients. That is, some services (such as information and representation) are relatively well defined and amenable to competition but in practice they cannot easily be unbundled from those services (such as advice and case management) which are less amenable to competition.

The majority of submitters also felt a comprehensive open tender process — a characteristic feature of a 'purchase of servicing' or 'classical contracting' arrangement — was inappropriate in this sector. Instead, many participants favoured a collaborative engagement model between governments and providers. For example, NATSILS' strong preference was to have:

> … ATSILS, the Commonwealth Government as well as state and territory governments [work] together on an equal basis to determine the most effective engagement model for inclusion in such a renegotiated [National Partnership Agreement (NPA)]. (sub. DR256, p. 11)

But while collaboration often sits comfortably with partnerships (Alford and O'Flynn 2012), a collaborative engagement model does not necessarily imply a partnership.[31] In Australia, NPA's are typically intergovernmental agreements; they rarely (if ever) include third parties. Accordingly, another mechanism is needed for a formal collaboration between governments and providers of Indigenous-specific legal assistance services. As outlined in chapter 21, the Commission is proposing that the jurisdictional legal assistance forums (LAFs) would form this mechanism.

The Commission considers that the unique features of ATSILS and FVPLS warrant longer-term models of engagement between governments and providers, such as 'negotiated agreements' or 'collaboration'. These models also favour relational (as opposed to command and control) governance. As Alford and O'Fynn (2012) noted, ultimately the choice of engagement model depends on an assessment of which model best stimulates external providers to deliver the desired services. This, in turn, may depend on the relative maturity of providers and their particular governance arrangements (see below). As such, negotiated agreements (together with relational contracting) can be a worthwhile step when progressing along the spectrum from classical contracting to collaboration.

But, implementing collaborative engagement models poses a range of challenges for both providers and public service agencies (see Alford and O'Flynn 2012).

While all of these challenges need to be understood and worked through, value for money remains an appropriate principle for developing and continuing longer-term engagement models. Achieving value for money may mean occasionally testing the market throughout the extended life of the relationship. For example, market testing could occur at fairly lengthy intervals through open, restricted or select tender processes, requesting providers to identify service offerings within various fixed funding envelopes. However, determining when to do it and via which method represents another set of inherent challenges.

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[31] The use of the term 'partnership' implies an arrangement where a government agency shares the producing role. This is not the case with the Australian Government and providers of legal assistance services for Indigenous Australians. The term 'collaboration' here infers joint deliberations involving shared commitment and trust (see Alford and O'Flynn 2012, chapter 5).

Supporting coordination and cooperation among legal assistance and other providers

Service duplication can be minimised by coordinating legal assistance services. This requires efforts by all providers to communicate effectively. While coordination and cooperation can be informal and sporadic (on a needs basis), services are more likely to be efficient and effective if facilitated through mutually agreed formal relationships.

The Commission has proposed (chapter 21), that the LAFs would provide the basis for intra-jurisdictional coordination, cooperation and possible collaboration across all four providers of legal assistance services. But these arrangements should not preclude other 'bilateral' mutually agreed, formal arrangements. One such example is the relationship between Legal Aid NSW and the Aboriginal Legal Service NSW/ACT which includes sharing legal assistance resources (see, for example, sub. DR189).

Governments' administrative arrangements can also support networking, coordination and cooperation across providers. Some concerns were expressed by the National FVPLS Forum about the recent machinery of government changes, which transferred management of the FVPLS program from AGD to PM&C:

> Departmental transfer … may challenge continued collaboration between legal assistance services, potentially reducing the effectiveness of the National Forum's membership of the Australian Legal Assistance Forum (ALAF). Many FVPLS units are also accredited members of the NACLC and therefore have common governance practices and processes and involvement in a continual quality improvement program. (sub. DR194, pp. 1–2)

The Australian Government should ensure that administrative arrangements do not undermine networking, coordination and cooperation across legal assistance providers.

Improving governance and reporting requirements

Governance[32] and reporting arrangements are used to ensure that all legal assistance providers operate well and that taxpayer dollars are well spent. Ideally, arrangements should be tailored to reflect the model of engagement employed.

A key challenge is reconciling Indigenous and non-Indigenous approaches to governance. Given their importance, governance arrangements for ATSILS and FVPLS have been subject to ongoing review and refinement.

[32] Governance refers to the way members of a group or community organise themselves to make decisions that affect them as a group, including how their resources are allocated to deliver services (SCRGSP 2011).

Scope to further improve governance

While much has been done to improve current governance arrangements (box 22.5), some inquiry participants suggested that governance arrangements could be improved further.

Box 22.5 Current governance arrangements

Drawing in part on a 2008 evaluation of ATSILS (OEA 2008), governance arrangements were revised in July 2011 to reduce complexity and red tape, enhance ATSILS' autonomy, improve quality assurance processes and improve contract payment arrangements to align with revised risk assessment processes (AGD, pers. comm., 13 March 2014). ATSILS providers now receive three year funding grants (rather than a contract for services), which allow them to develop their own service plans for approval by AGD. The agreements are considerably shorter than the previous contracts (approximately 30 rather than 140 pages).

As part of the new arrangements, AGD assesses the risk profile of service providers and tailors its accountability mechanisms accordingly. A 'high risk' provider is subject to greater reporting and monitoring than a 'low risk' provider. In addition, a 'high risk' provider receives a monthly upfront payment while a 'low risk' provider receives a six-monthly upfront payment. AGD monitors providers' progress against their service plans and meets with them biannually to review performance. The provider's risk profile is reviewed after each meeting.

An independent financial audit of the eight ATSILS in 2009-10 found that most were financially sound. However, the audit identified financial irregularities in two ATSILS, and a range of common areas for improvement across all ATSILS in the administration of assets registers, purchase orders, employee contracts and delegation of authority. The Commission was advised that these areas have since been improved and, as a result, a number of ATSILS received a lower risk rating than in previous risk assessments.

The capacity and skills of some boards of ATSILS and FVPLS providers was identified as requiring ongoing attention. There can be a limited pool of suitably skilled individuals from which to draw board members, and not all board members may understand their roles and responsibilities. The Commission heard that AGD has addressed some of these concerns through training for board members of ATSILS. Measures to improve board capability would assist FVPLS in particular — two FVPLS providers were recently placed under special administration (ORIC 2012b, 2012c). In one case, there were 'allegations of improper payments and misappropriation of corporation funds' (ORIC 2012a, p. 1).

A more widespread concern raised during consultations related to the prescriptiveness of program guidelines and the associated regulatory burden. ATSILS and FVPLS providers considered that the guidelines constrained their ability to tailor services to meet client needs. While closer management by AGD of higher risk providers is appropriate, it is important that lower risk providers are not subject to overly prescriptive requirements.

Revamping performance reporting

Improved reporting would provide a more comprehensive picture of performance and help AGD (and PM&C) to better match oversight and risk. This is not to discount the intrinsic difficulties of measuring and benchmarking the performance of ATSILS and FVPLS providers. Users face different barriers, reside in different locations and their disputes arise in different areas of the law. This complicates comparisons across services and providers.

The biggest constraint in evaluating the performance of FVPLS (and ATSILS, to a lesser extent) is the lack of credible and consistent performance data. Indicators and data to measure performance against program guidelines are generally lacking, with many performance indicators based on outputs rather than outcomes. While ATSILS set service targets in their annual service plans, there are no service targets set for FVPLS. Instead, departmental officials use administrative data to monitor the work of each provider.

The quality of the indicators and data that is collected is questionable, particularly among FVPLS, but also among ATSILS in some areas (ACG 2014b). For example, some data required under agreements are either not collected or not reported. Further, data are not consistently reported across providers as data collection requirements are being interpreted in different ways by different providers. Among FVPLS, the high turnover among administrative staff can also cause inconsistent reporting over time.

Having reviewed existing performance indicators, the Commission found that, for FVPLS in particular, it was difficult to assess provider performance without explanations as to reporting differences. Further, in relation to FVPLS, a small number of departmental program managers were able to 'make sense' of existing data. Indeed, with staff turnover, the relevant administering department (PM&C) may not be able to sensibly use the existing data. Some providers also questioned the value of the information collected:

> The concept of benchmarking the FVPLS program remains problematic for all parties involved, including the Commonwealth Government, as data input into the Community Legal Service Information System (CLSIS) appears to be inconsistent across service providers. This makes it extremely difficult to assist the Commission with service delivery cost analysis methodologies. (NAAFVLS, sub. 138, p. 1)

Assessment of provider performance is also complicated by the use of two different administrative data collection systems, each with different variables and data collection protocols. ATSILS use the Indicator Reporting Information System (IRIS) while FVPLS use the Community Legal Service Information System (CLSIS), which is also used by CLCs.

Concerns about reporting arrangements are not new. In 2008, the Office of Evaluation and Audit (OEA 2008) identified inadequate reporting arrangements as a key issue for ATSILS and AGD. It made recommendations to strengthen strategic program management, enhance provider capacity (through benchmarking), strengthen IT support systems, streamline contract reporting arrangements and improve provider management (such as through data quality checking and client satisfaction surveys). While AGD agreed (albeit sometimes

with qualification) to all of the OEA recommendations, progress in implementing them has been mixed. In particular, available data do not allow AGD to accurately gauge average cost per matter or to benchmark the cost of ATSILS service delivery against other providers, such as LACs (both of which were recommended by the OEA). Further, the OEA's recommendation for an independent (ATSILS) client satisfaction survey has instead been replaced with a stakeholder survey.[33]

The paucity of data, which prevents robust benchmarking of the cost of services, remains as an Achilles heel in this sector (see also ACG 2014b).

While robust reporting requirements have long been supported by ATSILS, NATSILS noted that:

> … additional resources will be required to implement any significant change to data collection and reporting systems, both in terms of start-up costs and the ongoing collection/reporting requirements. (sub. DR256, p. 12)

NATSILS (sub. DR256) also observed that the performance reporting needed to cover the full range of services (including client service officers and field officers), reflect both quantity and quality of services, provide scope to report on individual measures and initiatives, and have a high degree of uniformity across the sector.

The National FVPLS Forum (sub. DR194) noted that while the Commission's suggestion to revamp the performance reporting of FVPLS was not novel, they welcomed the development of an effective outcomes-based approach. But their strong desire was that meaningful performance indicators for FVPLS needed to be developed collaboratively and that they be different from ATSILS. They also suggested that FVPLS' service delivery targets within service plans should be reviewed annually and be linked to the National Plan to Reduce Violence against Women and Children, the Closing the Gap Strategy and any other relevant plans in each jurisdiction.

The Commission considers that, consistent with the proposed collaborative engagement model between governments and providers (recommendation 21.7), the reporting of outcomes, outputs, efficiency and effectiveness would be subject to negotiation (recommendation 21.8). That said, to enable comparison between individual providers within a sector as well as across providers in different sectors, a range of common performance indicators remains necessary. The issue of additional resourcing to support revamped data collection is discussed in chapter 25.

The administrative data collection should be framed by suitable benchmarking for ATSILS and FVPLS. Ongoing training and comprehensive manuals are required to ensure that providers understand data requirements and report in a consistent fashion. The Commission was advised that the Australian Government has funded additional guidance and support to FVPLS over the last 12 months to encourage greater consistency in the collection and entering of information by providers on CLSIS.

[33] Stakeholders are nominated by ATSILS and surveys occur once every three years.

Better directed use of taxpayer funds

Reducing administrative overheads

Reducing administrative overheads would allow for better use of funds. ACG's (2014b) survey revealed that ATSILS (like most LACs) tended to devote less than 20 per cent of their funding to administration (with larger jurisdictions reporting the lowest proportion of expenditure on administration). By contrast, FVPLS reported wide variations in the proportion of spending on administration (ranging from 17 to 46 per cent).

Those FVPLS which reported lower levels of expenditure on administration (relative to service delivery) tended to be those operating under the auspice service delivery model (under which administration costs may be shared with other parts of the auspicing organisation) (ACG 2014b).

The scale of providers does not just affect administrative costs; it can also affect career progression opportunities and the support that providers can offer for staff training. These compound other difficulties providers face in recruiting and retaining legal practitioners including comparatively low salaries and high workloads, funding uncertainties and the demands of remote travel and work (NAAJA, sub. 95; AGD, sub. 137).

But as both the OEA and ACG reviews noted, the effects of greater scale can be mixed. Greater use of single providers servicing multiple regions often leads to measured cost efficiencies (for example, lower costs per unit of output), but it may be at the expense of service effectiveness, especially in the Indigenous context which requires organisations that are trusted and supported by communities (OEA 2008). Local-level organisations could perform better in this regard than regional (amalgamated) organisations.

In response to the Commission's request for information on the benefits of further amalgamating services, most participants considered that further amalgamating ATSILS was not feasible (given that each jurisdiction generally only has one ATSILS) (NATSILS, sub. DR256).

By contrast, the National FVPLS Forum stated:

> While centralising administration and business support may save governments money there is always the potential that this will come at the risk of local community participation and control in services, essential in producing sustainable impacts and access to justice. (sub. DR194, p. 11)

Given that auspicing arrangements can maintain community ties, and typically result in lower levels of administrative costs, the Commission considers that there is scope to better realise the benefits of this model. Small, stand-alone FVPLS should be encouraged to explore auspice arrangements within their communities.

Better targeted services

While legal assistance services are generally targeted at high need communities and individuals, some reallocation appears warranted and could help fill some service gaps.

There are currently different approaches to determining the distribution of the fixed funding envelopes for ATSILS and for FVPLS. The dichotomy is not dissimilar to the two approaches used to fund LACs and CLCs (chapters 20 and 21).

The funding model for ATSILS attempts to take account of both the level of demand for services in a given geographic area and the costs of providing the services. Available funds are distributed across eight providers according to their assessed needs and costs. As noted in chapter 21, while the general approach to allocating funding among ATSILS is sound, more contemporary of legal need could be employed.

In contrast, the model employed to fund FVPLS is less formulaic. The reasons for targeting particular geographic areas over others, and the process for determining the quantum of funds allocated to providers, is relatively opaque.

As outlined in chapter 20, the initial funding allocation approach for FVPLS was to allocate the same amount of funding to each of the 31 service areas, regardless of their circumstances, demands and relative needs. Over time there have been deviations from the fixed funding approach in response to the demands associated with regionalised provision[34] and the changing needs of communities surrounding FVPLS units (Nous Group 2013; AGD, sub. DR300). Even so, the funding allocation does not always align with need (section 22.3).

In its unpublished review of the FVPLS Program, ACG (2012) recommended basing the funding formula for FVPLS on a capitation approach, where the level of expected activity of each provider would be estimated based on population characteristics in specified service areas. The relative need of areas would then be used to allocate funds. The Nous Group's unpublished report is one step in this direction. But cost considerations also need to be integrated into funding allocations and scant data is available to address this issue.

While data issues are being remedied (chapter 25), the FVPLS funding allocation model should be overhauled to incorporate regular, systematic and transparent analyses of needs, and to take into account differences in the costs of providing services. The latter is particularly important given the focus on servicing client groups in rural and remote communities.

That said, the costs of redesigning the model need to be proportionate to the scale of this program. A sensible way forward would be to develop a FVPLS funding model which piggy-backs off the ATSILS funding model. However, the risk factors employed in the ATSILS funding model should be adapted for FVPLS funding to capture the risk of

[34] Regionalised service provision involves a single provider servicing multiple service areas.

experiencing family violence (rather than the risk of experiencing legal disputes more broadly). Cost factors would likely require adaptation given that some FVPLS operate across large geographic areas but do not enjoy the same scale as ATSILS and this can impact on costs.

Harmonising the two funding models would mean that, for any given geographic area, a clearly defined amount of funding would be on offer. (For FVPLS this might mean zero funding in locations where there are alternative mainstream culturally tailored service offerings available.)

The success of this proposed funding allocation approach will depend, in large part, on the development and implementation of robust understanding of costs and benchmarks to better measure and compare performance (chapter 21).

In response to the draft report, the Aboriginal FVPLS Victoria contended that FVPLS funding should not be restricted to regional, rural and remote areas, stating that:

> Aboriginal women and children who live in urban areas must also be able to access culturally safe legal assistance for family violence-related matters. … the 2006 Census found that 48% of Victoria's Indigenous population reside in major cities. (sub. DR212, p. 6)

However, as indicated earlier, it is not possible (nor is it necessarily desirable) for all unmet need to be met by Indigenous-specific services. Alternative mainstream providers (for example, Women's Legal Services) in metropolitan and regional areas can, and do, culturally tailor their services to meet the needs of Indigenous women in this area. Moreover, the Victorian, Queensland and Western Australian Governments have augmented Commonwealth funding to FVPLS to enable Indigenous families in need of assistance in regional and metropolitan areas in those jurisdictions to better access services (AFVPLS Victoria 2013; trans., p. 1057; Women's Legal Centre (Western Australia) nd).

Increasing funding

Even when put together the reforms outlined above will not be enough to address unmet need in family and other civil law matters. Greater funding is likely to be required.

Many submissions and previous reports have called for greater funding for ATSILS and FVPLS (box 22.6; SLCARC 2009).

Box 22.6 Views on the adequacy of funding for ATSILS and FVPLS

Many participants felt funding was inadequate for ATSILS …

The National Congress of Australia's First Peoples said:

> … the total amount of funding provided to [Indigenous] legal assistance services is simply inadequate. (NCAFP 2013, p. 27)

NATSILS said:

> Despite gaps in data as to the exact level of unmet need, it is our view that there is sufficient available evidence to enable the Commission to reach a clear finding on the inadequate quantum of funding for legal assistance services, particularly the disparity in the funding of ATSILS ... (sub. DR256, p. 10)

The Public Interest Advocacy Centre (PIAC) said:

> ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements. (sub. 45, p. 41)

… as well as for FVPLS

The National FVPLS Forum (subs. 97 and DR194) argued that funding to the FVPLS program should be increased to meet service gaps and to expand the delivery of services to a larger number of Aboriginal communities (including in metropolitan areas).

A minority view was that FVPLS funding was adequate

One provider, NAAFVLS, said:

> NAAFVLS is of the opinion that current funding provided by the Commonwealth is adequate to provide the return on investment and performance required by the Commonwealth in the delivery of the program in the Top End of the [Northern Territory] in its current form. (sub. 138, p. 1)

There are a range of indicators which support these views.

Indicators that demand outstrips supply

First, funding growth has seemingly not kept up with cost of service delivery, resulting in a range of adjustments either within providers or in the services delivered to clients. As noted in chapter 20, per capita funding for ATSILS has fallen. For example, NAAJA said:

> … the failure of our funding to keep up with increases in our workload, … not only limits our ability to provide a full range of services … but also limits our ability to implement best-practice strategies, including early intervention and prevention initiatives. (sub. 95, p. 28)

The Commission was also furnished with evidence on the relatively high workload and lower remuneration rates in the criminal law section of this provider (NAAJA, sub. DR306).

Second, ATSILS funding provides little scope to service family and other civil needs.

While most ATSILS devote almost all of their core funding to servicing criminal law matters, the Commission heard that one provider (NAAJA) managed to commit around 40 per cent of its practice to servicing family and other civil matters. But it only does so

with additional 'non-core' funding, estimated to be around $900 000 per year from the Australian Government's Stronger Futures Program for the Northern Territory (trans., p. 1032). In particular:

> Eleven positions in our civil law practice, including our entire family law and welfare rights practices, are reliant on additional funding. At this stage we are unsure of whether this funding will continue beyond June 2015 and expect that we may have to cease all services in family law, as well as reduce civil law services, as a result of funding not continuing. This will be disastrous in terms of the ability of Aboriginal people in the Top End to access justice. There is nobody else who can fill this gap. (Priscilla Collins, NAAJA, trans., pp. 1025–1026)

Third, reductions in funding growth have also led to cuts in some front line services. For example, NCAFP observed:

> … ATSILS have had to cut services in recent years in order to operate within current funding levels. The Aboriginal Legal Service (NSW/ACT) has had to cut almost all of its family and civil law services and the Aboriginal Legal Service of Western Australia has had to withdraw services from a number of regional and metropolitan courts and has closed a number of regional offices. The North Australian Aboriginal Justice Agency (NAAJA) has also reported they are no longer able to provide a family law service or assist defendants in relation to applications for Domestic Violence Orders that are brought against them. (NCAFP 2013, p. 27)

The Commission also heard during hearing testimony that the recent cuts in law reform and advocacy funding had resulted in a range of service cuts to ATSILS. For example, Christopher Charles (ALRM), stated:

> As a result of the last government, we got a little bit of extra money which meant we were able to employ another civil lawyer and another child protection lawyer — enormously important because we had one person attempting to do the whole thing; let's say all of the child protection work. Now we have got two other lawyers to help her to do that work and it means that the burden is not so great. All of those positions will be closed by the end of this year because … the … money which came to us to enable us to employ those extra lawyers ran out or will run out and the second tranche of it has been taken away. (trans., p. 464)

NATSILS also submitted, alongside the removal of Commonwealth funding for itself, that:

> NAAJA … has had to make the decision to close their Nhulunbuy office, and ATSILS [Queensland] have had to close their Warwick, Cunnamulla, Chinchilla, Dalby and Cooktown offices (sub. DR327, p. 3)

Leaving aside the effect of these funding cuts on front line services, advocating for policy and legislative changes can lead to allocative efficiencies. One example, initiated in a criminal context but involving civil litigation, is outlined in box 22.7.

Box 22.7 One example of the efficiency of policy advocacy

Jonathan Hunyor, Principal Legal Officer, North Australian Aboriginal Justice Agency (NAAJA), said:

> Section 104A of the Sentencing Act up here used to contain particular provisions that related to the way evidence of Aboriginal custom and culture was to be led in a criminal proceeding. We took the view that they were racially discriminatory and we engaged in advocacy. I thought we had a pretty good case, if we were going to take it as a case to the Federal Court and, probably, ultimately the High Court, to challenge the law as being contrary to the [Racial Discrimination Act] but, instead, we lobbied the former Attorney and I met with the Solicitor-General and we talked through the issues and ultimately they changed the law and they've made it much better than I could have hoped to have done if I'd spent tens or hundreds of thousands of dollars litigating the matter; it would have been enormously expensive. We got that done through advocacy. (trans., pp. 1036–1037)

The expertise of ATSILS staff in giving a voice for Aboriginal people and helping to avoid unintended consequences is also demonstrated by requests for them to participate on consultative panels, steering groups and in commenting on draft legislation (Cheryl Axleby, ALRM, trans., p. 463; Jonathan Hunyor, NAAJA, trans., p. 1037).

The Law Council of Australia said:

> … it is very concerning that the Commonwealth has announced cuts of $13 million over four years, allegedly directed at 'policy and law reform' programs. This appears to suggest that ATSILS and other legal assistance providers should not be attempting to engage with government or collect and publish information of relevance to policy development. (sub. DR266, p. 95)

The Commission considers that addressing systemic issues can represent an efficient use of limited resources (chapter 21). Further, the Commission is of the view that the most recent funding reductions for advocacy services over four years of $13.3 million for ATSILS have impacted on frontline services and should be reversed. The necessary funding for this is contained in the funding envelope contemplated by recommendation 21.4.

But how much additional funding is needed?

Estimating the size of the additional funding required to ameliorate unmet need is highly problematic given the paucity of data. There needs to be a better understanding of who is receiving services, how many services are being provided, whether the same people receive similar services over time, and whether services are being delivered in a cost-effective manner and achieve what is expected. (This issue is discussed above and elaborated on in chapter 25.)

Without such information it is extremely challenging for governments to weigh up competing calls for additional funds and make assessments about where additional funds might make the biggest difference. It is equally challenging for providers to defend current funding arrangements, make a case against funding cuts in a tight fiscal environment or indicate how much extra is needed to service unmet need.

Many providers were unable to provide an estimate of how much additional funding they needed to fill their civil law service gaps. For example, NAAJA noted:

> … the difficulty in providing a figure given the vast unmet legal need, particularly to areas of civil law, which to a large extent simply cannot be quantified. (sub. DR306, p. 1)

The Commission has supported an increase in the provision of cost-effective culturally tailored ADR services for Aboriginal and Torres Strait Islander Australians in high need areas (recommendation 22.2). Such an arrangement represents a quasi-quarantining of funding to assist in the early resolution of civil disputes, with a view to preventing them from escalating into, at best, court-based processes or, at worst, criminal matters, and so largely avoid these greater costs. As culturally tailored ADR will affect the demand for legal assistance services, Australian Government consideration of proposals to increase the funding to ATSILS (to meet family and other civil legal assistance) should be considered alongside proposals to fund culturally tailored ADR services.

But what about FVPLS? Although most providers were unable to provide cost estimates, one FVPLS provider (NAAFVLS), estimated 'in the order of $150 000' (Tony Lane, NAAFVLS, trans., p. 1066) was required to meet unmet need in the nine communities that were not included as part of its current contract with the Australian Government. The Commission estimates that this additional funding would service an extra 80 clients at $1875 per client. Put another way, this corresponds to $37.50 per head of the local area population for these types of very remote areas.

But extrapolating this individual provider's cost estimate to calculate the cost of meeting all areas of identified need for FVPLS is complicated. It depends on how many local government areas (LGA) are considered to be in need, what proportion of people in each LGA are likely to be FVPLS clients and the cost of servicing each client. Identifying LGAs most in need can be gleaned from the Nous Group's unpublished report. ABS data can be used to determine the Indigenous population in each area, but determining the proportion that would become FVPLS clients is problematic. While Tony Lane's testimony suggests that around 2 per cent would become clients, this may be an underestimate.

In the absence of adequate data, the Commission's proposed reversal of the most recent funding cuts (recommendation 21.4) represents an interim funding measure while performance benchmarking and data collection systems for ATSILS and FVPLS are upgraded. As well, associated with funding model developments proposed in chapter 21 for LACs and CLCs, improvements to ATSILS and FVPLS funding models should be formulated. Future funding for legal assistance providers should broadly reflect agreed service priorities and be sufficiently stable so as to allow for longer term planning (recommendation 21.5).

Enhancing state and territory funding contributions

Although the supply of Indigenous-specific legal services are funded almost entirely by the Australian Government, it is state and territory laws that most affect the demand for these services (especially in criminal matters). For example, unpublished ATSILS data showed that in 2012-13, 98 per cent of all matters were state- or territory-based and 83 per cent of all matters were criminal in nature.

This disconnect means that the resource implications of state government policy changes on Indigenous-specific legal services are unlikely to be fully considered or addressed. This point was made by a number of stakeholders (box 22.8; NATSILS, sub. DR256; NAAJA, sub. 95). Other submitters suggested that changes to Commonwealth legislation can also affect state and territory governments and legal assistance services (Curran, sub. DR170; Law Council of Australia, sub. DR266).

One way of addressing this problem is for state and territory governments to have a stake in funding these services. NCAFP argued:

> If State and Territory governments were engaged in the funding of legal services for Aboriginal and Torres Strait Islander people, this would also encourage a greater understanding of the 'downstream' impacts of changes to the law. This may help assist to reduce Aboriginal and Torres Strait Islander over-representation in the criminal justice system. (2013, p. 27)

But state and territory governments tend to regard Indigenous legal assistance services as an Australian Government responsibility, despite Indigenous policy being a shared responsibility under the Constitution and many civil problems relating to state law (QPILCH, sub. 58).

Given the complexity of both Commonwealth and state and territory legislation and the significant work performed by FVPLS in response to state-based legislation and policy, members of the National FVPLS Forum supported additional (ongoing and stable) funding from state and territory governments for FVPLS on the proviso that such funding did 'not facilitate opportunities for contention about Federal/State/Territory government accountabilities' (sub. DR194, p. 12). In a similar vein, NATSILS also supported supplementary funding from the state and territory governments.

The Australian Government agreed in principle to the Senate Legal and Constitutional Affairs References Committee's (2009) recommendation that legal aid for Indigenous Australians be jointly funded by state and territory governments (Australian Government 2010). As a result, the Australian Government raised the issue with state and territory governments in May 2010. Consequently, the Australian Government committed to undertaking a review of the relationship between the delivery of legal assistance services for Indigenous Australians by LACs and Indigenous legal service providers. (The Commission was advised that the review referred to above was the *LAW Survey* undertaken by the Law and Justice Foundation of NSW.)

Box 22.8 Participant's comments on the effects of changes in state and territory laws on demand for Indigenous legal assistance

The National Congress of Australia's First Peoples observed:

> In the area of crime, for example, a change in policing practices, bail laws or public order offences can have a significant impact on the need for assistance from [ATSILS]. This has been demonstrated in the Northern Territory, where the recent introduction of the offence of breach bail has led to significant increases in offences before the court and in demand for criminal representation. … Mandatory sentencing laws also disproportionately impact Aboriginal and Torres Strait Islander people, and have placed a significant burden on ATSILS, particularly in Western Australia and the Northern Territory. (NCAFP 2013, pp. 26–27)

In some instances, changes have resulted in clients being unrepresented and without an interpreter (CAALAS et al. 2014). CAALAS submitted:

> … the Northern Territory Government recently introduced an alcohol mandatory treatment scheme which confers power on a Tribunal to, among other things, detain a person in a residential alcohol treatment facility to receive mandatory treatment. The [Northern] Territory Government did not provide funding to any legal assistance service in the Northern Territory to advise and represent people appearing before the Tribunal, which has meant that none of the legal assistance services in Central Australia have been able to represent people brought before the Tribunal … (sub. 89, p. 25)

Other needs have not been met as supply is shifted to meet sharp increases in demand following changes in the Northern Territory Government's tenancy maintenance and eviction policies (CAALAS, sub. 89).

In some cases, disputes are between Indigenous Australians and a state or territory government. Here too, state and territory governments have little incentive to consider the representational needs of parties:

> … there is a very substantial demand for legal assistance in tenancy law, especially with respect to representation in courts in relation to eviction matters involving the [Western Australian] public housing authority. As far as ALSWA is aware, very few Aboriginal clients are provided with actual representation in court in relation to these sorts of disputes. (ALSWA, sub. 112, p. 3)

A key challenge for state and territory governments in supplementing Commonwealth funding for ATSILS and FVPLS is the vertical-fiscal imbalance between these two levels of government.

State and territory government funding may also bring with it additional reporting responsibilities and the risk of differing priorities. Both NATSILS and the National FVPLS Forum strongly favoured the maintenance of existing reporting lines.

In the absence of additional state or territory funding, National FVPLS Forum highlighted that other arrangements can also help to align the broader policy goals and the service delivery objectives of different providers. For example:

> … a culturally specific strategic plan which engages all service providers and government in the planning of service priorities and delivery. … The safety of vulnerable Aboriginal community members should be a service delivery priority for each State and Territory as well as the Commonwealth (sub. DR194, p. 12).

The idea of a Justice Impact Assessment was proposed by the Law Council of Australia (2013a) as a mechanism to ensure the flow-on impacts of Australian and state and territory government policies for the justice system are adequately and systematically considered. For example, in the United Kingdom, when a regulatory proposal is expected to have impacts on the justice system, a Justice Impact Test is a mandatory requirement of the broader impact assessment process in that country (Law Council of Australia 2013a).

However, the Commission envisages that LAFs will help to ameliorate the current lack of incentives for considering the cross-jurisdictional ramifications of policy changes (see recommendation 21.7). Further, a comprehensive regulation impact analysis (RIS) should capture all the significant costs and benefits that a proposal is likely to impose on the community (PC 2012c), including the justice sector. As stated by the OECD, a RIS should:

> Adopt *ex ante* impact assessment practices that are proportional to the significance of the regulation, and include benefit cost analyses that consider the welfare impacts of regulation taking into account economic, social and environmental impacts including the distributional effects over time, identifying who is likely to benefit and who is likely to bear costs. (OECD 2012, p. 10)

Identifying 'who' is likely to bear the benefits and the costs can include different levels of government. Hence, while regulation impact statements should theoretically take on board all the significant impacts of proposed policy changes in the justice sectors, in practice it is unclear whether or not this is occurring.

The Commission considers that direct incentives, in the form of funding contributions, are more likely to prompt state and territory governments to consider the implications of their policy changes on the demand for legal assistance services.

RECOMMENDATION 22.4

Given that the policies of State and Territory Governments have a significant impact on the demand for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services, especially in relation to criminal matters, State and Territory Governments should contribute to the funding of these services as part of any future legal assistance funding agreement with the Australian Government.

23 Pro bono services

Key points

- 'Pro bono' refers to services provided by lawyers, for free or at a reduced cost. Of interest to this inquiry are pro bono services that are directed at improving access to civil justice for those in need.
- Data available on the provision of pro bono services are limited.
  - 'Headline' figures indicate that lawyers from large firms provided over 340 000 hours of pro bono in 2011-12, at an average of nearly 30 hours per lawyer. But extrapolating these figures to the wider profession would be an overestimate.
  - In terms of the number of full-time equivalent lawyers, pro bono provision from larger firms accounts for around three per cent of the capacity of the legal assistance sector, and 0.5 per cent of the entire legal market.
- Pro bono does not always (directly) assist individuals — over 60 per cent of pro bono services are undertaken for not-for-profit organisations.
- There are a range of delivery models for pro bono, from firms being approached directly, to case referral schemes and partnerships with community legal centres.
- Not all pro bono lawyers are skilled in the areas of law that most affect disadvantaged clients.
- The capacity and culture of some firms, the difficulty of matching expertise with needs, and conflicts of interest all limit the effectiveness of pro bono in improving access to justice.
- Some of these limitations could be overcome through reform:
  - Retired and other non-practising lawyers in all jurisdictions should be able to access free practising certificates.
  - The Australian and state and territory governments should adopt the Victorian Government's use of a pro bono 'coordinator' (who coordinates requests from firms for clearance on conflicts of interest matters).
  - Governments in some larger jurisdictions should require that firms adopt aspirational pro bono targets in order to tender for government work. Less formal approaches are more appropriate for smaller jurisdictions.
- Evaluating past pro bono projects is critical to understanding the best ways to provide services to those in need.

From 'pro bono publico' ('for the public good'), pro bono broadly refers to professional services provided free of charge (or at reduced prices).

While there are a range of definitions relating to the provision of 'free' work by lawyers (and the available data on pro bono reflects all types of work undertaken free of charge), increasingly pro bono is being used to describe work provided in response to disadvantage.

This is also the most important aspect in terms of promoting access to justice, as it can assist Australians who would otherwise not have their needs met. As David Hillard, the pro bono partner at Clayton Utz, observed:

> We act for disadvantaged people who cannot obtain legal aid and for the non-Governmental organisations which support disadvantaged people. There are other types of legal work which we might perform for free, but we do not call this our pro bono work. For example, we might choose to act for free for an arts organisation which is supported by one of our major commercial clients. It is work which we might decide to do without a fee, as part of strengthening our business relationship with a commercial client. However it is not about responding to disadvantage and therefore does not count as pro bono work. (2012)

The provision of pro bono can be a source of tension between the legal profession and government. While both parties aim to assist disadvantaged Australians, government seeks to do so (at least in part) by 'crowding in' pro bono — offering incentives for its provision. The profession, on the other hand, is wary of 'crowding out' government legal assistance with pro bono services that are limited and may not be as suited to addressing disadvantage.

This chapter begins by examining the nature of pro bono services as well as how, and how much, pro bono is delivered (sections 23.1, 23.2 and 23.3). The effectiveness of pro bono in providing assistance to those in need is explored in section 23.4. Section 23.5 considers the appropriate role for pro bono and, in this context, section 23.6 goes on to suggest possible improvements to pro bono service delivery.

23.1 Who are the major providers and beneficiaries of pro bono services?

Large firms provide the bulk of pro bono services

Pro bono services are provided by lawyers across the spectrum of the profession. The capacity and approach to delivering services depends on the characteristics of providers:

- *Large firms* are often considered to have a leadership role in the delivery of pro bono and appear to provide the bulk of pro bono services — 95 per cent of all lawyers who are signatories to the National Pro Bono Aspirational Target (section 23.3) are employed by a firm with 50 or more lawyers (NPBRC 2013f). Roughly half of these large firms also employ a pro bono coordinator who facilitates, supports and oversees the pro bono work of the firm (NPBRC 2013a). Larger firms are also the primary target for incentives to encourage pro bono services, which are built into government tender arrangements (section 23.5).
- *Small firms* account for roughly 5 per cent of lawyers that are signatories to the Aspirational Target. In contrast to the coordinated programs operating in larger firms, pro bono work undertaken by small firms tends to be ad hoc and typically occurs when

disadvantaged clients approach the firm directly. The contribution by small firms partly reflects their limited capacity, and the associated risks, such as increased insurance premiums after complaints from pro bono clients (NPBRC 2013d). Conflicts of interest are also a significant issue for small firms, who not only give up their time to volunteer, but also risk losing paid work, meaning they effectively 'burn the candle from both ends' (NPBRC 2013d, p. 67). Even so, small firm lawyers are valuable pro bono providers, as their (paid) legal experience is more likely to be relevant to pro bono cases and can have a substantial impact, particularly in smaller, more disadvantaged communities.

- *Sole practitioners* including barristers, face many of the same barriers as small firms and the number of individual solicitors and barristers who are signatories to the Aspirational Target is low relative to their share of the legal services market (chapter 7). The provision of pro bono by sole practitioners is often facilitated by referral and duty lawyer schemes. Examples of such schemes include those provided by the New South Wales Bar Association (sub. 34) and the Victorian Bar (sub. 127).
- *In-house (corporate and government) lawyers* contribute a relatively small amount of pro bono. They typically work in smaller teams and so have less support and flexibility to take on pro bono work than those in large law firms. They also can have accentuated conflict of interest and organisational reputation issues that may preclude them from acting in certain areas of law. Some may not hold practising certificates or professional indemnity insurance, potentially limiting their capacity to provide pro bono.

Organisations rather than individuals are the main beneficiaries

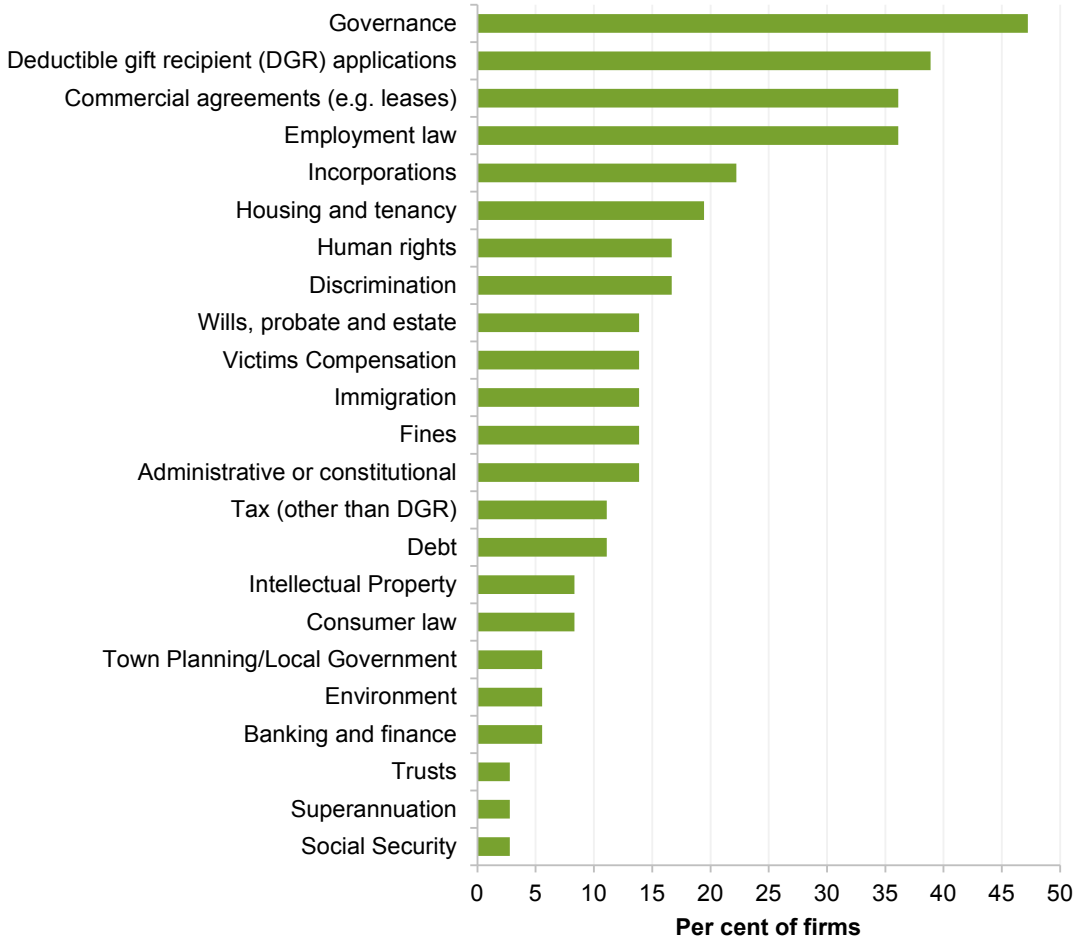
While pro bono is often thought of as improving access to justice for those experiencing disadvantage, it is not always provided directly to *people* in need. Indeed, the National Pro Bono Resource Centre (NPBRC 2013a) survey of large law firms indicated that the majority (63 per cent) of pro bono work is undertaken for not-for-profit (NFP) organisations who operate in areas such as health, social services, sports, arts and culture, the environment and animal welfare.

However these results are likely to be influenced by seven firms who reported that over 90 per cent of their pro bono work was undertaken for organisations (NPBRC 2013a). Similarly, Allens (trans., p. 878) noted that of new pro bono matters at the firm this year, 80 per cent were for organisations and 20 per cent were for individuals.

Areas of law affecting the operations of NFPs, such as matters involving deductible gift recipient (DGR) applications and incorporations, dominate pro bono practice (figure 23.1).

Figure 23.1 **Top five most accepted areas of pro bono practice**

2012, per cent of firms that identified these areas in the top five



Data source: NPBRC (2013a).

While pro bono services of this nature are valuable, particularly to the NFPs in receipt of services, they tend not to have direct benefits in terms of access to justice (as much of the work is of a transactional nature). For the purposes of this inquiry, the Commission's focus is on how pro bono services impact on access to civil justice and the resolution of civil disputes.

Of those areas of pro bono practice that principally affect individuals, housing and tenancy, human rights and discrimination matters rank highly, while family law, domestic violence and social security matters feature far less (reasons for this are discussed in section 23.4).

23.2 How are pro bono services delivered?

Pro bono has evolved from being a patchwork of informal options to an increasingly organised and coordinated set of services. There are a range of pathways to deliver pro bono; two of note are through case referral services such as clearing houses, and partnerships between law firms and community legal centres (CLCs).

Case referral is the traditional model for the provision (and coordination) of pro bono services, whereby parties seeking legal assistance approach an organisation who then refers them to a law firm that is prepared to provide services on a pro bono basis. Service providers choose the level of resources they are prepared to contribute, and even nominate particular areas of law that match the skills and interests of the staff they have available. Using a pool of providers spreads the demand for pro bono services and broadens the range of matters that pro bono providers can assist with.

In addition to providing a point of contact for potential users, referral schemes filter requests for assistance before directing users to appropriate service providers:

> [They] provide an important 'triaging' service for the many requests made for pro bono legal assistance. They only seek to place requests for assistance with their members, or the firms and barristers that have agreed to consider referrals, once they have made the assessment that the case meets pro bono guidelines. (NPBRC 2013d, p. 53)

This oversight and 'triage' role can also lead to the identification of trends at a higher level than individual law firms would be capable of (NPBRC 2013d).

Referral schemes have existed for some time. The first scheme was founded in New South Wales in 1992 by the Law Society, law firms and the Public Interest Advocacy Centre (Law and Justice Foundation of NSW 2002). Today, there is a referral scheme in every jurisdiction, each providing a range of services (table 23.1).

An alternative to referring out work is for a specific law firm or firms to form an ongoing partnership with a CLC. Partnerships can involve direct referrals and co-counselling (where a firm and a CLC work together, such as on a particular piece of public interest litigation). Another common approach involves law firms partnering with CLCs (providing staff and resources) to deliver pro bono services through legal clinics.

Typically, partnerships target particular client groups or areas of unmet need. For example, each specialist team in the Redfern Legal Centre is supported by a law firm which allows the Centre to service areas of law that are not covered by legal aid commissions, such as providing advice in relation to student visas (trans., pp. 282–284). Similarly, the National Children's and Youth and Law Centre partners with King & Wood Mallesons and in-house lawyers at the Australian Securities and Investments Commission and Telstra to deliver email-based legal advice to young people (NPBRC 2013d).

Table 23.1 **Pro bono clearing houses and referral schemes**

Jurisdiction	
NSW	Public Interest Law Clearing House (NSW) Inc, now part of Justice Connect Law Society of NSW Pro Bono Scheme NSW Bar Association Legal Assistance Referral Scheme Cancer Council Legal Referral Service
Vic	Public Interest Law Clearing House (VIC) Inc, now part of Justice Connect
Qld	Queensland Public Interest Law Clearing House Incorporated (QPILCH) (manages both the Queensland Bar and Queensland Law Society schemes, along with its Public Interest Scheme)
WA	Law Access Pro Bono Referral Scheme (based at the Law Society of WA) WA Bar Association
SA	JusticeNet SA
Tas	Law Society of Tasmania Pro Bono Clearing House
NT	The NT Pro Bono Clearing House (based at the Law Society of the NT)
ACT	The ACT Pro Bono Clearing House (based at the Law Society of the ACT) The Centre for Asia-Pacific Pro Bono (based at the Law Council of Australia)

Source: NPBRC (2013d).

Together, case referral and CLC partnerships are the source of around half of all reported pro bono work — referral schemes account for just over 30 per cent and partnerships with CLCs for a little under 20 per cent (NPBRC 2013a). The remaining services are sourced through a combination of direct requests from new and repeat pro bono clients and referrals from employees of the firm.

23.3 How much pro bono is provided?

Estimates of the amount of pro bono undertaken vary

There are a range of measures of the extent of pro bono services provided — they employ different definitions and have been undertaken at different times.

The broadest measure is based on the last legal services survey conducted by the Australian Bureau of Statistics in 2008 (ABS 2009), which found that lawyers undertook 955 400 hours of pro bono legal work in the 2007-08 financial year, the equivalent of 531 full time lawyers, or just over 27 hours per 'practising solicitor and barrister' per annum.[35] The ABS valued this work at $238.2 million in 2007-08.

[35] This represents a narrow definition of the profession and does not include patent attorneys, law graduates/clerks, paralegals or other staff of firms (ABS 2009).

However, this number overstates the extent of pro bono services that are directed to improving access to justice. The definition of 'pro bono' used by the ABS was much broader than services provided to disadvantaged Australians, capturing any free or discounted services (other than paid legal aid work), including discounted work provided to family and friends, as well as organisations such as the Australian Ballet (NPBRC, sub. 73).

More recent data on the extent of pro bono services provided by large firms (those with 50 or more lawyers) is available from surveys conducted by the NPBRC. The most recent survey of large firms concluded that:

> … In the 2011-12 financial year, 11,460 FTE lawyers employed by firms with more than 50 lawyers undertook more than 343,058 hours of pro bono legal work, or an average of 29.9 hours per lawyer per annum. (NPBRC 2013d, p. 57)
>
> … [these] survey results only cover the law firms with 50 or more FTE lawyers that responded to the survey. Lawyers in the 36 respondent firms in 2012 represent just under a fifth of lawyers in Australia (19% or 11,460 FTE lawyers). (sub. 73, p. 9)

The survey results show a large variation in average pro bono hours between individual firms — ranging from 1.8 to 64.2 hours per lawyer in the 2011-12 financial year. The largest firms (those with between 450 and 1000 lawyers) reported the highest levels of pro bono services, providing on average around 38 hours per lawyer per year.

Performance reporting for signatories to the National Pro Bono Aspirational Target, which is intended to encourage pro bono provision, particularly among firms wishing to tender for Australian Government legal work, provides a further source of pro bono data. In 2012-13, the Aspirational Target had 104 signatories (79 firms and 25 individuals) and covered 8763 full-time equivalent (FTE) lawyers (approximately 15 per cent of the profession) who collectively undertook over 294 000 hours of pro bono work (NPBRC, sub. 73).

Stricter definitions, along with more realistic assumptions, suggest that pro bono efforts are relatively modest

The above figures provide an incomplete and potentially biased picture, since firms that are most active in providing pro bono services are also more likely to respond to the survey and be signatories to the Aspirational Target. Moreover, extrapolating survey results based on pro bono work undertaken by large firms (who appear more likely to provide pro bono compared to in-house lawyers or sole practitioners) to the wider legal market could significantly overestimate the amount of pro bono work undertaken.

Even based on the survey of large firms, it appears that pro bono only adds a small percentage to other sources of free legal services for the disadvantaged:

> … it appears that [large firms] add around 7% to 8% to the capacity of free legal services through their total pro bono legal work. Given that less than 40% of this reported work was done for individuals (the remainder being for not-for-profit organisations), their pro bono work for individuals makes up less than 3% of the capacity of legal assistance services. The percentage from that work actually performed for marginalised and disadvantaged clients is expected to be even lower. (Justice Connect, sub. 104, p. 6)

Expressed as a FTE number of lawyers, the work of lawyers surveyed at large firms equates to 191 lawyers, plus a further 134 lawyers volunteering in CLCs — some 325 lawyers in total. However, this equates to just over 0.5 per cent of the total number of practising lawyers. As Hillard et al. (2012) observed:

> More than 300 extra free lawyers is impressive, but to put that in context, there are about 60,000 lawyers in Australia. About 2000 lawyers work in community legal centres, legal aid commissions and Indigenous legal services (some part-time).
>
> In addition, private lawyers conduct more than two million hours of legal-aid-funded work, equivalent to an extra 1190 full-time legal aid lawyers a year.

Alternatively, putting the average number of hours per year into the broader context of other activities a lawyer may undertake:

> Even where lawyers average 50 hours of pro bono work each per year, this translates to less than an hour a week worth of pro bono work. It is most likely that lawyers will spend more time drinking coffee at work each year than they will performing pro bono work. (Hillard 2012)

Following the Commission's draft report, some participants (for example the City of Sydney Law Society, sub. 249, and the New South Wales Bar Association, trans., p. 106) took issue with the characterisation of pro bono efforts as modest, arguing that the provision of free services showed generosity on the part of the profession.

The Commission's observations relating to the proportion that pro bono contributes to overall legal assistance services merely reflect the available data. They do not, nor were they intended to, comment on the generosity shown by providers, bearing in mind that there are a range of factors that motivate individuals and firms to provide pro bono.

23.4 What impacts on lawyers' willingness and capacity to provide services?

Pro bono providers enjoy a range of benefits

Pro bono service provision has been, and to a large extent still is, motivated by a lawyer's sense of professional responsibility. But, increasingly both individual practitioners and firms have come to appreciate that the provision of pro bono services affords a range of benefits. Active involvement in pro bono can provide training and development opportunities for staff, improve a firm's public image or its relationship with a large client, and bolster morale (box 23.1).

Box 23.1 Getting from giving: benefits of pro bono to providers

While social and professional responsibility are often cited as the main reasons for undertaking pro bono, there are other reasons for lawyers to offer pro bono:

> Many see it as a professional development opportunity, providing a chance to develop their skills by doing interesting work, as well as finding it satisfying to be able to work autonomously and take responsibility for a matter from beginning to end. Some pro bono work provides lawyers with much more direct client contact than their usual work and a feeling that they are making a real difference to a person's life. (NPBRC 2013d, p. 62)

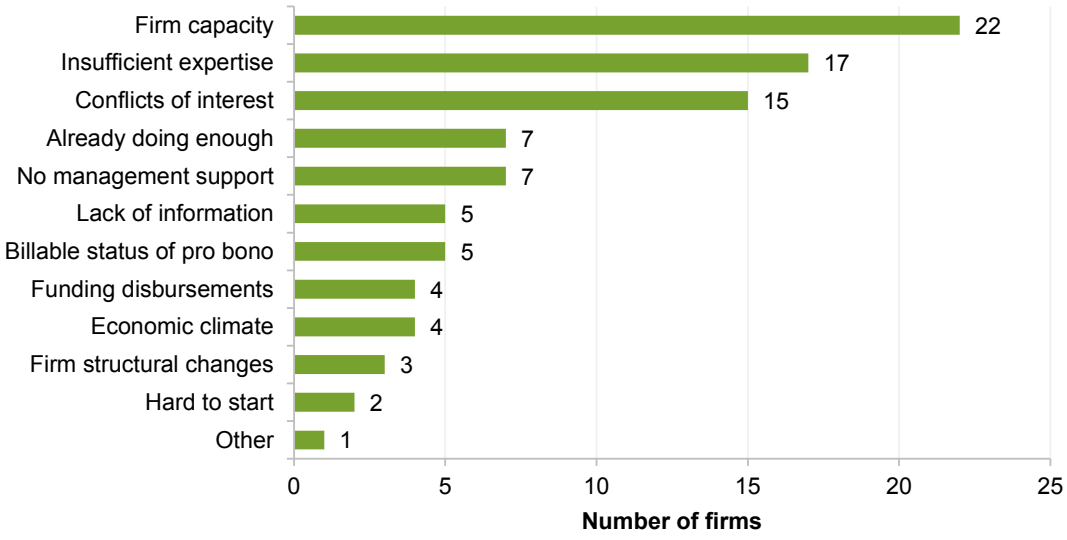
In addition to benefits to the practitioner, pro bono can provide a range of other benefits to the firms providing it. These have been summarised as:

> **1. Morale.** Most lawyers began their legal studies because they understand the need for a legal system to work properly. … Embracing pro bono work as part of a law firm's ordinary practice allows lawyers to return to the very heart of what made them become lawyers in the first place. …
>
> 2. **Recruitment and retention.** As a result of improved morale, it is easier for law firms to attract good lawyers to their firm and to have those lawyers stay at their firm. Our pro bono practice features heavily in the feedback which we receive from applicants for employment … 93% of our people said that they felt proud of our pro bono practice. …
>
> 3. **Training and experience.** Pro bono work often requires lawyers to think outside of their regular comfort zone. It improves their professional skills and makes them better lawyers.
>
> 4. **Pro bono can help bind people more closely to the firm.** Our pro bono practice is probably the only experience … which is shared by all of our lawyers across six different offices in Australia and four diverse legal departments. In this way, it can operate as 'firm glue', to make people feel more closely as part of a single team. …
>
> 5. **Pro bono work can help to build a firm's reputation.**
>
> 6. **Pro bono practice [provides] a different way for us to relate to our commercial clients.** There are a number of examples now of pro bono partnerships between law firms and the in-house legal teams at some of their major commercial clients. I think that it is a very useful way for us to entrench our relationship with major commercial clients by having our lawyers work with their lawyers on shared pro bono projects. … (Hillard 2012)

But both law firms and individual lawyers face a number of constraints

The need for pro bono to 'fit' within firms' commercial work (both in terms of capacity and character of work) impacts on their ability to deliver pro bono services. According to an NPBRC survey of 36 larger law firms, the overall capacity of the firm to take on additional (unpaid) work features as the main constraint to taking on further pro bono. Issues of expertise in the relevant areas of law, concerns about conflicts of interest and lack of management support are also significant barriers (figure 23.2).

Figure 23.2 **Constraints on further provision of pro bono**
All constraints identified by firms with 50 or more lawyers, 2012



Data source: NPBRC (2013a).

Lawyers and firms are constrained by a lack of capacity and expertise

It is natural for commercial firms to have a limited capacity to provide free services in addition to their paid work. As noted above, this can be especially true for smaller firms, and by extension, jurisdictions where smaller firms dominate the market:

> For example … it is difficult to obtain a secondee in Queensland as the firms are smaller and have less capacity than the bigger offices in Sydney and Melbourne. JusticeNet in South Australia has similarly found it challenging to develop and staff services such as clinics … (NPBRC 2013d, p. 37)

Further, the 'law' is a broad term covering many different practise areas, each with different demands and clients. As such, even where lawyers are available, they might not have the requisite skills and experience to deal with a particular case or with particular clients:

> Many clients may present with complex needs, for example mental illness, intellectual disability or a history of victimisation and abuse, which may affect their ability to understand legal advice or to give instructions. Lawyers may need specific communication and client management skills to be able to build a relationship of trust with their client in order to be able to assist them effectively. (NPBRC, sub. 73, p. 31)

> Often it is only after you have dealt with a client who is distressed and threatening to harm themselves that you realise you are entirely unprepared for that side of it. (A pro bono clearing house manager) (NPBRC 2013d, p. 74)

The (in)ability of some lawyers to communicate in lay language can also hinder their work with pro bono clients:

> Many CLCs have voiced concerns about corporate lawyers not meeting the needs of the clients … explaining why something can/cannot be done, using plain English … giving non-legal alternatives, referring to counselling services, spending time doing non-legal work eg, filling out forms, listening to the client's story and concerns … (NPBRC 2013d, p. 73)

Beyond simply limiting the effectiveness of pro bono lawyers, such mismatches between expertise and need can also reduce the trust between clients, referring or partner bodies and pro bono providers, affecting provider relationships.

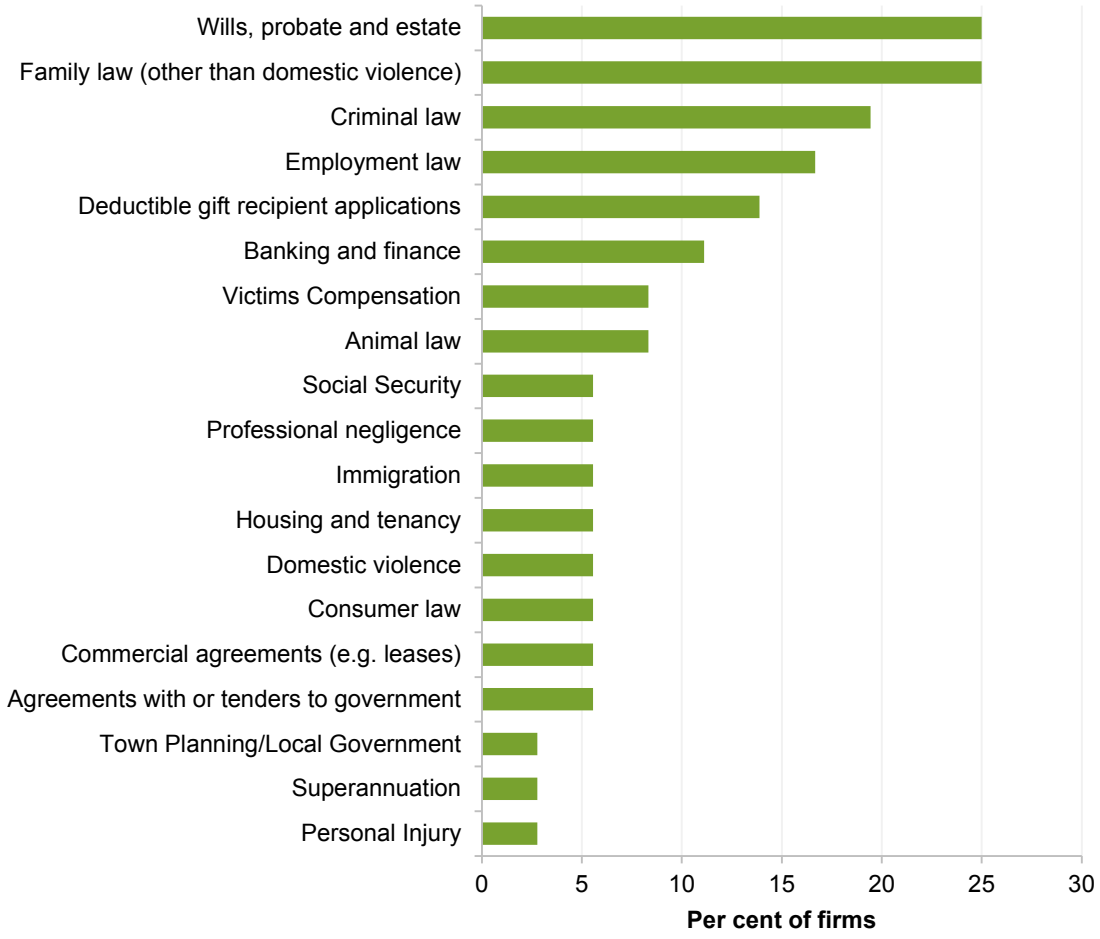
Some areas of law do not lend themselves to pro bono provision

There are some areas of law where firms will reject requests for pro bono assistance simply due to the nature of the matter. This might be due to a lack of expertise within the firm in the area of law and/or concerns about reputational impacts.

When asked as part of the NPBRC's survey to nominate the top five areas in their practice where requests were most turned down, larger firms indicated a range of areas (figure 23.3). Some of the rejected areas (employment law, DGR applications, and to a lesser extent matters dealing with wills and estates) were also prominent in areas where firms provided most assistance (figure 23.1). In these instances, the rate of rejection may simply reflect the volume of applications.

Figure 23.3 **Top five most rejected pro bono practice areas**

2012, per cent of firms that identified these areas in the top five



Data source: NPBRC (2013a).

However, other areas such as family law, criminal law and immigration are also commonly rejected, but are not prominent areas of assistance, suggesting that these areas are more likely (per case) to be rejected than others. Family law (box 23.2) provides an example where the nature of the matter itself limits the provision of pro bono services.

Further, some pro bono work may not be favoured by providers due to the image it can create and its potential to damage their reputation. This can be a particular issue for in-house corporate lawyers:

> There are some areas of pro bono work which 'corporates' may be less likely to actively pursue, due to perceived reputation issues, for example, work involving prisoners or refugees. (NPBRC 2013d, p. 87)

Box 23.2 Constraints to providing pro bono in family law matters

The National Pro Bono Resource Centre (2013c) identified a series of limitations that led to a low provision of pro bono assistance for family law.

First, family law is a highly specialised area, with its own legislation and body of case law. While targeted training can overcome a lack of expertise in some areas, pro bono providers argued that the complexity of family law made this impractical:

> The Family Law Act is huge. Absolutely huge. And it has an equally large body of case law. And its own set of procedural rules. There's no way that amount of information can be imparted in a few days of training. (Pro bono coordinator, large firm) (NPBRC 2013c, p. 12)

Second, the nature of family law *matters* makes it difficult to provide meaningful services through short, sporadic interactions (such as legal clinics).

Third, the nature of family law *clients* is relationship-intensive, and may impact on the willingness of large firms and lawyers (who are typically more used to dealing with dispassionate commercial clients) to provide pro bono services:

> Our lawyers aren't used to dealing with highly emotional, sometimes irrational and traumatised clients. It can be very confronting and is a skill learned over time. You can't just throw lawyers into those situations - they'd need to be supported in that regard as well. (Pro bono coordinator, mid-sized firm) (NPBRC 2013c, p. 12)

These factors, combined with a view from some firms that the 'scope of a firm's pro bono policy should not extend into areas that are considered to be government responsibility' (NPBRC 2013c, p. 11) may weigh differently on different firms, but in their totality highlight some of the limitations of pro bono service provision.

Conflicts of interest restrict the cases that pro bono lawyers can take on

Local lawyers with expertise in the areas of law that affect disadvantaged clients would be ideal pro bono providers. Unfortunately, these lawyers are also more likely to have conflicts of interest issues. Indeed, part of what makes them valuable pro bono providers is the expertise they have gained from acting for the 'other side' (for example, acting for local employers, insurance companies or government bodies). Potential conflicts can result in some firms effectively ruling out pro bono service provision in entire areas of law, for example a pro bono coordinator at a mid-sized firm commented that:

> We told PILCH [Public Interest Law Clearing House] not to send any matters involving major banks since they are likely to be clients. (NPBRC 2013d, p. 46)

The risk, or fear, of a conflict can be even greater in smaller jurisdictions, or in smaller towns or communities, where the limited number of lawyers (and parties) may already have established clients in certain areas of law:

> … Hobart Community Legal Service (HCLS) found it difficult to obtain pro bono assistance for their clients in certain areas of law. … Industrial law is particularly difficult because there are only a couple of firms with the requisite level of expertise to enable them to provide mentoring/training assistance or advice/representation in complex cases, and they are usually

> acting for the few large employers in Tasmania so they always have a conflict (or fear having a future conflict). (NPBRC 2013d, p. 37)

Further, simply a fear or perception of a conflict of interest, and conservative behaviour in response to this, can have a real effect on the amount of pro bono provided. This problem is accentuated in areas of pro bono work that might involve 'unsympathetic client groups or politically contentious subjects' (NPBRC 2013d, p. 61).

Firm culture also impacts on the extent of pro bono provided

The culture within a firm, whether explicitly stated or implicit through observation of general attitudes, can impact on the willingness of lawyers to undertake pro bono services, and the perception of what impact that can have on their career. Support for pro bono at the partner and manager level can promote innovative projects with successful results, while a lack of leadership from a firm's partners can have a discouraging impact on staff:

> Some secondees have been told by partners in firms that are not supportive of pro bono that doing a secondment will be a black mark in their career. We recently lost a secondee this way. (A pro bono clearing house manager) (NPBRC 2013d, p. 29)

> Lawyers are more likely to put their hand up to do pro bono work if their supervising partner has been involved in pro bono work themselves. (Large law firm pro bono coordinator) (NPBRC 2013d, p. 63)

Another factor that can signal the importance of pro bono work compared to a firm's other work, is how pro bono work is treated in terms of one of the law firm's key metrics — the billable hour. Some have commented on the impression this can give to the lawyers undertaking the work:

> Pro bono hours do not count towards billable targets and are discounted by 25% in the timesheet system. It can be seen as one of the many non-billable demands on lawyers. We wouldn't do it unless we personally believed in it. (Mid-sized law firm pro bono coordinator) (NPBRC 2013d, p. 63)

Indeed this view appears to be validated by results from the NPBRC's survey of larger firms. These results show that just over half of firms treat pro bono hours as billable, but this figure is down from almost two-thirds in 2010 (NPBRC 2013a). Further, the proportion of firms that apply a lower value to pro bono for financial targets (and implicitly, a lower priority) has risen from 5 per cent in 2010 to 11 per cent in 2012. The proportion of firms that treat pro bono hours as non-billable, but recorded as a special category with lower value for financial targets, also increased from 18 to 20 per cent over the same period.

Others have also pointed to cultural issues that may hamper increased pro bono services from government lawyers, including an 'underdeveloped pro bono legal culture' in government organisations, and that government lawyers are 'less engaged with their

professional bodies … and therefore less immersed in the culture of pro bono as a professional obligation' (NPBRC 2013d, p. 92).

23.5 What role can pro bono play in improving access to justice?

Pro bono is not a panacea, nor is it costless

As noted above, though it constitutes a significant and valuable volunteer effort, pro bono provision in Australia remains a relatively minor component of overall legal assistance services. Further, limitations that are, to some extent, inherent in the nature of employing private parties in volunteer work (such as capacity, expertise, conflicts of interest and firm culture) also limit the extent and type of pro bono services that the legal profession can (and is willing to) provide.

One of the inherent tensions in a volunteer-dependent service is the mismatch between *clients'* legal needs and *lawyers'* preferences to volunteer in particular areas. This mismatch can result in lopsided and 'patchwork' service provision, reflecting the attractiveness of certain areas of work rather than a systemic approach to addressing unmet legal need for disadvantaged people.

Given these limitations, no matter how well organised or resourced, pro bono service provision is unlikely to become the dominant means of assisting disadvantaged people with legal needs. Indeed, a consistent message the Commission heard during consultations was that pro bono was 'no substitute' for government funded legal aid, but rather a complement to it, as the Centre for Innovative Justice noted:

> The limits of pro bono work, however, also need to be recognised. For example, just as governments should not assume that pro bono work should plug the gap in access to justice, nor should the profession assume that pro bono work justifies charging fees that are inherently unaffordable for ordinary fee paying clients. This is particularly the case when over 60% of pro bono services by large law firms are provided to organisations, not individuals; with many of these individuals nevertheless ineligible for assistance from the publicly funded sector. (2013, p. 32)

Further, even though pro bono is a volunteer-based service its provision is not 'free' and incurs a range of direct and indirect costs. The direct costs to government include the funding allocated to referral services. For example, in 2012-13, the Queensland Public Interest Law Clearing House (QPILCH) received nearly $1 million of funding from a range of sources, including the Australian and state governments, and recurrent and non-recurrent funding from the Queensland Legal Practitioner Interest on Trust Accounts Fund (QPILCH 2013a). Similarly, the Public Interest Law Clearing House in Victoria (which has now merged into Justice Connect) received just under $1 million in Commonwealth and state funding in 2012-13 (PILCH 2013a, 2013b).

In isolation, these may not appear to be large sums. But the important issue is whether these funds are devoted to their best possible use in improving access to justice for disadvantaged people. For example, could the funds better be devoted to CLCs or legal aid commissions directly delivering services, or are there genuine benefits from leveraging these funds into pro bono service provision? Such questions accentuate the need for evaluation of pro bono programs (section 23.6).

In addition to government funding, there are also the costs imposed on the providers of pro bono. Volunteer lawyers will, to varying degrees, forgo paid work in order to deliver pro bono (but as noted above, receive benefits themselves). Referral centres and CLCs must also use money and resources (that could be devoted to alternative service delivery methods) in order to facilitate pro bono. As the Public Interest Advocacy Centre noted, the mismatch between the expertise of the volunteer lawyers and the areas of pro bono law (and skills needed to effectively interact with pro bono clients) means that the CLCs themselves must expend staffing resources to coordinate, supervise and assist the pro bono lawyers:

> … all of the pro bono lawyers need training, and HPLS [Homeless Persons' Legal Service] staff supervise the information and advice given to every client who attends every HPLS clinic in a timely manner. During an average week, this involves the supervision of at least 20 solicitors providing advice to at least 35 clients face-to-face at an HPLS clinic, in addition to 200 ongoing casework files.
>
> This example illustrates that pro bono does not equate to free. There are substantial costs associated with training and supervising lawyers to do pro bono work, and this coordination role needs to be properly funded so the benefits of pro bono work can be fully realised. (sub. 45, p. 5)

But pro bono still has a role in improving access to justice

Notwithstanding the above constraints, pro bono represents a resource that can be used to improve access to justice. To not make use of such a (willing) resource could unnecessarily result in some legal needs going unmet.

Equally, a volunteer resource should not be taken for granted, nor used in a haphazard manner when improved approaches could make better use of the valuable time of providers and volunteers. Therefore, the best use of this resource, and methods to alleviate any barriers to further provision, must be carefully considered.

23.6 How might pro bono service delivery be improved?

There are several strategies that can be used by firms, providers and governments to address the limitations to pro bono service provision discussed above, and to ensure that pro bono efforts are directed towards their most effective uses.

Some of these strategies, including removing barriers such as conflicts of interest and utilising existing capacity within the profession, are relatively low cost. Other approaches give rise to potential costs (such as aspirational targets and disbursement funds) or require longer-term change (such as cultural change within the profession) and so require more evaluation.

Making the best use of capacity within the profession

While large law firms may not have a presence in every jurisdiction, other significant employers of lawyers such as large corporations (including utilities) and governments do. As noted in chapter 7, nearly one quarter of the roughly 60 000 practising solicitors in Australia work within corporations or government. Smaller jurisdictions may be able to increase pro bono service provision by drawing on these (relatively) untapped resources.

One important difference in utilising in-house (and government) lawyers is the training and support they require. Those working in law firms can turn to colleagues and specialists in a range of areas when they need support. In-house lawyers on the other hand, are likely to be part of a smaller and more narrowly specialised team. Where possible, partnering existing law firms that have a pro bono presence with government and in-house lawyers can alleviate this:

> Lawyers in law firms have broader access to specialists who they can turn to when they have questions. This is where a partnership with a large law firm can make it easier for in-house lawyers to undertake pro bono as they have someone to ask when they have a question. (NPBRC 2013d, p. 90)

Where there are few (or no) large law firms to partner with, and technology cannot overcome distance barriers, this support role may fall more heavily on CLCs or local clearing houses.

Finally, it is worth noting that a lack of large firms does not mean a lack of lawyers willing and able to provide pro bono assistance, as the Law Society of Tasmania noted:

> There are no large law firms operating in Tasmania … 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. (sub. DR227, p. 28)

Improving the coordination of pro bono efforts

Significant efforts to coordinate pro bono provision have been taking place over the last two decades. More recently, the consolidation of some clearing houses (as is the case with Justice Connect in New South Wales and Victoria) shows that those within the sector are examining opportunities to improve service delivery. The work and publications of the NPBRC also provide a valuable basis for providers to draw on when examining best practice approaches and benchmarks. And as large law firms gain more experience in the

pro bono sector, they too are seeking out better methods of coordination and ways to improve the availability of pro bono services (box 23.3).

Box 23.3 Improving coordination through partnerships

As noted above, legal clinics are a well-known model of pro bono service provision. But they are not without drawbacks (NPBRC 2013d).

The success of such models relies heavily on the effectiveness of the partnering CLC in providing organisational support and training:

> Law firms … want to ensure that … any firm resources that are invested in a partnership with a CLC are used to provide pro bono legal services to clients rather than on the administration of a pro bono project that is poorly managed. Also, the benefits to firms of increasing staff retention and skill development through [pro bono] can only be realised where the CLC is in a position to provide quality training and supervision to pro bono lawyers. (NPBRC 2013d, p. 59)

While pro bono providers may find the limited time commitments of clinics ('one afternoon a week') appealing, there is also a risk that, if poorly targeted and not integrated with other services, the clinic may do little to address unmet need, especially for clients with complex needs that span several areas of law. This problem can be compounded if pro bono lawyers are not appropriately trained or experienced to deliver appropriate services for the target group (including communication and interview skills).

The issue-specific nature of clinics can also limit their ability to deliver services in every area of law. The variety of CLCs in the community cover a range of issues, but their ability to attract pro bono partnerships may vary depending on the attractiveness (or profile) of a particular area of law. In such an environment, some CLCs may struggle to attract partnerships and must 'market' themselves to make their work seem appealing in order to attract firms to particular clinics or projects (NPBRC 2013d).

From a systemic perspective, partnerships (and clinics) may represent an issue-specific and relatively 'patchwork' approach to addressing broad legal need compared to a more centralised clearing house model. However, partnerships also offer the opportunity for experimentation, and a degree of competition, as particular causes or nonprofit groups may seek to make themselves more attractive as pro bono partners to firms (Cummings and Sandefur 2013). Over time, such experimentation could lead to improvements in both the amount, and effectiveness, of pro bono delivered.

CLCs also face incentives to improve their approaches to pro bono, since those that prove to be more effective in coordinating and delivering services are more likely to attract more partnerships from law firms.

Removing barriers to individuals

In other cases, government may need to intervene to prompt improvements by removing regulatory impediments to offering pro bono services.

As they may not be involved with 'front-line' legal service delivery, not all in-house lawyers hold practising certificates or professional indemnity insurance. This can present a barrier if they are prevented or discouraged from providing pro bono services.

Professional indemnity insurance has been an issue for some time and there has already been reform in this area through a scheme operated by the NPBRC:

> Previously in-house lawyers were limited to volunteering at CLCs where their work could be supervised by the CLC's principal solicitor and covered by the professional indemnity insurance held by the Centre …
>
> Lawyers working in-house or in government roles can now obtain professional indemnity insurance for pro bono work free of charge through the insurance scheme of the National Pro Bono Resource Centre (NPBRC). The [Policy] is underwritten by LawCover and is held by the NPBRC. (2013d, p. 84)

However, the NPBRC scheme does not operate in all jurisdictions. For example, in Western Australia, volunteer lawyers must obtain discounted insurance from the local professional indemnity insurance provider, Law Mutual.

In some jurisdictions, limitations on certain classes of practising certificates also hinder volunteering:

> … Restricted (Corporate Lawyer) practicing certificates [issued] by the Law Society of the Northern Territory, entitle the holder to provide legal advice only to their employer. Similar restrictions exist in corporate and government practicing certificates in some other Australian jurisdictions (for example Tasmania). (NPBRC, sub. 73, p. 26)

The Australian Corporate Lawyers Association also noted the impacts of such limitations:

> … in the Northern Territory and Tasmania, in-house counsel are not entitled to be the solicitor on record for any pro bono matter. In other jurisdictions in-house legal teams are being prevented from starting pro bono projects because of practising certificate restrictions in their jurisdiction. (sub. DR263, p. 6)

A number of jurisdictions have made changes to practising certificates to facilitate volunteering, but as the NPBRC (2013d, p. 84) noted, 'the position still varies from state to state'. For example, under section 47 of the *Legal Profession Uniform Law Application Act 2014* (which applies in both Victoria and New South Wales), holders of all classes of practising certificates (including in-house and government lawyers) are authorised to volunteer on a pro bono basis.[36]

However, this only covers those lawyers with (any class of) current, paid, practising certificates, not those with legal training who do not hold a certificate. While fees for an unrestricted practising certificate may be commensurate with earnings for a practising lawyer, for those on career break or recently retired, obtaining such a certificate can be a real financial barrier:

> … the cost of an unrestricted practicing certificate in several Australian jurisdictions exceeds $1,000. For individual lawyers wanting to provide pro bono legal assistance, this cost may be

[36] The policy is currently approved under the relevant regulation in Queensland, New South Wales and Victoria as appropriate insurance cover to qualify for relevant practising certificates (following changes in 2009 and 2012 to remove restrictions on certain classes of practising certificates) (NPBRC 2013b).

prohibitive and can act as a disincentive to participation in pro bono service provision.[37] (NPBRC, sub. 73, p. 26)

The NSW Young Lawyers (sub. 79, p. 28) suggested that one way to increase pro bono services could be to make 'free limited practising certificates available for retired or career break lawyers to provide exclusively pro bono services'.

Volunteer practising certificates already exist in some jurisdictions. For example, the Queensland Law Society already has a no cost volunteer practising certificate for retired and career break solicitors working through a CLC (QPILCH, sub. 58), or if the pro bono service is approved by the NPBRC (who can also provide professional indemnity insurance).[38] The NPBRC will approve work if 'the work falls within the definition of pro bono used by the Law Council of Australia and is to be undertaken without fee to the client' (NPBRC 2013g).

In examining these schemes, the NPBRC remarked that the Queensland system was 'the one that best facilitates [pro bono] … and is the most administratively straightforward' (NPBRC 2013g).

There is evidence that where volunteer certificates are available, individuals are utilising them. The NPBRC submitted (sub. DR199, p. 11) that in Victoria, volunteer certificates issued went from 80 in 2006-07 to 277 in 2012-13. Similarly, in Queensland the number of volunteer certificates went from 17 in 2007-08 to 82 in 2012-13.

To involve those already working as in-house lawyers, the Commission considers that, at a minimum, other jurisdictions should adopt the approach in Victoria and New South Wales, and allow holders of all classes of practising certificates to work on a volunteer basis.

For those without any class of current practising certificate, a free volunteer practising certificate would tap into a section of the legal community that, while not large, could provide some additional pro bono services. Importantly, such free certificates would also provide a quality control mechanism, for example, by requiring continuing professional development (CPD) and, in some cases, supervision requirements — an approach supported by the NPBRC (sub. DR199, p. 12). Including CPD requirements addresses the concerns of some participants, such as the Law Society of New South Wales (trans., p. 131) that retired practitioners may be 'out of touch' with current laws and may not provide the best service to the disadvantaged. Notably, CPD requirements are not necessarily expensive to meet, and can be done in a number of ways:

> … there is quite a lot of free CPD available. There's lots of ways that you can get your CPD points without having to spend that much money. You can write an article for a magazine. Even that will give you CPD points. (NPBRC, trans., p. 156)

[37] The cost of an unrestricted practising certificate is $1498 in the Northern Territory, $1000 in Western Australia, $1176 in the Australian Capital Territory and $1100 in Tasmania (NPBRC, sub. 73)

[38] *Queensland Law Society Administration Rule 2005*, Rules 15A and 15B.

Indeed, as QPILCH (sub. DR247, p. 18) noted, some states in the United States recognise pro bono work itself for the purposes of CPD.

Of the existing arrangements for volunteer practising certificates, the Victorian scheme appears to facilitate pro bono provision only through CLCs, whereas the Queensland scheme extends this to a broader range of pro bono projects, provided they are approved by the NPBRC. Given that it further extends the opportunities for pro bono provision, while still maintaining a degree of oversight, the Commission considers that the Queensland system provides the best model for jurisdictions to adopt. In relation to fidelity and indemnity insurance, the Commission notes that CLCs' fidelity insurance generally covers volunteers, and the professional indemnity insurance cover provided by the NPBRC appears to be appropriate (though the Western Australian government would need to remove barriers to its operation there).

To facilitate volunteer provision by recently retired practitioners, free certificates should be granted with minimal administrative requirements where the applicant is admitted (or eligible for admission) and their practising certificate has expired within the last three years, provided they have had no disciplinary conditions or sanctions placed on their certificate in that time.

RECOMMENDATION 23.1

Where they have not already done so, State and Territory Governments should allow holders of all classes of practising certificates to work on a volunteer basis.

Further, those State and Territory Governments that have not done so 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. These certificates should include requirements for continuing professional development and, where appropriate, be able to impose conditions of supervision on the pro bono service provider.

- 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.

Perceived and real conflicts of interest need to be better managed

Conflicts of interest, where they do arise, are not always intractable and various strategies can be implemented to manage them, including having clear policies in place to identify and manage conflicts:

> While the risk of conflicts exists for all pro bono work and needs to be assessed on a case by case basis, setting up structures and having clear policies in place will make potential conflicts

> easier to identify and manage. … [for example] When an appointment is taken by one of the pro bono volunteers they phone the firm from the outreach site to check for conflict. If there is a conflict they give the person a brochure on the issue and refer them to three other solicitors. (NPBRC 2013d, p. 46)

Upfront policies, explicitly agreed upon by both the CLC/referral body and the pro bono provider, are important for pro bono work involving in-house lawyers, particularly those from companies that may be the subject of some of the pro bono actions:

> The Telstra lawyers don't take on any matters that could potentially involve telecommunications companies (for example, a young person disputing their mobile phone bill) but they may give information or assistance to another lawyer … eg about the process of complaining to the Telecommunications Industry Ombudsman. (NPBRC 2013d, p. 89)

Although some conflicts may prove to be unavoidable, a clear policy (including examples of what is and is not a conflict for the relevant lawyers) can help to remove uncertainty about matters. Given many pro bono providers would prefer to err on the side of caution, minimising these 'grey areas' could increase the provision of pro bono services.

In addition to internal policies from firms and facilitators, another way to avoid or contain a conflict of interest is to obtain consent from the affected parties, as one pro bono coordinator remarked:

> Banks and utility companies are often happy for representation to be provided to clients who would otherwise find it difficult to articulate the issues and provide their consent for our firm to act. (NPBRC 2013d, p. 46)

This may appear to be a simple solution, however, coordination issues would likely prevent every pro bono provider from checking with every company on every matter. Issues as simple as finding the right contact, knowing what their standpoint has been in the past, and identifying any other affected agencies, companies or parties may make the task significantly harder than it first appears.

Potential conflicts of interest can also arise for firms taking on pro bono work where governments are the counter-parties. While measures such as the Aspirational Target are intended to provide an incentive for increased pro bono work, there is a risk that governments can send 'mixed signals', particularly where the government is the counter-party for a pro bono client. In contemplating such situations, s. 11.3 of the *Commonwealth Legal Services Direction 2005* requires that, unless there is a conflict of interest:

> The Chief Executive of an FMA [Financial Management and Accountability Act] agency is responsible for ensuring that the agency, when selecting and retaining legal services providers, does not adversely discriminate against legal services providers that have acted, or may act, pro bono for clients in legal proceedings against the Commonwealth or its agencies.

Despite this, the Commission has heard that a perception remains that firms will not be favoured if they take pro bono actions against government departments or agencies. This may not be true (and is difficult to substantiate), but nonetheless, perception matters.

Indeed, perceptions alone could discourage some firms or lawyers from making themselves available for certain classes of pro bono cases.

One way to alleviate these problems would be to provide a formal means of countering perceptions with actual approval (or, if the conflict is genuine and unavoidable, refusal) based on engagement with the affected (government) parties. As such, the Commission considers there is merit in exploring a concept of a pro bono 'coordinator'.

Such a 'coordinator' model operates within the Victorian Government. As with the Australian Government, the Victorian Government incorporates a pro bono target into their process for tendering for government legal services. Where there is a potential conflict of interest, firms contact a nominated officer within the Department of Justice (Vic DoJ 2010) who will relay the concern in a generalised form (so as not to unnecessarily expose the potential pro bono client) to the relevant agency or department. The relevant agency then determines whether any conflict would prevent pro bono delivery. The coordination role performed by the Department of Justice provides important 'distance' for the firms, allows the nature of the concern to be relayed to the relevant agency in an anonymous form (preventing any risk of the agency 'retaliating' against the potential pro bono client), and fit naturally with the centralised tender arrangements for government legal services.

Adopting, and publicly announcing, such a coordinator would go at least some way to dispelling adverse perceptions, and potentially increase pro bono services. A central coordinator with a record of actions allowed, or those not allowed due to direct conflicts, could also provide a repository for information for prospective pro bono providers to examine before considering a case.

Following the draft report, there was broad support for this recommendation, with some participants noting that the Victorian system was 'reasonably effective' (Allens, sub. DR232, p. 5), and that it had 'facilitated an increase in the amount of pro bono by removing a barrier' (NPBRC sub. DR199, p. 12). The NPBRC also noted that the coordinator role would need to be tailored to fit the circumstances of each jurisdiction, including 'factors such as the number and size of government departments' (sub. DR199, p. 12).

The position of a coordinator could also be strengthened by governments explicitly adopting a pro bono policy, based on s. 11.3 of the Commonwealth Legal Services Direction as noted above. As the NPBRC (sub. DR199) noted, such a policy statement would work in concert with a pro bono coordinator to alleviate law firms' conflict of interest concerns relating to pro bono work.

RECOMMENDATION 23.2

The Australian Government, and the remaining State and Territory Governments, 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.

- Where they have not already, State and Territory Governments should also adopt provisions in their legal tendering or panel arrangements which state that firms undertaking pro bono against government will not be discriminated against in allocating government legal work. Such provisions should be based on s. 11.3 of the *Commonwealth Legal Services Direction 2005*.

In the draft report, the Commission sought views on the potential to apply a coordinator role to certain industry associations, albeit noting that the diffuse nature of industry might limit the effectiveness of such a role. Despite the potential to ease concerns from law firms relating to conflicts of interest, several participants (such as the Pro Bono practices of Allens, Ashurst and Clayton Utz, sub. DR224, and the NPBRC, sub. DR199) confirmed the Commission's concerns relating to the practicality of implementing such arrangements.

Core to these concerns was that, despite their membership, individual companies have a more 'separate' relationship with their industry associations — they are not part of a single entity, but remain individual legal actors. As such, industry associations do not have the same ability as government agencies to act on behalf of their members. As Allens (sub. DR232) observed, approval from an industry association, rather than the client themselves, would be insufficient to alleviate a law firm's conflict of interest concerns. Further concerns also arise in relation to breaching confidentiality of contracts or otherwise interfering with the relationship between companies and their law firms.

Instead of a coordinator role, participants suggested that industries could move to alleviate conflict of interest concerns through adoption of policies or 'best practices':

> … in matters which raise a potential 'commercial conflict', the Firms support the development of best practice protocols by industry which permit the conduct of identified pro bono work by law firm lawyers in circumstances which do not raise a direct legal conflict. This could be done through the support of industry groups, the Australian Corporate Lawyers Association (the peak national association representing the interests of corporation and government in-house lawyers) and peak pro bono bodies such as Justice Connect and the NPBRC. (Pro Bono practices of Allens, Ashurst and Clayton Utz, sub. DR224, p. 14)

> One additional measure … is to encourage relevant industries to adopt policies, similar to that of the Commonwealth and Victorian Governments, making it clear that in their process of selecting and retaining legal services providers, those that have acted pro bono for clients in legal proceedings against them will not be adversely discriminated against … (NPBRC, sub. DR199, p. 14)

The Commission agrees, and considers that industry associations in areas of frequent commercial dispute (such as banking, finance, telecommunications and utilities) should develop such policies.

Aspirational pro bono targets can help

The Australian and Victorian Governments both include pro bono aspirational targets as part of a requirement for firms to tender for government legal work (under the Commonwealth's Legal Services Multi-Use List (LSMUL) and the Victorian Government's Legal Services Panel).

The nature and form of the targets differ with the Victorian scheme relying on a target based on the percentage of hours billed in the government contract (requiring at least 5 or up to 15 per cent), while the Australian Government requires only that firms commit to pro bono work, either becoming a signatory to the National Pro Bono Aspirational Target (of 35 hours per lawyer per year), or by nominating a target value of their own. Parties must undertake to use their 'best endeavours' to meet their nominated targets, and report to the Australian Government within 30 days of the end of a financial year (which the Australian Government publishes as part of its Government Legal Services Expenditure Report (NPBRC 2013e)).

Australian Government arrangements have changed. As of 1 July 2014, firms with more than 50 lawyers providing services to the Australian Government will be required to be signatories to the Aspirational Target (and can no longer nominate their own target).

The Aspirational Target is generally regarded as being effective in increasing the amount of pro bono services provided. Results from the NPBRC's survey of firms with 50 or more lawyers show that Aspirational Target signatories provided higher average hours, and had higher participation rates (numbers of lawyers within the firm who provided pro bono work) (table 23.2).

Most larger firms (over 70 per cent of respondents) also indicated that the pro bono conditions in the Australian and Victorian Government tender arrangements were 'useful in encouraging their firm to undertake pro bono legal work' (NPBRC 2013a, p. 6).

Table 23.2 **Pro bono performance of signatories and non-signatories to the National Pro Bono Aspirational Target**
2011-12

	Aspirational Target signatories	*Non-signatories*	*All survey respondents*
Pro bono hours per lawyer	36.6 (from 20 firms)	20.1 (from 12 firms)	29.9 (from 32 firms)
Average participation rates [a]	59.3% (from 19 firms)	43% (from 12 firms)	53% (from 31 firms)
Average % of gross billable hours	2.9% (from 11 firms)	1.4% (from 7 firms)	2.3% (from 18 firms)

[a] 'Participation rate' refers to the percentage of lawyers at a firm undertaking at least one hour of pro bono legal work during the year.

Source: NPBRC (2013a).

But these results do not provide conclusive evidence that the Aspirational Target is encouraging additional pro bono work. As signing up to the Aspirational Target is voluntary, an element of self-selection is to be expected. That is, those firms who already have a good pro bono culture are more likely to sign up to such targets, making it difficult to ascribe causation for increased pro bono hours to the Aspirational Target itself, rather than any underlying pro bono culture in the relevant firms. (Though signing up to the Aspirational Target could affirm and publicise what might have previously been an unrecognised strength.)

The Attorney-General's Department felt that the Aspirational Target, combined with LSMUL had provided a positive incentive for pro bono:

> The department considers that the target has been very effective in encouraging pro bono work. Since its introduction in 2007, the number of lawyers undertaking pro bono work has trebled to over 8,000 lawyers nationally. In 2011-12, these lawyers undertook over 340,000 hours of pro bono work. …
>
> It should be noted that the relationship between the Target and the Legal Services Multi Use List has also been very effective in encouraging pro bono. (sub. 137, p. 41)

And, following the draft report, the Pro Bono practices of Allens, Ashurst and Clayton Utz submitted that the Aspirational Target:

> … has been a significant factor in the last six or seven years in really dramatically increasing the breadth of what's provided by law firms in the pro bono space. (trans., p. 875)

However, there is some question regarding the effectiveness of the tender arrangements as an incentive, given the level of awareness among larger firms. In 2012, 23 of the 36 respondents to the NPBRC's survey were on the Commonwealth LSMUL, but a further seven respondents did not know if they were. Similarly, in Victoria, 16 of 36 firms were on the Victorian Panel, and a further six respondents did not know if they were (NPBRC 2013a).

And while those firms that did comment on the tender arrangements generally did so in a favourable way, the extent of administrative compliance was an issue for some:

> … the process requires a substantial amount of administrative time … [and] appears to be designed to assist firms that have dedicated pro bono teams. … [Victorian] reporting requirements are extremely onerous – more so than [the] Commonwealth. (NPBRC 2013a, pp. 51–2)

Further, the NPBRC commented that although the incentive of increased access to government work may be effective in larger jurisdictions (or those jurisdictions where government is a larger 'player' in the market), it is not necessarily effective in smaller jurisdictions:

> South Australia is another example of a small jurisdiction with very few national firms. When JusticeNet conducted a review of its members two years ago, the motivation for firms to join seemed to be primarily about doing the right thing, followed by Corporate Social Responsibility and, to a smaller extent, keeping up with what other firms were doing in a smaller jurisdiction. … [The] Target and publicity for firms are not as significant for Adelaide firms. (NPBRC 2013d, p. 38)

A lack of government work can mean it is hard to provide sufficient incentive to meet a target. For example, JusticeNet SA (trans., p. 437) suggested that a relative lack of (Commonwealth and state) outsourced legal work in South Australia would limit the effectiveness of a target linked to government tenders.

While the inclusion of a target as part of government tender arrangements might not be appropriate for smaller jurisdictions, there remain some larger jurisdictions in Australia who do not have jurisdiction-specific pro bono targets and related tender arrangements.

Following the draft report, the NPBRC indicated to the Commission that New South Wales and Queensland 'have for quite some time been trying to work out their legal panel arrangements'(trans., p. 158) and that questions of applying a pro bono target are tied to these broader arrangements. Further, the Queensland Law Society noted that adopting a mandatory target may unduly impact on regional and rural firms:

> … given the spread of the practitioners across Queensland, and the fact that most firms in regional and rural Queensland are smaller firms, there are potentials for significant disadvantage in requiring those firms to on the one hand reach certain targets and its reporting requirements potentially, and undertaking and having free equal access to undertaking government tender work. (trans., p. 1101)

The extent to which small rural and regional firms seek to undertake government tender work is unclear.

However, as applied by the Australian Government, the only requirement for firms wishing to tender for government work is that they are *signatories* to the aspirational goal, not that they actually meet the goal. Further, any reporting requirements should not be implemented in a manner that is unduly onerous for providers (regardless of their size or location). At most, these burdens should consist of minimal additional record keeping in

tallying and verifying the number of hours of pro bono work. As discussed below, such data can also be used for public policy and academic analysis of trends in pro bono service provision (however, this should not excuse a disproportionate compliance burden).

Overall, the Aspirational Target has been beneficial in encouraging pro bono work. Accordingly, the Commission considers that, at least for firms seeking to tender for larger projects, the Queensland, New South Wales and Western Australian Governments should consider adopting the Aspirational Target for use in their tendering arrangements. Adopting the pre-existing National Pro Bono Aspirational Target (of 35 hours per year) would limit compliance burdens for national firms, and improve comparability across the country.

As noted above, targets are tied to arrangements for government to tender for legal work. The tender arrangements could be formulated with exceptions that allow for certain (small) contracts. These exceptions would mean that not all government work would require that firms be signatories to the target. For example, in Victoria, the target is only mandatory for government departments, while statutory agencies can use the panel arrangements on an opt-in basis. Further, the Victorian Government's *Regional Sourcing Policy* (2002) means that departments can engage (regional and rural) firms outside of the panel in relation to a regional or rural matter that is expected to cost less than $25 000. Finally, there is a broad exemption in the Victorian panel arrangements that allows for approval to use non-panel firms where, for example, panel firms are conflicted or do not possess the appropriate expertise. Such exception policies allow flexibility in the operation of a target to ensure that smaller firms can still access government work.

Regardless of the attractiveness of government work, for the smaller jurisdictions, and smaller firms in the large jurisdictions, signing up to the Aspirational Target can motivate additional pro bono work, as it provides:

> … a very clear statement that this is what good lawyers are expected to do, and this is … the quantity of work that meets the benchmark. … even in some of those other smaller jurisdictions, I don't think that it is more difficult, or that the lawyers in those jurisdictions are more different, that the concept of providing 35 hours is an unrealistic one for them to aspire to. … there is still that opportunity within a smaller jurisdiction, like South Australia, for the firms which see themselves as leaders to be able to say, 'We are nailing our colours to the mast. We are committed to this.' (Pro bono practices of Allens, Ashurst and Clayton Utz, trans., pp. 875–7)

Even if it is ultimately determined that targets may not be appropriate for all jurisdictions, as noted by the NPBRC (sub. DR199), Attorneys-General in all jurisdictions should encourage pro bono work by publicising its importance, and raising awareness of the resources available to practitioners wishing to undertake pro bono (including referral schemes, CLCs and the NPBRC itself).

Should targets be aspirational or mandatory?

The current Commonwealth Target is aspirational only. Even the Commonwealth's tender obligations only require signing up to the Aspirational Target, not actually delivering a certain level of pro bono services. This is consistent with the approach taken in other international jurisdictions. For example in the United States, the American Bar Association's Model Rules of Professional Conduct (rule 6.1) state that a lawyer 'should aspire to render at least 50 hours of pro bono public services per year'.

The Victorian target differs from the Commonwealth one. In force since 2002, the Victorian target requires firms that wish to contract for government work to commit to pro bono work of between 5 and 15 per cent of the value of total hours billed under the relevant contract, hence this target is ultimately expressed in dollars, rather than hours per lawyer per year. Also, the ability to nominate this target allows firms to tailor their pro bono delivery to suit their own capacity. So far, this target does not appear to be onerous, as the NPBRC noted '[m]ost firms nominate 15 per cent and many exceed it each year' (2013e).

The commitment under the Victorian target is enforceable, and in some circumstances firms can make a payment (to a pro bono service provider or to the Victorian Government) in lieu of the obligation. Firms can also deliver the obligation to pro bono providers in kind (for example, through the provision of equipment, information technology services, or use of premises), and in practice firms have also been allowed to 'make up' the commitment in a subsequent year (NPBRC 2013e). Allowing flexibility in how firms meet the target (through lawyers' time, in kind donations or payments) may improve the efficiency of pro bono delivery as firms are able to determine the methods that suit them best.

Some consider that a further option to increase pro bono services would be to make such requirements (and their delivery) strictly mandatory. However, mandatory pro bono has several drawbacks:

- Given the unpaid nature of the work, those with a genuine desire and interest are likely to be more involved and effective than those fulfilling an externally imposed obligation (Taylor 2013).
- Requiring mandatory pro bono efforts may not assist those that need it most, as lawyers may instead focus on where it is easiest to 'clock up the hours' or on pro bono efforts that could be parlayed into paid work.
- It is also possible that with greater weight placed on them, the administration and compliance costs of reporting requirements would increase.

The Commission notes that the flexibility inherent in the Victorian target means that it largely avoids the first two drawbacks. However the reporting and audit requirements needed to enforce the commitments do give rise to compliance costs. Further, measuring pro bono efforts in dollars may be a less accurate reflection of the amount of pro bono work done:

> Measuring pro bono performance in dollars can be misleading because it is difficult to standardise and track the method of costing, with the likelihood of different monetary values being placed on the same work. For example the same work undertaken by a small firm lawyer may be charged out at a lower rate than a large firm lawyer. If the work was done within a community legal centre or legal aid, the monetary value attributed to it would be different again (much lower). (NPBRC, sub. DR199, p. 17)

Overall, in order to better reflect 'work on the ground', and ensure relatively simple record keeping, targets adopted by governments should be expressed in hours (per lawyer). The Commission also considers that targets should remain aspirational to avoid any incentive for firms to simply 'clock up the hours'. These targets should remain voluntary in the sense that they are not levied on all firms in the market, but only on those who understand it is a condition of engaging in government work, and are willing and prepared to do so.

There has been substantial effort already undertaken to establish and operate the target in Victoria, with firms now accustomed to the system. Therefore, the Commission considers that the balance of compliance cost reductions against the transition costs required to move away from this scheme do not, at this stage, warrant Victoria changing the form of its target. If other large jurisdictions adopt the Aspirational Target, and firms in Victoria see a benefit from aligning the requirements, the Victorian government may wish to reconsider adopting the Aspirational Target at a later date.

RECOMMENDATION 23.3

The Queensland, New South Wales and Western Australian Governments should consider adopting the National Pro Bono Aspirational Target, tied to their legal panel arrangements.

- This target should remain aspirational, and be expressed in hours per lawyer. Reporting required for pro bono targets should be clear and simple.
- At the same time, appropriate arrangements should be put in place to ensure that firms located outside capital cities are not disadvantaged and are encouraged to provide pro bono services where practical for their local circumstances.
- All Attorneys-General should promote the value of pro bono work and provide information on resources available to assist lawyers wanting to undertake such work in their jurisdiction.

Limited disbursement funds are not a significant barrier to pro bono

Disbursements relate to costs incurred in the course of a legal action other than the fee for the lawyer themselves. For the purposes of pro bono matters, there are two categories of disbursements: *internal disbursements* (non-legal costs incurred within a law firm, such as photocopying) and *external disbursements* (incurred where the law firm engages third parties such as experts or barristers).

For pro bono matters, of the firms that took part in the NPBRC's survey of larger firms, most (83 per cent) met the cost of all internal disbursement themselves, with only 6 per cent applying to disbursement assistance schemes to cover internal costs.

External disbursements were less likely to be covered by the firm, and there was a higher rate (31 per cent) of applying to disbursement assistance schemes (NPBRC 2013a).

Of the barriers to pro bono represented by disbursements, expert witnesses (both medical and non-medical), and filing fees were regarded by the surveyed firms as the greatest, while internal disbursements and government fees were relatively minor (NPBRC 2013a). However, as noted above (section 23.3), disbursements did not feature as an important barrier to the provision of pro bono.

There are several government assistance schemes that providers can apply to offset the cost of disbursements in pro bono actions:

> There are currently nine different disbursement assistance schemes … at least one in each state and territory with the exception of the ACT, and a separate scheme for Commonwealth law matters. … only the NSW and Commonwealth disbursement assistance schemes … have been established specifically to fund disbursements in pro bono matters … (NPBRC, sub. 73, p. 28)

Responses to the NPBRC's survey of larger firms indicates that the schemes are neither widely used, nor universally praised:

> … the responses to the 2010 Survey indicated that many respondents were dissatisfied with the operation of some of these schemes.
>
> In the 2012 Survey, nine of the 36 firms (25%) had applied to a disbursement assistance scheme in the last two years. In 2010 seven firms (24%) had applied. (NPBRC 2013a, p. 47)

Further, those that did use the schemes complained that funding was limited and required some administration on behalf of applicants, including:

> … an application fee, or a condition that an application can only be made once the disbursement has been incurred. Other limitations include caps on the amount that can be recovered, means and merits tests, and conditions that limit assistance to cases where damages are likely to be recovered. This means that from the perspective of a pro bono provider, there can be no [certainty] … that any disbursement costs will be met [and] … obtaining funding for reimbursements of disbursements, if available at all, can be difficult and time consuming. (NPBRC, sub. 73, pp. 28–9)

The Commission understands the frustration on the part of service providers regarding the certainty of funding. However, in the context of limited funding for the assistance sector as a whole, a range of factors suggest that simply increasing funding for disbursement schemes is a relatively poor use of funds. These factors include the low importance of disbursements as a barrier, the ability for some firms to cover them (or for the expert witnesses to provide their services on a pro bono basis), and the apparently limited use of the existing schemes.

Instead the Commission considers that certainty for pro bono lawyers can be best improved by ensuring that conditions for application to the funds are as objective and transparent as possible (so applicants can reasonably predict the outcome), and that the application process is not unnecessarily time consuming. In addition, in order to save the time and effort involved in completing and assessing applications, the Commission has recommended automatic relief for court and tribunal fees to clients of approved pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief (chapter 16).

Promoting a pro bono culture would be beneficial

In the short term, pro bono culture rests with the attitudes of firms and individuals (particularly the leadership within firms). In this context, existing advocates such as governments, coordinators at large firms, the NPBRC, law societies and bar associations, all have a continued role to play in identifying, evaluating and publicising ways to improve pro bono culture. CLCs and clearing houses can also help build a supportive pro bono culture by providing information and training to volunteers, explaining the philosophy of the service, and providing volunteers with a rewarding experience so that they too become advocates for pro bono services.

In the long term, further ingraining pro bono into the legal profession begins with legal education and the involvement of students. Students are already an important part of the resources available (in terms of hours available) for pro bono services — a 2012 survey reported that 55 per cent of all individual volunteering hours came from students (NPBRC 2013d). Some argue that increased student involvement has ongoing benefits:

> Law graduates who are actively involved in *pro bono* work at university are more likely to enter legal practice with a personal commitment to undertake *pro bono* work as part of their professional obligations as a solicitor or barrister. Although these cultural practices are difficult to quantify in economic terms, it is clearly a phenomenon which, in the Centre's view, is likely to generate costs savings across the board as it leads to greater numbers of legal professionals actively engaged in *pro bono* work. (University of Queensland Pro Bono Centre, sub. 74, p. 5)

Current pro bono opportunities for students include clinics initiated through universities, for example the University of Queensland Pro Bono Centre (sub. 74, pp. 2–3). Students can also gain experience through CLCs and clearing houses, the Northern Suburbs CLC in Perth has employed a number of lawyers that had gained relevant experience by completing placements at the agency during their university studies (trans., p. 505).

In addition to long-term cultural change and the promotion of a social justice ethos, pro bono involvement during their education can provide students with additional skills that could benefit both practitioners and clients, including 'legal and work environment skills, particularly interpersonal skills required to deal with colleagues and clients in a legal professional environment' (NPBRC 2013d, p. 99).

That said, it is important that the programs and roles offered for student involvement are carefully structured to ensure that both CLCs and students benefit, and that any long-term benefits are preserved by offering (at least some component of) meaningful and interesting work. This, and other, changes to the content of legal education are discussed in chapter 7.

Governments and pro bono providers need to understand what works

Both pro bono and government funded legal assistance providers share a common aim — to provide a good outcome for (generally) disadvantaged clients. Despite these good intentions, there appears to be little analysis of programs to highlight the best way to use limited pro bono resources for the benefit of those in need:

> No matter what drives the provision of pro bono legal assistance, having more information about the impact of pro bono projects and programs would help to inform decisions about where pro bono resources should be allocated. However there is currently little evaluation of the impact of pro bono programs/projects on addressing unmet legal need. (NPBRC 2013d, p. 36)

As noted above, both CLCs and clearing houses seek to address the legal needs of the disadvantaged and attract government funding to do so. It is therefore important to understand the relative costs (and, where possible, benefits) of these and other approaches to addressing legal need. At an extreme, this could mean that the important social aims of pro bono work could be achieved in other ways:

> If expanding sources of legal aid is the goal, researchers should focus on gathering evidence about whether pro bono is, in fact, an effective way to achieve this. … there is little evidence on the questions of whether pro bono services are effective, whether lawyer charity is a cheaper way to provide them (because it does cost money to do pro bono), or whether it would in fact be more efficient and effective if firms and attorneys stopped giving their time and instead donated money to the organizations already specializing in these clients and causes. (Cummings and Sandefur 2013, p. 91)

In addition to finding the best way to help those who experience disadvantage, clarifying how a project will be evaluated up front can also provide benefits through the course of the project itself (as well as lessons for other projects):

> … early planning for how a project will be evaluated later can also help to crystallise the shared mission and objectives of the project partners. … Evaluation also allows providers to reflect on their work and identify what can be improved in the future to better address unmet legal need. (NPBRC 2013d, p. 48)

Despite the benefits that can be gained from identifying best (and worst) practices, some in the sector have argued that pro bono services may not be suited to 'statistical' analysis as 'providing legal services to vulnerable and disadvantaged people has value in itself' (NPBRC 2013d, p. 48).

Measurement difficulties exist in a range of other areas, but these difficulties do not exempt them from careful evaluation. While it may be difficult to apply a numerical value to a range of outcomes, they can at least be categorised. Where like outcomes exist, the costs of different methods of achieving them can then be compared, allowing an evaluation of their cost-effectiveness. Indeed, efforts to measure the impact and effectiveness of pro bono are already underway — for example, Justice Connect (in New South Wales and Victoria) highlighted its current evaluation framework:

> Justice Connect's work also contributes to broad social goals of access to justice and a fairer society. These goals are evaluated using a 'Theory of Change' model of evaluation and assessment. By setting measures to monitor the programs, Justice Connect is better able to understand how its programs work and where improvements can be made. The Theory of Change also enables meaningful reporting on program outcomes. (sub. 104, p. 11)

Justice Connect's Victorian predecessor, PILCH, has also attempted to evaluate the economic contribution of its 'PilchConnect' program (which assisted NFP organisations) by examining the value of the pro bono services rendered, the impact they had on the capacity of the NFP and broader social impacts such as savings to the justice system and reduced social services costs (Deloitte Access Economics 2011). Commentators in the United States have also considered means to obtain better data on pro bono (box 23.4).

As others in the sector have acknowledged, in the presence of limited funding, evaluation is an important means of prioritising services, meaning that 'legal assistance providers will increasingly be required to demonstrate the impact of their projects to justify a continuation of support … ' (NPBRC 2013d, p. 48)

Obtaining a better understanding of how funding can be most effectively devoted to gain the best outcome for disadvantaged individuals (be it through Legal Aid Commissions, direct services from CLCs, or other means to facilitate pro bono) is vital to improving overall outcomes in the long term. As such, the Commission considers that, where government funding is provided, there should be a requirement that program evaluations are conducted.

After the draft report, there was broad support for both the need for improved evaluation, and for making government funding contingent upon evaluation of pro bono services. While some participants, such as the NPBRC (sub. DR199), pointed to the continued difficulty in conducting accurate evaluations, they also acknowledged the potential benefits:

> The Centre is not aware of any existing social impact metrics for pro bono legal work that can be immediately adopted. … While it may remain difficult to measure whether stated goals are being met, the Centre agrees that is a worthwhile pursuit. At the very least, the evaluation frameworks that need to be put in place in an attempt to measure them may nevertheless be a useful planning tool in themselves that at least provide a framework for: defining objectives, outcomes, outputs and inputs; measuring performance against these; and setting priorities. (NPBRC, sub. DR199, p. 20)

Box 23.4 Potential ways to improve pro bono data

Cummings and Sandefur (2013) considered several methods for improving pro bono data, including:

Standardised data collection about the work pro bono lawyers do

This involves tracking cases by area of law (such as housing or immigration), type of service provided (advice, completing transactions, representation) and categorised outcomes (settlement, success at court, avoided penalties). While much of this information is already collected for some pro bono services in the NPBRC's surveys of large firms, a broader application would provide a richer understanding. These categories would be of most benefit if they were aligned with those used by legal aid commissions and CLCs more broadly.

Standardised client and lawyer satisfaction evaluations

Pro bono clients could complete standardised surveys relating to their satisfaction with their pro bono lawyer. This would include aspects such as the quality and frequency of lawyer communication, the lawyer's responsiveness to client concerns and input and satisfaction with outcomes. While such surveys may be inherently subjective, they would not be used to identify individual lawyers. Instead the aggregate results may point to systemic issues where support and training could usefully be targeted.

Enhanced cost tracking

The cost of undertaking pro bono cases could be collected in a uniform fashion. This could include the time spent on a case by the pro bono lawyers and support staff, internal organisational costs assigned to each matter and referral or partner agency time and costs (in training, organising and supporting pro bono activities).

Social impact metrics

Defining objectives, outcomes, and the contribution made by pro bono towards them, is a complex issue. However, there are established metrics such as the 'social return on investment', which examine additional revenues or avoided costs to government. Broader measures require clearly identified and prioritised objectives, as well as ways of measuring whether they are met. The metrics used to evaluate PilchConnect (see text) offer another example of ways to assess social impact.

Indeed, the Commission considers that it would be worth developing a standardised evaluation tool for use by pro bono providers. A body such as a referral scheme (Justice Connect or QPILCH for example) or the NPBRC could be funded to coordinate the development of such an evaluation tool, which could then be disseminated through referral schemes, CLCs and, later, large firms that are signatories to the Aspirational Target.

RECOMMENDATION 23.4

The provision of public funding (including from the Australian, State and Territory Governments, and other sources such as Public Purpose Funds) to pro bono service providers should be contingent upon robust evaluation of the services provided. This evaluation should be conducted as part of the periodic review of broader legal assistance outcomes and resourcing.

A further consideration is that recording, collating, reporting and using data is not a costless activity. In other areas, there are examples of onerous reporting requirements for data that is of either limited use, or difficult to use and compare with other sources (chapter 24). Indeed excessive reporting requirements could displace work done directly to assist the disadvantaged. As such, in implementing improvements to data collection, careful consideration needs to be given to ways to minimise the cost of data (such as 'piggybacking' off existing collections or methods) while maximising its usefulness.

In this light the Commission notes the efforts of the Queensland Law Society (sub. DR267) to improve quantification of pro bono services by introducing a request for feedback on the amount of pro bono work undertaken by practitioners when they renew their practising certificates. This represents a minimal additional cost on a form that practitioners are already required to submit. The Commission considers that this approach could usefully be adopted in other jurisdictions.

24 Family law

Key points

- Family disputes involve relationship problems, which can become legal problems — many arise from complicated circumstances involving family violence, mental health and substance abuse.
- More serious family disputes can have lasting consequences for the individuals involved and their children. Providing appropriate government-funded services to resolve such disputes fairly and as quickly as possible benefits both the individuals involved and society.
- Considerable government funds are directed towards the family law system:
  - alternatives to formal legal processes for separating families (funded through the Commonwealth Family Support Program) cost approximately $153 million in 2012-13
  - a large proportion of Commonwealth legal assistance funding is directed to family law matters. In 2012-13, around two-thirds of funding for casework (across all four providers) was spent on family law matters, equivalent to over $220 million
  - the family law courts operated at a combined cost of around $173 million in 2012-13.
- The family law system has undergone considerable reform over the past decade to bring about a 'cultural shift' in the management of parental separation away from litigation towards co-operative parenting. Many family disputes are resolved with minimal assistance.
- However, a significant minority of family law disputes — particularly those complicated by family violence — continue to challenge the family law system. A range of reforms will increase access to justice in this area, including:
  - increasing the availability of appropriate family dispute resolution for these matters
  - better aligning the means test used by legal aid commissions with that of other measures of disadvantage (chapter 21) to increase coverage of family law matters involving family violence
  - improving procedural protections for victims of family violence in family law proceedings
  - examination by governments of options for jurisdictional change to address the problems caused by the constitutional division of jurisdiction in the areas of family law, child protection and family violence.
- Access to affordable and proportionate advice and dispute resolution services for low value family law property disputes is also a problem. Reforms canvassed elsewhere in this report will assist, including those supporting greater unbundling of legal services (chapter 19), better information for consumers of legal services (chapter 6), and limited licences for family law practitioners (chapter 7).
- However, additional reforms are warranted. In particular, the Australian Government should review the *Family Law Act 1975* (Cth) with a view to clarifying how property will be distributed on separation, and introduce requirements for parties to attend family dispute resolution prior to commencing a family law property matter in court.

Family law represents a significant part of the civil justice system and considerable resources are devoted to resolving family disputes. But the family law system is complex and fragmented, with responsibilities for different parts of the system shared between jurisdictions and service providers. Reforms to make the system more accessible are needed to improve resolution pathways and outcomes for families.

This chapter examines the nature of family law disputes and the various components that make up the family law system (sections 24.1 and 24.2 respectively). The factors that limit the accessibility and effectiveness of particular elements of the system are then explored, along with options for their reform (section 24.3).

24.1 The nature of family disputes

Family disputes arise from problems and events in relationships and can have a number of dimensions. In the context of separation, disputes may relate to issues involving the division of assets, parenting arrangements and child support.

Many family disputes arise from complicated circumstances

While family disputes arise from people making choices about their relationships, these choices are often complicated by family violence, mental health and substance abuse issues. Research indicates that significant proportions of family disputes are affected by these issues (box 24.1).

Parties seeking to resolve their disputes can also experience financial disadvantage, which is both a predictor and consequence of relationship breakdown. Recipients of government income support payments have been found to be more than twice as likely to separate as non-recipients of income support (Bradbury and Norris 2005). A 2012 survey of recently separated parents found that 'financial difficulties had been experienced by more than two-thirds (69 per cent) of all parents since separating' (De Maio et al. 2012, p. 9).

Relationship problems are also strongly correlated with the onset or continuation of deep and persistent disadvantage (McLachlan, Gilfillan and Gordon 2013). The Australian Social Inclusion Board (2011) highlighted family breakdown as a trigger for disadvantage, and a means by which it can become further entrenched. The effects appear to be particularly acute for single parent families, who are especially prone to the most severe forms of disadvantage.

The presence of complicating factors and/or financial disadvantage influence the appropriate choice of dispute resolution options.

Box 24.1 Factors that complicate family disputes

Family disputes are correlated with family violence, mental health and substance abuse issues. An evaluation into the impact of the 2006 family law reforms found that half of the mothers and around one-third of the fathers surveyed reported mental health, drugs or alcohol as issues in the separation (Kaspiew et al. 2009). One in four mothers and about one in six fathers reported that the other party had hurt them physically prior to separation (Kaspiew et al. 2009).

In a more recent survey, over half of parents reported that the other parent had directed emotional abuse towards them and one in five respondents reported that physical violence was experienced before or during separation (De Maio et al. 2012).

Participants in this inquiry have also raised the high prevalence of family violence among family law service users as an issue:

> The centre's core area work is family law and approximately half of the women who have contact with us are either in the midst of experiencing family violence or who have recently experienced family violence. So it's a high proportion of the clients that we deal with (Women's Legal Centre (ACT) trans., p. 5).
>
> Through the intake and assessment sessions, family dispute resolution practitioners have estimated that around 75 per cent of FRC [Family Relationship Centres] clients across our outreach region have been exposed to family violence, with many women having experienced significant levels of physical violence, including strangulation, kicking, punching and rape. Other forms of violence reported include emotional and financial abuse. Often children are involved in the violence, either directly or as witnesses to the violence. Many women are reluctant to acknowledge violence or abuse or report it. (Family Relationship Centre Port Augusta, sub. DR211, p. 6)

The potential for serious harm warrants government intervention

Family disputes span a continuum of potential consequences for those affected. At the lower end of the scale there are relatively minor disputes — these have few long-term detrimental impacts on the parties involved and the majority are resolved relatively quickly and without great expense. Ensuring that these disputes are appropriately and efficiently resolved is important to reduce the potential for escalation and cost to the parties. Resource pressures throughout the civil legal system mean that users of services should be expected to contribute to the costs of resolving such disputes where they have the capacity to pay.

More serious family disputes have the potential to have lasting consequences for the individuals involved and their children. The financial disadvantage experienced by many people with family disputes means that they would not generally be able to afford a private resolution service. Governments have an important role to protect vulnerable and disadvantaged citizens and help them to assert their legal rights.

Providing appropriate government-funded services to resolve serious family disputes fairly and as quickly as possible can allow parties to move on with their lives. Not only will the benefits of resolution accrue to the individuals involved but, in many cases, society will benefit from reduced welfare expenditure if early intervention in family disputes reduces the need for associated complex and costly social services.

24.2 What does the family law system look like?

Family disputes span both federal and state and territory jurisdictions. Divorce and separation, post-separation parenting arrangements, division of assets, and payment of child support are governed by federal law. Guardianship, care and protection matters and responses to family violence come primarily under state and territory laws.

Across the Commonwealth and the states and territories there a range of government funded and private organisations and individuals delivering both non-legal and legal services. Key service delivery providers in the family law system include:

- organisations funded under the Commonwealth Family Support Program (FSP) (box 24.2), which deliver services including counselling, family dispute resolution, children's contact services, and relationship and parenting education services
- private family dispute resolution practitioners
- legal assistance services (for example, legal aid commissions (LACs), community legal centres (CLCs) including those that specialise in women's and children's issues, Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Family Violence Prevention Legal Services (FVPLS))
- private legal practitioners practicing family law, and
- courts (including the Family Court, Federal Circuit Court, Family Court of Western Australia, state and territory magistrates courts).

Box 24.2 Family Support Program

The Family Support Program is a Commonwealth government program that provides early intervention and prevention support for children and families in Australia. The program comprises two streams:

- the *Family and Children's Services* stream, which aims to improve family functioning, safety and child wellbeing and development with a particular focus on vulnerable and disadvantaged families
- the *Family Law Services* stream, which provides alternatives to formal legal processes for families who are separated, separating or in dispute, to improve their relationships in the best interests of children.

The Family Law Services stream is funded through the Attorney-General's Department. Total funding in 2012-13 was $153 million across 69 organisations. Total fees of $2.8 million were charged by service providers funded under this stream in 2011-12.

Sources: ACG (2014a); FaHCSIA (2012).

There are a range of other Commonwealth bodies that form part of the broader family law system. These include:

- Centrelink (with its range of income and personal support measures)

- the Child Support Agency (for assessment of child support liability and collection and disbursement of child support)
- the Social Security Appeals Tribunal and Administrative Appeals Tribunal (for review of income and child support decisions).

Entry points to the system — information, advice and referral

There are a wide variety of entry points to the family law system and a range of information and advice services to help separating families. These appear relatively accessible in terms of geographic access, ease of use, timeliness and cost. Many services are funded by the Commonwealth Attorney-General's Department through the family law services stream of the FSP, including:

- Family Relationships Advice Line — a free national telephone service which has two components:
  - Information and advice — provides information and advice on family relationship issues and referrals to appropriate services if required (the advice line received 61 514 calls between 1 July 2013 and 30 June 2014) (AGD, pers. comm., 1 September 2014)
  - Legal Advice Service – provides families with simple legal advice and information on referral (the legal advice line fielded 12 601 calls between 1 July 2013 and 30 June 2014) (AGD, pers. comm., 1 September 2014).
- Family Relationships Online — a website that provides families with access to information about family relationship issues and informs families about a range of services that can assist them to manage relationship issues, including agreeing on appropriate arrangements for children after parents separate.
- Family Relationship Centres (FRCs) — a national network of 65 centres operated by community-based organisations, which are intended to provide a first point of contact for separating parents and effectively operate as a 'gateway' to the family law system. They assist separating parents to focus on their children's needs and to agree on workable parenting arrangements outside the court system through providing information, support, referral and family dispute resolution services.

Information, education and legal advice and minor assistance services are also provided by legal assistance providers such as the LACs and CLCs (chapters 20 and 21). For example, LACs offer free telephone-based legal advice services. Some LACs have also developed supporting resources, such as a video series 'When Separating', which is available online through YouTube and presents a real-life scenario to guide separating couples through legal and parenting issues in the early stages of separation. Both Centrelink and the Child Support Agency also provide information about government benefits and child support.

For many families, early information and minor advice may be sufficient to help them resolve their disputes independently. For those who require more assistance, a range of referral arrangements exist in line with the 'no wrong door' policy (chapter 5).

Family dispute resolution services

Reflecting the need for a graduated and multidisciplinary response to resolving family disputes, Australia's family law system has undergone considerable reform over the past decade to bring about a 'cultural shift' in the management of parental separation 'away from litigation towards co-operative parenting'.[39] This shift has included greater reliance on informal mechanisms for resolving family disputes — with an emphasis on equipping separating parents to develop and implement parenting solutions in the immediate and longer terms.

Government has fortified this shift by requiring that parties attempt family dispute resolution (FDR) prior to seeking parenting orders from a court. FDR is a non-judicial process in which an accredited, independent practitioner helps people affected or likely to be affected, by separation or divorce to resolve some or all of their disputes. Before applying to a family law court for a parenting order, a person is required by law to have a certificate from an accredited FDR practitioner (a section 60I certificate), which states that the person has made a genuine effort to resolve the dispute through FDR, with exceptions applying in certain circumstances.[40] No similar legislative requirement applies to family law property disputes.

While FDR is a precursor to court action, recognising that 'sorting out' parenting disputes is a dynamic process, FDR can also be particularly helpful at times when external events, such as re-partnering, place extra stress on the parental relationship and/or raise new issues regarding arrangements for the children (Australian Institute of Family Studies, sub. 101).

Who provides FDR?

A range of different bodies provide FDR including:

- organisations funded under the FSP — these include FRCs (which can operate in partnerships with CLCs and LACs) and other organisations
- LACs, which provide a form of FDR called 'legally assisted FDR'
- private FDR practitioners, and

[39] Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), Explanatory Memorandum, p. 1.

[40] For consent orders, a person is responding to an application, the matter is urgent, there has been, or there is risk of family violence or child abuse, a party is unable to participate effectively (for example, due to incapacity or geographical location), or a person has contravened and shown a serious disregard for a court order made in the last 12 months.

- the Telephone and Online Dispute Resolution Service (the third component of the Family Relationships Advice Line, funded under the FSP program), which provides FDR services by referral only.

For individuals, the cost of FDR depends on the provider but, in general, most services are affordable for clients. FRCs provide at least one hour of FDR free for all clients, with clients earning $50 000 or more gross annual income charged $30 per hour for subsequent sessions. Centres may also charge fees in accordance with the Centre's fees policy if further joint sessions are required. The cost to government of FDR delivered by FRCs is difficult to determine due to the different models of service delivery across Centres. However, the national average cost per FRC activity (an 'activity' being a type of service such as FDR or counselling — which may involve multiple client sessions) was $2224 in 2011-12 (ACG 2014a). Government provided $75 million to FRCs in 2012-13 (ACG 2014a).

In recognition of the fact that early legal advice can assist the FDR process, the Australian Government funded a pilot program in 2009, at a cost of $4.2 million, which facilitated partnerships between FRCs and legal assistance providers. This program coincided with the lifting of restrictions on the presence of lawyers at FRCs and allowed some FRCs to deliver legally assisted FDR, although uptake was limited (Moloney et al. 2011). The program was subsequently funded on an ongoing basis.

FDR providers delivering services funded by the Australian Government outside the FDR platform are required to have a fees policy that takes into account the capacity of the client to pay. The Australian Government provided $22 million to fund these services in 2012-13. The cost to government per FDR activity was around $1550 in 2010-11 (ACG 2014a), noting that the assistance provided may be less intensive than that provided through the FRC platform.

Legally assisted FDR is also provided by LACs under a grant of legal assistance (chapters 20 and 21) and, as such, services are provided either free or at very low cost to the individuals involved. The cost to government of legally assisted FDR delivered by LACs varies across jurisdictions. However, the average cost of an FDR conference delivered by Legal Aid Queensland was around $2000 (net of overheads) in 2013-14. This includes the cost of the FDR practitioner and the cost of the legal aid solicitor representing the party to the conference (based on 2 hours for solicitor interview, 4 hours for the conference and 1 hour to draft the agreement reached at the conference into consent orders). It also includes the additional costs that may be incurred for some conferences, for example, the cost of interpreters and funding for representation for more than one party (Legal Aid Queensland, pers. comm., 2 September 2014).

Private FDR providers set their own fees, which are much more costly to individuals than the dedicated and subsidised FDR services outlined above. For example, the Australian Institute of Family Law Arbitrators and Mediators offers fixed fee mediation in family law property matters (where the property pool is less than $750 000). The fee of $1980 covers

preparation, pre-mediation interviews with parties and up to a full day of mediation. However, it does not include the cost of the venue for the mediation for which the parties are responsible, or the cost of each party's individual lawyer (AIFLAM 2013).

The role of non-legal support services

Alongside FDR, there are a number of other non-legal support services that aim to provide targeted assistance to individuals and families involved in certain types of family disputes.

The Parenting Orders Program, for example, assists separating families in high conflict to resolve parenting arrangements that are in a child's best interests as an alternative to taking their disputes to court. The program assists dispute resolution but also provides counselling and education services to family members, including children.

Children's Contact Services provide separated parents with a safe, neutral venue for the transfer of children and provide supervised contact where there is a perceived or actual risk to the child. The Supporting Children After Separation Program aims to support the wellbeing of children from separated or separating families.

These services seek to minimise use of the more formal parts of the family law system and promote outcomes in the best interests of children.

Court-based disputes

For matters that do proceed to court, the Family Court, the Federal Circuit Court (FCC) and the Family Court of Western Australia all exercise jurisdiction under the *Family Law Act 1975* (Cth) to hear family law matters. State and territory magistrates (or local) courts excise more limited jurisdiction for consent matters.

The Family Court is a superior court of record and is a specialist family law court. The Court's case mix predominantly comprises complex cases, which often involve multiple issues with higher levels of conflict between the parties.

While the FCC exercises jurisdiction under a range of Commonwealth legislation, the majority of its workload relates to family law — 93 per cent in 2012-13. The FCC hears the majority of family law matters — 87 per cent of all federal family law matters filed in 2012-13 (excluding Western Australian family law matters) (FCC 2013). Additionally, almost all applications for divorce are filed in the FCC (uncontested divorce applications are heard by registrars with delegated powers).

While more complex matters are intended to be directed to the Family Court (and a protocol exists for the purpose of assisting litigants and practitioners to direct matters to the appropriate court), the jurisdiction of the two courts is largely concurrent. This structure differs from state and territory court hierarchies where there are clearer jurisdictional delineations between superior and inferior courts.

The Family Court of Western Australia is a State court established under section 41 of the *Family Law Act 1975* (Cth). It is almost exclusively federally funded, with some administrative support provided by the Western Australian Department of the Attorney-General. The Court exercises federal jurisdiction under the Family Law Act and State jurisdiction under the *Family Court Act 1997* (WA) (in relation to ex-nuptial children and de facto children and property matters), as well as other State laws, such as the *Adoption Act 1994* (WA).

How much does court-based dispute resolution cost ?

For individuals who are not eligible for legal assistance the costs of pursuing a family law matter through the courts can be prohibitive. While a range of factors impact the cost of engaging a private lawyer for a family law matter, including the complexity of the case, the location of the practice and the seniority of the lawyers, there is some evidence that the cost of representation is a significant barrier to accessing fair outcomes for those cases that need a court resolution.

The Women's Legal Service Victoria (sub. 33) submitted that a less complex family law case (including pre-action negotiation and court proceedings including a trial of less than two days) was estimated to cost between $20 000 and $40 000 depending on the size and location of the firm undertaking the work. A complex case (including pre-action negotiation and court proceedings including a trial of three or more days was estimated to cost between $200 000 and $250 000. An indicative breakdown of the costs associated with progressing a family dispute through the court is provided in box 24.3.

For government, the costs associated with resolving family disputes through courts are substantial. The Commission estimates that the operational costs of family law matters across the various courts was around $173 million in 2012-13 (SCRGSP 2014).

Box 24.3 **Breakdown of legal costs for court-based disputes**

While costs will vary depending on the nature of the matter, estimates concerning the costs associated with divorce reveal the following.

Initial steps – the Application:

Divorce application = $845

Initiating an application for orders relating to children and financial matters = $530

Filing a response to these applications = $320

Solicitors for conferences, the preparation of statements and relevant documents = an average of $300 per hour for a small-tier firm and anywhere from $300 to $800 per hour for a top tier firm.

Pre-trial stage:

The above solicitors' fees for further direction, conferences, documents, preparation and other relevant work.

Counsel fees = an estimated $1000 per hour for Queen's Counsel, $400 to $700 per hour for Senior Counsel, and $250 to $500 per hour for Junior Counsel for services related to directions hearings, preparation, conferences, advice on evidence, settling applications, statements of claim, affidavits, defence, opinions, written submissions and other documents.

Trial stage:

Costs of expert witnesses are highly dependent on the profession of the witness and nature of the evidence they are giving, but can be similar to the hourly rate of solicitors.

Court hearing fees = $805 for each Family Court hearing day, and $590 for each Federal Circuit Court hearing day.

Counsel daily hearing fees = an estimated $8000 per day for Queen's Counsel, $5000 for Senior Counsel, and $3000 for Junior Counsel.

Sources: Family Law (Fees) Regulations 2012 (Cth); Goddard (2014).

24.3 What are the accessibility problems and solutions?

Many family disputes are resolved with minimal assistance

There is no rush to the law for family disputes. In disputes relating to parenting, the evidence shows that many separating families can resolve their disputes with minimal assistance. In two large studies of separating parents, inter-parental discussions and 'it just happened' were the most common pathways for parents who indicated that they had sorted out, or were in the process of sorting out, parenting arrangements (De Maio et al. 2012; Qu et al. 2014). Reaching agreement through these pathways was strongly correlated with friendly or cooperative post-separation relationships. As one participant described it, 'these families are largely in the 'self-help' category when it comes to sorting out arrangements

for their children' (AIFS, sub. 101, p. 12). Even so, most had made contact with at least one formal service at the time of separation (De Maio et al. 2012).

In disputes relating to property, inter-parental discussions were also nominated as the main resolution pathway for 40 per cent of matters (Qu et al. 2014). That said, the use of lawyers was higher — lawyers were nominated as the main resolution pathway in 29 per cent of property matters, as compared with 9 per cent for parenting matters. This may be due to the complexity of the law (which makes it difficult for parties to know their entitlements), a culture of encouraging parties to seek legal advice in relation to property disputes, and the fact that the two options for formalising property agreements once negotiated — consent orders or a binding financial agreement — generally involve, or require a lawyer.[41]

Access to justice for families experiencing less complex disputes can best be enhanced by the continued availability of low cost FDR and the availability of affordable legal advice on parenting and financial issues. A number of options canvassed elsewhere in this report should assist in relation to the latter, including reforms supporting greater unbundling of legal services (chapter 19), better information for consumers of legal services (chapter 6) and limited licences for family law practitioners (chapter 7).

But a range of accessibility problems exist for more complex parenting disputes

It is the more difficult and enduring post-separation disputes over children — in which parties rely mainly on services, lawyers or courts for resolution — that present greater access to justice challenges. Post-separation relationships for this group are more likely to be characterised as distant, highly conflicted or fearful (Qu et al. 2014). As noted above, a significant proportion of these disputes are complicated by issues such as family violence, mental health and substance abuse, with family violence being described as 'core business' for family relationship services, lawyers and courts (Qu et al. 2014).

While a considerable amount of research and reform has occurred with a view to improving the service response for families involved in these types of disputes, there is evidence that complex families continue to pose significant challenges for the family law system:

- The role of FRCs (and other FSP service providers) in respect of family violence is unclear and there are concerns about some agreements reached through 'standard' FDR and pathways for those screened out of FDR.
- Related to concerns about pathways for those screened out of FDR, there is evidence that limited legal aid funding means that the legal needs of some complex families are not being met. Unmet need has a range of negative consequences.

[41] Obtaining legal advice prior to finalising a financial agreement after the breakdown of a relationship is a legislative requirement if the agreement is to be legally binding: s. 90G *Family Law Act 1975* (Cth).

  - For matters that do not proceed to court (due to a reluctance to do so in the absence of representation), individuals may agree to potentially unfair or unsafe arrangements. Ongoing conflict between the parties or continued exposure to family violence can have particularly negative impacts on the children involved.
  - For matters that proceed to court, self-representation by parties with complex psychosocial issues can result in a lack of coherent and timely evidence available to the court to assist it in reaching a decision in the best interests of the child. For victims of family violence, being required to present their own case against a perpetrator and being cross-examined by a perpetrator can result in negative justice outcomes and can be viewed as a continuation of violence.
- Families experiencing family violence and child safety issues face access to justice problems due to fragmentation — they must use multiple and seemingly contradictory systems and service providers to find a resolution.

The response to family violence by FRCs and other FSP service providers could be improved

A significant number of parents are using FDR to resolve disputes where there has been family violence (Kaspiew et al. 2009; De Maio et al. 2012; Qu and Weston 2010). While there is evidence that FDR works well for many parents and their children as a way of reaching agreement about parenting disputes (Kaspiew et al. 2009), it is important to consider whether this extends to circumstances involving family violence.

In some circumstances, standard FDR delivered appropriately may be an adequate service response. But in other circumstances a range of concerns exist, including whether the process itself maintains safety, whether it produces outcomes that reflect genuine (rather than coerced) agreements, and whether these outcomes are in the best interests of children (Kaspiew et al. 2014). These concerns were echoed by participants:

> In general, if parties do not meet legal aid criteria, the other main ADR [alternative dispute resolution] option is mediation via a Family Relationship Centre. There is a screening process for family violence cases, but the experience of some Victorian CLCs is that some of these cases are then assessed as suitable for mediation, without best practice safeguards necessarily being in place. (NACLC, sub. 77, p. 9)

There are also concerns about those who present with family violence and safety issues whose matters remain unresolved despite their engagement with FDR service providers. The evidence suggests that some of these families — particularly those issued with a certificate exempting them from the FDR requirement — may experience difficulties over a protracted period of time with limited assistance (Kaspiew et al. 2014). In a large, longitudinal study of separated parents, the one-fifth of parents who were issued with an exemption certificate showed signs of greater distress. Less than one quarter of these parents reported that parenting arrangements were sorted out at all three phases of the study:

> … there is a sub-group of families with multiple indicators of complexity (family violence/abuse, safety concerns, negative relationships) who continue to experience significant difficulties well into the post-separation period covered by this research. Many of these families are likely to require intensive and coordinated interventions that go beyond — though it may at times include — modified forms of FDR. For many of these families, negotiations are likely to be fraught with difficulties, especially while safety concerns remain unresolved and family violence/abuse and other dysfunctional behaviours continue to cast a shadow over attempts to establish new family relationships and new family structures. (Qu et al. 2014, p. 68)

A recent review of FSP funded services also found that there is room for improvement in the way family violence is responded to by FSP service providers, including FRCs. In particular, the review found evidence that some family violence may not be picked up and acted on, that responses by service providers to family violence lack consistency and that there are opportunities for FSP funded services to play a greater role in supporting people with family violence issues (ACG 2014a) (box 24.4).

Box 24.4 Family Support Program (FSP) funded services and family violence

Recent research into the FSP family law services stream identified a range of problems with respect to the way service providers, including FRCs, respond to family violence:

- Comparison of the extent to which FSP family law services are providing referrals to domestic violence and other related services raises some questions about the extent to which these needs are being addressed. In 2010-11, around 8 per cent of total service users presented with family violence needs, while 0.8 per cent of all activities received a referral to a domestic violence service, and just over 3 per cent of total service users presented with childhood physical/emotional abuse, while only around 0.2 per cent of total activities received a referral to a child protection agency.
- [Stakeholder] feedback suggests that reported figures [of service users presenting with family violence] might be an underrepresentation of the issue.
- Strategies [for dealing with family violence] are not consistent across services and some FRCs are more specialised than others in this area. Some stakeholder feedback reinforces concerns about consistency across service providers in relation to violence issues, with commentary to the effect that providers 'may not be recognising the issues'.
- The role of FSP family law services in cases involving violence is an open question. The research has uncovered many instances of practices, whereby these service users are screened out through issuance of s. 60I certificates, or referred to legal aid commissions for legally assisted FDR.
- Feedback from stakeholders suggests that there may be a greater role for FSP family law services in supporting people with family violence issues including collaboration with legal assistance services in delivering FDR, effective use of technology and adapted mediation methods. (ACG 2014a, pp. 51–53)

A 2010 report examining the impact of family violence on post-separation decision-making found that some 40 per cent of survey respondents with experiences of past or current family violence who used FRCs did not disclose the violence and only 10 per cent of respondents who disclosed family violence were exempted from family dispute resolution (Bagshaw et al. 2010).

The review noted that FRCs can utilise very different service delivery models for FDR and may offer other information and/or counselling at varying levels of intensity as part of their

service delivery model. For example, average 'sessions' per 'activity' in 2011-12 ranged from 1.8 to 7.5 across locations, illustrating the different intensity of service delivery models (ACG 2014a).

Considerable work has been undertaken to improve responses to family violence

A range of initiatives have been implemented in recent years to improve the support and dispute resolution assistance provided to persons presenting with family violence, both in terms of better identifying family violence as an issue and improving practices for responding to it. These include amendments to the *Family Law Act 1975* (Cth), which introduced a wider definition of family violence, and provisions specifying that, where there is conflict between the aims of protecting children from harm and maintaining a relationship with both parents after separation, greater weight is to be accorded to protection from harm.[42]

In addition to legislative change, a free family violence training package has been developed for professionals in the family law system to help them better understand family violence and its impacts and promote the safety of those involved in the family law system (AVERT Family Violence nd). Additionally, a universal family violence screening tool — the Detection of Overall Risk Screen framework — has been developed to identify clients who are at risk of harm, including the immediacy and extent of the risk. The tool is intended to demystify and structure screening for all professionals working within the family law system.

In 2010, the Australian Government funded the Coordinated Family Dispute Resolution (CFDR) pilot across five locations (box 24.5) in response to the perceived need for a non-court based mechanism for resolving post-separation parenting disputes where there has been family violence. It was not funded on an ongoing basis.

[42] *Family Law Legislation (Family Violence and Other Measures) Amendment Act 2011* (Cth).

Box 24.5 Coordinated Family Dispute Resolution

Coordinated Family Dispute Resolution is a process where parents are assisted with post-separation parenting arrangements where family violence has occurred.

The process involves a case manager/family dispute resolution practitioner, a specialist family violence professional for the person assessed to be the 'predominant victim,' a men's support professional for the person assessed to be the 'predominant aggressor' (when they are male), a legal adviser for each party, and a second family dispute resolution practitioner. Child consultants are part of the professional team and may be called upon to feed into case management decisions.

Specialised risk assessment and management takes place throughout the process, which unfolds over several steps — screening, intake and assessment, preparation for mediation, mediation (up to four or more sessions) and post-mediation follow-up.

The process is applied in a multi-agency, multi-disciplinary setting and it aims to provide a safe, non-adversarial and child-sensitive means for parents to sort out their post-separation parenting disputes. The level of support provided to parents is intensive, and this is a key means by which the process attempts to keep children and parties safe and ensure that power imbalances resulting from family violence do not impede parents' ability to participate effectively.

Source: Kaspiew and De Maio (2012).

More needs to be done to improve delivery of FDR and alternative pathways for matters involving violence

Some of the initiatives outlined above, particularly those relating to screening and training, will go some way to improving the delivery of FDR by FSP funded providers in matters involving family violence. However, bigger questions remain about: how to ensure best practice FDR for cases involving family violence; the level of funding required to support this; and which service providers, or combinations of providers, should be funded. Recent research is this area has looked only at FDR conducted by FSP funded services, not the forms of legally assisted FDR conducted by LACs, which do not appear to have been formally evaluated since 2008 (KPMG 2008).

One stakeholder to this inquiry called for continued funding for the CFDR model or funding for an expansion of legally assisted FDR delivered through partnerships between CLCs and FDR providers:

> Unfortunately, this model [CFDR] was not funded beyond the trial, despite an evaluation recommending its continuance and expansion. Central to the model was the legal representation of … parties to counterbalance the power and control of the violent partner. Should this model receive funding in the future, many family law disputes could be resolved early, despite the presence of violence.
>
> In the alternative the government should at least consider the funding and expansion of the CLC partnerships with FDR providers to enable legally assisted FDR, especially for particularly vulnerable clients. (WLS, sub. 117, p. 7)

A 2011 evaluation of partnerships between legal assistance providers and FRCs found considerable variation in attitudes and approaches to lawyer assisted FDR, and noted that this service was not offered to a great extent:

> While most professionals indicated a strong belief in the potential of this service [lawyer assisted FDR], a range of reasons were given for not offering this service, including the resource-intensive nature of the service, conflict of interest issues and the need to develop an agreed practice model. Some philosophical concerns were expressed by a small number of family relationship practitioners about losing the child focus if lawyers became actively engaged in FDR. (Moloney et al. 2011, p. E1)

An evaluation of the CFDR model found that practice in the area is very complex with risk management being an active and time-consuming process. Due to tighter selection for CFDR cases, a smaller proportion of the CFDR group reached FDR than the comparison group, but those that did were more likely to reach either full or partial agreement in the FDR process. Nearly three-quarters of pilot group cases had multiple mediation sessions. Parents interviewed were mostly positive about the process but with some exceptions. The evaluation found:

> Where mediation sessions are handled carefully, the data from parents indicate that the process can be safe and can empower parents to make appropriate arrangements for their children. Some parents reported coming out of the process with workable arrangements and an improved capacity to communicate with the ex-partners. Children in the CFDR group were less likely to be in shared care than those in the comparison group. They were also more likely to have changeover arrangements that mitigated the need for contact between the two parents. (Kaspiew and De Maio 2012, p. xii)

Most parents also valued the support they received from the specialist family violence professional or the men's support professional and were also appreciative of the access to free legal advice.

Reflecting the need for a greater level of coordination, referral and support for families with complex issues than is provided by current services, CFDR cases also received services at a higher level of intensity than standard practice. The CFDR evaluation found that almost half of the pilot files were single party cases, reflecting situations in which the second party in a matter refused to engage with the processes, or were ultimately not invited due to safety concerns. Single party cases received significantly more support in the CFDR process than single party cases in the comparison group — over half of the CFDR single party cases received multiple services as a result of their engagement with the process, compared with 1 per cent of comparison group cases. The evaluation concluded:

> In practice, the focus of CFDR is wider than dispute resolution: the proportion of single-party-only cases and the level of service they receive highlights the wider role of CFDR as a support and referral mechanism. (Kaspiew and De Maio 2012, p. xi)

However, the CFDR pilot was very resource intensive. From the time the pilot commenced operation in late 2010 to 31 August 2012, only 126 cases were completed across the five pilot sites. The funding for the pilot was $4.8 million. The Commission was unable to obtain detailed costings, but even accounting for the fact that a proportion of the funding

would have gone towards designing the process and administrative costs involved in setting up the relevant partnerships, the model of service delivery, involving multi-disciplinary support and multiple sessions, comes at a high cost.

The Commission considers that improving FDR service delivery in matters involving family violence and increasing the use of appropriate models of FDR for these matters is a priority. However, given the very different models of service provision across current providers, the limited data on the cost of service provision of different models, and the limited evidence relating to outcomes achieved by different models, the Commission is not in a position to recommend a particular model or assess the level of additional funding that may be required.

RECOMMENDATION 24.1

The Australian Government, in consultation with family dispute resolution (FDR) providers and other stakeholders, should examine the way FDR is delivered by different providers across the system, and the level of support provided to those for whom FDR is not appropriate. This review should consider:

- service provision costs
- long-term outcomes, including impacts on parents, children and the future need for formal services
- timeliness of resolution
- best practice approaches across individual providers, including legally assisted FDR
- the evaluation of the Coordinated Family Dispute Resolution pilot
- appropriate funding for the appointment of case managers at Family Relationship Centres to coordinate with other elements in the system, including the police, courts, child protection agencies and relevant services/authorities in each jurisdiction.

The review should inform future Commonwealth funding decisions of family dispute resolution and support services and should be completed and published by 31 December 2015.

Some individuals with complex problems have limited options

In addition to problems around the delivery of FDR, there is evidence that limited legal aid funding is impacting the justice outcomes for a proportion of families experiencing complex issues, particularly family violence.

As discussed above, the cost of legal representation in family law matters is prohibitive for many, with National Legal Aid commenting:

> The position of people on low to middle incomes who fall outside means tests, but who are still not in a sufficiently strong financial position to purchase private legal services, is of ongoing concern to LACs. Again, family law is a particular area of focus where low to middle income earners have difficulty with the affordability of legal representation. (sub. 123, p. 29)

These concerns are supported by evidence which suggests the existence of a 'U-shaped' relationship between income and lawyer use in the case of family problems (chapter 19).

Of particular concern is evidence that, despite matters involving family violence being a priority matter under the National Partnership Agreement (chapter 20), a number of such matters are conducted in the family law courts without the benefit of legal representation. However, quantifying the number of these matters, and how they are linked to the lack of legal aid funding, is difficult using available data.

It is clear that family violence is 'core business' for the family law courts. A recent survey of separated parents found that, where family violence is an issue, courts are used as the main pathway in sorting out parenting arrangements far more often. For example, of parents who reported experiencing physical violence, 8 per cent cited the courts as the main pathway used compared to 1 per cent for those who had not experienced violence (Kaspiew and De Maio 2012).

Rates of self-representation (at some point during proceedings) in the family law courts currently sit at around 30 per cent, and the reasons for self-representation vary (chapter 14). A number of stakeholders reported that guidelines implemented by Victoria Legal Aid (VLA) in early 2013 that restrict legal representation for court-based family law disputes in which the other party is not represented have impacted rates of self-representation. The guidelines apply even in situations involving family violence (subject to very limited exceptions around capacity). Data provided by VLA show that rates of refusal for representation at family law trials increased by threefold on average upon introduction of its guidelines — from 0.49 per day to 1.49 per day (VLA, sub. DR332).

Lack of representation in family law matters can have particularly negative consequences where family violence is involved

As noted earlier, family disputes — particularly those at the more complex end of the spectrum — have more serious negative consequences for individuals than many other dispute types. The evidence also suggests that it is predominately complex cases (often in terms of psychosocial issues rather than issues of law) that end up disputed in the family law courts. In these types of cases, self-representation presents particular challenges.

Where a person is refused legal aid (whether due to the application of guidelines, the means test, or other eligibility criteria) but cannot afford private legal assistance, the person can obtain minor or unbundled assistance from a LAC or CLC. Alternatively, they can pursue a court determination without the benefit of legal assistance, although this may be beyond the capability or capacity of the individual, and lead to difficulties for the family

law courts in terms of not having the benefit of a legal practitioner to assist in the collection and presentation of evidence.

A review of the way family violence is dealt with in the family law courts described the importance of representation in family law matters in this way:

> The importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence. Where one or both parties are unrepresented, even with the benefits of increased judicial involvement arising from Division 12A [of the *Family Law Act 1975* (Cth)], it can be almost impossible for the court to receive the sort of evidence and argument that can lead it to make an informed decision about the child's best interests. Settled cases, too, are a worry when parties are unrepresented, because they may reach agreements in ignorance of the legal situation, or because they know they cannot properly put their case before the court. (Chisholm 2009, p. 168)

The Commission heard evidence that the application of the Victorian guidelines have had very negative consequences for those affected:

> It's a really significant issue … We saw almost immediately a real impact in terms of women seeking our help. They were women who were at the very end stage of their proceeding and they had lost legal aid at the trial. So they were faced with either trying to negotiate a settlement or attending the trial by themselves and arguing their case, and for most of them it wasn't really a choice. You're talking about cases that are high conflict, they've got really complex issues, like drug and alcohol, mental health issues, and it wasn't really a choice for them to attend trial. So we have duty lawyers at the Melbourne Family Court who were negotiating settlements at the door of the court, spending five hours doing that, because we had women who didn't want to go into court to argue their case. So, you see, we've been seeing a lot of quite poor outcomes for women at that stage, and it's certainly an issue. (Women's Legal Service Victoria trans., p. 804)

At public hearings, VLA indicated that the guidelines reflected difficult policy choices (trans., p. 745). Subsequently, in July 2014, it announced a change to the guidelines to come into effect on 1 November 2014 to cover situations where there has been:

- a conviction for breach of an intervention order, or for other family violence related offences, or
- police or other government department involvement in people having to relocate because of safety concerns.

VLA also announced that it would be undertaking a broader review of its family law services with a view to ensuring that they are 'as widely available as possible and sustainable in the longer-term' and that it is keen to work with stakeholders 'to explore solutions to the wider problem of the many women who are not eligible for a grant of legal assistance and go unrepresented in the family law court each year' (VLA 2014a).

While the change in policy is a positive development, it does not fully address the issue of a lack of legal representation in family law matters for women who have experienced family violence, as not all will meet the criteria in the new guidelines (relevant to those in Victoria) or meet the means test (relevant to all jurisdictions).

Reports that, in some cases, independent children's lawyers (who represent children's interests in family law proceedings) have not been appointed when requested by a family law court due to limited legal aid funds are also of concern. In 2009, Professor Chisholm stated:

> Unfortunately, there is evidence that on occasions it is impossible to have children represented, even when a court so orders, because of lack of legal aid funding. … This represents, in my opinion, a lamentable situation and one that puts children seriously at risk. (2009, p. 170)

The FCC (sub. DR326) has confirmed that this is an ongoing problem and a number of LACs have reporting resourcing concerns in this area (Legal Aid NSW, trans., p. 175; Legal Services Commission South Australia, trans., p. 373; Legal Aid Western Australia, trans., p. 575).

Options for reform

A range of responses is necessary to improve access to justice in matters involving family violence. Improving the way FDR is delivered and increasing the number of these matters that can be appropriately addressed through FDR (recommendation 24.1) will assist in reducing the number that need to progress to the family law courts. Better aligning the means test used by LACs with that of other measures of disadvantage (chapter 21) will reduce the number of individuals who fall into the 'gap' by extending coverage of family law matters involving family violence.

However, given that it will not be possible to ever fully ensure representation for both parties in a contested family law dispute involving family violence (for example, an alleged perpetrator of violence may choose to self-represent), it has been suggested that legislative provisions restricting personal cross-examination by those alleged to have used violence — along the lines of those that exist in some state and territory family violence legislation[43] — should be introduced for family law proceedings. Women's Legal Services NSW said that:

> There are currently no specific provisions in family law that prevent self-represented litigants from cross-examining a victim of violence. … We propose that part of a solution is an amendment to the Family Law Act to provide protection from being cross-examined by an alleged perpetrator of violence. Similar legal protections exist in State law in criminal jurisdictions for sexual offences, for example, s294A Criminal Procedure Act 1986 (NSW). In such cases, the court appoints a person to ask questions on behalf of the alleged perpetrator. (sub. DR257, pp. 11–12)

Cross-examination is an intrinsic part of the trial process. When allegations of family violence are contested, there is often limited or no corroborative evidence for the court to rely on. Currently, it is a matter for the judicial officers of the family law courts to ensure

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[43] *Family Violence Protection Act 2008* (Vic), s. 70; *Restraining Orders Act 1997* (WA) s. 44C; *Intervention Orders (Prevention of Abuse) Act 2009* (SA), s. 29(4); *Domestic and Family Violence Act 2007* (NT) s. 114

that any cross-examination is conducted without improper questioning of a witness.[44] However, there are no specific statutory protections restricting alleged victims of family violence from being directly cross-examined. The family law courts can and do make specific arrangements to facilitate the testimony of vulnerable persons via video or in closed court. However, the FCC noted that there can be significant difficulties, particularly in circuit localities, with limitations on the availability of facilities to ensure adequate protection for vulnerable persons (sub. DR326).

In 2010, the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC) jointly recommended that state and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence. In making this recommendation the Commissions said:

> [We] recognise concerns about allowing a person who has allegedly used family violence to personally cross-examine a victim of that violence. This provides an opportunity for a person to misuse legal proceedings and exert power and control over the victim of his or her family violence. Considering the nature and dynamics of family violence, this may significantly inhibit the ability of a victim, or another witness, to provide truthful and complete evidence in protection order proceedings. (ALRC and NSWLRC 2010, p. 863)

The Commission considers that these arguments apply equally to family law proceedings and that the issue warrants further consideration. Any legislative provisions would need to be developed in close consultation with the family law courts to ensure that they are workable.

RECOMMENDATION 24.2

The Australian Government, in consultation with the family law courts, should amend the *Family Law Act 1975* (Cth) to include provisions restricting personal cross-examination by those alleged to have used violence along the lines of provisions that exist in State and Territory family violence legislation.

Fragmentation remains a barrier to justice in this area

Families attempting to resolve complex disputes involving family violence and child safety issues are required to use multiple systems and engage with a large number of organisations and service providers. Some organisations and service providers are the responsibility of the states and territories (for example, police, child protection agencies, magistrates courts, children's courts), others are the responsibility of the Commonwealth (family law courts, FRCs and other FSP funded services), and some are jointly funded (LACs and CLCs).

44 Section 101 of the *Family Law Act 1975* (Cth) provides some general protections for witnesses.

The interaction and overlap between jurisdictions can result in multiple proceedings and inconsistent orders, which can cause unsafe and traumatic situations for parents and children. The current court structure means that parties often will have to institute or be engaged in proceedings in various legal forums in order to have all of their issues determined. As noted by the Family Law Council:

> The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse. (2009, p. 48)

The intersection of the areas of family law, child protection and family violence was identified by a number of stakeholders as a priority for reform (box 24.6) and has been the subject of a number of previous reviews. In particular, both the Family Law Council (2009) and, jointly, the ALRC and the NSWLRC (2010) have considered ways to improve responses to child safety issues and family violence.

In 2009, the Family Law Council recommended that a referral of powers should be given so that federal family courts would have concurrent jurisdiction with state and territory courts 'to deal with all matters in relation to children including, where relevant, family violence, child protection and parenting orders' (2009, p. 61).

In 2010, the ALRC and NSWLRC noted that this proposal would have considerable benefits in terms of seamlessness, accessibility and safety for those families presenting in family courts with child protection and parenting issues. However, they also noted that a referral of powers would have to meet a number of challenges, including that:

- family courts are federal and most services (including child protection and police) are at the state level, with existing intersecting legislation and established processes between state law and state agencies
- family courts would be making orders that affect the workload of state agencies, such as child protection agencies and the police
- family courts and child protection agencies have different objectives and different focuses, and there may be a lack of trust as a consequence
- there would still be a gap in the system, requiring some families to go to a family court for child protection and parenting issues and to magistrates courts for family violence protection orders and criminal prosecutions (ALRC and NSWLRC 2010).

In light of these challenges, the approach of the ALRC and NSWLRC was to promote 'seamlessness' by enabling the existing courts to provide as many solutions as possible. Their recommendations included expanding the jurisdictions of federal, state and territory courts responding to family law, family violence and child protection issues in targeted ways with a view to allowing victims of family violence to resolve their legal issues in the same court, as far as practicable, consistent with the constitutional division of powers.

Box 24.6 **Problems caused by a fragmented system**

Various stakeholders highlighted the problems that can arise from a fragmented family law system:

> Separation from a violent partner continues to be the most dangerous time for women and children who have lived with violence. Interventions by professionals at these times can be critically important to aid safe decision-making. However, women find their interactions with these three jurisdictions [family law, family violence and child protection] at best confusing, sometimes frustrating and at worst they can be dangerous, as they place almost insurmountable systemic barriers to some women and children being able to achieve safety. …
>
> Women in domestic violence situations are often told by child protection authorities that they need to leave the violent relationship otherwise the children will be taken from them. Despite separation being the most dangerous time for women and children in domestic violence situations they are generally not provided with any support to do this by the child protection authority other than being advised to get a domestic violence order with their children named and to go to the Family Court. Protection of the children therefore becomes the individual woman's responsibility. When women follow these directions and attempt to get their children named on a domestic violence order they are often advised that they cannot be named without direct physical abuse (despite the legislation not requiring this). Many magistrates are reluctant to make protection orders naming children as they are concerned about giving a party an advantage in family law proceedings. When women turn to the family law system for protection they are generally told they must arrange for the children to have time with the perpetrator, in direct contradiction to the child protection authorities' previous advice to them that related to their concern about the perpetrator. (Women's Legal Services Australia, sub. 29, pp. 3–4)
>
> What we see is that the overlap between those systems, which are often happening in the same time frame, is not effective and not an accessible system for our clients … What we see is not only having to stay engaged … in each of those jurisdictions, but also the extraordinarily different frameworks that each of those courts or sets of legislation require the client to comply with … You have got clients having to not only get their heads around a whole lot of different processes and court dates and different sets of court documents, but you're also looking at very different legal frameworks for the type of evidence they're having to provide, for the value or the weight that's given to that evidence. (ACT Women's Legal Centre, trans., p. 40)

Research into the impact of family violence on post-separation decisions made in 2010 made similar findings:

> A complicating factor was that some respondents approached services about family violence before the separation, without necessarily having decided to separate at that point, including state-based services such as child protection, police and domestic violence courts, in order to stop the violence and gain protection. Some of these services, particularly child protection services, encouraged or urged separation, not always considering potentially negative or unanticipated consequences for the respondents. Respondents reported contradictions that become obstructions due to the differences in the goals of the services in the state and Commonwealth jurisdictions. Some state-based services showed little knowledge of the family law socio-legal services and the practical risks in respondents using them. (Bagshaw et al. 2010, pp. 4–5)

However, the Australian and state and territory governments have disagreed in principle with some of the ALRC and NSWLRC's recommendations (Australian Government 2013a; Standing Council on Law and Justice 2013).[45] Other relevant recommendations have not been formally responded to. These include a recommendation for a limited referral of powers to enable the Australian Government to make laws

[45] In particular, recommendations 16.3, 17.3 and 17.4.

allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer, and a recommendation for the *Family Law Act 1975* (Cth) to be amended to give children's courts the same powers as magistrates courts.[46]

That said, considerable work is being undertaken across the system to promote more holistic responses to families with violence and child safety issues in the form of agreements, protocols and memoranda of understanding between agencies and service providers. In particular, progress is being made to improve collaboration between state and territory child protection systems and the federal family law system. In 2010, a National Justice Chief Executive Officers' Group approved a project plan for the development of a national initiative to improve collaboration between the family law system and the child welfare authorities to better protect children.

In March 2013, the Commonwealth Attorney-General's Department published a report on how to improve information sharing between the family law system, state and territory child protection systems, LACs and independent children's lawyers. The report included a model information sharing agreement to guide the development of agreements between the family law courts, child welfare authorities and relevant stakeholders (Chisholm 2013). In March 2014, a further report was published making a range of recommendations about how to improve the sharing of experts' reports (Chisholm 2014).

The family law courts have also been active in this regard. For example, to better facilitate the early provision of information concerning any child welfare involvement, the family law courts have sought to enhance local relationships with state and territory child welfare agencies. In the Melbourne and Dandenong registries a co-location initiative with the Department of Human Services has been established and reviewed. A Child Protection Practice Leader is positioned at the Melbourne registry to support the child protection interface with the family law courts registry (which services both the FCC and the Family Court). In Parramatta and Newcastle, a pilot has commenced with the Department of Family and Community Services to obtain a 'Personal History' document in certain proceedings. In South Australia, a working group has been formed to facilitate the Court's interface with Families South Australia to enhance the flow of information (FCC 2013).

As some of these reforms to improve collaboration are quite recent, or still in the process of development, it is difficult to assess the impact they have had, or will have, in improving the accessibility and safety of the system. However, improved collaboration alone will not solve the problem of multiple proceedings for family violence and child safety issues in the context of separation and divorce. This can be achieved only by more significant jurisdictional change such as that recommended by the Family Law Council and the ALRC and NSWLRC.

Given that key recommendations in this area have not been accepted, and cognisant of the challenges involved, the Commission considers that further analysis of the costs and

46 Recommendations 19.2 and 19.4.

benefits of other options for a more unified system should continue to be examined as a priority. The potential benefits of improved justice and safety outcomes for families, and the more efficient resolution of complex cases (with consequential cost savings to society through reduced government expenditure per case) appear to be significant.

The Commission is aware that relevant stakeholders in Western Australia are developing a proposal for legislative, policy and process changes for consideration by Government. These changes would integrate the protection and care jurisdictions of the Children's Court of Western Australia, and the child-related proceedings jurisdiction of the Family Court of Western Australia, through a 'joint partial concurrency' model. This would allow the Children's Court to make family law orders — and the Family Court to make care and protection orders — in clearly defined circumstances. It has been suggested that this could be used as a pilot for the extension of the jurisdiction of the children's courts in other states (ALRC and NSWLRC 2010). Legal Aid WA is leading the development of the proposal. It is anticipated that the Western Australian Government will have an opportunity to formally consider this proposal within the next 12 months (Legal Aid WA, pers. comm., 2 September 2014).

The Commission strongly supports the examination and development of this model, which could usefully inform reform in other jurisdictions, noting that due to the unique position of the Family Court of Western Australia as a state family court, constitutional issues arise for other jurisdictions that do not arise in Western Australia. To ensure that the costs and benefits of the new model can be assessed, it will be important that the model is evaluated and that appropriate pre-reform data are collected by relevant stakeholders to enable comparisons to be made.

In the absence of reforms of this nature, the Commission supports the efforts of all involved to continue to work towards 'joined up' and consistent responses to families presenting with these complex combinations of issues. Recommendation 24.1 above will go some way to improving access to justice in this area.

RECOMMENDATION 24.3

Improvements in access to justice have resulted from the work of the National Justice Chief Executive Officers' Group in developing national initiatives to improve collaboration between the federal family law system and the state and territory child welfare authorities. However, reform of current constitutional arrangements relating to family law, family violence and child protection would lead to better outcomes.

The Law, Crime and Community Safety Council should consider options for jurisdictional and structural change to further address the problems caused by the constitutional division of jurisdiction in the areas of family law, child protection and family violence. The Council should be informed by any available evaluation of the Western Australian joint partial concurrency model.

Proportionality for low value property disputes is a particular problem

Whether or not family law property disputes involve complexities such as family violence or highly conflicted post-separation relationships, obtaining professional advice and dispute resolution services for property issues at a cost that is affordable and proportionate to the value of assets in dispute is a problem, particularly for low value (including net debt) property disputes. Fehlberg and Milward state:

> … the availability of free or low cost professional advice on financial — especially property — matters after separation is very limited in Australia. There is negligible legal aid available for property matters, most community legal centres do not provide property advice, Family Relationship Centres deal mainly with parenting issues and financial counselling is not widely available. (Fehlberg and Millward 2014, p. 236)

Concerns about the lack of accessible advice and dispute resolution options for low value family law property matters were echoed by participants:

> One example of unmet need is for women in relation to property assistance in family law. Although on the surface, perhaps un-related to issues of family violence, free or low-cost assistance with property settlement is a huge gap in legal service provision in Australia. Women experiencing family and domestic violence who also face other forms of disadvantage such as a disability or being CALD [culturally and linguistically diverse] or Aboriginal women with cultural and linguistic differences are particularly affected by this yawning gap. (WLSA, sub. 29, p. 8)

A range of evidence supports these concerns. While data on the extent to which FSP funded service providers deliver FDR in property matters was not available, it is clear that FRCs are not funded to provide FDR in property only disputes. The extent to which FRCs provide FDR in property matters associated with children's matters appears variable. The operational framework for FRCs states:

> The aim of joint family dispute resolution is to assist parents to agree on arrangements for the care of their children post-separation. The primary focus of joint family dispute resolution sessions at Family Relationship Centres should be on the needs of the children. Where both children's issues and property are involved, the Centre may deal with both issues as part of a family dispute resolution process, subject to staff having appropriate skills in both property and children's matters. Family Relationship Centres will not provide dispute resolution services in matters that involve property issues only, but will refer these to other accredited dispute resolution practitioners. (DHS 2014, p. 3)

A small study looking at the impact of family violence on property disputes noted that participants accessed mediators or FRCs regarding financial issues far less often than they did for parenting issues, reflecting the greater focus of such services on parenting (Fehlberg and Millward 2014). A 2011 evaluation noted:

> Some clients [of FRCs who had developed partnerships with legal assistance providers] reported receiving advice about property and financial matters, while others said this advice was unavailable but would have been useful. (Moloney et al. 2011, p. E3)

It is clear that parenting matters are prioritised by publicly funded legal assistance providers. Some LACs conduct property mediations under a grant of legal aid when there is an associated children's matter (Legal Aid NSW, sub. DR189), although others focus on parenting matters only (LSCSA, trans., p. 371). Access to LAC assistance for property-only matters is extremely limited. The Women's Legal Service Victoria said:

> … regardless of the level of disadvantage that you experience, you actually can't access Legal Aid in Victoria if your family law case only relates to a property dispute, and we often step into that gap to assist women where there are property disputes. Given the complexity in the system you'd understand why women don't pursue an equitable property claim. It's far too complex for them. It's too expensive, and often their claims are quite small. They're often under $100,000. (trans., p. 795)

While CLCs pick up some of the 'gap', only 17 per cent of the family law activites of CLCs is for property matters (chapter 20).

In short, the provision of low cost legal advice and dispute resolution options for family law property disputes appears to been thinly covered and unevenly provided across jurisdictions through different models of service provision. These models of service provision include:

- minor legal advice provided by LACs or CLCs on factors and procedural steps relevant to dividing property
- free or subsidised legally assisted FDR delivered by some LACs (where there are associated parenting matters and the person meets the eligibility criteria)
- free or subsidised FDR delivered by some FRCs where there are associated parenting matters and the centre has staff with the relevant skills or operates in partnership with a legal assistance provider to provide such services
- subsidised FDR delivered by some FSP funded providers outside of the FRC platform.

The available data on resolution pathways for those with low value family law property disputes appears to reflect the rather patchy availability of free or low cost dispute resolution services. While, overall, lawyers are used more commonly for property disputes than for parenting disputes, those in the low (less than $40 000) and low-medium ($40 000 to $139 000) asset pool ranges use lawyers disproportionately less often — and nominate 'no specific pathway' disproportionately more often — relative to those in the higher asset pool ranges (table 24.1).

Table 24.1 **Main pathways used in property division[a]**

By level of net assets at separation, parents who reached property settlements

	Net assets at separation[b]					
Main pathway	*Negative (in debt)*	*< $40 000 (%)*	*$40 000 – 139 000 (%)*	*$140 000 – 299 000 (%)*	*$300 000– 499 000 (%)*	*$500 000+ (%)*
Mediation or dispute resolution services	4.9	1.3	3.5	6.1	5.0	7.7
A lawyer	22.8	6.8	25.0	41.4	42.7	50.6
The courts	7.4	2.0	6.0	8.9	10.4	13.1
Discussions	43.8	49.9	45.8	35.1	34.5	25.1
Nothing specific, it just happened	17.1	37.9	18.3	8	7.0	2.9
Other	4.0	2.3	1.5	0.5	0.5	0.6
Total	100.0	100.0	100.0	100.0	100.0	100.0
No. of participants	119	1163	1270	1160	1180	1271

a Data have been weighted. Excludes a small number of parents who did not know or refused to answer (0.5%). Percentages may not total 100% due to rounding. **b** p<.001; statistically significant relationship emerged between main pathway used and level of net assets.

Source: Qu et al. (2014).

Key observations from these data are:

- mediation or dispute resolution services are used less than half as often in the low-medium and low asset pool ranges than the higher asset pool ranges
- those in the low asset pool range use lawyers only one-sixth as often as those in the higher asset pool ranges; those in the low-medium asset pool range and those arguing over debt use lawyers just over half as often as those in the higher asset pool ranges
- those in the low and low-medium asset pool ranges use courts less frequently (2 and 6 per cent respectively) than those in higher asset pool ranges (8.9 per cent and 10.4 per cent respectively), although, for those arguing over debt, this figure is higher (7.4 per cent)
- significant minorities in both the low and low-medium asset pool range (almost two-fifths and one-fifth respectively) nominate that no specific pathway is used — much more than those in the higher asset pool ranges.

For some, avoiding the use of formal services for low value property disputes may be a proportionate and appropriate response. However, for others — particularly those who nominate no specific pathway — lack of access to affordable legal and financial advice and dispute resolution services may be a significant factor. This leads to questions about the appropriateness of agreements or outcomes arrived at in these cases.

While it is understandable that parenting matters are prioritised by government funded providers given resource constraints, inequitable property divisions can have a significant impact on the wellbeing of families with limited means in the long term:

> … there is evidence that poverty amongst single parents is a strong predictor of poor outcomes for both parents and children, and debates continue on the extent to which this could be alleviated by adjustments to the post separation distribution of property and child support. (AIFS, sub. 101, p. 5)

Further, given the high prevalence of family violence among separating couples, there have been calls for greater focus on the impact of family violence on financial settlements:

> Women with a history of domestic violence can be reluctant to pursue their financial entitlements through the legal system post-separation for a variety of reasons: they may be fearful of their former partner and choose safety over property; they may lack confidence; feel they do not have the necessary skills; be daunted by the costs involved in legal proceedings and they may be unaware of their financial entitlements under the law. … These factors can result in a lifetime of financial hardship for many women and their children (WIRE Women's Information 2014, p. 3)

> There has been much emphasis on family violence when reviewing the 2006 shared parenting amendments, but less on its implications for financial outcomes. In our study, family violence was often relevant to disputes and to disadvantageous processes and outcomes for both finances and parenting (property and child support) matters, and could add to financial difficulties for primary carers and children. Our study, and the paucity of previous research in Australia and internationally, suggests that more work needs to be done with larger, representative samples as a first step in encouraging law reforms and policies that reflect a more holistic understanding of the relevance of family violence to post-separation disputes. (Fehlberg and Millward 2014, p. 242)

Options for reform

A number of options canvassed elsewhere in this report should assist in improving the availability of low cost advice and dispute resolution mechanisms for family law property disputes.

However, a number of additional reforms would assist in ensuring the timely and proportionate resolution of family law property disputes. These include clarifying the law governing property division to better enable parties to resolve disputes themselves, promoting greater use of FDR for property matters by introducing pre-filing requirements, and improving the accessibility of legal and financial advice and dispute resolution services for family law property matters.

Making it easier to resolve property disputes informally by clarifying the law

Given that very few family law disputes are resolved through the courts, there is value in ensuring that those seeking to resolve disputes outside the courts have a reasonable degree of clarity about what the law is and what their entitlements are. However, there is a question as to whether the current *Family Law Act 1975* (Cth) provisions applying to the division of property limit the effective use of informal dispute resolution mechanisms by making it difficult for parties to know what their obligations or entitlements in a property division are.

The complexity of the Act's property provisions (and associated court processes) was raised by stakeholders as a particular barrier to justice in this area (WLSV, sub. 33).

There has been limited reform in the distribution of property upon separation in recent years. Currently, the Act provides for a discretionary approach — judges are given very wide powers to adjust property as they consider appropriate under the circumstances — provided the particular order is just and equitable. A four stage approach is employed and involves:

- identifying the property, liabilities and financial resources of the parties
- identifying and assessing the contributions (financial and non-financial) that the parties have made to the property of the parties to the marriage or de facto relationship
- identifying and assessing the needs of each party, including childcare responsibilities
- making an order that is just and equitable in all the circumstances (ALRC and NSWLRC 2010).

As noted by the Australian Institute of Family Studies, ongoing debate exists as to whether this is the optimal approach:

> … the discretionary nature of the approach to determining property matters in the *Family Law Act 1975* (Cth) has led to ongoing debates … about whether a system based not on discretion but on prescriptive principles would lead to greater certainty, fairer outcomes and lower transaction costs from a personal and systemic perspective. (Qu et al. 2014, p. 89)

The Australian approach can be contrasted with those in other jurisdictions, such as New Zealand, which contain presumptions about equal sharing of property which, arguably, contribute to greater predictability and certainty.[47]

The Commission considers that, consistent with attempts to promote greater use of informal dispute resolution mechanisms, it is timely for the Australian Government to consider whether the property provisions in the *Family Law Act* should be clarified to make it easier and cheaper for people to work out their entitlements and come to fair agreements about their division of property.

RECOMMENDATION 24.4

The Australian Government should review the property provisions in the *Family Law Act 1975* (Cth) with a view to clarifying how property will be distributed on separation. The review should consider introducing presumptions about splitting of property as currently applies in New Zealand.

47 *Property (Relationships) Act 1979* (NZ).

Requiring pre-action FDR to be undertaken for property matters

In addition to making the law about property division simpler and more certain, greater use of informal dispute resolution mechanisms for family law property disputes can be promoted by the introduction of pre-action requirements. As noted above, before a family law court can hear a parenting application, the applicant must have filed a certificate from a FDR practitioner stating that the person has attempted FDR or FDR was not possible. There are currently no similar legislative provisions in respect of property matters and the evidence suggests that mediation and dispute resolution services are not used as often as in parenting matters (Qu et al. 2014).

In the absence of a legislative requirement, the family law courts have taken steps themselves to encourage separating parents to resolve issues in property cases before filing. The Family Court requires people intending to apply for financial orders to follow pre-action procedures, including attending dispute resolution, before filing an application (with some exceptions).[48] However, there is some evidence that suggests that non-compliance with this requirement is common (Fehlberg, Smyth and Fraser 2010). The FCC encourages (but does not require) parties to resolve disputed issues when an application is filed with the court. Parties will generally be required to attend a conciliation conference conducted by a registrar. The court also offers privileged mediation (through community-based organisations) in appropriate matters — particularly in rural and regional areas — and refers appropriate matters to privately funded mediation. In 2012-13, registrars held 4490 privileged conciliation conferences and settled 1621 of these matters (FCC 2013).

The Commission considers that extending the requirement to attempt FDR prior to lodging a court application to property matters will assist family law property disputes to be resolved at the most appropriate level. A number of stakeholders supported the extension of this requirement (AGD, sub. DR300; NLA, sub. DR228). Others favoured leaving discretion to the court (Law Council, sub. DR266). The Women's Legal Service NSW expressed qualified support:

> In principle, we support an extension of alternative dispute resolution (ADR) in financial matters, particularly where there is a small pool of assets or only debts. However, we submit it is important there be screening for domestic/family violence in any such matters and there is an option for legally assisted ADR. (sub. DR257, p. 3)

Prior to the introduction of such a requirement it will be important that the issues of training and accreditation are worked through. Currently, there are no specific accreditation standards for practitioners who mediate in property disputes. This is in contrast to the situation for parenting disputes where only FDR practitioners accredited under the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) can issue a certificate under the Family Law Act (which will then allow a person to proceed to court for a parenting matter).

48 Family Law Rules 2004 (Cth), rule 1.05.

The educational requirements for accreditation can be met by completing a Vocational Graduate Diploma of FDR (or the higher education equivalent). Accredited FDR practitioners must also meet a range of other accreditation requirements — including ensuring access to a suitable complaints mechanism, professional indemnity insurance and ongoing professional development. FDR practitioners also face obligations when delivering services (such as ensuring that, as far as possible, the FDR process is suited to the needs of the people involved) (CSHISC 2012).

While National Legal Aid supported an accreditation regime applying in the context of property disputes, it considered that family law property dispute resolution should only be undertaken by lawyers:

> Family law property dispute resolution should only be undertaken by lawyers, and there should be a process for accreditation of those dispute resolution practitioners in much the same way as there is currently a process for the accreditation of family law dispute resolution practitioners. Existing FDRPs [FDR practitioners] who are lawyers with family law property knowledge and experience are a ready work force, and capable of resolving all associated family law matters and are currently used by some LACs to resolve both parenting and property matters through dispute resolution. … any accreditation must address adequate screening for, and understanding about, the dynamics of family violence which also apply frequently in property law matters. (NLA, sub. DR228, p. 19)

In 2012, the Commonwealth Attorney-General's Department commissioned the Community Services and Health Industry Skills Council (Skills Council) to conduct a scoping study into whether there was a need for competency units for property and spousal maintenance to be included in the Vocational Graduate Diploma of Family Dispute Resolution.

The report noted that there is a clear difference of opinion as to whether qualifications in law are necessary in order to mediate property and spousal maintenance disputes. In particular, legally qualified stakeholders were more likely to hold the belief that practitioners who provide mediation in property should hold legal qualifications. It stated:

> A particular point of difference was the strongly differing opinions as to the importance of a mediator having in-depth knowledge of the law relating to property and spousal maintenance. Some practitioners believe it is crucial, and others argue that the process skills of facilitating mediation are more relevant than detailed technical knowledge, and that detailed technical knowledge may make it difficult for a mediator to maintain his or her position as an impartial third party. (CSHISC 2012, p. 18)

The scoping study recommended the development of a new unit of competency in respect of property and spousal maintenance. The Commonwealth Attorney-General's Department advised that this recommendation has not been progressed at this time (sub. DR300). However it noted:

> … a 'streamlining project' being conducted by the Skills Council is intended to review and strengthen existing property references in the qualification and fix any other areas of inconsistency. The streamlining project is expected to commence again in mid-2014. It is

anticipated that the endorsement date for any changes to the qualification will be December 2015. (AGD, sub. DR300, p. 4)

The Commission considers that a new unit of competency in respect of property and spousal maintenance should be progressed and should strike a balance between ensuring appropriate standards are maintained, while not unduly restricting access to the qualification. Further, the taskforce recommended in chapter 7 to design and implement a limited licence for family law should, in consultation with the Skills Council, consider how the education requirements for limited licence holders would interact with any education requirements for practitioners undertaking family law property dispute resolution.

RECOMMENDATION 24.5

The Australian Government should extend the requirement to undertake family dispute resolution before taking a parenting dispute to the family law courts to property and financial matters.

The taskforce established to design a limited licence for family law (recommendation 7.5) should also consider the potential role for limited licence holders to conduct family dispute resolution in family law property matters.

Improving the accessibility of low cost advice and dispute resolution services for family law property matters

If attempting FDR is to be compulsory for those seeking to commence family law property matters in a family law court, it is important that there are adequate low cost advice and dispute resolution services for those that are unable to afford the cost of private services. This is particularly critical in matters involving family violence given that there is evidence that those who have experienced family violence are more likely to do poorly in financial settlements compared with those who have not (Fehlberg and Millward 2014).

As noted above, due to funding constraints, legal assistance for family law property and financial matters is thinly covered. However, National Legal Aid indicated that FDR in property disputes was an area in which LACs could readily expand:

> Funding permitting, LACs could readily expand their dispute resolution conferencing programs in matters involving family law property disputes. (NLA, sub. DR228, p. 18)

The Legal Services Commission of South Australia, in particular, identified this as a space they had hoped to step into, prior to recent funding cuts:

> There is no reason, apart from funding, as to why this program [FDR in relation to disputes involving children] couldn't be rolled out to other aspects of litigation … What we had wanted to do for a very long time was to step into this space of small value property settlement. … we provide an enormous amount of advice to people in relation to property settlements where they can't afford to go off to a private lawyer and many a time, our advice is, 'You have sufficient

assets to go and pay for someone, because you will get a worse situation without getting good advice,' but many times we recognise there's not even sufficient assets to justify going to spend even a thousand dollars on legal advice. As soon as this money came [the budget allocation in year 2013-14], we thought that's [what] we are going to do. We are going to provide a pilot program [for small value property settlement]. (trans., pp. 371–4)

In chapter 21, the Commission has recommended that, as an interim measure, additional funding for civil legal assistance services in the order of $200 million be provided, and notes that a comprehensive assessment of the appropriate quantum of funding for legal assistance services is required. The need for, and financial consequences of facilitating greater coverage of low value family law property matters by legal assistance providers (particularly in cases involving family violence), should be considered as part of that assessment.

Further consideration by the Australian Government about the best way to ensure that the financial and legal needs of those with low value property disputes are met is also warranted. Options include increasing funding for FRCs (and other FSP FDR providers) to provide subsidised FDR in property matters to a greater extent than is currently the case, additional funding for LACs to further expand into the area of family law property matters, and the broader rollout of Legal Aid Queensland's arbitration model (box 24.7). Improved data (chapter 25) in respect of the current level of service provision by FSP funded providers in respect of family law property disputes, the cost of different models of service provision in this area, service provision outcomes, and legal need should inform future funding decisions in this area.

Box 24.7 Legal Aid Queensland's arbitration model

Legal Aid Queensland's arbitration model uses experienced family lawyers who have specialist training in arbitration and provides a quicker and less costly way of resolving property disputes than the courts (LAQ 2014).

It is directed at disputes involving property with a total net equity of between $20 000 and $400 000. The costs of the arbitration are deferred for legally aided parties until the matter has been resolved, at which time a notice is sent advising how much the party needs to pay.

The amount usually includes lawyers' fees and half of any outlays Legal Aid Queensland has paid for. The upper limit for the costs of arbitration that will be charged are 20 per cent of the property settlement's dollar value. Usually the amount is far less.

Legal Aid NSW expressed support for this model:

> Given that complex financial issues can arise in property matters, Legal Aid NSW notes the potential role for family law property arbitrations. Queensland Legal Aid has a model of family law property arbitration conducted by barristers, with both written and oral evidence. Arbitrators would need to be appropriately trained and accredited. (sub. DR189, p. 17)

25 Data and evaluation

Key points

- It is widely acknowledged that data on the civil justice system are seriously deficient for policymaking and evaluation purposes. Previous reviews have called for this situation to be remedied and identified the need to build an evidence base to monitor the system and guide policy reform.
- Factors contributing to the present state of the data landscape include:
  - inconsistencies in definitions and measures between providers and institutions, and across jurisdictions
  - data not sufficiently detailed to usefully inform policy
  - a lack of information around outcomes
  - incomplete and patchy data collection and reporting
  - inadequate management systems especially with regard to the use of technology for data collection and storage
  - a lack of resources among some of those who currently report data and a lack of awareness of how data will be used.
- Changes in legislation, regulation, entitlements, economic circumstances and lifestyle all contribute to changes in legal need. As such, surveys of legal and unmet need should be undertaken at regular intervals.
- Greater efforts should be made to gather data and evidence to support civil justice policy development. Governments should work together, and with the legal services sector — including courts, tribunals, ombudsmen, private law firms and legal assistance providers — to develop and implement reforms to collect and report data that have common definitions, measures and collection protocols. Outcomes based standards to measure service effectiveness and the capacity to link de-identified records should be a priority given their value in policy evaluation.
- Given privacy concerns are managed, data should be publicly-available to assist research and evaluation, particularly quantitative studies, which are currently lacking. Evaluations need to be prioritised, coordinated and made public.
- The Commission has identified a range of specific policy questions and associated data gaps that should be considered by the relevant stakeholders. This does not necessarily mean that providers and institutions will need to collect more data. Rather, the emphasis will be on adapting existing standards so that more useful data are collected.

This chapter emphasises the need for high quality data and better evaluation of the civil justice system. It begins by discussing the importance of data and evaluation (section 25.1). The chapter then examines some of the general problems identified in the present data landscape (section 25.2) and explores reasons why evaluation has been difficult (section 25.3). The chapter concludes by presenting a range of important improvements to data collection and evaluation (section 25.4).

25.1 Data and evaluation are important but underutilised

Data and evaluation form the foundation of the evidence base for developing and reviewing policy. Making policy without evidence can ultimately lead to poor and unexpected outcomes:

> Without evidence, policy makers must fall back on intuition, ideology, or conventional wisdom — or, at best, theory alone. And many policy decisions have indeed been made in those ways. But the resulting policies can go seriously astray, given the complexities and interdependencies in our society and economy, and the unpredictability of people's reactions to change. … Among other things, policies that haven't been informed by good evidence and analysis fall more easily prey to the 'Law of Unintended Consequences' — in popular parlance, Murphy's Law — which can lead to costly mistakes. (Banks 2009, pp. 4–5)

Poor policy and unexpected outcomes can be particularly damaging in the civil justice system — especially because of imperfect markets and incomplete information. Because the civil justice system is complex, evidence-based policy requires information that can:

> … reveal gaps in current legal provision, or weakness in the ways in which current laws work. It can help identify new strategies for dispute resolution and more generally for increasing the impact of law on society. (Partington 2010, p. 1003)

Data and evaluation have important and mutually-reinforcing roles in analysing and improving the civil justice system. Policy-relevant data is a prerequisite for evaluation of policies and programs, while periodic reviews and evaluations highlight useful data and gaps in the evidence base (chapter 4). More broadly, evaluations of the efficiency and effectiveness of programs can lead to improvements in their operation and, in turn, improve access to justice (Sheen and Gregory 2012).

Stakeholders recognise that the evidence base is poor

The inadequacies of present data collection efforts are widely acknowledged across all types of stakeholders. The Commission has received numerous submissions from participants — including providers, government, and community organisations — which acknowledge the absence of consistent, policy-relevant data.

The Law Council of Australia stated:

> … a key priority in this area should be the development of nationally consistent data collection policies, to be applied across legal assistance providers (including LACs [legal aid commissions], ATSILS [Aboriginal and Torres Strait Islander legal services], CLCs [community legal centres] and FVPLS [family violence prevention legal services]) and Federal, State and Territory courts. Currently (for example) there is no consistently applied definition of what amounts to a 'legal inquiry'. There is also no central body collecting and publishing data coming out of Australian legal service providers and courts. (sub. 96, p. 140)

The Commonwealth Attorney-General's Department (AGD) asserted:

> Access to justice related inquiries over several years have frequently commented on the lack of comprehensive and consistent data available to inform civil justice policy and program reforms. In particular, there has been a lack of information about the actual costs of different dispute resolution pathways and the economic and social impact of these costs.
>
> In response to these concerns, the department is developing the architecture necessary to develop a strong, consistent evidence base across the civil justice system. This evidence base will enable us to answer important questions about the function and operation of the civil justice system in Australia and information about those who [encounter] it. (sub. 137, p. 44)

The Queensland Public Interest Law Clearing House (QPILCH) noted:

> This is a reoccurring theme in this policy area. A lack of reliable and comparable statistics makes sensible comparisons of the operation of the sector extremely difficult. (sub. DR247, p. 5)

Rigorous evaluation of programs is also lacking

While providers (such as legal assistance providers and the legal profession) and institutions (including courts, tribunals, and ombudsmen) often have an anecdotal understanding of 'what works', an understanding of the social costs and benefits, relevant counterfactuals, indirect effects and uncertainties are generally lacking. Anecdotal evidence is rarely useful in determining whether programs are having their desired impact or if they are cost-effective. As Genn noted:

> The discourse is anti-empirical. It does not need information, although it does incorporate atrocity stories that support any particular matter under discussion. What is discussed becomes what is known. The mythology is developed and elaborated on the basis of war stories told and repeated. (Genn 1997, p. 169)

Even worse, programs that may be effective and represent a 'best practice' response to a problem cannot be defended without sound evaluation, and may be at risk of being terminated.

In general, quantitative research on the sector is sparse and in some cases (where evaluations have occurred) 'comprehensive evaluations and empirical research studies … are not publicly available' (Sheen and Gregory 2012, p. 67). The absence of publicly-available reviews may have negative consequences for the performance of the

civil justice system. As Sheen and Gregory argue, there is 'a strong case … for the desirability of transparent research that acts as a catalyst for change' (2012, p. 67).

Even where evaluations are to be made public, they may only be released some time after their finalisation. Two prominent examples include *The review of the National Partnership Agreement on Legal Assistance Services (NPA)* which was tendered in early 2012 (AGD 2012d), scheduled for completion in June 2013 (AGD 2012b), and released early July 2014 (ACG 2014b); and the *Family Violence Prevention Legal Services — Research and Needs Analysis Report* which was commissioned in April 2013, scheduled for completion in June 2013 (Senate Legal and Constitutional Affairs Committee 2013a) and is unpublished (NAFVPLS, sub. 97).

The prompt release of such reports supports policy development and delivery — the timely release of the two reports mentioned would have greatly assisted the Commission in this inquiry and stakeholders more broadly.

25.2 What are the problems with the existing data collected?

Those who seek to use data to better understand the workings of the civil justice system are hindered by:

- definitions and measures that are inconsistent
- data that are reported at a level that is too general to prove valuable
- outcomes that are poorly captured
- some cases of incomplete data.

Those responsible for collecting and reporting data also face constraints, including:

- management systems that inadequately collect and store data
- data collection 'fatigue' and a lack of resources to collect useful data.

Inconsistency in definitions and measures

Without standard terminology, the ways that services are counted and measured, and how service users are classified, differ across providers and institutions. For example, what constitutes mediation is not standardised across providers and institutions using alternative dispute resolution (ADR) (NADRAC 2009). As a result, it is not possible to determine the relative frequency with which mediation is used across types of providers and institutions, and jurisdictions (chapter 8). Similarly, the Commission heard that the way the delivery of community legal education is measured differs, with some providers counting the number of sessions and others counting the number of attendees. An inaccurate picture of the

relative efficiencies of providers emerges when costs are ascribed to activities that are not consistently defined.

Similarly, performance is reported and measured differently by providers of similar services. Using government ombudsmen as an example, table 25.1 illustrates that there is little consistency in the periods used to measure timeliness and in the ways complaints are defined. In some cases, the timeframes employed do not reveal the speed with which complaints are resolved. For example, reporting timeliness over a 12 month period provides little detail as to whether complaints are resolved within one month or within 10 months.

Table 25.1 **Reported timeliness of government ombudsmen**
2011-12

Ombudsman	*Reported measure of timeliness of finalising complaints*
Commonwealth Ombudsman	• 80 per cent of complaints and approaches finalised within one month
New South Wales Ombudsman	• 99 per cent of complaints finalised within 12 months
Victorian Ombudsman	• 97 per cent of complaints finalised within required timelines
Queensland Ombudsman	• 85 per cent of complaints finalised within 10 days • 90 per cent of complaints finalised in three months • 99 per cent of complaints finalised within 12 months
Ombudsman South Australia	• Average age of complaints and Freedom of Information reviews was 87 days
Ombudsman Western Australia	• 72 per cent of allegations finalised within 3 months • 99 per cent of allegations finalised within 12 months
Ombudsman Tasmania	• 85 per cent of complaints finalised within three months (excluding Freedom of Information and Right to Information) • 88 per cent of complaints within six months (excluding Freedom of Information and Right to Information) • 98 per cent of complaints within 12 months (excluding Freedom of Information and Right to Information)
Ombudsman Northern Territory	• 99 per cent of inquiries and complaints resolved within three months (excluding police) • 89 per cent of police inquiries and complaints resolved within three months
Australian Capital Territory Ombudsman	• 88 per cent of complaints finalised within three months

Sources: Australian Capital Territory Ombudsman (2012); Commonwealth Ombudsman (2012); New South Wales Ombudsman (2012); Ombudsman Northern Territory (2012); Ombudsman South Australia (2012); Ombudsman Tasmania (2012); Ombudsman Western Australia (2012); Queensland Ombudsman (2012); and Victorian Ombudsman (2012).

Collections of demographic data are also affected by inconsistent classifications. For example, the definitions of homelessness, risk of homelessness and disability differ across the different surveys and administrative data sets. In turn, this can lead to poor

decision-making as allocations are based on inconsistent results from a poor definition as opposed to comparable measures of need.

The data often cannot be disaggregated

Much of the administrative data collected by service providers and institutions are very high level, making it hard to assess the effectiveness and efficiency of types of services.

A lack of data disaggregation may mean that providers are not aware of the success or cost of the provision of specific services. For example, total costs of preventative services are reported by legal assistance providers, but the costs of the constituent programs of preventative services, including information and community legal education, are often unknown or poorly understood.

A lack of disaggregated cost data frustrates cost comparisons between ombudsmen, complaints bodies, tribunals and courts. For example, in the case of some complaints bodies, reported costs capture both the costs of executing regulatory functions and complaint functions (chapter 9). Ideally, the complaints function would be separately costed and the number of complaints recorded, to get a clearer picture of the average costs of servicing complaints, and to enable benchmarking.

A lack of data disaggregation also reduces the value of data that are available on those who use the civil justice system. In some cases, data are not available on particular groups within the community. For example, the National Aboriginal and Torres Strait Islander Legal Service noted:

> There is not a large amount of comprehensive nationwide data available in regards to Aboriginal and Torres Strait Islander peoples' civil law needs. (sub. 78, p. 3)

Similarly, while courts and tribunals record tallies of self-represented litigants, they tend not to report information about self-represented litigants, such as whether they come from a culturally and linguistically diverse (CALD) background and/or experience disadvantage. The absence of this demographic data makes it challenging to design measures to assist this group (chapter 14).

Data reported by legal aid commissions (LACs) also do not provide enough detail on the types of services used by different groups.

> Although some LACs may report on the breakdown of gender between criminal, family and civil law, they do not do a further breakdown within family law grant applications themselves. If they do report, the commissions seem to report on overall statistics of grants approved but there is no way of determining the extent of the assistance that is provided. We believe it is important to know this information in terms of accountability, evaluation and policy development. (Women's Legal Services Australia, sub. DR207, p. 24)

The absence of sufficiently disaggregated service data complicates the already difficult task of identifying gaps in legal assistance offerings.

Outcomes are poorly captured

The key to assessing the effectiveness of services is measuring the outcomes they achieve (Sheen and Gregory 2012). The first step in this process is crafting outcomes that reflect policy objectives, which is not a straightforward task (box 25.1). Measuring outcomes involves more than recording counts of activity and relying solely on the latter can distort effort. As Curran observed:

> There is also a problem with activity reporting, where the focus can become the number of tasks completed, which may have little bearing on the actual effect of the intervention. To reduce things to tasks or activities can lead to significant inefficiencies or over-servicing as services become obsessed with the number of the activities they are doing so that they can report positively and not lose their funding, rather than strategically approaching client problems to achieve real results. (2013a, p. 22)

Besides the inconsistent timeliness measures collected by ombudsmen, tribunals and courts, there is a lack of outcome measures collected about the civil justice system. Legal assistance and ADR services tend to rely more on service counts than outcome data.

User satisfaction is often measured as a proxy for a good outcome, but there are many reasons why this may not be the case. While user satisfaction surveys may provide a record of users' experiences and perceptions, they do not completely encapsulate the 'desirability' of the outcomes achieved and the complexity of the legal landscape. Curran notes the problem with relying on user satisfaction surveys to measure desirability of results in the legal assistance sector.

> Studies that involve 'Client Satisfaction Surveys' are problematic if applied to the legal assistance sector, in view of the overriding obligations of the legal profession under the various legal professional legislation and conduct rules which impose duties and obligations which can conflict with what a client might want or expect (for example, the paramount duty to the court). (2012a, p. 6)

A further issue relating to the interpretation of user surveys is the correlation between satisfaction rates and the direction of the settlement. For example, individuals tend to be more satisfied with the services they received if they were successful (chapter 2). But this may not have much to do with the quality of the service they receive.

Box 25.1 Shortcomings of the NPA on Legal Assistance Services

The National Partnership Agreement on Legal Assistance Services (NPA) commits the Australian and the state and territory governments to jointly fund the provision of legal aid services. Under the NPA, legal aid commissions (LACs) are to provide efficient and cost-effective services for disadvantaged Australians. The NPA sets out performance indicators for LACs. These indicators have a number of shortcomings, highlighting the difficulty in measuring the outcomes of legal assistance services.

First, linkages between indicators, outcomes and objectives are not provided. For example, it appears that indicators for two of the priority outcomes — improving service targeting and promoting a national response — are not included in the NPA. And in some cases, it appears that measurement is a secondary consideration.

> Performance indicator 1 in the NPA required reporting on "successful legal aid service outcomes". The first of these was specified in the NPA as "less than 20% of legal aid grant recipients return seeking a grant of aid for the same type of matter within a 24 month period" and the NPA did not contain requisite definitions. The other "successful outcomes" referred to in Performance Indicator 1 of the NPA were not identified or defined prior to the signing of the NPA. Definitions, and additional reporting therefore had to be hurriedly retro fitted on the basis of existing data sets. The capacity to glean anything beyond what was already known was therefore minimal, and the reporting of data could not be said to be cost effective. (National Legal Aid, sub. DR228, p. 12)

There may even be a tension between some of the indicators and outcomes. Many indicators focus on increasing the number of services. For example, LACs are to increase the number of early intervention services provided. But LACs are also meant to ensure that their services are efficient and cost-effective. Compelling LACs to increase the number of early intervention may conflict with efficient delivery of legal assistance services, encouraging LACs to divert their resources away from better uses and leading to the duplication of early intervention services across the sector. Mechanisms to avoid these unintended consequences are not presented in the NPA.

Second, the NPA does not provide guidance on how to measure performance. For example, LACs need to show that there has been a 10 per cent increase in 'successful outcomes' over four years. How to measure a 'successful outcome' is not detailed — reference is made to collecting client satisfaction feedback, and containing the number of repeat clients requesting a grant of legal laid for the same type of matter. The difficulties of using client feedback and the degree of control that LACs have in containing the number of repeat clients are not considered. Not having direction in measuring outputs and outcomes has meant that data are inconsistent across jurisdictions.

Third, LACs may have little control over some of the indicators. For example, LACs are expected to increase the number of services by 25 per cent. Growing services depends on the demand for services and the capacity of LACs to service additional clients. When providers have little control over their performance indicators, they may not 'buy in' to the need for data and hence lack the incentive to collect accurate and timely data.

Source: COAG (2010).

Data collection and reporting are incomplete

Many in the sector do not collect useful data or fail to retain it. Where services receive government funding, the collection and reporting of data is particularly important because these services need to demonstrate a net benefit to the wider community. Determining the right amount and distribution of funding also requires data that are reliable and transparent.

Legal assistance providers are required to report to various government agencies on services provided, costs, and characteristics of users. In theory, the data provided should indicate the level of activity and the types of clients being serviced. However, in practice records are incomplete (Curran 2012a).

Even data that are relevant to an organisation's stated goals — such as ensuring that advice is reaching marginalised or disadvantaged users — can be incomplete, and sometimes not retained (box 25.2). As a result, administrative data sets, in their existing form, can be of limited use in assessing the effectiveness and efficiency of legal assistance services.

Box 25.2 CLCs and data collection

One example where data are not being properly collected occurs in community legal centres (CLCs). The goal of CLCs is stated in the National Association of Community Legal Centres' (NACLC) submission:

> Community legal centres are independent community organisations providing equitable and accessible legal services. Community legal centres work for the public interest, particularly for disadvantaged and marginalised people and communities. (sub. 91, p. 6)

However, the data collected by CLCs are patchy, even when that data may be directly relevant to their stated goal. For example, data that relates to indicators of disadvantage are not collected regularly. For civil (including family) matters in the 2011-12 financial year:

- disability information was not recorded for 39 per cent of CLC clients
- homelessness risk was not recorded for 71 per cent of CLC clients
- English 'ability' (an indicator of culturally and linguistically diverse status) was not recorded for 21 per cent of CLC clients
- self-reported income was not recorded for 16 per cent of CLC clients.

NACLC notes that CLSIS has contributed to the limitations in the data, and while data collection remains an issue, CLCs are improving:

> While NACLC acknowledges the need to improve data collection on a number of levels, it notes that in 2011-12, for over 74% of clients, the rate of data collection across eight client demographic data items was 70% or better. In 2012-13 this improved to 79% of clients. (sub. DR268, p. 43)

Source: Commission estimates based on unpublished CLSIS data from AGD.

Private providers of legal services are not under the same obligations as legal assistance providers to report to government, but their actions in public institutions — such as courts — can have a significant effect on the public good and the information they collect has a public policy value. These firms lack an incentive to publicly reveal

commercially-sensitive information such as data on legal fees, particularly where it may put competitors at an advantage (chapter 6). There are also ethical or lawyer-client privilege issues which can stymie the reporting of policy-relevant data.

Inadequate data management processes and systems

Data collection across the civil justice system is limited by the administrative data collection and storage protocols of some providers and institutions. Some current management systems do not allow for cost effective record keeping and data collection. This is an issue for CLCs in particular.

> PCLC [Peninsula Community Legal Centre] agrees that there is a definite need to improve data collection systems. CLCs use the Community Legal Service Information System (CLSIS), which has longstanding deficiencies that make reporting and planning difficult. For example, producing reports is a convoluted process and definitions can be incompatible with those used by legal assistance providers. (Peninsula Community Legal Centre, sub. DR192, p. 12)

There are also documented problems around the retention of records and data, which in turn can prevent effective evaluation of service providers:

> Curran noted that the biggest obstacle when conducting her research in 2007 was that most CLCs had thrown out many of their campaign files … The State peak body for CLCs the Federation of Community Legal Centres (FCLC) had retained some materials but it relied on CLCs providing these to them regularly which had not occurred over the two decade period under examination. The FCLC had also had to cull material that would have been relevant due to its own space issues. (Curran 2012a, p. 60)

Similarly, some tribunals do not use electronic case management systems (chapter 10), and as a result these tribunals do not have easy access to data on their case loads and costs.

Further, the use of different management systems by providers of similar services makes data coordination and consistency more difficult to achieve. In the case of publicly-funded legal assistance, differences in collection methodology across the four types of legal assistance providers degrade the quality and comparability of information collected. This complicates the task of measuring the use of legal services by disadvantaged and marginalised groups. For example, ATSILS and FVPLS use two different administrative data collection systems, which have different variables and data collection protocols. As a result, data are inconsistent even though services are targeted at similar communities.

A lack of resources, and 'fatigue', among those collecting and reporting data

Many legal assistance providers expressed a willingness to collect data to improve the evidence base but stated that a lack of resources is a barrier to doing so. For example:

> NLA [National Legal Aid] is supportive of national legal assistance data collection, although developing one data set with associated definitions, counting rules, and weightings is not an easy task. Systems which enable the capture, recording, and reporting of new data sets also need to be developed and implemented, and there are significant resource issues associated with the adjustment of electronic [such as eligibility, case-management, and finance systems] and other systems associated with data collection, recording and reporting. The capacity to resource proposed changes is a relevant factor in decision making about proposed data collection. (National Legal Aid, sub. DR228, p. 11)

A concern has also been raised about the need for a central repository for information — such as a data clearinghouse — given the constrained budget environment:

> … NLA is concerned that there are currently insufficient funds for critical legal assistance services delivery with existing data already demonstrating the need for further funding.
>
> In a situation where funding to legal assistance service providers has recently been reduced the question appears to be whether allocating money for the establishment of a clearing house at this time is warranted. (National Legal Aid, sub. DR228, p. 13)

Others (including the Law Council of Australia, sub. 96; Legal Aid ACT, sub. 27; Dr Elizabeth Curran, sub. 88; QPILCH, sub. DR247; Legal Aid NSW, sub. DR189) have suggested that reporting requirements act as a burden on many providers and institutions and there is a perception that data are collected for data's sake:

> … at one Victorian community legal service where all staff members were engaged in direct service delivery, 36% of staff time was being dedicated to measurements and accountabilities. This often occurs because one service has a number of funders (such as Territory/State and Commonwealth Governments), each with their own accountability requirements. It is therefore imperative for those who set accountability criteria to ensure that measurement tasks are efficient and do not prevent or distract staff from providing services to clients. (Curran 2012b, pp. 3–4)

Part of the problem is that agencies require reports in different formats, which can increase the time and cost of reporting. This can be a significant burden for small providers. For example, QPILCH noted that:

> … different organisations want different reporting and it actually is an expensive, difficult thing for a small CLC to do. … we use MYOB, but the state government doesn't accept the reports that MYOB uses, so they have to be changed … which unfortunately means the auditor has to reconvert it back [to an MYOB format] to see that we're not cheating the government. (trans., pp. 1142–1144)
>
> … our accountant said that the process of reconverting and making sure that the reports to government were the same as our reports to the management committee, so the management committee get the MYOB reports, cost about $1000 extra on our costs to our audit. (trans., p. 1144)

Another problem is that the data currently being collected are not being fully exploited by government or providers (Sheen and Gregory 2012). As noted by QPILCH:

> … [CLSIS] data is not currently being analysed or consolidated in a transparent or useful way. As far as we were aware, this data is not being published. (sub. 58, p. 65)

Presently, it is difficult for legal assistance providers to use the data they collect to improve service delivery (Law and Justice Foundation of NSW, sub. DR231; Dr Elizabeth Curran, sub. DR170).

The incentives for providers and institutions to collect accurate data are reduced when they lack the capability to use it themselves, or observe no one else using the information to good effect. In turn, this makes it more difficult for providers and institutions to appreciate the benefits of collecting more useful and available data, as all they have experienced are the costs.

Measuring the quality of legal services is difficult

As discussed in chapter 6, quality is difficult to measure from a consumer perspective. Equally, it is difficult to measure from a data perspective since doing so can involve imputing the value or suitability of advice or services given by legal providers, or how 'fair' an experience was in the legal system. Where data are collected by providers or institutions, it is normally in the form of feedback. Feedback provided is often at one of two extremes — respondents are either very satisfied or very unsatisfied. Self-reported survey data are also prone to framing effects and survey responses are highly correlated with the outcome of the dispute, which indicates that users of the legal system are not able to assess the quality of the advice or service provided independent of the outcome.

While the civil justice system does face challenges around measuring quality in the context of the service provided, it is not a challenge that is unique to the sector. Similar problems are faced in equally complex policy areas, such as health care, where data are collected effectively to account for the scale of problems and the quality of care provided. Follow-up on a random sample of users can be used to understand what aspects of the services consumers valued and what aspects they did not. This can indicate to providers and institutions those aspects of services that are working well, and hence help improve service delivery and understanding for providers and institutions.

25.3 Why have evaluations been limited?

The lack of policy-relevant data has made evaluation difficult, and the nature of the civil justice system means that it does not lend itself easily to evaluation. The Commission considers that while these factors complicate evaluations they do not, and indeed should not, rule them out.

A lack of robust inputs

Robust data are required for evaluation of policies and programs. However, many stakeholders (NADRAC 2009; Sheen and Gregory 2012; Sourdin 2012b; QPILCH, sub. 58) have argued that evaluations — across jurisdictions and over time — have been inhibited by a lack of consistent data.

> The ability to effectively evaluate service delivery and ensure demand is being met is hampered by a lack of independent, cost benefit analysis research. There are a number of shortcomings in the data that is available — due to the inconsistency of collection and storage methods across the sector and many services do not have the resources or capacity to effectively collect and analyse data. (QPILCH, sub. 58, p. 58)

Inconsistent data also frustrate benchmarking and make it difficult to understand interactions within the civil justice system.

> The lack of sufficiently comprehensive and comparable data and performance benchmarks is not only an issue for ADR. It is an issue for the entire civil justice system. As a result, not only is it impossible to effectively measure or compare different ADR processes in different environments, it is also impossible to get a clear picture of the interaction between ADR and other civil justice services, including litigation. (NADRAC 2009, p. 82)

The context of the civil justice system complicates measurement

The civil justice system is very diverse — there are a number of different types of legal service providers and dispute resolution bodies, each of which offer different types of services targeted at different users in different jurisdictions. The interplay of these factors means that many of the outcomes are contextually-dependent — what is considered a 'successful outcome' depends on the circumstances of a particular matter. As such, there is a concern that evaluations, and the data used to underpin them, will ignore important details of the civil justice system (Law Council of Australia, sub. 96; Sheen and Gregory 2012).

While it is important to acknowledge context, it does not preclude data collection or evaluation that can meaningfully inform policy.

First, there are ways to control for context in evaluations including by accounting for the timing of an intervention. For example, the outcome of an intervention may depend on the stage of the dispute — the success rates of mediation mandated by court, or occurring before a dispute escalates to trial, may differ. Comparing similar interventions occurring at similar stages will help control for context.

Second, similarities exist across some types of matters and services, which allows for the collection of comparable data. For example, casework occurs in many different settings. While the data collected may not be able to describe every legal matter in detail, it may be more than sufficient to use for evaluation purposes.

25.4 How to improve data collection and evaluation

There are many challenges to overcome in order to improve data collection and evaluation of the civil justice system — and indeed in making evidence-based policy more generally.

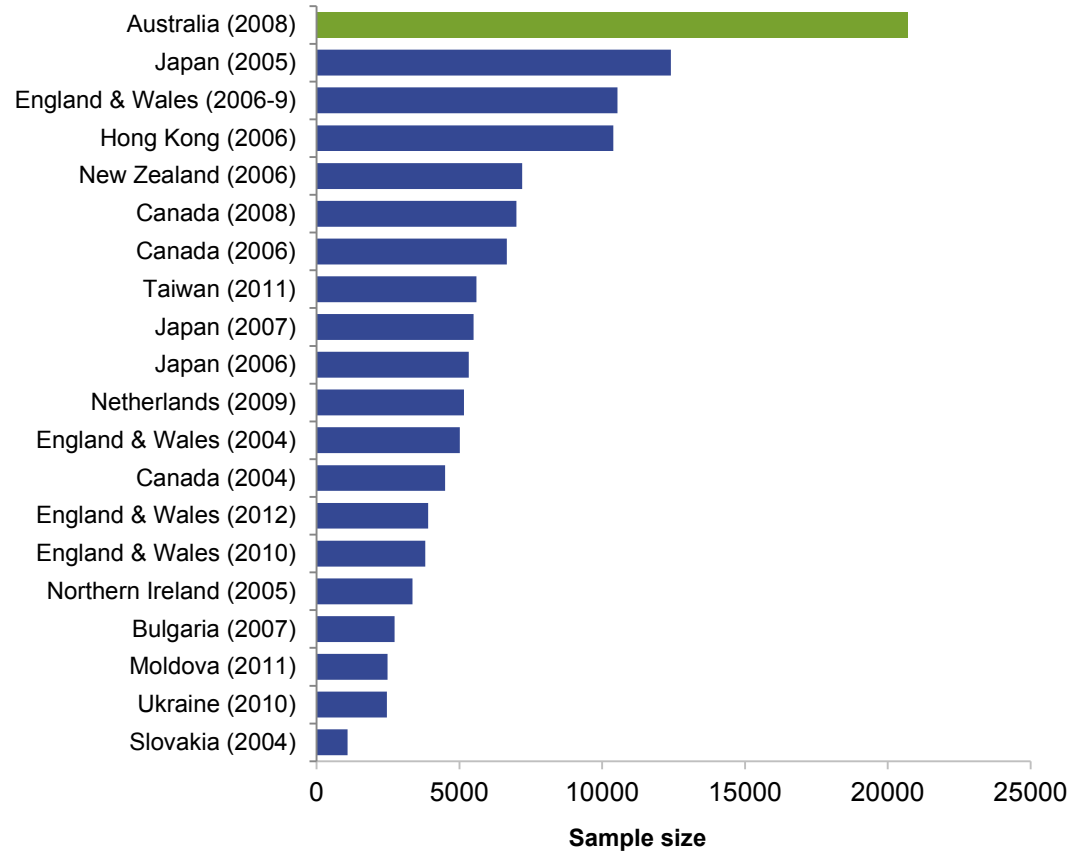
Do we need to better understand legal need?

While legal needs surveys, such as the *Legal Australia-Wide* (*LAW) Survey* (Coumarelos et al. 2012) have helped to provide evidence on the civil justice system, stakeholders' opinions about future surveys have been mixed. Some stakeholders, including QPILCH (sub. DR247) and Peninsula Community Legal Centre (sub. DR192) support a regular survey of legal need. Legal Aid NSW (sub. DR189) support a legal needs survey, but highlighted the need for such surveys to ensure that those who are hard to reach (such as the homeless and the disadvantaged) are properly represented. The Law and Justice Foundation of NSW — the organisation that conducted the *LAW Survey* — expressed reservations around the costs and need for future legal needs surveys because legal need does not change much through time. However, 'monitoring the broad public experience of legal problems over time' was important for continuous improvement of services (Law and Justice Foundation of NSW, sub. DR231, p. 23).

The Commission notes that the *LAW Survey* was very large and detailed — over 20 000 interviews were conducted and respondents were asked about 129 specific types of legal problems (chapter 2). In comparison, other legal needs surveys conducted overseas have had much smaller sample sizes (figure 25.1). It may be possible that future surveys of legal need and unmet need in Australia could be smaller, cheaper and still provide the necessary policy-relevant information, as has been the experience in other jurisdictions. These surveys should be undertaken by the Australian Bureau of Statistics (ABS) at regular intervals.

As noted by Legal Aid NSW (sub. DR189) and the Law and Justice Foundation (sub. DR231), there are some groups of people that are underrepresented in legal needs surveys of the general population, particularly if surveys are conducted over the telephone. This highlights the need for additional effort to understand the legal needs of these groups. The ABS should conduct needs-specific surveys of particular groups that are underrepresented in legal needs surveys including Indigenous, youth, the homeless, prisoners, and people living in remote areas. The ABS is the appropriate organisation to undertake these surveys as they have experience in sampling hard-to-reach groups.

Figure 25.1 **Different sizes of national surveys of legal needs**



Data source: Adapted from Pleasance and Balmer (2012).

RECOMMENDATION 25.1

A legal needs survey that is more contained than the 2008 *LAW Survey* should be undertaken by the Australian Bureau of Statistics at regular intervals. Such a survey should collect data to measure both legal need and unmet legal need. The results of, and underlying data from, such surveys should be made public. Collection of survey information should commence no later than 1 July 2016.

The Australian Bureau of Statistics should also conduct regular surveys of the legal needs of groups that are likely to be underrepresented in a survey of the general population. Such groups may include youth, Aboriginal and Torres Strait Islander people, the homeless, prisoners and people living in remote areas. A different group could be surveyed in each instance. These surveys should commence no later than 1 July 2016.

The timing of these regular surveys should be informed by the timing of reviews of legal assistance funding.

Data collection needs to be better coordinated and more accessible

Policy-relevant data can be best used when they are consistent within and across different types of providers and institutions. The Commission recognises that the AGD and the ABS are currently working together to identify data gaps and develop standards across the civil justice system. While this is an important step in developing the evidence base, there is still a need for a common framework around definitions, objectives and use of the data to substantially improve the quality of data collected. Many stakeholders also support the development of a common framework (National Legal Aid, sub. DR228; Law Society of SA, sub. DR219, Attachment; Legal Aid NSW, sub. DR189; Law and Justice Foundation of NSW, sub. DR231; Women's Legal Services Australia, sub, DR207; QPILCH, sub. DR247; NACLC, sub. DR268).

The Commission has identified many of the 'data gaps' that presently hamper evaluation and evidence-based policymaking in respect to the civil justice sector (appendix J), but particular gaps are so severe that they have warranted recommendations in order to remedy them. Box 25.3 shows a summary of these recommendations, with additional detail provided in the relevant chapter and in appendix J. These data gaps occur in relation to the courts, tribunals, ombudsmen, legal assistance providers and private law firms.

Moving towards a common data framework will not be costless as providers and institutions will need to learn what data to collect and implement new collection processes. The emphasis needs to be on collecting more useful data rather than 'more data' — existing frameworks often overemphasise quantity over quality of data. As such, the first step is to assess existing data to ensure that they are relevant, feasible, and makes sense to those providing the service and gathering the data. To achieve this:

> … measures need to be informed heavily by those who deliver the legal services on the ground and ought not [to be] burdensome in an under resourced sector. Instead, all the efforts should be on actually delivering the services to the community who need them most. (Curran 2013a, p. 59)

Efforts also need to be made to identify and reduce 'redundant data' requirements (Legal Aid ACT, sub. 27). This is best done in collaboration with providers and institutions.

Presently, there is often a disconnect between the data legal assistance providers are required to provide to government and the information they collect for their own internal purposes. This adds unnecessary costs. Throughout this inquiry, the Commission has heard that the CLSIS is particularly difficult and expensive to use (Peninsula Community Legal Centre sub. DR192; QPILCH sub. DR247). This is partially because the CLSIS format does not align with many of the internal budget formats (which are preferred because they present financial and operational material in a more useful way) and it is time consuming to convert data between the formats (QPILCH nd). Better aligning operational data and reporting requirements could save CLCs time and money.

Box 25.3 Recommendations that require improved data collection

A summary of the Commission's recommendations that involve improvements to data collection is provided below.

Private practitioners

- More information is needed about the fees that clients are likely to face, and what different billing structures are available. This information should be presented online. A taskforce to advise on how best to collect the data is proposed. (Recommendation 6.2)

Courts

- The efficacy of ADR is not well understood as data collection is poor. Courts and tribunals should collect more information on where ADR is used, and undertake evaluations to determine whether ADR is more efficient and effective than other means of resolving disputes. (Recommendation 8.1)
- Targeted pre-action protocols, and the possibility that they can narrow the issues in dispute, means that courts need to collect more information about when they are used in order to identify best-practice. (Recommendation 12.2)
- Costs awards based on fixed scales will require the court scales to be reviewed on a regular basis. (Recommendation 13.2)
- Court fees should be reviewed every three years to reflect changes in the costs of providing court services. (Recommendation 16.1)

Government ombudsmen

- Performance benchmarking is needed to promote the efficiency and effectiveness of government ombudsmen. Standardised data should be reported to facilitate performance benchmarking. (Recommendation 9.4)

Legal assistance providers

- In consultation with legal assistance providers, benchmarks need to be developed and implemented by Australian and state and territory governments to enable better measurement and comparison of performance between individual providers as well as between types of providers. These benchmarks should be a consideration in framing administrative data collection. (Recommendation 21.8)

The value of more policy-relevant data also needs to be understood by providers. Policy-relevant data can help build a case for additional funding of legal assistance services — where they are merited — and can be used to determine the quantum of additional funding that is needed. If governments do not have a clear understanding of the services, and the contexts in which they are delivered, those services may be at risk of being underfunded.

> Funding of legal assistance, measuring effectiveness/impact and identifying legal need are and ought to be integrally connected. There is a danger in governments being left to determine funding of services in a vacuum as [they are] often remote from the factors that impact on service delivery and community impact. This can lead to programs being under-funded or unfunded due to the absence of understanding of local factors that are at play. (Dr Elizabeth Curran, sub. DR170, p. 20)

Changing the data collection systems to make them fit for purpose may be a costly exercise, but the benefits to the community mean that it is warranted. Governments should bear the costs associated with transitioning to new data collecting requirements as the public will benefit the most from evidence-based policy made in regards to the civil justice system.

Most of the effort and cost in improving data collection will be 'front-loaded'. It will take stakeholders time to determine which items should be collected and to agree on common definitions. Collection of data can commence once this is completed.

In the case of legal assistance providers, governance arrangements (such as funding and national partnership agreements) should clearly define the data items to be collected, and there should be penalties for failing to do so. There should be a greater emphasis on the measurement of frequent users of the legal system (chapter 20) as these users often receive a substantial proportion of legal assistance services. For example, Victoria Legal Aid found that:

> … while representing 3 per cent of the total number of clients who have received a grant of legal assistance, [high-contact users] received 16 per cent of the total grants during that ten year [between 2003–13] period. (Jolic 2014, p. 5)

Measurement of frequent users is already occurring in some jurisdictions — Legal Aid NSW and Victoria Legal Aid have recently completed studies on their frequent users — and other jurisdictions should do the same. Information on frequent users of legal assistance is critical to making judgments about the effectiveness of services to assist these individuals who are highly disadvantaged and may require more intensive assistance.

Discussions around definitions, collection, databases, de-identification, outcomes and other data items to be collected should commence immediately, so that better data collection can begin on 1 July 2016. These discussions should involve the Law, Crime and Community Safety Council, the Law Council of Australia, the Australian Legal Assistance Forum and the courts.

Collection of data, and the results from future surveys of legal need, will need to be ready well in advance of future National Partnership Agreements on Legal Assistance Services.

RECOMMENDATION 25.2

The Law, Crime and Community Safety Council, the Law Council of Australia, the Australian Legal Assistance Forum and the courts should develop and implement reforms to collect and report data from courts, tribunals, ombudsmen, legal assistance providers and legal services providers (the detail of which is outlined in this report). Discussions should commence immediately so that data collection can commence 1 July 2016. The National Centre for Crime and Justice Statistics should provide secretariat support.

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 including data on repeat users of legal assistance services
- designing data collection systems that encourage policy-relevant data that can also be used by legal service providers to inform their service delivery. In particular, the Community Legal Service Information System should be re-designed to collect more useful information.

Policy-relevant data should be publicly available

One of the recurring challenges faced by the Commission during the inquiry process — and indeed by all those who seek to undertake evaluations of the various components of the civil justice landscape — has been the disparate nature of the data collected. Significant effort was required to identify what is available, what is accurate, and bring it together into a usable form.

Much of the data provided to government as part of reporting purposes is not made publicly available, which restricts the capacity of academics and other researchers to make valuable, policy relevant contributions. In the absence of these contributions, governments (and indeed service providers) have typically paid consultants to undertake evaluations.

One way of overcoming these challenges is through a data clearinghouse, which coordinates, gathers and disseminates data from a wide range of stakeholders. Such a measure would enable researchers, policy makers, and evaluators to access and analyse comparable data across the sector. Stakeholders are supportive of the development of a data clearinghouse (including Dr Elizabeth Curran, sub. DR170; Law and Justice Foundation, sub. DR231; QPILCH, sub. DR247; AGD, sub. DR300).

While data coordination would greatly assist evaluations of the civil justice system, a balance between data collection and dissemination for policy purposes and privacy, needs to be carefully articulated. This is well-recognised by stakeholders:

> The Law Council also supports collection of data in relation to the legal profession. However, the capacity of law practices to collect data and provide information will be limited by a number of factors, including cost, obligations of confidentiality to clients and concerns about the way in which the data may be used or compared. (Law Council of Australia, sub. 96, p. 10)

However, there are precautions that can be taken to de-identify data so that they can be used without the possibility of personal or business information being revealed. These are relatively common practices among statistical agencies (including the ABS) and government organisations that collect data (such as the Department of Social Services). Indeed, there are already examples where this has successfully occurred including 'Data Linkage WA' which links 'registers of birth defects, of cancer … of autism and mental health problems' (Stanley 2010; quoted in PC 2013b, p. 10) by setting up unique identifiers that preserve the anonymity of individuals.

The Commission considers the ABS to be the most appropriate agency to host a civil justice data clearinghouse given their expertise in handling and de-identifying sensitive data — and indeed the ABS is required to maintain the confidentiality of those it collects information from as part of section 19 of the *Census and Statistics Act 1905* (Cth). The ABS also has experience linking, using and presenting administrative data, and consulting with (and coordinating data from) a wide range of stakeholders including governments and courts, and tribunals. For example, AGD is currently working with the ABS to undertake a data gap analysis of the Administrative Appeals Tribunal (AGD, sub. DR300). The civil justice data clearinghouse could be housed within the ABS' National Centre for Crime and Justice Statistics (AGD, sub. DR300). The civil justice data clearinghouse will need to be appropriately funded by the Australian and state and territory governments. Examples of similar initiatives and their costs are provided in box 25.4.

RECOMMENDATION 25.3

The Australian and State and Territory Governments should provide funding for a civil justice data clearinghouse. The clearinghouse should be established as part of the National Centre for Crime and Justice Statistics, within the Australian Bureau of Statistics, and be operational by 1 July 2016. The clearinghouse should coordinate data collection from multiple civil justice stakeholders and disseminate the information in a timely fashion. The clearinghouse should also be able to link, use and present data, especially administrative data.

Box 25.4 How much might a data clearinghouse cost?

The cost of a data clearinghouse will depend on the volume and detail of data collected. The costs of operating a clearinghouse will also increase as more organisations are involved in collecting data.

Recent examples of funding initiatives that included the formation and maintenance of clearinghouses provide an indication of the cost of establishing and maintaining a data clearinghouse.

- The Australian Government allocated around $2.5 million to the Closing the Gap Clearinghouse from 2008-09 to 2012-13. This funding was matched by state and territory governments (DSS 2012).
- $9.1 million is to be provided to the National Aged Care Data Clearinghouse and for an expansion of the ABS' Survey of Disability, Ageing and Carers over five years starting 2012-13 (DOHA 2012).
- The Australian Government provided $1 million to establish the National Centre for Excellence to Reduce Violence Against Women and Their Children (the Centre). Starting 2013, the Centre is to receive annual funding of $1.5 million from the Australian Government (DSS 2014). This is to be matched by state and territory governments (DSS 2014). The Centre will be fully incorporating two clearinghouses — the Australian Domestic and Family Violence Clearinghouse and the Study of Sexual Assault — from October 2014, after a transition period starting January 2014 (Edwards 2013).
  - The Australian Domestic and Family Violence Clearinghouse was established in 2000 with a grant of $180 000 (roughly $260 000 in today's dollars[a]) from the Australian Government (PMC 2000).
- Between 2009-13 (DSS 2013; FaHCSIA nd), the Australian Government allocated $5.8 million[b] to research capacity building and dissemination as part of the National Homelessness Research Agenda. The Australian Homelessness Clearinghouse received $160 000 in 2010-11 (FaHCSIA 2011).

While these examples demonstrate the range of funding allocations to clearinghouses, the Commission considers that the civil justice data clearinghouse will most closely resemble the National Aged Care Data Clearinghouse because both are to collect data from private and public service providers, and on clients. The civil justice clearinghouse will also need to establish and implement standard data definitions, which will likely add to the cost.

[a] Inflated using the Consumer Price Index ABS Cat. No. 6401.0. [b] Commission's estimate from reported data from DSS (2013) and FaHCSIA (nd).

Facilitating evaluations

Coordinated, publicly-available data are a prerequisite of evidence-based policy, but without evaluations, there will be little understanding of the performance of the justice system. Evaluations need to be undertaken at regular intervals using a common and transparent methodology, and be made public, to inform policy and funding decisions, and drive improvement in service delivery. Further, while a data clearinghouse will enable more quantitative evaluations, the civil justice system is too important and there are too

many research gaps to leave to ad hoc evaluation. As such, evaluations also need to be coordinated.

As it currently stands, there is an absence of publicly-available evaluations of civil justice programs and research on the civil justice system is patchy (Sheen and Gregory 2012). While there have been efforts to conduct research projects that can inform policy — including the Australasian Institute of Judicial Administration (AIJA) and Australian Centre for Justice Innovation (ACJI) (box 25.5) — they focus on the formal parts of the system. While there are important, policy-relevant research questions concerning the formal aspects of the civil justice system, there are other parts of the civil justice system that would benefit from more rigorous research and evaluation (appendix J). For example, cost-benefit analyses of legal assistance services should be undertaken, and the effectiveness of ADR in contexts outside of courts needs to be measured.

Box 25.5 Australasian Institute of Judicial Administration

The Australasian Institute of Judicial Administration (AIJA), which is associated with Monash University, sponsors:

> … research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems …
>
> The Institute has published widely in matters of judicial administration and associated subjects including areas such as case management, cultural awareness, judicial ethics, technology and the courts, complex criminal trials and cross-vesting legislation …

AIJA and Monash University also jointly fund the Australian Centre for Justice Innovation (ACJI), which researches and evaluates innovative approaches to court administration, and non-adversarial justice. ACJI is also a teaching centre.

AIJA receives around $450 000 each year from the Law, Crime and Community Safety Council. A small amount of income is sourced from membership subscriptions and fees charged to access its research reports and attend its educational courses. There are around 1 000 AIJA members, including judges, magistrates, tribunal members, court administrators, practising legal professionals, academics and court librarians. AIJA is governed by a council of representatives from the judiciary, tribunals, court administrators, the legal profession, government and academia.

Sources: AIJA (nd); Monash University (2014).

An effective way to minimise the problems associated with patchy research is to promote greater coordination of policy-relevant research and evaluation. This would facilitate greater engagement between governments and researchers, which in turn would help to identify research gaps and produce high quality, useful research. A central repository of civil justice program evaluations and research could also make it easier for people to locate and use relevant research, including service providers, which could use research findings to improve their service delivery.

Given the multi-institutional and multi-jurisdictional nature of the civil justice system, there needs to be national coordination of the evaluation effort. The Law, Crime and Community Safety Council is best placed to guide the coordination of research and evaluation supported by an expert advisory committee.

The Commission acknowledges the ongoing research and evaluation task is broad and perhaps daunting but it is critical to improving civil justice outcomes and the efficiency of the system. Initial priorities should include:

- ADR, including culturally tailored ADR for Aboriginal and Torres Strait Islander people, particularly in high need areas
- quantitative analyses of the merits of different case management approaches
- cost-benefit analyses of legal assistance services.

RECOMMENDATION 25.4

The Law, Crime and Community Safety Council should establish a Civil Justice Evaluation Advisory Committee to advise on priority areas for quantitative research and evaluation to support improving access to civil justice. Initially, priority should be given to examining the:

- effectiveness of alternative dispute resolution techniques (as broadly defined)
- efficiency and effectiveness of different case management approaches and techniques adopted by courts in different jurisdictions
- effectiveness of legal assistance providers, and cost-benefit analyses of the services that they provide
- costs and benefits of establishing a dedicated institute to advise on priority areas for research and evaluation into the civil justice system, compared to using an advisory committee.

A Conduct of the inquiry

The Commission received the terms of reference for this inquiry on 21 June 2013. It subsequently released an issues paper on 16 September 2013 inviting public submissions and highlighting particular matters on which it sought information.

In total, 334 public submissions were received and placed on the inquiry website. A list of all public submissions is contained in table A.1.

During the course of the inquiry, the Commission held informal consultations, roundtable discussions and public hearings with governments, members of the judiciary, representatives of tribunals and ombudsmen, regulatory bodies, peak industry groups in the legal sector, legal assistance service providers, as well as a number of individuals and organisations with legal and non-legal backgrounds. Tables A.2, A.3 and A.4 list these participants.

The Commission would like to thank all those who contributed to this inquiry.

Table A.1 **Public submissions received**

Participants	*Submission no.*
Aboriginal Family Violence Prevention & Legal Service Victoria	99, DR212
Aboriginal Legal Rights Movement (ALRM)	126
Aboriginal Legal Service of Western Australia Inc (ALSWA)	112
Actuaries Institute	DR243
Adelaide Law School, The University of Adelaide	16, DR230
ADJ Consultancy Services	DR164, DR297
Administration of Norfolk Island (Norfolk Island Government)	DR260
Administrative Appeals Tribunal	65, DR312
Adrian Evans	114
Allens	111, DR232
Andrew Bird	DR159
Andrew Smart	147
Andrew Watkins	DR304, DR308
Anita Stuhmcke	DR160
Annette Marfording	19
Attorney-General's Department (Australian Government)	137, DR300
Australasian Legal Information Institute	DR250
Australasian Professional Legal Education Council	DR210
Australian and New Zealand Ombudsman Association Inc	133, DR200
Australian Bankers' Association Inc	121, DR254
Australian Bar Association	149, DR286
Australian Centre for Disability Law	67, DR215
Australian Corporate Lawyers Association	DR263
Australian Federation of Disability Organisations	24
Australian Government Solicitor	DR307
Australian Inquest Alliance	62
Australian Institute of Company Directors	40, DR172
Australian Institute of Family Studies	101
Australian Lawyers Alliance	107, DR298
Australian Lawyers for Human Rights	DR253
Australian Network of Environmental Defenders Offices	94, DR293, DR329
Australian Taxation Office	150
Avant Mutual Group	DR216
Bar Association of Queensland	DR245
Barriers to Justice	DR233
Bentham IMF Limited (formerly IMF Australia Ltd)	103, DR204
Bill Orme	DR203
Brett Dawson	8
Brian Ward & Partners	DR292
Central Australian Aboriginal Legal Aid Service Inc (CAALAS)	89
Central Coast Community Legal Centre	39
Central Highlands Community Legal Centre Inc	13
Centre for Advocacy, Support and Education for Refugees Inc	DR241

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Table A.1 **(continued)**

Participants	*Submission no.*
Centre for Rural Regional Law and Justice & National Rural Law and Justice Alliance	20
Centre for Rural Regional Law and Justice, School of Law, Faculty of Business and Law, Deakin University	DR236
Chris and Claire Priestley	DR334
Christopher Enright	10
Christopher Jenkinson	DR264
City of Sydney Law Society	110, DR249
Allens, Ashurst and Clayton Utz	DR224
Commonwealth Ombudsman	129, DR282
Communication Rights Australia	71
Community Legal Centres Association (WA) Inc	DR214, DR315
Community Legal Centres NSW and others	4
Community Legal Centres NSW	DR213
Community Legal Centres Tasmania	DR294
Consumer Action Law Centre	49
Consumer Action Law Centre and Consumer Credit Legal Centre NSW	DR202
Consumer Credit Legal Centre (NSW) Inc	87
Council of Australasian Tribunals	98
David Caruso & Suzanne Le Mire (Adelaide Law School, University of Adelaide)	106
David Neal	DR158
Diarmuid Hannigan	DR222
Disability Advocacy Network Australia (DANA) Ltd	35
Disability Discrimination Legal Service Inc	116
Disability Discrimination Legal Service/Villamanta Disability Rights Legal Service	DR237
Domestic Violence Legal Service	140
East End Mine Action Group (Inc)	37, DR168
Elizabeth Curran	88, 92, DR170
Energy & Water Ombudsman NSW	141, DR190
Energy and Water Ombudsman (Victoria) Limited	119, DR183
Eqalex Underwriting Pty Ltd	108, DR278
Evan Whitton	7, 42
Family & Relationship Services Australia	90
Family Court of Australia	70
Family Relationship Centre Port Augusta /Centacare Catholic Family Services Country SA	DR211
Federal Circuit Court of Australia	DR258, DR326
Federation of Community Legal Centres (Victoria)	77, DR226, DR317
Financial Ombudsman Service	136
Fitzroy Legal Service	DR276
Flemington & Kensington Community Legal Centre	DR225
Funds in Court of the Supreme Court of Victoria	152

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Table A.1 **(continued)**

Participants	*Submission no.*
Gabrielle Appleby (Law School, University of Adelaide)	DR169
Gabrielle Appleby & Suzanne Le Mire (Law School, University of Adelaide)	63
Gabrielle Hall	DR323
Geoff Bird	DR157
Governance Institute of Australia	DR180
Grays Institute	38
Helen McGowan	DR284
Hunter Community Legal Centre	26
Indigenous Legal Needs Project	105
Indigenous Legal Needs Project & Victorian Aboriginal Legal Service	125
Insurance Council of Australia	DR193
Intellectual Disability Rights Service Inc	75, DR261
John Joseph	113
Johnson & Johnson Family of Companies	DR239
Jonathan B. Horrocks	148
Jones Day Lawyers	54
Judicial Conference of Australia	DR195
Judicial Council on Cultural Diversity	120
Julian Knight	DR166
Julie Grainger	66
Justice Action	43
Justice Connect	104, DR290
JusticeNet SA	DR280
Kevin Rothery	22
Kingsford Legal Centre	53, DR242
La Trobe School of Law and Advocacy and Rights Centre Ltd	DR184
Launceston Community Legal Centre	DR173
Law Admissions Consultative Committee	DR162
Law and Justice Foundation of NSW	DR231
Law Consumers Association Pty Ltd	DR209
Law Council of Australia	11, 96, DR167, DR266, DR309
Law Institute of Victoria	DR221
Law Society of NSW	DR174
Law Society of South Australia	61, 131, 139, DR219, DR319
Law Society of Tasmania	DR227
Lawcover Insurance Pty Ltd	DR251
LEADR	DR205
Legal Aid (ACT)	27
Legal Aid NSW	68, DR189
Legal Aid WA	DR273

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Table A.1 **(continued)**

Participants	*Submission no.*
Legal Practitioners' Liability Committee	DR178
Legal Profession Conduct Commissioner	DR313
Legal Services Board & Legal Services Commissioner	DR248
Legal Services Commission of South Australia	93, DR265
Legalwise Australia Pty Ltd	154, DR155
Liability Reform Steering Group	DR279
Luke Nottage	DR275
Lynton Freeman	9, 12, DR269
Madeleine Kingston	DR333
Magistrates Court Northern Territory	DR331
Marrickville Legal Centre	DR277
Mary Anne Noone	DR186
Maurice Blackburn Pty Ltd	59, DR197, DR302,DR320
Mediation & Arbitration Chambers	DR244
Medical Consumers Association Inc	41, DR177
Mental Health Carers Arafmi (WA) Inc	5
Michael O'Keeffe	69
Mid North Coast Community Legal Centre	85
Migration Review Tribunal and Refugee Review Tribunal	14, DR188
Narelle Bedford & Monica Taylor	DR328
National Aboriginal and Torres Strait Islander Legal Services (NATSILS)	3, 78, DR256, DR327
National Alternative Dispute Resolution Advisory Council (NADRAC)	109
National Association of Community Legal Centres (NACLC)	91, DR268, DR301
National Child Rights Taskforce	DR285
National Children's and Youth Law Centre	50
National Family Violence Prevention Legal Services Forum	97, DR194, DR316
National Legal Aid (NLA)	6, 123, DR228
National Native Title Tribunal	55
National Pro Bono Resource Centre	73, DR199
National Public Lobby	143
National Welfare Rights Network	DR201
Nature Conservation Council of NSW on behalf of the Conservation Councils of Australia	124
Negocio Resolutions	52, 144, DR198
New South Wales Aboriginal Land Council	80
New South Wales Bar Association	34, DR206
Newcastle Law School	DR283
North Australian Aboriginal Family Violence Legal Service (NAAFVLS)	138, DR303
North Australian Aboriginal Justice Agency (NAAJA)	95, DR306
Northern Community Legal Service Inc	DR196

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Table A.1 **(continued)**

Participants	*Submission no.*
Northern Suburbs Community Legal Centre Inc	DR281
Northern Territory Legal Aid Commission (NTLAC)	128, DR255
NRMA Insurance	DR238
NSW Ombudsman	DR295
NSW Society of Labor Lawyers	130, DR322
NSW Young Lawyers Committees	79
Office of the Australian Information Commissioner	DR179
Office of the Australian Small Business Commissioner	23, DR185
Office of the Information Commissioner (WA)	DR318
Office of the Information Commissioner (Qld)	DR305
Office of the Legal Services Commissioner (NSW)	36
Office of the Public Advocate (Vic)	DR311
Office of the Tasmanian Ombudsman	DR288
Patrick Cavanagh	1
Paul Evans	15
Peninsula Community Legal Centre Inc	28, DR192
People with Disability Australia Incorporated	30
Peta Spender	135
Peter G.F. Street	DR156
Peter Johnson	DR187
Peter Mair	2, DR161
Peter White	142
Physical Disability Council of NSW	DR229
Prisoners' Legal Service	82
Private Health Insurance Ombudsman	DR175
Pro Bono Centre, University of Queensland	74
Prue Vines	17
Public Interest Advocacy Centre Ltd (PIAC)	45, DR246
Public Transport Ombudsman Limited	118, DR223
Queensland Advocacy Incorporated	64, DR234
Queensland Association of Independent Legal Services Inc (QAILS)	DR314
Queensland Indigenous Family Violence Legal Service (QIFVLS)	46
Queensland Law Society	57, DR267
Queensland Public Interest Law Clearing House Incorporated (QPILCH)	58, DR247, DR325
Quinn Emanuel Urquhart & Sullivan	DR272
Redfern Legal Centre	115
Rich Krasnoff	100
Richard Whitwell	81

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Table A.1 **(continued)**

Participants	*Submission no.*
Roger Quick	DR270
Ronald Strauss	DR208
Salvos Legal (Humanitarian) Limited	122
Shearer Doyle Pty Ltd	21, DR165
Shoalcoast Community Legal Centre	18
Slater & Gordon Lawyers	56
Small Business Development Corporation	76, DR240
Social Security Appeals Tribunal	86, DR191
Springvale Monash Legal Service (Inc)	84, DR274
St Kilda Legal Service Submission Co-Op Ltd	51
Stan van de Wiel	DR218
Steve Phillips	151
Stuart Bruce Venn	60
Supreme Court of South Australia	DR330
Supreme Court of Victoria	DR324
Tasmanian Government	72
Telecommunications Industry Ombudsman	134, DR220
The Aged-care Rights Service Incorporated	31
The Environmental Defenders Office (SA) Inc	DR299
The Refugee Advice and Casework Service (RACS)	47, DR182
Tom Benjamin (Vice-President Medical Consumers Association Inc)	44
Tony Woodyatt	DR310
Transformation Management Services Pty Ltd	DR296
U.S. Chamber Institute for Legal Reform	25,153
University of New South Wales (UNSW Law)	DR181
UNSW Law Society	DR289
UQ Pro Bono Centre	DR271
Veterinary Surgeons' Board of WA	145
Victoria Legal Aid (VLA)	102, DR252, DR332
Victorian Bar	127
Victorian Council of Social Service (VCOSS)	132
Victorian Ombudsman	DR176
Western Australian Dispute Resolution Association Incorporated	146
Westside Community Lawyers Inc	DR235
Wolfgang Babeck	DR217
Women's Health In the North	83
Women's Legal Service (SA) Inc	DR287
Women's Legal Service (Vic)	DR259

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Table A.1 **(continued)**

Participants	*Submission no.*
Women's Legal Service Inc (Brisbane)	11
Women's Legal Service Tasmania	48, DR262
Women's Legal Service Victoria	33
Women's Legal Services Australia	29, DR207
Women's Legal Services NSW	32, DR257
Wyndham Legal Service	DR163
Young People's Legal Rights Centre (YOUTHLAW)	DR291

Table A.2 **Meetings**

Participants

ACT
ACT Justice and Community Safety Directorate
ACT Magistrates Court
ACT Ombudsman
Administrative Appeals Tribunal
Attorney-General's Department
Bruce Chapman (Australian National University)
Department of Social Services (Australian Government)
Federal Court of Australia
Richard Denniss (The Australia Institute)

New South Wales
Department of the Attorney-General and Justice (NSW Government)
Australian Law Reform Commission
Community Legal Centres NSW
Federal Court of Australia
Law Society of NSW
Legal Aid NSW
National Legal Aid Grants and National Statistics Working Group
District Court of NSW
Judicial Commission of NSW
NSW Land and Environment Court
Law and Justice Foundation of NSW
NSW Local Court
Energy & Water Ombudsman NSW
Supreme Court of NSW

Northern Territory
Aboriginal Interpreter Service
Community Justice Centre
Darwin Community Legal Centre
Department of Attorney-General and Justice (NT Government)
Northern Territory Magistrates Court
Northern Australian Aboriginal Family Violence Legal Service
Law Society Northern Territory
NT Legal Aid Commission
Ombudsman NT
Top End Women's Legal Service Inc

Queensland
Department of Justice and Attorney General (QLD Government)

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Table A.2 **(continued)**

Participants
Federal Circuit Court of Australia
Family Court of Australia
Indigenous Legal Needs Project
Law Council of Australia
Law Council of Australia Family Law Section
Legal Aid Queensland
Legal Services Commission
Queensland Law Reform Commission
Queensland Law Society
Women's Legal Services Australia
South Australia
Attorney-General's Department (SA Government)
Chief Justice of SA & Procedure Executive Committee
Chief Justice of SA & representatives of the Judiciary
Law Society of South Australia
Legal Practitioners Conduct Board
Legal Services Commission
National Aboriginal and Torres Strait Islander Legal Services (NATSILS and representatives of member ATSILS)
South Australian Bar Association
Robert Lunn and James Lunn
Tasmania
Department of Justice (Tas Government)
Law Society of Tasmania
Legal Aid Commission of Tasmania
Legal Profession Board of Tasmania
Magistrates Court of Tasmania
Supreme Court of Tasmania
Tasmanian Aboriginal Centre Inc
Greg Barns
Victoria
Telecommunications Industry Ombudsman
Australian Bar Association
Australian Centre for Justice Innovation
Dispute Settlement Centre of Victoria
Family Law Council

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Table A.2 **(continued)**

Participants
Federal Circuit Court/Family Court
Bentham IMF Limited (formerly IMF (Australia) Ltd)
Magistrates' Court of Victoria
Supreme Court of Victoria
Victorian Bar
Victorian Civil and Administrative Tribunal
Federation of Community Legal Centres (Victoria)
Victoria Legal Aid
John Alford
Peter Shergold
Western Australia
Department of the Attorney-General (WA Government)
Law Reform Commission of Western Australia
Law Society of Western Australia
Legal Aid Western Australia
Western Australian Ombudsman

Table A.3 **Roundtables**

Organisations
Sydney — 22 November 2013
Aboriginal Family Violence Prevention Legal Service Forum (Victoria)
Access to Justice Division, Attorney-General's Department (Australian Government)
ACIL Allen Consulting
Ashurst
Commercial Disputes Management Centre, Law Council of Australia
Deakin University, Centre for Rural Regional Law and Justice
Deputy Commonwealth Ombudsman
Dispute Resolution Unit, NSW Small Business Commissioner
Energy & Water Ombudsman NSW
Family Law Council
Federation of Community Legal Centres (Victoria)
Foundation Chair and Director of Australian Centre for Justice Innovation at Monash University
Representatives from NADRAC (before disbanded)
Indigenous Country and Governance, AIATSIS
Institute of Arbitrators & Mediators Australia (NSW chapter)
Judith Stubbs & Associates
Justice Connect (previously PILCH NSW and PILCH Vic)
Law and Justice Foundation of NSW
Law Council of Australia
Legal Aid NSW
Legal Services Commission of South Australia
National Aboriginal and Torres Strait Islander Legal Services (NATSILS)
National Aboriginal Family Violence Prevention Legal Services Forum
National Association of Community Legal Centres
North Australian Aboriginal Family Violence Legal Service
Pro Bono, Clayton Utz
Relationships Australia Victoria
Salvos Legal
Senior Executive Officer responsible for ADR at Australian Taxation Office
UNSW Faculty of Law
Victoria Legal Aid

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Table A.3 **(continued)**

Organisations
Melbourne – 25 and 26 November 2013
Access to Justice Committee, Law Institute of Victoria
Administrative Appeals Tribunal (AAT)
Australian Centre for Justice Innovation, Monash University
Australian Skills Quality Authority
Centre for Innovative Justice, RMIT University
Consumer Action Law Centre
Department of Attorney-General and Justice (NSW Government)
Family Court of Australia
Federal Circuit Court of Australia
Federal Court of Australia
Justice Connect (formerly PILCH NSW and PILCH Vic)
Law Council of Australia and Australian Bar Association
Law Society Northern Territory
Law Society of NSW
Law Society of South Australia
Legal Aid NSW
Legal Practitioners Conduct Board (South Australia)
Legal Services Commissioner of Victoria and CEO Legal Services Board
QBE Australia (on behalf of the Insurance Council of Australia)
Queensland Public Interest Law Clearing House (QPILCH)
Social Security Appeals Tribunal
South Australian Bar Association
Supreme Court of Victoria
Supreme, District and Land Courts Service (Qld Government)
University of Melbourne Law School
Victoria Legal Aid
Victorian Bar
Victorian Civil and Administrative Tribunal (VCAT)

Table A.4 **Public hearings**

Participants	*Transcript page nos.*
Canberra — 2 June 2014	
Women's Legal Centre (ACT & Region)	4-20
Legal Aid Commission (ACT)	21-39
Women's Legal Centre (ACT & Region)	40-42
Australian Small Business Commissioner	43-55
Environmental Defender's Office ACT	56-64
Bruce Chapman	65-76
Disability Advocacy Network Australia	77-88
Sydney — 3 June 2014	
Community Legal Centres (NSW)	92-104
New South Wales Bar Association	105-124
Law Society of New south Wales	125-136
Bentham IMF	137-149
National Pro Bono Resource Centre	150-157
Indigenous Legal Needs Project	158-169
Legal Aid NSW	170-184
LEADR (Association of Dispute Resolvers)	185-216
Australian Lawyers Alliance	217-237
Law Consumers Association	238-244
Sydney — 4 June 2014	
John Emmerig	250-258
Australian Centre for Disability Law	259-266
National Association of Community Legal Centres	267-280
Redfern Legal Centre	281-297
Financial Rights Legal Centre	298-308
Australian and New Zealand Ombudsman	309-321
City of Sydney Law Society	322-328
Grays Institute	329-336
Ronald Strauss	337-342
East End Mine Action Group	343-355
Adelaide — 5 June 2014	
Peter Johnson	359-368
Legal Services Commission of South Australia	369-390
Chris Snow	391-399
Law Society of South Australia	400-420
Family Relationships Centre Port Augusta	421-431
JusticeNet SA	432-440
Women's Legal Service (SA)	441-451
University of Adelaide	452-460

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Participants	*Transcript page nos.*
Aboriginal Legal Rights Movement	461-474
South Australian Bar Association	475-482
Perth — 6 June 2014	
Law Society of Western Australia	487-503
Northern Suburbs Community Legal Centre	504-515
Legalwise Australia	516-523
Women's Legal Services Australia	524-536
Community Legal Centre Association of Western Australia	537-553
Western Australian Dispute Resolution	554-564
Legal Aid Western Australia	565-583
Chief Justice of Western Australia	854-601
Melbourne — 10 June 2014	
Public Transport Ombudsman	605-619
Transformation Management Services	620-635
Maurice Blackburn	636-649
Helen McGowan	650-657
Law Institute of Victoria	658-675
Mary Anne Noone	676-687
Flemington Kensington Community Legal Centre	688-697
Justice Connect	698-709
Australian Shareholders' Association	710-718
Office of The Public Advocate	719-727
Jemal Abdelrehem	728-731
Madeleine Kingston	732-737
Melbourne — 11 June 2014	
Victoria Legal Aid	741-761
Federation of Community Legal Centres (VIC)	762-776
Australian Bar Association	777-792
Women's Legal Service (VIC)	793-809
Elizabeth Curran	810-820
Andrew Watkins	821-830
Telecommunications Industry Ombudsman	831-844
Consumer Action Law Centre	845-859
Supreme Court of Victoria Funds in Court	860-873
Pro Bono Practices of Allens, Ashurst and Clayton Utz	874-887
Diarmuid Hannigan	888-895
Hobart — 13 June 2014	
Women's Legal Service Tasmania	899-913
Legal Aid Commission of Tasmania	914-924

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Table A.4 **(continued)**

Participants	*Transcript page nos.*
Law Society of Tasmania	925-939
National Legal Aid	940-951
Launceston Community Legal Centre	952-962
Environmental Defenders Office Tasmania	963-973
Community Legal Centres Tasmania	974-980
Hobart Community Legal Centre	981-995
Darwin — 17 June 2014	
Northern Territory Legal Aid Commission	998-1013
Northern Territory Bar Association	1014-1024
NAAJA & NATSILS	1025-1041
Northern Territory Law Society	1042-1051
National Aboriginal Family Violence Prevention Forum	1052-1063
NAAFVLS	1064-1075
Jane Carrigan	1076-1084
Brisbane — 18 June 2014	
Law Society of Queensland	1088-1103
Christopher and Deborah Jenkinson	1104-1112
Shearer Doyle – Affording Justice	1113-1122
Legal Aid Queensland	1123-1140
Queensland Public Interest Law Clearing House	1141-1159
Andrew Bird	1160-1168
Bar Association of Queensland	1169-1183
Stuart Bruce Venn	1184-1193
Queensland Association of Independent Legal Services	1194-1211
Alpha One Business Consultancy	1212-1216
Brisbane — 19 June 2014	
Women's Legal Services Queensland	1221-1234
University of Queensland Pro Bono Centre	1235-1239
Lynton Freeman	1240-1247
Queensland Independent Costing Services	1248-1256
Law Council of Australia	1257-1285

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