Australian Government

Productivity Commission

Access to Justice Arrangements

Productivity Commission Inquiry Report

Overview

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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 complete two volume report is available from the Productivity Commission's website (www.pc.gov.au).

Acknowledgements

The Commission is grateful to everyone who has taken the time to discuss the very wide range of matters canvassed in the terms of reference.

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.

OVERVIEW

Key points

- There are widespread concerns that Australia's civil justice system is too slow, too expensive and too adversarial. But the notion of a civil justice 'system' is misleading. Parties can resolve their disputes in many ways, including through courts, tribunals and ombudsmen. Each differs in its formality, cost and timeliness. Such a complex system resists both a single diagnosis and remedy.
- While much focus is on the courts, the central pillar of the justice system, much is done in their shadow, with parties resolving their disputes privately. Community legal education, legal information (including self-help kits) and minor advice help ensure that parties are better equipped to do so. Better coordination and greater quality control in the development and delivery of these services would improve their value and reach.
- Where disputes become intractable, parties often have recourse to a range of low cost and informal dispute resolution mechanisms. But many people are unnecessarily deterred by fears about costs and/or have difficulty in identifying whether and where to seek assistance. A well-recognised entry point or gateway for legal assistance and referral would make it easier to navigate the legal system.
- Most parties require professional legal assistance in more complex matters. But the interests of lawyers and their clients do not always align. Reforms to professional regulation are required to ensure clients are better informed and have more options for selecting the tasks they want assistance with, and how they will be billed. Clients should also have independent and effective options for redress when professional standards fall short.
- Some disputes, by their nature, are more appropriately handled through the courts. While these disputes may be small in number, many individuals are poorly placed to meet the associated costs. Court processes in all jurisdictions have undergone reforms to reduce the cost and length of litigation. But progress has been uneven and more needs to be done to avoid unnecessary expense.
- The ways in which parties interact with each other and with courts and tribunals also needs to change. The adversarial behaviour of parties and their lawyers can hinder the resolution of disputes or even exacerbate them. Changes to rules governing the conduct of parties and lawyers, and the way in which costs are awarded, would improve incentives to cooperate.
- Court fees vary widely across courts and jurisdictions and are not set with reference to a common framework. A more systematic approach is required for determining fees. Parties can derive significant private benefits from using the court system; these benefits need to be reflected in court charges, which in many cases should be increased.
- Disadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes. Governments have a role in assisting these individuals. Numerous studies show that efficient government funded legal assistance services generate net benefits to the community.
- The nature and predictability of funding arrangements constrain the capacity of legal assistance providers to direct assistance to the areas of greatest benefit. This needs to change and, in some cases, funding should be redirected.
- While there is some scope to improve the practices of legal assistance providers, this alone will not address the gap in services. More resources are required to better meet the legal needs of disadvantaged Australians.

Overview

The role of this inquiry

The Commission has been asked to undertake an inquiry into Australia's system of civil dispute resolution with a view to constraining costs and 'promoting access to justice'. There are many definitions of 'access to justice'. As Justice Sackville observed:

> Like other catchphrases, such as 'fairness' and 'accountability' (if not 'democracy' itself), the expression 'access to justice' survives in political and legal discourse because it is capable of meaning different things to different people. (2002, p. 19)

For the purposes of this inquiry, the Commission has used the term 'promoting access to justice' to simply mean, 'making it easier for people to resolve their disputes'.

Civil disputes involve many matters and impact on many people

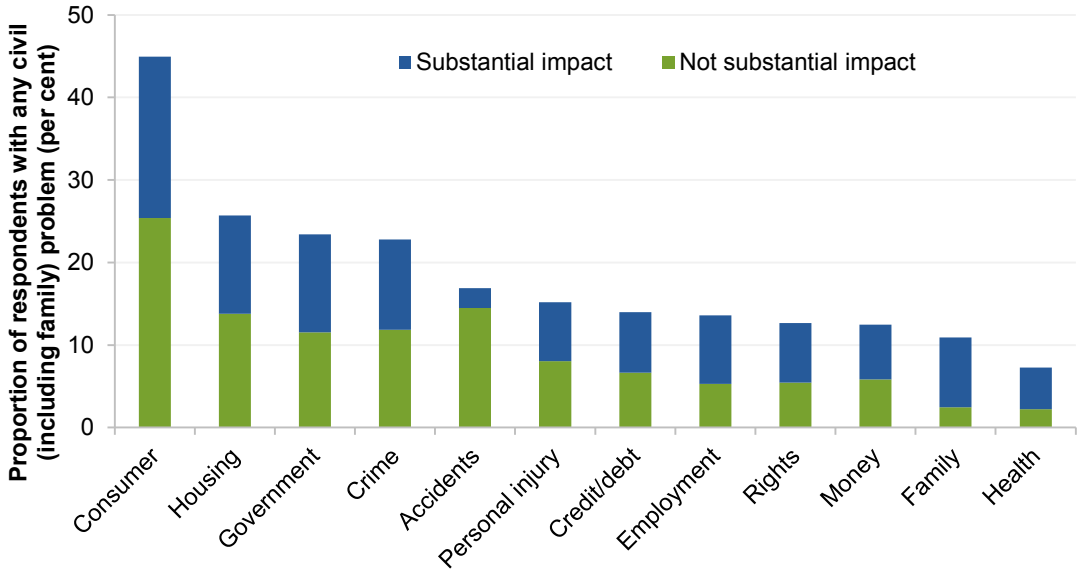
Civil disputes span a wide range of areas and involve a variety of parties, or as Professor Dame Hazel Genn puts it, 'comprise a rag-bag of matters and participants':

> There are disputes relating to the performance or non-performance of contracts involving businessmen suing each other, individuals suing businesses, and businesses suing individuals. There are claims for compensation resulting from accidental injury in which individuals sue institutions. There is the use of the courts by lenders who realize their security by evicting individual mortgage defaulters. Civil justice also involves attempts by citizens to challenge decisions of central and local government bureaucrats, a rapidly growing field that includes immigration, housing, mental health, child welfare, and the like. … Finally, there are the acrimonious and often heartbreaking struggles between men and women following the breakdown of family relationships as property and children become the subject of legal dispute. (1997, p. 160)

Reflecting the wide range of areas that they encompass, civil disputes are relatively common. According to the most recent comprehensive survey of legal need, undertaken by the Law and Justice Foundation of NSW in 2008, close to half of respondents experienced one or more civil legal problems (including family law matters) over a 12 month period. More than half of respondents who experienced at least one civil problem considered the problem had a 'severe' or 'moderate' impact on their everyday life (figure 1).

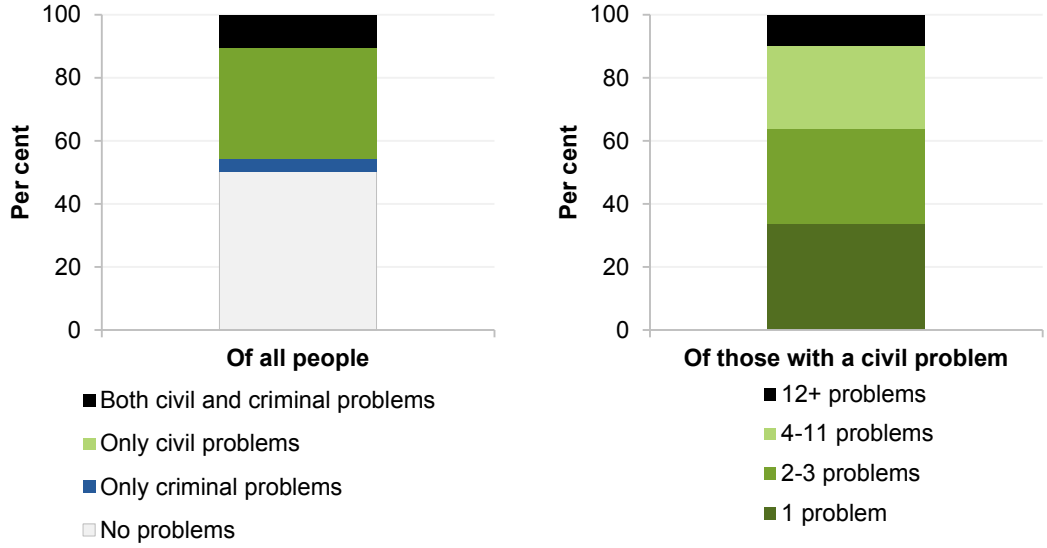
Legal problems were also concentrated among a minority of respondents (figure 2). Of those who experienced at least one civil problem, around 10 per cent accounted for more than half of those legal problems.

Figure 1 **Prevalence of legal problems and severity**



Data source: Commission estimates based on unpublished *LAW Survey* data.

Figure 2 **The composition and concentration of legal problems**

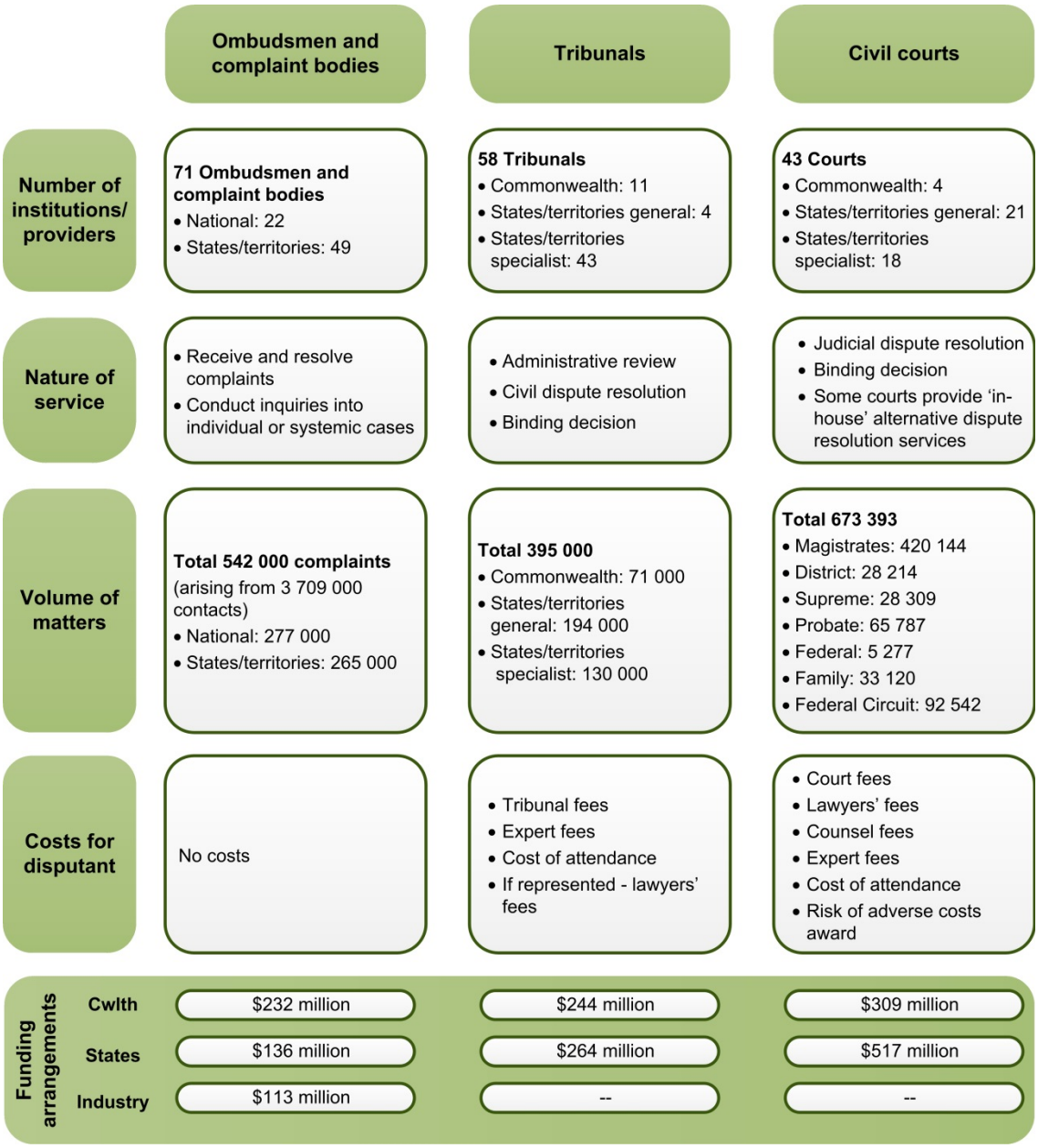


Data source: Commission estimates based on unpublished *LAW Survey* data.

The civil justice system offers many options for resolving disputes

Where parties are unable to reach a private resolution, the civil justice system provides them with a range of means for resolving their disputes and asserting their legal rights. The federal, state and territory courts, statutory tribunals, government and industry ombudsmen and complaint bodies, and organisations and individuals offering alternative dispute resolution services all form part of the civil justice mix (figure 3).

Figure 3 **The three major dispute resolution mechanisms[a]**



[a] Data for ombudsmen/complaint bodies and tribunals is for 2011-12, and data for courts is for 2012-13.

But there are concerns that the system is not accessible

Each dispute resolution mechanism has its own processes, which vary in formality, cost and timeliness. Over the years, there has been a steady stream of official reviews, reports and academic studies aimed at improving the accessibility of the various elements. Courts, tribunals and ombudsmen have also initiated their own reforms designed to improve accessibility.

Even so, concerns remain that the civil justice system is inaccessible to many Australians. As noted by the Chief Justice of Western Australia, Wayne Martin:

> The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. … In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance. (2012a, p. 3)

While much focus has been on the institutions, differences in the personal resources and capabilities of users, and their perceptions about the system, also influence accessibility. As the Law Council of Australia explained:

> The 'effective access' enjoyed by individuals necessarily depends on a range of factors, including geographic location, economic capacity, health, education, cultural and linguistic variations, formal and informal discrimination, and other variable factors. (sub. 96, p. 28)

Disadvantaged Australians in particular face a number of barriers in accessing the civil justice system. These include communication barriers and a lack of awareness and resources. The disadvantages that these individuals face mean that they are both more susceptible to, and less equipped to deal with, legal disputes.

Improving accessibility would generate social and economic benefits

There are good reasons for governments to seek to improve the functioning and accessibility of the civil justice system.

A well-functioning civil justice system protects individuals and businesses from infringement of their legal rights by others. The ability of individuals to enforce their rights can have profound impacts on a person's wellbeing and quality of life. For example, it can mean that someone who has sustained injuries due to the negligence of others can seek recompense for impairment and/or their reduced income generating capacity.

But a well-functioning civil justice system serves more than just private interests — it promotes social order, and communicates and reinforces civic values and norms. A well-functioning system also gives people the confidence to enter into business relationships, to enter into contracts, and to invest. This, in turn, contributes to Australia's economic performance.

There can also be fiscal benefits. Prompt, affordable and well understood dispute resolution arrangements can help avoid issues escalating into more serious problems that can place burdens on health, child protection and other community welfare services.

Consistent with these broader social and economic benefits, governments already play an active role in Australia's civil justice system. They provide the broad institutional framework for the civil justice system — governments, through parliaments, make the law and establish and provide funding for the courts, tribunals and government ombudsmen. They also set down the nature of disputes that these bodies will adjudicate and many of the rules that they will operate under.

Governments also regulate the market for legal services to address information and incentive problems, and provide funding for legal assistance and dispute resolution services.

The Commission's focus

The Commission considers that the performance of the civil justice system (and, in turn, the wellbeing of the community) can be enhanced by:

- providing access to least cost avenues for dispute resolution and facilitating the quick resolution of disputes at the earliest opportunity
- enabling the provision of a range of legal services that are proportionate to the problems experienced, easy to access and understand, and treat people fairly
- promoting affordable services, so that access to justice is equitable regardless of people's personal, social or economic circumstances and background.

The Commission has assessed each of the various elements of the civil justice system against these criteria and examined the problems that frustrate the realisation of these objectives. In doing so, the Commission has focused its attention on problems that — either by themselves, or in concert with other problems — significantly affect the functioning of the civil justice system and, absent government intervention, are likely to go unresolved.

Finally, in weighing up options for reform, the Commission considered the likely costs and benefits, including whether proposed reforms would be likely to make the community as a whole better off. Importantly, while the overriding objective is to enhance community wellbeing, that does not imply that the purpose of reform should be to address all instances of unmet legal need.

Problems common to informal and formal aspects of the justice system

Many parties encounter a common set of problems regardless of whether they seek to resolve their disputes informally, such as through private mediation or ombudsmen, or through formal mechanisms such as tribunals and courts.

People lack knowledge about whether and what action to take …

Interactions with the civil justice system often occur at times of personal stress — during a family break up, as a defendant in a claim, following a traumatic injury or the financial failure of a business. Experience is not readily transferable. For example, experience with a dispute about a faulty product leaves parties none the wiser about how to handle a family law dispute.

Not surprisingly, many people lack an understanding of their rights, have difficulty identifying the legal dimensions of their problems and do not know where to go for appropriate advice and assistance. A lack of knowledge and capacity contributes to legal problems going unresolved, which in turn can lead to more severe problems in the future.

Many organisations, including legal assistance providers, government agencies, ombudsmen, trade unions and industry associations, provide legal information and community legal education to improve the knowledge and capacity of the community. But information and advice services — including those that attract government funding — lack visibility, and service efforts can be duplicated.

Information about where to refer people with legal problems needs to be simple and widely known. The Commission considers that each state and territory should have a central, widely recognised contact point for legal assistance and referral to make it easier for people to enter the civil justice system. Each service should be responsible for providing free telephone and web-based legal information within the jurisdiction (including in relation to Commonwealth laws) and should have the capacity to provide minor advice for more straightforward matters. They should also refer clients to other appropriate legal services where necessary, such as local or specialist services. The *LawAccess* model in NSW provides a working template.

Even if well publicised, not all individuals will enter the system through the central contact point. Effective referral processes will be required to connect people to the assistance they need — there should be no wrong door to enter the system.

Further, some disadvantaged and vulnerable people will still have difficulty identifying when their problem has a legal dimension and will not be able to access the system without additional assistance. Legal assistance providers, which deal predominantly with disadvantaged clients, are already using methods to effectively reach these clients, but

more needs to be done. A greater use of holistic services, outreach, training of non-legal community workers to identify legal problems, and legal health checks would identify those who need additional assistance and help them to navigate the civil justice system.

… and they find it hard to shop around for legal services

While many disputes can be resolved with some basic information and direction, where people do need to engage a private legal professional, they find selecting a service provider challenging. The irregular need for legal advice, combined with different billing arrangements and services offered by providers, makes drawing comparisons difficult and often inconclusive.

The difficulties consumers face in selecting lawyers — and switching lawyers, should they prove dissatisfied — have meant that they have not fully appropriated the benefits of the increased supply of lawyers in recent years. Making information available on the average costs that consumers might expect to pay when engaging a lawyer (by area of law and jurisdiction) would help reduce the uncertainty over legal fees that many consumers face and would promote competition. The Commission recommends that state and territory governments establish an online resource (as part of the well-recognised central entry point) that reports typical fees for a variety of legal matters commonly encountered by individuals and small businesses.

Even where consumers are given a 'headline' price, the Commission has heard that the 'devil is in the detail' with some consumers failing to understand key determinants of cost. While all jurisdictions require lawyers to provide cost estimates, some estimates have become impenetrable and have left consumers no better informed. Once consumers have engaged a lawyer, they still face significant uncertainty, since lawyers can and (sometimes unavoidably) do revise their cost estimates during the course of a matter.

Placing an onus on lawyers to ensure that their clients understand upfront cost estimates (and any major changes to those estimates) would help address current problems with cost disclosure arrangements. This represents current practice in New South Wales and Victoria — the remaining jurisdictions should follow suit.

Consumers of legal services can find it hard to judge quality …

The complicated nature of many legal services means that consumers also find it difficult to judge the quality of the services they receive. Reputation can be important in solving this problem. Some consumers can gather information on the quality of lawyers through repeat transactions, and large corporations can rely on in-house legal advice to assess the quality of externally sourced services. But these options are not available to one-off users of legal services, such as many smaller businesses and individuals.

One way of overcoming problems with judging service standards is to provide all consumers with some assurance of a base level of quality, including through entry restrictions to the legal profession and professional conduct rules. These work relatively well, although a balance is required to ensure that measures intended to protect consumers do not act as an unnecessary barrier to entry.

A second response is to provide consumers with an avenue for recourse when quality falls short or charges are excessive. Given the disparity in information and expertise between lawyer and client, dispute mechanisms need to be robust and consumer focused. However, some complaint bodies have relatively limited powers and there is scope for some jurisdictions to expand the disciplinary and investigative powers of these bodies. Newly introduced complaint processes in New South Wales and Victoria provide a model.

Further, some complaint bodies focus on the profession rather than the consumer, favouring a technical and often strict approach to maintaining professional standards. Melbourne barrister Stephen Warne (2012) outlined how the high threshold for disciplinary action plays out in practice in relation to overcharging:

> My survey of recent gross overcharging prosecutions suggests that disciplinary prosecutions tend to fail unless based on a fee of at least twice what the disciplinary tribunal decides to be the reasonable fee. Nothing less than 'gross overcharging', which is misconduct at common law, generally gives rise to disciplinary charges, even though the statutory definitions of 'professional misconduct' in the *Legal Profession Acts* specifically include plain old 'charging of excessive legal costs'. (pp. 13–14)

Governing legislation needs to be amended to ensure that consumer protection is the explicit and primary objective of complaint bodies.

… and whether services make them better off

Consumers not only lack the ability to judge when lawyers fail to provide services of a sufficient quality, they also have poor information about whether lawyers are over-investing in quantity or quality (by providing gold-plated services).

Indeed, a number of factors encourage lawyers to do just that. For example, lawyers have a duty to their clients. While intended to overcome quality issues, this duty can create perverse incentives, with risk-averse lawyers 'leaving no stone unturned'. Duties to clients can also mean that lawyers are less inclined to offer assistance for discrete tasks, limiting consumer choice. Further, some commonly used billing arrangements reward inputs rather than outcomes — faced with the incentive of time-based billing, lawyers might take actions of limited benefit to their client.

While the Commission does not consider it appropriate to limit time-based billing or any other pricing structure, it considers that lawyers should be obliged to make clients aware of alternative billing arrangements. These obligations should operate in conjunction with obligations on lawyers to only seek remuneration for 'fair and reasonable' costs.

Big potential gains from early and informal solutions

Some individuals are deterred from pursuing action for fear that the process will prove too slow and costly. One third of individuals who chose not to act on a substantial legal problem cited a belief that it would be too costly as a reason for inaction. A similar proportion thought it would take too long.[1]

These fears need not be realised, particularly for less complex matters. Parties have at their disposal a broad range of low cost and timely informal mechanisms to help resolve many kinds of disputes.

Ombudsmen provide a low cost, informal pathway

Many common disputes, such as those with telecommunications providers, banks and government agencies, can be dealt with by industry and government ombudsmen and other complaint bodies. Ombudsmen mediate outcomes between parties and conduct investigations where necessary, obviating the need for legal representation. Complainants face no, or very low costs — government and industry typically pick up the tab, at around $650 per dispute. Ombudsmen resolve matters quickly — 80 per cent of matters are resolved within one month and 97 per cent within six months.

Better directing people to ombudsmen (and other low cost and informal dispute resolution mechanisms) could significantly reduce the level of unmet legal need. But many of these bodies tend not to be visible to those who might make use of their services and, in some cases, complaints processes are unnecessarily prescriptive. Accessibility could be improved through better referral processes, by requiring businesses and government agencies to inform complainants about the relevant ombudsmen, and by removing any requirements for complaints to be in writing.

Such measures may lead to an increase in caseload, and while ombudsmen are free of charge, they are not costless. It is therefore important that parties face incentives to resolve disputes in the most efficient manner possible. Ideally, where complaints reflect systemic issues, such as poor billing or communication practices, industry and government agencies would internalise the costs of, and subsequently seek to remedy, these poor practices.

Industry ombudsmen create incentives for this to occur — for most schemes, members pay fees according to the number of complaints received and the stage at which they were resolved. While public reporting by government ombudsmen provides some incentives for government agencies to respond in an effective and efficient manner, there is potential to experiment with introducing industry-type payments for disputes involving governments.

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1 Respondents could nominate more than one reason in the *LAW Survey*.

Alternative dispute resolution can be effective, but not for all

Alternative dispute resolution (ADR) encompasses a broad range of facilitatory, advisory and determinative processes whereby parties can resolve disputes with the assistance of an impartial practitioner. These techniques are increasingly being recognised as a way for people to resolve disputes without recourse to traditional trial processes. ADR offers a number of advantages, including cost and time savings and confidentiality of outcomes, provided both sides are willing to constructively engage in the process. In cases that already involve courts and tribunals, ADR can be used to narrow the issues in dispute and so minimise hearing times and avoid significant costs.

The Commission considers that there are a number of areas where there is potential to better target and encourage ADR use, including in contested disputes of relatively low value. Stakeholders further suggested that family law property disputes and will and estate matters are areas of civil law that may be amenable to greater resolution by ADR. The Commission considers that there are good grounds for using ADR in family law property disputes (this is discussed below) and recommends that pilots be undertaken to assess the relative merits of using ADR in disputes over wills and estates.

Governments — be they Commonwealth, state, territory or local — are often party to disputes. Despite good results when deployed, ADR is not widely used by government bodies, save for a few key departments and agencies. Where ADR has been used successfully by government agencies, it has often been underpinned by the use of a dispute resolution plan. There would be benefit in all government agencies (including local governments) finalising and releasing tailored dispute resolution plans and employing ADR more extensively. The dispute resolution plan developed by the Australian Taxation Office provides a template. This should be a priority for agencies involved in relatively common disputes, such as disputes over government benefits and licence approvals.

While ADR has proved effective in some circumstances, the Commission recognises that it is not an appropriate mechanism for resolving all disputes. Its use must be accompanied by safeguards that allow for litigation if settlement cannot be reached.

Informal resolution processes need to be improved for family disputes

It is widely recognised that resolving family disputes through the courts is costly. The Women's Legal Service Victoria submitted that a less complex family law case costs parties between $20 000 and $40 000, with complex cases costing in excess of $200 000. Family law disputes can also be costly for government, with disputes resolved in the Family Court of Australia costing government on average $5000. Where cases proceed to a final order, the average cost to government is in the order of $20 000.

In light of these costs, and the benefits that arise from less adversarial approaches in matters involving children, there has been a shift in the management of parental separation away from litigation towards cooperative parenting. Government has fortified this shift by

requiring that parties attempt family dispute resolution prior to seeking parenting orders from a court, and by subsidising the provision of these services.

Sadly, some family disputes can involve allegations of violence — a recent survey found one in five respondents reported that physical violence was experienced before or during separation. While parties who have experienced violence can seek an exemption from requirements to undertake family dispute resolution, they are left with few, if any, low cost options for resolving their disputes. The highly rationed nature of legal assistance means that few qualify for these services, even though many would struggle to afford a private lawyer. With jurisdiction for family matters involving violence shared by the Commonwealth and the states and territories, parties are also required to navigate multiple systems and organisations.

A significant minority of family law disputes — particularly those complicated by family violence — continue to challenge the family law system. A range of reforms are required including increasing the availability of appropriate family dispute resolution services in matters involving violence, clarifying how property will be distributed on separation, and requiring parties to undertake family dispute resolution prior to taking court-based action in matters involving property.

Problems in the formal system cast a long shadow

Governments, in granting courts and tribunals exclusive jurisdiction over certain matters, have a responsibility to ensure that these institutions operate as efficiently and effectively as possible. There are numerous improvements that could be made.

Tribunals have been accused of 'creeping legalism'

Tribunals are responsible for the resolution of a wide range of disputes, including administrative law matters, civil disputes and guardianship and anti-discrimination cases. They are intended to provide a low cost alternative to the courts by creating a forum where self-representation is the norm, and where parties generally bear their own costs irrespective of the outcome. Indeed, many tribunals include objectives around timeliness and cost in their enacting legislation.

However, some participants in this inquiry expressed concerns about 'creeping legalism' — with tribunals being seen by users as increasingly formal bodies. As the Springvale Monash Legal Service (SMLS) commented:

> Tribunals are promoted as a user friendly, cost and time effective option in the dispute resolution process. SMLS believes that whilst this was the initial intention of the tribunal jurisdiction there has been a drift away from this ethos. (sub. 84, p. 9)

The use of legal representation is thought to be contributing to this problem, with some representatives conducting themselves as if they were in court. Some stakeholders have expressed concerns that lawyers are also bringing an adversarial tone to proceedings.

Where legal representation is used it increases the costs incurred by parties. A study undertaken by the Victorian Small Business Commissioner of small businesses using Victoria's Civil and Administrative Tribunal found that the average cost of legal advice and representation was just over $8000.

Legal representation is already restricted in a number of tribunals and some stakeholders have advocated stronger enforcement of these restrictions. The Commission considers that some restrictions on representation in tribunals are appropriate and should be enforced more strictly.

However, the Commission also accepts that some degree of representation is inevitable and indeed desirable. For example, representation is appropriate where it would facilitate efficient identification and resolution of the issues, or ensure fairness and equity, such as in specialist tribunals dealing with adult guardianship and mental health issues.

In cases where representation might genuinely be required, the Commission considers that representatives should be required to support the objectives of the tribunals in which they appear. This was supported by the Administrative Appeals Tribunal, which suggested that these requirements be made explicit in legislation.

The key to promoting compliance with stronger restrictions on representation is to ensure tribunals operate in the manner in which they were intended — providing an accessible and understandable forum for individuals to seek justice. Improved processes, including greater adoption of ADR and more user-friendly arrangements for self-represented litigants, would diminish both the need for, and value of, legal representation.

Court processes have been improved but reforms have been uneven

Courts are the central pillar of the civil justice system. They provide an open forum where individuals and businesses may come to determine and enforce their legal rights and to establish and clarify the law. In performing these functions, courts need to balance competing tensions. Michael Black, former Chief Justice of the Federal Court of Australia, described the tension faced by courts in the following way:

> We should maintain the search for that elusive point of equilibrium at which the competing pulls of cost, speed, perfection and fairness are balanced in a way that produces substantial and accessible justice — not perfection, but nevertheless processes and outcomes readily recognisable as substantial justice according to law. (2013, p. 92)

Recognising the need to strike a better balance between accessibility and 'perfection', courts in all Australian jurisdictions have either initiated or completed substantial reforms.

A central tenet of these reforms has been a shift away from traditional roles in which the court was reactive — where the judge was an umpire rather than a player in the process — and responsibility for the pace of litigation was left in the hands of the parties and their lawyers. In its place, there has been a move towards more active judicial management of cases with the court taking greater initiative in case preparation, including management of pre-trial processes and, for the very few matters that proceed to trial, the trial itself.

While substantial reforms have been undertaken, progress has been uneven across jurisdictions and arguably court processes do not yet sufficiently ensure that unnecessary costs and delays are avoided. Litigation costs are one indicator that more remains to be done. In many jurisdictions, these costs can easily run into tens of thousands of dollars in solicitors' fees alone. Added to this are the costs of disbursements — such as court fees, and fees for barristers and expert witnesses.

The Commission considers that well-targeted and appropriately employed case management can yield further significant benefits in terms of improved efficiency and reduced cost and delay. The challenge is in getting the balance right by ensuring that case management processes do not generate their own unnecessary work for legal practitioners, court staff and judicial officers.

There is no 'best' model of case management, but it is possible to identify elements of case management that promote timely, fair and efficient dispute resolution. These include, where appropriate, abolishing formal pleadings, tightly controlling the number of pre-trial appearances and strictly observing time limits. The case management processes employed by the Federal Court of Australia as part of its 'Fast Track List' provide a working example.

Independent of moves towards greater case management, particular aspects of court processes have also been reformed. Rules around discovery and expert witnesses — both of which have been identified as significant contributors to cost — stand out as two areas that have undergone change, although not all jurisdictions are equally advanced on this reform process.

Greater judicial scrutiny could help ensure that discovery efforts are proportionate to the matters at stake. This could be facilitated through restrictions on the availability of discovery and rules that expressly require the cost implications of discovery to be considered at the time it is ordered. Judicial training on discovery management is important to support judges to perform this 'gate-keeper' role, as is clear guidance to practitioners and the court about discovery options and alternatives.

Australian courts have also been active in developing innovative reforms to improve the quality of expert evidence and reduce unnecessary costs and delay associated with its use. The Commission sees scope for broader adoption of some of these reforms, such as requirements to seek directions before adducing expert evidence, and for greater use of concurrent evidence and single or court appointed experts.

The Commonwealth, New South Wales and Victoria provide examples of positive reforms in these areas.

Reforms to court processes are only a partial solution to the problems of disproportionate cost and delay. Any reforms need to be accompanied by better incentives for users and their legal representatives.

The system is adversarial, so there is little incentive to cooperate

Litigation has been compared to warfare, restricted only by the rules of the legal game. The adversarial behaviour of parties can hinder the resolution of disputes or even exacerbate them. Counterproductive behaviour can include:

- a lack of cooperation and disclosure, particularly at early stages of proceedings
- the use of procedural tactics, including to delay proceedings, where it is perceived to be in a litigant's interest
- incurring unnecessary or disproportionate legal and other costs.

It has been suggested that moving to an inquisitorial system would address many of the issues raised in this inquiry. However, consideration of such a fundamental change to the underlying tenets of Australia's legal system is beyond the scope of this inquiry.

Nonetheless, there is substantial scope to improve the efficiency and effectiveness of Australia's civil justice system. A cultural shift towards more cooperation would improve access to justice. The Commission considers that there are grounds for parties and their lawyers to be subject to requirements that facilitate the swift, proportionate and just resolution of disputes. Greater use should be made of pre-action protocols which, if well targeted, and accompanied by strong judicial oversight, can help resolve disputes early by narrowing the range of issues in dispute and facilitating ADR.

Costs awards provide another mechanism for deterring parties from incurring unnecessary or disproportionate legal costs. These arrangements — which courts use to determine whether and which parties should bear the costs following the outcome of a case — significantly affect the conduct of parties.

Typically, in Australia, 'costs follow the event' and the successful party is entitled to payment for legal costs from the unsuccessful party, referred to as party-party costs. The amount of costs awarded is often calculated by reference to a 'scale of costs' — such scales rarely match the actual costs incurred by parties. Many scales are activity-based and so encourage parties to over-spend and drive up the costs of litigation and the length of a trial. Moreover, parties have very little control over the amount of activity undertaken by their opponent and have little ability to predict their potential liability for costs.

The Commission recommends reforming arrangements for determining costs awards. In lower courts, fixed scales should be used to determine the amount of costs a party is

entitled to be awarded. These fixed scales should prescribe costs amounts based on the stage of proceedings reached and the amount that is in dispute. In superior courts, it may be more appropriate to adopt a system of costs management, which requires parties to submit and agree upon costs budgets at the outset of litigation, and so cap the amount of costs that may be reclaimed by the successful party. Such a system was recently introduced in English and Welsh courts.

Currently, parties that are self-represented or represented pro bono are not eligible for an award for costs if successful in a case. This reduces their ability to meet their expenses, and creates asymmetrical incentives that favour their opponents. There is a strong argument for allowing these types of parties to be awarded costs.

Not all parties are on an equal footing

The effectiveness of the adversarial system is premised on parties being on an equal footing, but this is not always the case. Differences in the bargaining power of litigants are most evident when comparing the two extremes — self-represented litigants and well resourced, repeat users of the system, such as governments and big businesses. If it is acknowledged that inequalities in bargaining power affect justice, it begs the questions: how might self-represented litigants be placed on a better footing; and how might the bargaining power of well-resourced litigants be kept in check?

When considering whether and how best to assist self-represented litigants, context is important. In some tribunals and lower courts, self-representation is the norm and poses few problems. However, self-represented litigants can be at a disadvantage in more adversarial settings such as higher courts.

Deputy Chief Justice of the Family Court, John Faulks, said there are three ways to respond to self-representation, ' … one is to get them lawyers, the second is to make them lawyers and the third is to change the system' (2013, p. 2). The Commission considers that ultimately, the civil justice system needs to better accommodate self-represented litigants. Many of the changes that would benefit self represented-litigants would also benefit other court users.

While courts and tribunals have already made efforts to simplify forms and procedures and provide information to support self-representation, there is still scope to improve outcomes. Equipping judges and court staff through training and clearer rules and guidelines is essential to give them the confidence to assist self-represented litigants while meeting their obligations of impartiality.

Notwithstanding the very best efforts to simplify the justice system, some self-represented litigants would benefit from direct assistance, particularly in complex cases in higher courts. A broader range of advice and representation options should be supported, such as unbundled legal services and allowing self-represented litigants to rely on assistance from non-lawyers with appropriate protections in place. Where self-represented litigants fall into

the gap between legal aid and private options, there is a role for duty lawyers and self-representation services. While these services can help to resolve disputes more efficiently and divert inappropriate matters away from courts and tribunals, the effectiveness of these services should be evaluated.

In comparison to self-represented litigants, parties such as governments and big businesses carry a substantial degree of bargaining power — reflecting the economic resources at their disposal and their greater experience and knowledge of the system as repeat users.

Special power also inheres in the nature of government itself, so judges expect high standards of competence, candour and civility from government parties and their lawyers. These expectations are typically embodied in model litigant rules, which set out acceptable standards and boundaries for the conduct of litigation with the aim of resolving disputes efficiently and appropriately. But there are concerns that model litigant rules lack enforceability, creating weak incentives for governments to comply. Commonwealth, state and territory governments and their agencies (including local governments) should be subject to model litigant obligations (not mere guidelines), with compliance monitored and enforced, including by establishing an independent formal avenue of complaint for parties through the relevant government ombudsmen.

Prices do not always reflect the balance of private and public benefits

Private and public benefits are generated when parties engage in litigation. Private parties are the primary beneficiaries — they gain by being given a forum to enforce their claims and restrain the actions of others. The wider community benefits through the enforcement of the rule of law and, in some cases, through the clarification of the law and the development of precedents. Given the mixture of private and public benefits associated with court usage, it is appropriate that litigants bear a share of court costs through fees and, in some cases, all costs.

Currently, there is no consistent framework or costing model for determining court fees. As a result, court fees generally bear little relationship to the resources used by the court in settling disputes. In many jurisdictions, fees are poorly targeted and so provide a significant subsidy to many parties who do not require such assistance. As noted by Chief Justice Martin, this can come at significant expense to the taxpayer:

> … the Bell case ran through our court, it was the second-longest-running trial in the history of the state, it consumed enormous resources of the court — on a conservative estimate, it cost us $15 million to run that case, we recovered probably around between $700,000 and $800,000 in fees. So the taxpayer of Western Australia subsidised the parties to that case, who were on one side an insurer, and on the other side a whole lot of banks, to the tune of $14 million, and that's $14 million that the legal system of this state could have invested much better than in that case. (trans., p. 587)

Clear and consistent criteria for setting court fees are required. To ensure that subsidies are only provided to those who require them, fees should be set with regard to the capacity and

willingness of parties to pay. Factors used to differentiate fees should include the amount in dispute, the type of parties involved, and the length of proceedings.

Whether measured as a share of the costs incurred by litigants or a share of the costs recouped by government, court fees in Australia are relatively low. Cost recovery through fee revenue varies widely, ranging from 3 per cent in the Family Court of Australia to just over 50 per cent in the Magistrates' Court of Victoria. By comparison, cost recovery in British courts is at around 80 per cent and there are intentions to move to full cost recovery by the end of 2014-15.

The Commission has estimated that court fees on average comprise roughly one tenth of a party's legal costs. Consistent with this estimate, empirical studies have found that court fees are not a significant source of financial concern to litigants. Further, recent fee increases in the federal courts have not significantly reduced filings, suggesting that fees do not pose a barrier to most parties at their current levels.

Given the substantial private benefits that can accrue to parties using court services, the Commission recommends increasing the level of cost recovery in most courts. Doing so, especially in litigation involving well-resourced litigants, would send a price signal to litigants to consider other suitable avenues for resolving their disputes and would provide additional revenue that may be used to resource the civil justice system. Tribunals should also adopt substantially higher fees in cases that are complex and commercial in nature.

Increased cost recovery would not be appropriate in all circumstances, such as in matters concerning personal safety or the protection of children, or where important test cases might otherwise not proceed. Fees should also remain low for small disputes dealt with by tribunals.

Accessibility for financially disadvantaged parties in courts and tribunals should be safeguarded through the use of fee waivers and reductions. The Commission has identified a number of avenues for improving the transparency, consistency and simplicity of fee relief processes.

The end of the quill pen — courts with 21st century technology

Technology is widely recognised as having the capacity to generate time and cost savings for the courts and their users. In his final report on the civil justice system in England, Lord Justice Woolf expressed the view that, in addition to streamlining and improving systems and processes, technology would be a catalyst for radical change.

In the past decade, many Australian courts and governments have implemented significant reforms aimed at better using technology to make legal processes more efficient. Initiatives have been wide-ranging and include:

- allowing court documents to be filed and court fees to be paid electronically

- providing online access to court documents
- conducting procedural hearings through tele- and video-conferencing or tailored 'virtual court' applications
- using case management systems to better support efficient case flow management and performance reporting functions.

However, consultations and submissions to this inquiry suggest that investment in information technology has been uneven across jurisdictions and that the availability, quality and use of technology varies widely. The Commission considers that greater investment in technology is warranted given the potential benefits. A lack of resources appears to be the main barrier to the uptake of technology. The Commission's proposal to increase court fees may provide some of the funds required. In this way, parties paying court fees would also benefit from a more efficient court system.

Assisting the 'missing middle'

The capacity of individuals to deal with the costs of significant litigation is regarded as particularly problematic for the 'missing middle' — those on high incomes are thought to be able to manage the costs, while those on lower incomes are thought to be covered by publicly funded assistance schemes such as legal aid.

These costs, which sometimes need to be met upfront, combined with the risk of an adverse costs order, can represent significant barriers to accessing justice for litigants who lack (liquid) financial resources but have meritorious claims.

While this problem is thought of as mainly affecting middle income earners, it is more widespread. The Commission estimates that only 8 per cent of households would likely meet income and asset tests for legal aid, leaving the majority of low and middle income earners with limited capacity for managing large and unexpected legal costs.

Unbundling legal services would help

'Unbundling' legal services — a half-way house between full representation and no representation — is one way of making costs more manageable and predictable. Unbundling means that the lawyer and the client agree that the lawyer will undertake some, but not all, of the legal work involved. Sometimes called 'discrete task assistance' or 'limited scope representation', it differs from traditional 'full-service' representation as clients perform some tasks on their own. Where clients cannot afford full representation they at least have the option of *some* level of assistance, rather than none at all.

While this practice runs counter to the convention of engaging a lawyer for the duration of a legal problem — a convention that is supported by a range of professional conduct rules — the practice of unbundling has been a common feature of the legal assistance landscape

for some time. Unbundling has also become more common in some sectors of corporate practice. Given the potential benefits of unbundling legal services, the Commission considers that changes to court and professional conduct rules are warranted to facilitate a shift towards more unbundling of legal services.

Limited licences can also play a role

Within Australia, the provision of legal services is 'reserved' for lawyers. Professional bodies often cite fears that allowing anyone other than fully qualified lawyers to provide legal advice risks consumers receiving low quality services and the possibility that courts have to 'pick up the slack' in rectifying errors or become 'clogged' with ill-prepared, ill-advised actions that delay other valid claims.

In contrast, in other jurisdictions, including the United States, there has been a growing recognition that non-lawyers should be able to perform some legal tasks, and that maintaining absolute notions of professional purity may be untenable in the face of a significant lack of access to justice. As a retired Chief Justice of the Supreme Court of Texas noted:

> Time and again, the profession has rejected reform efforts in the name of protecting core values. But as commentators have asked: '[W]hat good are the profession's core values to those who do not make it through the lawyer's office door?' Many of these reforms echo those experienced by the medical profession. Just as that model has moved away from services provided by physicians and toward those given by physician's assistants and nurse practitioners, we could similarly rely more on trained non lawyers to provide many of the services for which a lawyer is now required. Perhaps, '[a]s the medical profession has learned, it may be necessary to live with the ethical tension of encroachments on professional autonomy in order to make professional services available to a wider class of society'. (Jefferson 2013, pp. 1979–80)

Arrangements in Washington State provide an example of the activities that can be undertaken by non-lawyers. In that jurisdiction, legal 'technicians' can hold limited licences, which enable them to perform clearly specified activities. These include working independently to assist clients with tasks such as selecting and completing court forms, informing them of procedures and timelines, and reviewing and explaining proceedings. They are not however, allowed to represent clients in court or negotiate with opposing counsel on their behalf.

In Australia, non-legal professionals have, for some time, been providing advice (and in some cases advocacy) in a range of areas including conveyancing, intellectual property, workplace relations, taxation and migration. The Commission considers that allowing non-lawyers to perform some legal tasks has significant potential to improve accessibility and recommends that a taskforce be established to design and implement limited licences, with an initial focus on family law. While in the United States the road to establishing limited licensing has been a long one, the experience gleaned in that process should provide for a more timely implementation process in Australia.

Private sources of funding are important

Markets provide a range of mechanisms that allow litigants to spread the risks associated with large and unexpected legal costs, both across time and between parties. While generally limited to monetary claims with reasonable prospects of success, private funding provides an important avenue for litigants to access justice.

One private funding arrangement involves lawyers billing on a 'conditional' basis. Typically, no fee is charged if the legal action is unsuccessful and an 'uplift' percentage is added to the lawyer's normal bill if the action is successful. In contrast, where lawyers charge 'damages-based' fees, they receive an agreed percentage of the amount recovered by the client. While allowed in a number of overseas jurisdictions, this latter form of billing is prohibited in Australia due to concerns that it creates perverse incentives.

The Commission is unconvinced that any perverse incentives inherent in damages-based billing are more pronounced than those embodied in conditional billing. Rather, damages-based billing has the potential to provide several advantages, including better aligning the interests of lawyers and their clients by removing incentives to over service. There is an important caveat to this claim — in order for incentives to be aligned, clients need to be fully informed about the merits, and likely costs, of pursuing their claim.

The Commission considers that the prohibition on damages-based billing should be removed, subject to consumer protections such as comprehensive disclosure requirements and percentage limits on a sliding scale to prevent lawyers earning windfall profits on high value claims.

While lawyers are not currently allowed to offer damages-based billing, no such restriction applies to third parties. Litigants can obtain funding from litigation funding companies, which provide funds in exchange for a share of the amount recovered and typically agree to pay any adverse costs ordered in the event of a loss. They also often manage disputes on behalf of clients, including coordinating class actions. The Australian market for litigation funding is small but well established — having operated for two decades. Funded cases typically relate to insolvency, large commercial claims and class actions.

Stakeholder views on third party litigation funding are mixed. Supporters highlight the access to justice benefits, particularly in class actions where litigation funders can level the playing field for litigants who are in dispute with well-resourced and experienced parties. Opponents consider that litigation funding increases the volume of litigation and can give rise to unmeritorious claims. On examination, the evidence that there has been an increase in unmeritorious claims is weak and concerns do not appear to relate to the activity of litigation funders, but to the underlying laws and rights to which they facilitate access.

Overall, while the Commission judges that third party litigation funding can provide important benefits for access to justice, consumers need to be adequately protected and have 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. Licensing of litigation funders was broadly supported.

Does legal expenses insurance have a future?

Legal expenses insurance is another mechanism to spread the risk of legal contingencies and provide protection against the costs of bringing or defending legal action. It operates like other types of insurance — consumers pay a premium based on an insurer's assessment of risk, and their legal expenses are covered when required.

There have been attempts to establish legal expenses insurance in Australia. However, uncertainty over legal costs is said to have inhibited uptake and made it difficult to design benefit and premium levels. These problems were compounded by a lack of appetite by consumers who failed to see value in insuring against the costs of legal events.

There is better information available today that can be used to design premiums. Australia-wide surveys of legal need now provide important information on the propensity of different groups to experience legal problems, while reforms to costs awards outlined in this report would address a great deal of uncertainty around adverse costs orders. More broadly, the insurance market has adopted more sophisticated methods for pricing risk since the inception of the original legal expenses insurance in 1987.

But even if information gaps could be addressed, and insurance products offered, as has been the experience in the past, some parties might not take 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.

Is there a role for government in helping smooth legal costs?

Given the weak incentives outlined above, it is not clear that the market will offer legal expenses insurance. It has been suggested that a government-backed scheme is required and should be modelled on Australia's Higher Education Contribution Scheme. The proposed legal expenses contribution scheme (LECS) would offer income-contingent interest-free loans and provide a tool for those who do not qualify for legal assistance to pursue cases of merit — particularly where monetary amounts are not involved.

Those who qualify for a loan would repay the Australian Government by contributing a percentage of their income over the period of the loan. In cases where there was a sufficient award of damages, the loan would be paid out following the outcome of the case.

Similar arrangements to a LECS already operate within some legal aid commissions. However, it has been suggested that a LECS could apply to a larger group of Australians and to a wider range of legal matters and that people would have a longer period of time

over which to repay their loan. Some argue that the existence of similar schemes make LECS a proven concept.

However, the Commission is not convinced that LECS-style initiatives are suitable for those on very low incomes. While legal aid commissions already provide for a system of deferred payments, this has resulted in some taking on debt for extended time periods and in some cases, substantial amounts of debt have been written off.

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 below. While a LECS-style initiative may be better suited to middle income earners, the Commission has not examined the necessary design features and suitability of such a scheme for this demographic.

Legal assistance services for disadvantaged people

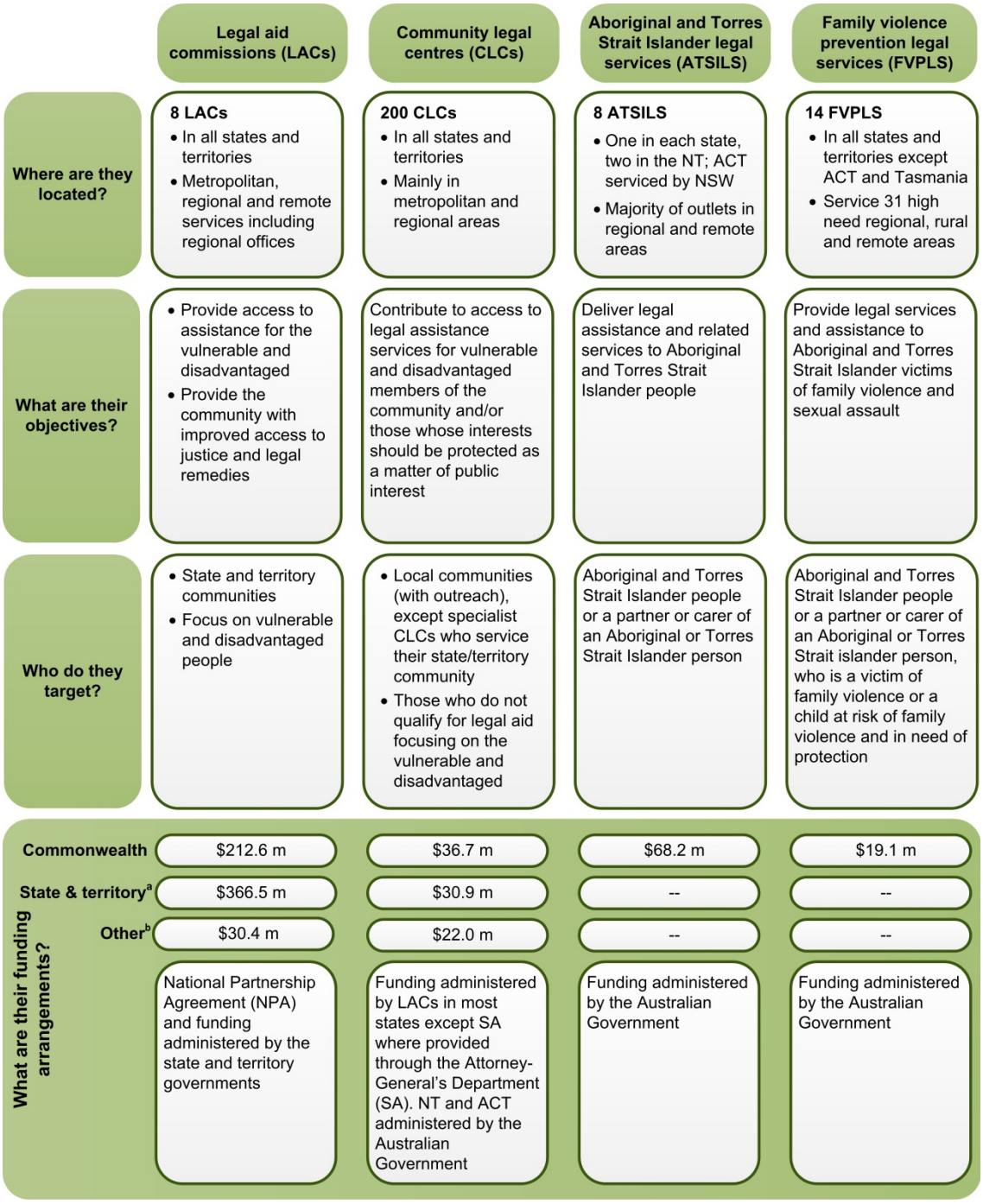
Disadvantaged people face a number of barriers in accessing the civil justice system, which make them both more susceptible to, and less equipped to deal with, legal disputes. If left unresolved, civil problems can have a big impact on the lives of the most disadvantaged. The Commission was given many examples of simple problems spiralling into complex problems when legal assistance was not provided. Unmet civil problems can also escalate into criminal matters.

Notwithstanding the reforms outlined in this report, differences in personal resources and capabilities mean that the most vulnerable Australians may still find the system inaccessible. There remains a role for government in assisting these individuals to uphold their legal rights and resolve their civil (including family) law disputes.

What does the legal assistance landscape look like?

The legal needs of disadvantaged Australians are currently serviced by one of four government funded providers, which offer a range of services, including information, advice and casework. Each of the four providers play a different role (figure 4).

Figure 4 **The four government funded legal assistance providers**
2012-13



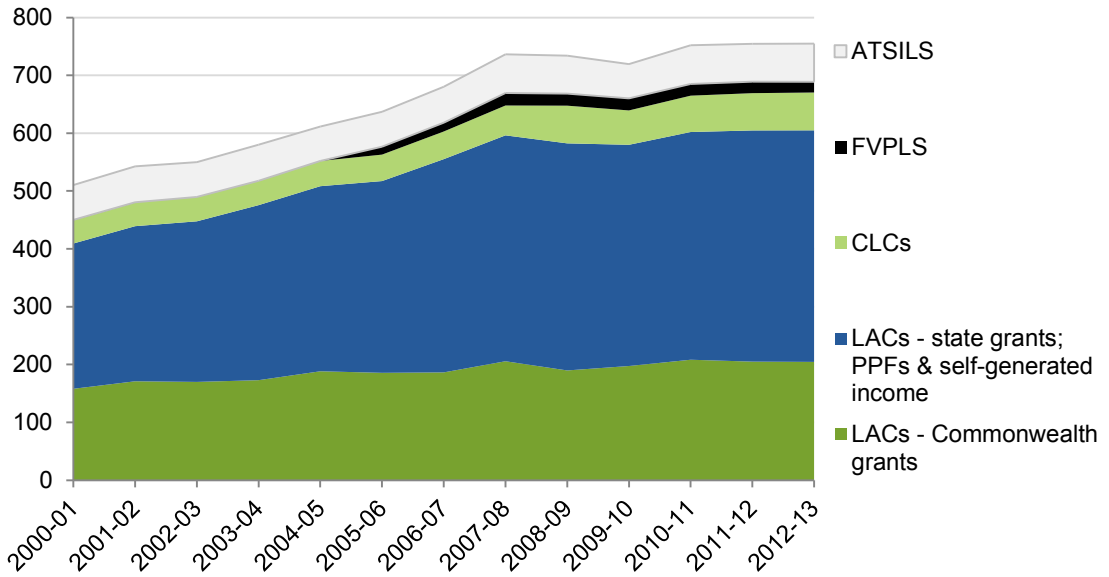
a Includes contributions from public purpose funds (PPFs). **b** For LACs, 'other' comprises self-generated income. For CLCs, 'other' includes fee income, philanthropic donations and other sources.

- Legal aid commissions (LACs) receive the majority of government funding and service most Australians who receive publicly funded legal assistance. The LACs are independent statutory authorities (established under state or territory legislation). They provide legal assistance services in criminal, family and other civil law matters.
- Community legal centres (CLCs) are community-based not-for-profit organisations. They play a distinct role assisting Australians who cannot afford a private lawyer but who are unable to obtain a grant of legal aid. As community-based organisations, they seek to embed their services within their communities, drawing on volunteers and pro bono services. Their primary focus is on civil (including family) law matters.
- Aboriginal and Torres Strait Islander legal services (ATSILS) focus on providing culturally tailored services in criminal and civil law matters.
- Family violence prevention legal services (FVPLS) specialise in family violence matters. Like the ATSILS, they provide culturally tailored services, but do so with the aim of preventing, reducing and responding to incidents of family violence and sexual assault among Aboriginal and Torres Strait Islander people.

Together, these four legal assistance providers received around $730 million in government funding in 2012-13 (figure 5), which covered both criminal and civil (including family) matters. To put this in context, this represented around 0.14 per cent of all government spending.

Figure 5 **Criminal and civil legal assistance funding**

Millions, expressed in 2011-12 dollars



There is scope to improve the delivery of legal assistance services

The people who manage and work in the four legal assistance services are highly committed to assisting their clients. The task they face is a challenging one — clients often have complex needs, requiring a holistic approach.

Ideally, the four providers would operate in such a way as to leverage their particular skills and expertise and maximise coverage (both in terms of geography and areas of law). While there have been efforts within particular jurisdictions to increase cooperation and coordination among providers, practice falls short of this goal.

An overarching vision is required and should be reflected in eligibility principles

While governments have service agreements with organisations from each of the four provider categories, these are not underpinned by a clear or common view of priority clients or areas of law. This has resulted in providers adopting different priorities as evidenced by the way eligibility criteria for civil casework are determined.

Eligibility tests typically involve a means, matter and merit test. The means tests consider both the income and assets of parties and are intended to give an indication of a person's capacity to pay for private legal advice. The way in which income and assets tests are applied by the LACs varies across states and territories, but all apply stringent criteria.

CLCs typically determine their own eligibility criteria, including means tests, but these tend to be, on average, slightly more generous than those applied by the LACs. Not all target disadvantaged Australians. Given that the distribution of CLCs is uneven across states and territories, and the eligibility tests vary across centres, access to casework services can be determined by a person's postcode.

The eligibility criteria employed by the ATSILS differ again. The means test includes a relatively more generous income test, while the assets test appears slightly less generous than that used by the LACs.

The Commission considers that the principles used for determining eligibility for government-funded individualised legal assistance should be consistent and linked to an agreed measure of disadvantage and appropriately updated so that they do not become more restrictive in real terms over time. This would make tests more transparent and equitable. This approach is consistent with aims embodied in the most recent National Partnership Agreement (NPA) on legal assistance services for 'more appropriate targeting of legal assistance services to people who experience, or are at risk of experiencing, social exclusion' (COAG 2010, p. 4).

The Commission recognises that social exclusion, while encompassing income and financial poverty, extends to a wider range of life domains, covering employment, skills, health, disability and personal safety. This points to the need for eligibility principles that

also take into account the impact of a legal problem on a client's life and the flow-on effects to the justice system and other publicly funded services.

A more systematic approach for allocating funding is needed

Many of the problems facing the legal assistance sector stem from the way in which resources are determined and allocated. Government funding for each of the four providers is determined independently and inconsistently. Funds are not allocated across providers so as to maximise coverage of geographic areas or particular dispute types. The total quantum of funds allocated is not necessarily sufficient to achieve governments' stated priorities and can be unpredictable, making it hard for providers to plan services. Further, some funding sources relied on by the states and territories — namely contributions from public purpose funds — are declining and are likely to continue to do so.

A closer look at government approaches to funding highlights some of the inconsistencies.

Commonwealth funding for LACs and ATSILS is distributed between the states and territories based on a model that seeks to reflect legal need and the costs of providing services in particular jurisdictions. Funding allocations for FVPLS are largely determined using an input-based approach, with providers receiving funding to cover core staff and other costs when servicing identified high need geographic areas.

In contrast, Commonwealth funding for CLCs is largely ad hoc or based on history. 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 government funding, such that two CLCs servicing similar communities and facing the same cost structures may not attract the same funding.

Commission analysis of the current geographic distribution of CLCs also revealed a mismatch between areas of greater disadvantage and the placement of centres. These findings align with those of previous reviews and studies, which have sought to examine whether CLCs are servicing areas of high need. While it has been suggested that centres located in relatively affluent areas focus on low-income clients, the Commission also found that these centres tended to serve fewer clients with low incomes.

The Commission considers that Commonwealth funding for all four providers should be allocated according to models that reflect the relative costs of service provision and indicators of need given their priority clients and areas of law. Funding allocation models currently used to determine LAC and ATSILS funding should be updated to reflect more contemporary measures of legal need.

Irregularities in Commonwealth funding for legal assistance services are compounded by the different funding approaches and efforts of the state and territory governments. It is not

clear how the states and territories determine their civil law funding contributions and the quantum varies significantly by jurisdiction.

State and territory government funding for LACs ranges from just under $10 per capita in Queensland through to $16 per capita in the ACT. Variation in funding for CLCs is more pronounced. State and territory governments provided around $30 million for the Community Legal Services Program (CLSP) in 2012-13. Victoria accounted for almost 40 per cent of the total, followed by New South Wales (27 per cent), Queensland (22 per cent), Western Australia (9 per cent) and South Australia (3 per cent). The governments of Tasmania, the ACT and the Northern Territory did not contribute any CLSP funding.

Differences in funding across states and territories could reflect either varying levels of effectiveness or different unit costs. But even these factors would only provide a partial explanation for variations in funding.

Further, while their activities often relate to areas of state and territory law, funding for ATSILS and FVPLS is provided almost exclusively by the Commonwealth. As a consequence, state and territory governments have little incentive to consider how their policies impact on the demand for the services of these two legal assistance providers.

The Commission considers that any additional Commonwealth funding for civil legal assistance services should be structured in such a way as to encourage funding participation by the states and territories. State and territory governments should also contribute to the funding of services provided by ATSILS and FVPLS.

In order to maximise the efficiency and effectiveness of services the Commission considers that the Australian, state and territory governments should agree on priorities for legal assistance services and should provide adequate funding so that priorities can be fully 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) in coming years.

The allocation of funds *within* jurisdictions should also be considered holistically, rather than undertaken separately by the Commonwealth and states. The model used to allocate funds for CLCs in Western Australia provides a working example, whereby the Australian and state governments agreed on service priorities following an assessment of localised legal need.

State-based forums, with representation from the Australian and the relevant state or territory governments, service providers and the community services sector, should be used to establish a clear understanding of the roles of each of the four providers in addressing the priorities articulated by governments.

Interim funding is required to fill service gaps

While assessments of localised legal need, along with comprehensive and comparable data on the costs and benefits of delivering legal services, should be collected to inform decisions about long-term resourcing requirements, in the interim, funding is needed to address the most pressing service gaps.

Legal assistance funding for civil matters has not kept pace with increasing costs and demand. Accordingly, there has been a growing 'justice gap' for the disadvantaged: those who would take private legal action to defend their rights, but do not have the resources to do so. Even where matters fall within the priorities set by government, service coverage can be incomplete. A recent review of legal assistance found:

> 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 … (ACG 2014d, p. 113)

The nature of matters that fall in the gap is particularly concerning. Assistance with family law matters, including domestic violence and care and protection of children, is not comprehensive in its coverage. The Commission finds the gap in independent lawyer services for children especially worrying. Other gaps in civil law assistance, such as employment and tenancy law, can also have serious consequences.

The present means tests used by the LACs are restrictive, reflecting the limited funds available. The income tests are below many established measures of relative poverty. It is not the case that people are 'too wealthy' to be eligible for legal assistance, but rather that they are 'not sufficiently impoverished'.

There is overwhelming qualitative evidence that narrowing the gap would be socially and economically justified. However, the costs to society, and the benefits of closing the gap, are difficult to measure quantitatively. Ideally, cost-benefit analysis would be used to determine the appropriate quantum of funding required to extend the reach of services, but a lack of data precludes this. The Commission has instead used an approach that derives funding by comparing the current reach of services against what it judges to be reasonable benchmarks (such as poverty and legal need).

The Commission has estimated that additional funding from the Australian and state and territory governments of around $200 million a year is needed to:

- better align the means test used by LACs with 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 funding.

Advocating for increases in funding (however modest) in a time of fiscal tightening is challenging. However, not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of

government spending such as health care, housing and child protection. Numerous Australian and overseas studies show that there are net public benefits from legal assistance expenditure. 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. (Law Council of Australia, sub. 96, p. 114, quoting State of Judicature, speech delivered at the Australian Legal Convention, 10 October 1999)

Getting better value for money from legal assistance

Given the scarcity of resources, it is critical that existing and additional funds are directed to where they are most needed. Frontline service delivery should be prioritised, along with advocacy work where it efficiently and effectively solves systemic issues which would otherwise necessitate more extensive individualised service provision. Some changes are required in order to bring this about.

Most CLCs are relatively small in scale. Whether measured as a share of expenditure or expressed in staff numbers, the evidence suggests that CLCs dedicate significant resources towards administration. The vast bulk of centres employ less than ten full-time staff, with centres with three or four full-time staff being common. As autonomous providers, each centre has its own management committee and corporate and administrative functions.

A lack of scale can give rise to other problems, including the absence of career paths for practitioners and a lack of capacity to deal with staff absences and peaks in workload. Where centres seek to cover a broad spectrum of legal work, there can also be problems with ensuring that staff have the relevant expertise. The capacity of staff to identify systemic problems is also less likely where scale is very small.

Centres are already looking to address a lack of scale. For example, CLCs that operate in the Western suburbs of Melbourne have agreed to amalgamate, with a view to improving resource allocation and managing organisational risks. 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 efficiencies across the CLC sector is a priority.

The operation of some FVPLS is also affected by their relatively small scale — around half of providers service a single high need area with very few staff. Where FVPLS operate in rural and remote communities, opportunities for amalgamation with other providers of legal assistance services are more limited. Auspicing arrangements, where units operate under the broad direction of a coordinating organisation, may provide an alternative in these circumstances.

Some separation of funding for civil and criminal matters 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.

Absent some demarcation of funding, any injection of funds to address the gap in civil services risks being siphoned into criminal matters. 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. However, the Commission considers that any current and future civil funding allocations be earmarked for that purpose as a way of ensuring that civil legal needs are met.

Pro bono plays a small but important role in bridging the gap

The private profession has a long tradition of providing legal services free of charge, and governments are keen for them to do more. But the role of pro bono services in assisting disadvantaged Australians to access justice is poorly understood and there are limits to the role that pro bono can play in addressing unmet legal need.

Headline figures suggest lawyers provide an average of close to 30 hours of pro bono service per year. But these estimates largely reflect efforts by lawyers in large law firms, who are more likely than lawyers in small firms and government agencies and in-house corporate lawyers to undertake formal pro bono work. Further, while there are efforts to reorient pro bono work towards disadvantaged groups, the bulk of pro bono work is undertaken for not-for-profit organisations rather than for disadvantaged Australians.

Placed in the broader context, the overall contribution of pro bono services is relatively modest. Expressed as a measure of the number of lawyers, pro bono from larger firms equates to around 3 per cent of the capacity of the legal assistance sector, and less than 1 per cent of the entire legal market.

There are some barriers to expanding pro bono services. Addressing the complex legal needs of disadvantaged clients can be challenging and not all private lawyers are equipped with the expertise to provide such services. Outside of the services they provide pro bono, many lawyers would have little exposure to 'poverty law' in their day to day work. The capacity and culture of workplaces can also affect the willingness of lawyers to provide pro bono services.

Other barriers are more easily addressed. Free practising certificates for retired and other non-practising lawyers are a simple and relatively inexpensive way of increasing pro bono

services. Providing positive affirmation that a conflict of interest does not exist (as occurs in Victoria) can also help overcome fears that pro bono work — for example, in immigration and income support matters — will come at the expense of future government contracts.

While compulsion is sometimes considered as a means of bolstering pro bono efforts, the Commission does not consider this approach to be appropriate. Providing pro bono is not 'free' — the lawyers involved give up their time, and partner organisations (such as CLCs or referral bodies) must use resources to coordinate, train and supervise pro bono lawyers.

Rather, the Commission considers that governments should promote the advantages to lawyers of providing pro bono services. Where government funds are used to encourage or facilitate pro bono effort, outcomes should be evaluated.

Steps to better understand how the system is functioning

It is widely acknowledged that data on the civil legal system leave much to be desired. Previous reviews have identified the need to build an evidence base to monitor the system and guide policy reform. The Commonwealth Attorney-General's Department considered that data on the justice system were lacking and statistics were inconsistently collected and reported.

The Commission concurs with these views. The absence of data has hampered policy evaluation and caused a reliance on qualitative assessments. The dangers with this approach were highlighted by Dame Hazel Genn, who remarked that:

> 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. (1997, p. 169)

Much needs to be done to improve the nature and quality of data collection in the civil justice landscape and the Commission has identified a number of areas throughout this report where data would be particularly valuable. Governments should work together 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.

Data should be collected and published by a civil justice clearinghouse. The clearinghouse should be established as part of the National Centre for Crime and Justice Statistics, within the Australian Bureau of Statistics.

Not only are more data needed, but a greater capacity to evaluate the data in order to craft evidence-based policy is also required. To that end, funding should be provided for

coordinated evaluation projects into all parts of the civil justice system, making best use of the data collected by the clearinghouse. Greater quantitative evaluation — especially cost-benefit analysis — has an important role in informing future funding and policy directions and thereby improving access to justice for all. The Commission has recommended an advisory committee provide expert advice to the Law, Crime, and Community Safety Council as to how this might best be done.

Summary of the Commission's main proposals

The following table represents a brief summary of the main reforms proposed and does not include all of the Commission's recommendations. The recommendations themselves should be relied on to provide details in each of the areas specified. The full set of recommendations is provided in a separate section of the overview. Figures in brackets refer to the recommendation numbers.

Current problem	*Proposed reform*	*Main benefits of change*
Consumers lack information		
People lack knowledge about whether and what action to take		
For most individuals and businesses, legal problems arise irregularly. They lack information on their legal rights and responsibilities, what action to take, or who to consult. Legal information and referral services are fragmented and duplicated.	Legal Assistance Forums should establish Community Legal Education Collaboration Funds to develop high quality education resources. *(5.1)* Legal aid commissions should enhance their existing activities to develop well-recognised entry points for the provision of legal information, advice and referrals. *(5.2)*	Individuals and businesses will be able to access information from a well-recognised entry point to determine whether they have a legal problem and be referred to an appropriate service to resolve their legal issue. Consolidation of current services provides potential for reallocation of existing funding to higher priority areas.
It is hard to shop around for legal services		
The irregular, subjective and uncertain nature of legal services means that consumers find it hard to shop around and cannot easily compare value for money.	A central online portal, which provides consumers with information on typical prices for a range of legal services, should be made available in each jurisdiction. *(6.2)*	Consumers will be better informed about potential costs prior to engaging a legal professional. Better access to information will improve consumer choice and reduce the transactions costs of engaging legal services providers.
Consumer redress options need to be more effective		
The powers of complaint bodies need to be strengthened to better protect consumers of legal services from wrongdoing.	Complaint bodies in each jurisdiction should have consumer protection as their primary objective, be equipped with powers to allow this, and be more transparent. (*6.4-8*)	Giving consumers an effective avenue for redress will provide appropriate incentives to deter wrongdoing by those offering legal services. This allows complaint bodies to exercise their functions more efficiently and effectively.

Current problem	*Proposed reform*	*Main benefits of change*
Big potential gains from early and informal solutions		
Ombudsmen provide a low cost, informal pathway		
Many consumers are not well informed of the services that ombudsmen offer in resolving disputes. In some cases, the small scale of ombudsmen can contribute to a lack of visibility.	Government and industry should raise awareness of ombudsmen, including among providers of referral and legal assistance services. Governments should look to rationalise the ombudsmen services they fund to improve the efficiency of these services. *(9.1-2)*	Raising the profile of government and industry ombudsmen would promote relatively low-cost dispute resolution options. Greater visibility and use of ombudsmen could reduce the level of unmet legal need.
Alternative dispute resolution can be effective, but not for all		
More legal problems could be resolved through alternative dispute resolution processes.	Courts should incorporate the use of appropriate alternative dispute resolution in their processes, where they are not already doing so, and provide clear guidance to parties about alternative dispute resolution options. *(8.1, 12.2)*	Adopting processes that facilitate greater use of alternative dispute resolution will lower costs and lead to faster resolutions.
Informal resolution processes need to be improved for family disputes		
Parties who experience family violence have few low-cost options for resolving their disputes and may participate in processes that are not appropriate due to limited options.	Family violence specialists and lawyer assisted dispute resolution should be used more broadly to better facilitate dispute resolution where violence is a factor. *(24.1)*	Those experiencing family violence will have more accessible and appropriate informal options for resolving their family law disputes.
Obtaining advice and dispute resolution services at a cost that is proportionate to the value of assets in dispute is a problem for family law property disputes. The law does not provide clear guidance on the likely distribution of property after separation and families with property disputes are not necessarily encouraged to undertake early, informal resolution.	Requirements to undertake mediation should be extended to property as well as parenting disputes and the Australian Government should consider how the law governing property division could be clarified to promote greater certainty, fairness and reduce transaction costs. *(24.3-4)*	Parties engaged in property-based family law disputes would use proportionate options for resolving them. It will be easier and cheaper for people to work out their entitlements and come to fair agreements about their division of property.
Aspects of the formal system contribute to problems in accessing justice		
Tribunals have been accused of 'creeping legalism'		
Tribunals are intended to be a low cost, less formal and more timely way to resolve disputes compared to courts. Outcomes do not always align with these objectives.	Tribunals should enforce processes that enable disputes to be resolved in ways that are fair, economical, informal and quick. Restrictions on legal representation should be more rigorously applied. *(10.1)*	Parties to disputes will be able to access justice through tribunals in the way that was intended. Improved processes will diminish the need for, and value of, legal representation.
Court processes have been improved but reforms have been uneven		
Court processes have significantly changed to improve the efficiency of the litigation process, but there is scope for further reform.	All courts should examine their processes in terms of consistency with leading practice in relation to case management, case allocation, discovery and use of expert witnesses. *(11.1-6)*	Adoption of leading practice processes will streamline the court system thereby reducing costs and time associated with litigation.

Current problem	*Proposed reform*	*Main benefits of change*
The system is adversarial, so there is little incentive to cooperate		
Adversarial conduct works against the timely and effective resolution of disputes in courts and tribunals.	Statutory obligations should be placed on parties and enforced to facilitate just, quick and cheap resolution of disputes. Targeted pre-action protocols may also assist. *(12.1-2)*	Overarching obligations on parties and targeted pre-action protocols will potentially reduce the costs and time associated with some litigation processes.
Parties have little control over the amount of activity undertaken by their opponent and little ability to predict potential liability for costs.	Lower-tier courts should award costs based on fixed scales. Higher-tier courts should further explore the introduction of processes for cost management and capping. *(13.2-3)*	Parties will have greater certainty about their potential cost liability and have more information on which to base their litigation decisions.
Not all parties are on an equal footing		
Some parties, including many self-represented litigants, do not understand the processes involved in undertaking legal action and appearing in a court or tribunal.	Courts and tribunals should further develop plain language forms and guides, assist self-represented parties to understand time-critical events and assess whether their case management practices could be modified to make self-representation easier. *(14.1)*	These initiatives will make the justice system easier to use by reducing complexity and giving parties a clearer understanding of the process.
Self-represented litigants can be disadvantaged in certain circumstances and would benefit from further assistance.	Consistent rules and guidelines are needed to give judges and court staff the confidence to assist self-represented litigants, while remaining impartial. Clearer rules on when non-lawyers can assist are also required. *(14.2-3)*	Self-represented litigants will be better supported in the court and tribunal systems. Clear guidelines and rules would make case management more responsive to self-represented litigants.
Prices do not always reflect the balance of private and public benefits		
Court fees are not set according to a consistent framework, vary widely and provide a significant subsidy to many parties who do not need it. For many parties, court fees do not provide an appropriate signal for parties to resolve disputes expeditiously.	Court and tribunal fees should be set to recover a greater proportion of costs depending on the characteristics of parties and the dispute. Fee waivers should continue to be provided to disadvantaged litigants. *(16.1-3)*	Higher and differentiated fee structures will increase fiscal sustainability and provide parties with an incentive to resolve disputes informally, while still providing a safety net. Extra fee revenue would improve services.
Assisting the 'missing middle'		
Unbundling legal services would help		
Legal services are generally provided on a 'full-service' basis with limited opportunity to purchase discrete task assistance.	Governments should develop a single set of rules to offer consumers the option of purchasing unbundled assistance. *(19.1)*	Consumers will be able to choose which legal services they want and access services from which they would otherwise be excluded.
Limited licences can also play a role		
Restrictions that only allow lawyers to provide legal services can have a detrimental effect on access to justice.	A taskforce should design and implement a limited licence for family law, with other areas of law to be explored following the implementation of the family law licence. *(7.5)*	Developing limited licences will facilitate access to appropriately trained and lower-cost service providers for transactional elements of matters.

Current problem	*Proposed reform*	*Main benefits of change*
Private sources of funding are important		
Not all consumers can afford the upfront costs of legal actions. While some forms of billing alleviate this, restrictions on damages-based billing mean that some meritorious claims may not be pursued.	Governments should remove the ban on damages-based billing (for most civil matters) subject to comprehensive disclosure requirements and percentage limits on a sliding scale. *(18.1)*	Removing these restrictions will encourage legal professionals to take on more cases. This may lead to more litigation but only where legal professionals consider a case to have merit.
Litigation funders are not appropriately regulated. This leaves consumers at risk of potential default on financial undertakings.	The Australian Government should establish a licence for third party litigation funding companies to verify their capital adequacy and properly inform clients. *(18.2)*	Regulating third party litigation funding companies will safeguard consumers while preserving a valuable mechanism that facilitates access to justice.
Improving legal assistance services for disadvantaged people		
An overarching vision is required and should be reflected in eligibility principles		
Eligibility tests for grants of legal aid vary across different legal assistance providers and access varies across different dispute types.	Governments should align the principles for determining eligibility for grants of legal aid so they are consistent and linked to a measure of disadvantage. *(21.2)*	Aligning eligibility tests will facilitate the allocation of scarce legal assistance resources to deliver the greatest benefit.
A more systematic approach for allocating funding is needed		
Funding for each of the four legal assistance provider categories is determined independently and inconsistently.	Commonwealth funding for legal assistance services should be allocated according to models which reflect the relative costs of service provision and indicators of need. *(21.5)* Legal assistance forums in each state and territory should be used to reach an agreement between the four main legal assistance providers on their respective roles in addressing governments' service priorities. *(21.7)*	Legal assistance services will be better targeted to areas of need and the funding model will be able to adapt to changing needs.
State and territory governments adopt different funding approaches. In some cases, they face poor incentives to consider the impact of their policies on the demand for legal assistance services.	Commonwealth funding for civil legal assistance services should be restructured to encourage greater parity in state and territory government funding. State and territory governments should contribute to the funding of services provided by ATSILS and FVPLS. *(22.4)*	Direct incentives, in the form of funding contributions, would prompt state and territory governments to consider the implications of policy changes on the demand for legal assistance services.
Interim funding is required to fill service gaps		
A lack of resources, combined with a focus on representation for criminal matters, has led to an under-provision of services for civil law matters.	Government funding for legal assistance services should be increased by around $200 million to better align the means test, maintain existing frontline services and broaden the scope of legal assistance services. *(21.4)*	Improving access to legal assistance for civil matters will often prevent legal problems from escalating, reducing costs to the justice system and the community.

Current problem	*Proposed reform*	*Main benefits of change*
Getting better value for money from legal assistance		
Many community legal centres are relatively small and significant resources are dedicated to administration.	Allocation of funding for community legal centres should reflect legal need and the efficiency and effectiveness of service providers. *(21.7)*	A greater share of resources will be dedicated to frontline services.
Some separation of funding for civil and criminal matters is required		
Access to legal aid grants for civil matters is highly restricted	Governments should separately determine and manage funding for civil legal assistance services. Such funds should not be diverted to criminal legal assistance. *(21.4)*	A specific funding allocation for civil matters will mean the demand for civil legal services is matched by a more appropriate level of service provision.
Steps to understand how the system is functioning		
Evaluation of informal resolution services, formal institutions and legal assistance services is poor and does not provide a robust evidence base to determine what is working and where improvements can be made.	All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data that can be used for policy evaluation and research purposes. *(25.1-4)*	Improving the reliability and quality of data collected about the sector's activities will facilitate robust policy evaluation, lead to more evidence-based policy decisions, and improve targeting of government expenditure.

Recommendations

Chapter 5 Understanding and navigating the system

RECOMMENDATION 5.1

Legal Assistance Forums should establish Community Legal Education Collaboration Funds (CLECFs) in their jurisdictions to ensure that high quality legal education resources for jurisdictional and Commonwealth matters are developed and maintained. Funding for community legal education should be allocated to projects where the forum has identified significant need. A database of community legal education projects should be used to share community legal education, identify community legal education that may be out of date and minimise duplication. Mechanisms to ensure coordination between CLECFs on matters of Commonwealth law should be put in place.

RECOMMENDATION 5.2

To establish well-recognised entry points, legal aid commissions should coordinate with the other members of their Legal Assistance Forums to build on their existing telephone helplines and websites. Minor advice for straightforward matters, including Commonwealth matters should be provided in all jurisdictions. Referrals, including warm referrals, to other services should occur as appropriate, based on the 'no wrong door' principle.

Once the well-recognised entry point is established, other legal assistance providers should reconsider whether resources should still be allocated to their existing telephone helplines. The cost of the provision of the well-recognised entry points should be shared by the Australian, State and Territory Governments. A funding model should be finalised no later than 30 June 2015.

RECOMMENDATION 5.3

To support the identification and assistance of disadvantaged people with complex legal needs:

- legal health checks that are developed for priority disadvantaged groups should be funded through the proposed Community Legal Education Collaboration Funds. The resulting material should be shared amongst providers. Legal Assistance Forums should coordinate this activity to avoid duplication between jurisdictions and maintain the currency of the health checks.
- legal assistance and relevant non-legal service providers should be encouraged to coordinate their services in order to provide more outreach and holistic services where appropriate and need is greatest.
- the proposed Community Legal Education Collaboration Funds should assess the most effective way to support the legal education of non-legal community workers. Training materials should be shared among legal assistance providers and between jurisdictions.

Legal Assistance Forums should regularly reassess the mix of these services in order to promote efficient service delivery by adapting to changing needs.

RECOMMENDATION 5.4

Australian, State and Territory Government agencies should:

- assess the accessibility of legislation during public consultation of an exposure draft and regularly review legislation
- publish plain language guides that summarise legislation in relevant areas of the law that are regularly encountered by individuals and small businesses, such as welfare, taxation and workplace relations and safety. The development of these guides should have particular regard to the needs of those disadvantaged groups most likely to be involved in these areas of civil law. Offices of Parliamentary Counsel (or their equivalent) could also assist, where appropriate.

Priority should be given to pieces of legislation that affect a large volume of people or affect disadvantaged people.

Chapter 6 Protecting consumers of legal services

RECOMMENDATION 6.1

In line with New South Wales and Victoria, other State and Territory Governments should ensure their Legal Profession Acts:

- require providers of legal services to take all reasonable steps to ensure that clients understand the billing information presented, including estimates of potential adverse costs awards
- provide protection for consumers through billing requirements, including an explicit requirement on firms that costs should be fair and reasonable.

RECOMMENDATION 6.2

Each State and Territory Government should establish a taskforce to develop a centralised online resource reporting on typical fees for various types of legal matters commonly encountered by individuals and small businesses.

- The online resource would be based on (confidential) cost data provided by firms operating in the jurisdiction, but would only report typical costs. Prices charged by particular firms or for individual matters would not be reported through this resource.
- The online resource should reflect the sorts of fee structures (such as billable hours, fixed fees and events-based fees) that are typically available for various types of legal matters, but would not include information on which providers offer which structures.
- Any changes in legislation required to ensure the collection of the necessary data from legal practitioners should be made.

The taskforce should consist of representatives of the legal professions, consumer advocacy groups, consumer affairs and small business commissioners, legal assistance providers and the department responsible for advising the Attorney-General. Data collection should commence as soon as practicable. The online resource should be operational in each jurisdiction by no later than 31 December 2016. The resource should be available through the 'well-recognised entry point' established under recommendation 5.2.

RECOMMENDATION 6.3

The New South Wales, Victorian, Queensland and Western Australian Governments should ensure that costs assessment decisions are published on an annual basis (and, where necessary, de-identified to preserve privacy and confidentiality of names, but not of costs amounts or broad dispute type).

- Costs Assessment Rules Committees (and their equivalents) in these jurisdictions should develop and publish guidelines for assessors relating to the inclusion or exclusion of categories of charge items in costs assessments.
- In the remaining jurisdictions, work should immediately commence to establish formal records of any ordered revisions of lawyers' bills. Subsequently, work should begin on publishing guidelines. Where there is no equivalent body in a jurisdiction, this function should fall to the jurisdictional legal complaint body.
- All State and Territory Governments should consider incorporating the published data from costs assessment decisions into the data used to inform the online costs resource in recommendation 6.2.

RECOMMENDATION 6.4

All States and Territory Governments should ensure that legal complaint bodies have the power to take disciplinary actions for consumer matters (those matters relating to service cost or quality, but which do not involve a breach of professional conduct rules).

- This should include the ability to issue orders such as: cautions; requiring an apology; requiring the work to be redone at no charge; requiring education, counselling or supervision; and compensation.
- Failure to comply with these orders should be capable of constituting a breach of professional conduct rules, and be subject to further disciplinary action.

RECOMMENDATION 6.5

As in Victoria, New South Wales and the Northern Territory, the remaining State and Territory Governments should ensure that all legal complaint bodies are empowered by statute to suspend or place restrictions on a lawyer's practising certificate while serious allegations are investigated, if the complaint body considers this to be in the public interest.

RECOMMENDATION 6.6

In the event that a complaint reveals poor disclosure or overcharging, State and Territory Governments should ensure legal complaint bodies have the power to access existing information relating to the quantum of bills issued to other clients of the lawyer. This process should be conducted in a way that does not breach any privacy considerations within the lawyer-client relationship (although as a result of later investigations, the complaint body may wish to publish percentages related to any overcharging).

- Lawyers should be required to provide access to the requested information within ten working days of the request.
- The costs information should only be used to assess whether the lawyer's final bills are frequently (across a range of clients) much greater than initial estimates.
- The complaint body should have the power to undertake an 'own motion' investigation, if it deems such an investigation is warranted as a result of initial conclusions drawn from the costs information.

RECOMMENDATION 6.7

Where it is not already the case, the legal complaint body in each State and Territory should be equipped with the same investigatory powers regardless of the source of a complaint. In particular, the power to compel lawyers to produce information or documents, despite their duty of confidentiality to clients, should be available regardless of whether the complaint came from the client, a third party or was instigated by the complaint body itself. To preserve client privilege, this information would only be used for the purpose of investigating the lawyer's conduct and any subsequent disciplinary action, and for no further purpose.

RECOMMENDATION 6.8

State and Territory Governments should ensure greater consumer focus by legal complaint bodies. The legislated objectives of complaint bodies need to explicitly state that protecting consumers of legal services is their primary purpose. In order to support these objectives:

- complaint bodies should report publicly on outcomes achieved for consumers, including aggregated figures of all disciplinary actions.
- State and Territory Governments should amend enabling legislation to require the involvement of at least two lay representatives in complaint bodies
- there should be a national review of the effectiveness of these complaint regimes in three years, including their interaction with the Australian Consumer Law.

Chapter 7 A responsive legal profession

RECOMMENDATION 7.1

The Law, Crime and Community Safety Council, in consultation with universities and the professions, should conduct a systemic review of the current status of the three stages of legal education (university, practical legal training and continuing professional development). The review should commence in 2015 and consider the:

- appropriate role of, and overall balance between, each of the three stages of legal education and training
- ongoing need for each of the core areas of knowledge in law degrees, as currently specified in the 11 Academic Requirements for Admission, and their relevance to legal practice
- best way to incorporate the full range of legal dispute resolution options, including non-adversarial and non-court options, and the ability to match the most appropriate resolution option to the dispute type and characteristics into one (or more) of the stages of legal education
- relative merits of increased clinical legal education at the university or practical training stages of education
- regulatory oversight for each stage, including the nature of tasks that could appropriately be conducted by individuals who have completed each stage of education, and any potential to consolidate roles in regulating admission, practising certificates and continuing professional development. Consideration should be given to the Western Australian and Victorian models in this regard.

The Law, Crime and Community Safety Council should consider the recommendations of the review in time to enable implementation of outcomes by the commencement of the 2017 academic year.

RECOMMENDATION 7.2

Where they have not already done so, State and Territory Governments should remove all bans on advertising for legal services. Protections under the Australian Consumer Law would continue to apply.

Legal complaint bodies, in cooperation with offices of fair trading and the Australian Competition and Consumer Commission, should formulate guidelines to inform practitioners and consumers of good practice in legal services advertising.

RECOMMENDATION 7.3

The Law, Crime and Community Safety Council should initiate an independent national review of professional indemnity insurance requirements for the legal profession. The review should consider whether:

- current restrictions on competition are in the best interests of consumers of legal services
- existing minimum standards are consistent with principles of good regulatory practice, such as effectively targeting a specific consumer protection problem and being proportionate to the size of that problem
- existing institutional arrangements are best suited to the provision of insurance, given the varying functions institutions play in each jurisdiction.

RECOMMENDATION 7.4

State and Territory Governments should review regulatory requirements for lawyers' trust accounts. These reviews should consider:

- reducing regulatory burdens by exempting small amounts where there are other financial instruments available to hold the funds
- removing any potential barriers to adopting new technologies (including new financial products) that facilitate the handling of clients' money
- ensuring that trust accounts (and alternatives such as e-conveyancing) are subject to appropriate and effective consumer protections
- the appropriate use of the net earnings of trust funds, including the possibility of returning interest earned on funds to individual clients who have contributed to the fund.

RECOMMENDATION 7.5

The Commonwealth Attorney-General should establish a taskforce to design and implement a limited licence for family law. The taskforce should be led and supported by the Australian Law Reform Commission and consist of representatives from:

- the legal and family dispute resolution professions
- the Family Court of Australia, the Federal Circuit Court and the Family Court of Western Australia
- relevant legal assistance providers, such as a women's legal service community legal centre
- the Council of Australian Law Deans
- the Commonwealth Attorney-General's Department.

The taskforce should report to the Attorney-General within 12 months of the Australian Government's response to this inquiry. After the family law licence has been in operation for two years, the taskforce could be reconvened (and reconfigured) to examine expanding limited licences into other areas of law such as consumer credit, housing and elder care.

Chapter 8 Alternative dispute resolution

RECOMMENDATION 8.1

Where alternative dispute resolution processes have been demonstrated to be efficient and effective (such as in low value litigation), courts and tribunals should endeavour to employ such processes as the default dispute resolution mechanism, in the first instance, with provision to exempt cases where it is clearly inappropriate.

In addition, courts and tribunals should endeavour to expand the use of alternative dispute resolution processes by undertaking and evaluating targeted pilots for dispute types that are not currently referred to such processes, including wills and estate matters.

RECOMMENDATION 8.2

All Australian, State and Territory Government agencies (including local governments) that have significant interactions with citizens and small businesses and do not have a dispute resolution management plan should accelerate their development and release them publicly to promote certainty and consistency. Progress should be publicly reported in each jurisdiction on an annual basis commencing no later than 30 June 2015.

The Australian, State and Territory Governments should ensure that there is an independent public review of the effectiveness and efficiency of dispute resolution mechanisms within their jurisdiction every 5 years. The first of these should be completed no later than 30 June 2016.

RECOMMENDATION 8.3

The Queensland Government should establish an independent Small Business Commissioner along the lines that exist in other large states. Given their limited resources the Tasmanian, Australian Capital Territory and the Northern Territory Governments should establish dedicated Small Business Offices within their departments generally responsible for business policies and services.

The Australian, State and Territory Governments should ensure by no later than 31 December 2015 that their Small Business Commissioners or dedicated Small Business Offices, have the financial resources, personnel and statutory capacity to, at a minimum:

- provide comprehensive advice to small businesses on their rights and obligations including appropriate referrals to other government and non-government agencies
- identify emerging and persistent areas of legal concern to small business and advocate for appropriate policy reform
- work co-operatively with other state, territory and national small business agencies
- mediate or refer disputes between small businesses and other businesses and State or Territory Government agencies, including local governments
- have the power to compel State or Territory Government agencies, including local governments, to provide information on, and participate in mediation related to, disputes with individual small businesses.

RECOMMENDATION 8.4

Organisations involved in dispute resolution processes should develop guidelines to assist administrators and decision makers to allocate disputes to an appropriate mechanism for attempting resolution (including providing access to formal resolution processes when alternative dispute resolution mechanisms are not suitable) or narrowing the scope of disputes and facilitating early exchange of full information.

Chapter 9 Ombudsmen and other complaint mechanisms

RECOMMENDATION 9.1

Industry and government organisations that are associated with ombudsman complaint schemes should be required to inform those who complain to their organisations about the availability of external review by the ombudsman. Information should be provided at the time a complaint is raised, whether or not that complaint is in writing.

RECOMMENDATION 9.2

Relevant governments should remove the requirement for complaints to ombudsmen to be made in writing.

RECOMMENDATION 9.3

The Australian, State and Territory Governments should consider whether certain high-cost, low-volume complaints services could be more efficiently and effectively incorporated into another body rather than as stand-alone services. Given that ombudsmen are not suited to every dispute type, governments should consider the factors that lend themselves to an ombudsman service prior to creating new schemes. Consideration should be given to subsuming new roles within existing ombudsmen rather than creating new bodies.

In particular, governments should re-consider the need for the Aged Care Commissioner and the dispute resolution services for the Produce and Grocery Code, Franchising Code, Horticulture Code and the Oilcode.

RECOMMENDATION 9.4

In order to promote the efficiency and effectiveness of government ombudsmen:

- their reporting powers should be expanded where necessary to ensure that systemic issues are dealt with promptly by government agencies
- governments should consider where it might be appropriate to impose a fee on government agencies for ombudsman services, particularly to encourage improved in-house complaint resolution
- government ombudsmen should report standardised data to facilitate performance benchmarking.

Chapter 10 Tribunals

RECOMMENDATION 10.1

In tribunals, where matters are relatively simple in legal and factual terms and equality between parties is likely to be the norm, the use of legal representation should be limited. To achieve this:

- Australian, State and Territory Governments and tribunals should rigorously apply existing restrictions, that is, legal representation should only be allowed with leave and that leave should only be granted in exceptional cases where one party would otherwise be significantly disadvantaged
- where restrictions do not currently exist, governments and tribunals should consider whether restrictions would be appropriate given the level of complexity of the subject matter and likely power imbalances between parties, and what exceptions (if any) should apply.

Tribunals should report on the frequency with which parties are legally represented, whether or not leave requirements are in place.

Chapter 11 Court Processes

RECOMMENDATION 11.1

Courts should consider whether elements of the Federal Court's Fast Track model should be more broadly applied, including:

- replacing formal pleadings with less formal alternatives
- focussing on early identification of the real issues in dispute
- more tightly controlling the number of pre-trial appearances
- requiring strict observance of time limits.

It is desirable that changes to courts' case management practices are evaluated (recommendation 25.4) and learnings disseminated across jurisdictions.

RECOMMENDATION 11.2

The National Judicial College of Australia should finalise a specific program in case management as soon as practicable. All judicial education bodies should develop and deliver training in effective case management techniques on an ongoing basis. Case management programs and training should draw from empirical evaluations to the extent that these are available.

RECOMMENDATION 11.3

Courts should assess the potential for greater use of individual dockets and other approaches that facilitate consistent pre-trial management with a view to improving the fair, timely and efficient resolution of disputes. Publications of these assessments would be desirable.

RECOMMENDATION 11.4

Jurisdictions that have not already acted to limit general discovery to information of direct relevance should do so. The Australian, State and Territory Governments should ensure that their courts are adequately empowered to manage discovery — including being able to make orders for the payment of costs of discovery.

Courts should consider the scope for further facilitating tailored and proportionate discovery in their respective jurisdictions by:

- clearly outlining in court rules or practice directions discovery options and the alternatives that are available
- utilising leave mechanisms or rules that defer discovery obligations until the court has considered what type of discovery is appropriate to the needs of the case
- imposing obligations on litigants to justify applications for discovery orders on the basis that they are necessary to justly determine the dispute and are proportionate
- facilitating and promoting the consideration by courts and parties of the option of the early exchange of critical documents.

RECOMMENDATION 11.5

All courts should have practice guidelines and checklists that cover the use of information technology to manage the discovery process more efficiently.

At a minimum, these checklists should cover:

- the scope of discovery and what constitutes a reasonable search of electronic documents
- a strategy for the identification, collection, processing, analysis and review of electronic documents
- the preservation of electronic documents (including, for example, identification of any known problems or issues such as lost or destroyed data)
- a timetable and estimated costs for discovery of electronic documents
- an appropriate document management protocol.

RECOMMENDATION 11.6

The Australian, State and Territory Governments should ensure their civil procedure rules contain provisions similar to Part 31 of the Uniform Civil Procedure Rules (NSW), including:

- a requirement on parties to seek directions before adducing expert evidence
- broad powers on the part of the court to make directions about expert evidence, including the appointment of a single expert or a court appointed expert.

In addition, all courts should:

- provide clear guidance in practice directions about the factors that should be taken into account when considering whether a single joint expert, court-appointed expert or concurrent evidence procedure would be appropriate in a particular case, and how any concurrent evidence procedure should be conducted
- explore greater use of court-appointed experts in appropriate cases, including through the establishment of 'panels of experts', as used by the Magistrates Court of South Australia
- facilitate the practice of using experts' conferences earlier in the process, as in the Queensland Planning and Environment Court model, where appropriate.

Chapter 12 Duties on parties

RECOMMENDATION 12.1

The Australian, State and Territory Governments should ensure that there are overarching statutory obligations on parties and their representatives to assist the courts and tribunals to facilitate the just, quick and cheap resolution of disputes. Courts and tribunals need to rigorously enforce these obligations, including via costs orders.

RECOMMENDATION 12.2

The Australian, State and Territory Governments, and courts and tribunals, should:

- further explore the use of targeted pre-action protocols for those types of disputes which may benefit most from narrowing the range of issues in dispute and facilitating alternative dispute resolution. This should be done in conjunction with strong judicial oversight of compliance with pre-action requirements
- develop a national framework of data collection and evaluation to identify leading practices.

RECOMMENDATION 12.3

The Australian, State and Territory governments (including local governments) and their agencies and legal representatives should be subject to model litigant obligations.

- Compliance should be monitored and enforced, including by establishing a formal avenue of complaint to government ombudsmen for parties who consider model litigant obligations have not been met.
- State and Territory Governments should provide appropriate assistance for local governments to develop programs to meet these obligations.

RECOMMENDATION 12.4

The Australian, State and Territory Governments should adopt a regime of graduated responses to enable the judiciary to proactively and proportionately manage frivolous and vexatious litigation. Parties adversely affected by vexatious or frivolous litigation should be able to apply directly to the courts for appropriate action.

Chapter 13 Costs awards

RECOMMENDATION 13.1

Court rules should require a defendant or plaintiff who rejects a settlement offer that is more favourable than the final judgment to pay their opponent's post-offer costs on an indemnity basis, unless the court orders otherwise.

RECOMMENDATION 13.2

In Magistrates' courts and the Federal Circuit Court, costs awarded to parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to the:

- type of dispute
- stage reached in the trial process
- amount that is in dispute (where relevant).

For plaintiffs awarded costs, the relevant amount in dispute should be the judgment sum awarded. For defendants awarded costs, the amount in dispute should be the amount claimed by the plaintiff.

The fixed scale amounts should reflect the typical market cost of resolving a dispute of a given type, value and length. Data collection and analysis should be undertaken to facilitate a public review of the amounts and costs categories every three years. The amounts should be indexed to the relevant capital city Consumer Price Index increase in other years.

The public reviews should be undertaken concurrently with those contained in recommendations 16.1 and 17.3 to minimise consultation burdens on interested parties.

RECOMMENDATION 13.3

Judicial officers in all superior courts in Australia should, at their discretion, have the power to require parties to submit costs budgets at the outset of litigation. Where parties do not agree upon a budget, the court may make an order to cap the amount of awarded costs that can be recovered by the successful party. Courts should publish guidelines informing parties and the judiciary as to how costs budgeting processes should be carried out.

By 30 June 2016, the Australian Law Reform Commission (in consultation with its State and Territory counterparts) should examine the performance of the costs budgeting regime of the English and Welsh courts and recommend in which Australian courts the application of such a regime would be appropriate.

RECOMMENDATION 13.4

Parties represented on a pro bono basis should be entitled to seek an award for costs, subject to the costs rules of the relevant court. Courts should formally clarify this entitlement and, in collaboration with legal profession bodies, ensure that practitioners are educated on how to recover costs in pro bono matters.

RECOMMENDATION 13.5

In addition to out-of-pocket expenses such as disbursements, successful self-represented litigants (including those who have purchased 'unbundled' legal services) should be able to recover legal costs from the opposing party in courts where costs are awarded.

In lower tier courts, the costs recoverable by a successful self-represented litigant should be the fixed, lump sum scale amounts used by all parties.

In courts that use activity based scales, self-represented litigants should be able to recover costs equal to either:

- the actual financial loss suffered by the litigant as a result of time and effort spent dealing with the case, or
- an hourly rate equivalent to average full time earnings, for any reasonable time spent dealing with the case.

The total amount of costs recoverable, other than for out-of-pocket expenses, should be capped at two thirds of the reasonable costs claimable by a represented party.

RECOMMENDATION 13.6

Courts should grant protective costs orders (PCOs) to parties involved in matters deemed to be of public interest that, in the absence of such an order, would not proceed to trial. To ensure that PCOs are applied in a consistent and fair manner, courts should formally recognise and outline the criteria or factors used to assess whether a PCO is applicable.

Chapter 14 Self-represented litigants

RECOMMENDATION 14.1

To assist litigants, including the self-represented, to clearly understand how to bring their case, courts and tribunals should take action to:

- draft all court and tribunal forms in plain language
- ensure that court and tribunal staff assist self-represented litigants to understand all time critical events in their case, and examine the potential benefits of technologies such as personalised computer generated timelines
- assess whether their case management practices could be modified to make self-representation easier, and implement changes where cost effective to do so.

RECOMMENDATION 14.2

The Australian, State and Territory Governments, courts, tribunals and the legal profession should:

- work together to develop clear guidelines for judges, court staff and lawyers on how to assist self-represented litigants within the courts and tribunals of each jurisdiction
- introduce mechanisms to enable sharing of lessons from each jurisdiction on an ongoing basis
- consider introducing qualified immunity for court staff so that they can assist self-represented litigants with greater confidence and certainty.

The guidelines should be explicit, applied consistently across courts and tribunals, updated whenever there are changes to civil procedures that affect self-represented litigants and form part of the professional training of court and judicial officers.

RECOMMENDATION 14.3

Australian, State and Territory Governments, courts, tribunals and the legal profession in each jurisdiction should:

- work together to facilitate the use of McKenzie friends to assist self-represented litigants, including through developing and implementing guidelines for courts and tribunals and a code of conduct for McKenzie friends
- develop and implement guidelines on other forms of non-lawyer assistance in courts and tribunals, where they are not already available.

RECOMMENDATION 14.4

Australian, State and Territory Governments should continue to facilitate and fund duty lawyers and self-representation services. An evaluation of both services should be conducted, particularly regarding outcomes for clients. A pilot to determine the scope for a co-contribution charge for self-representation services would be beneficial.

Chapter 15 Tax deductibility of legal expenses

RECOMMENDATION 15.1

No change should be made to arrangements governing the tax deductibility of legal expenses.

Chapter 16 Court and tribunal fees

RECOMMENDATION 16.1

Irrespective of the overall level of cost recovery that is adopted, fees charged by Australian civil courts and tribunals should be:

- underpinned by costing models to identify where court resources are consumed by parties
- charged at discrete stages of litigation — and for certain court activities or services — that reflect the direct marginal cost imposed by parties on the court or tribunal
- charged on a differentiated basis, having regard to the capacity of parties to pay and their willingness to incur litigation costs.

Factors used to charge fees on a differentiated basis should include:

- the amount in dispute (where relevant)
- whether parties are an individual, a not for profit organisation or small business, or a large corporation or government body
- the length of proceedings (for example, by basing hearing fees on the number of hearing days undertaken).

Fees should be reviewed every three years to reflect any changes in the costs of providing court services and the nature of services provided. Fees should be indexed to the relevant capital city Consumer Price Index increase in other years. Such reviews should include public consultation undertaken concurrently with those in recommendations 13.2 and 17.3 to minimise consultation burdens on interested parties.

RECOMMENDATION 16.2

The Australian, State and Territory Governments should increase cost recovery in civil courts and tribunals. The additional revenue should be directed towards improvements in court resourcing (recommendations 17.2 and 17.3) and legal assistance funding (recommendation 21.7).

In addition to applying the principles outlined in recommendation 16.1, courts and tribunals should recover their full costs in all cases of a substantial financial or economic value, with the court being able to defer or reduce fees only in cases where it would be in the public interest to do so, or to avoid a particular party being denied access to justice.

In resetting fees, the impost on parties should not materially increase in:

- cases concerning family violence, child protection, deprivation of liberty, guardianship, mental health, or claims to seek asylum or protection
- disputes dealt with by tribunals and courts that are of minor economic or financial value.

RECOMMENDATION 16.3

The Australian, State and Territory Governments should establish and publish formal criteria to determine eligibility for a waiver, reduction or postponement of fees in courts and tribunals on the basis of financial hardship. Such criteria should not preclude courts and tribunals from granting fee relief on a discretionary basis in exceptional circumstances.

Fee guidelines should ensure that courts and tribunals use fee postponements — rather than waivers — as a means of providing fee relief if an eligible party is successful in recovering an award for costs in a case.

Fee guidelines in courts and tribunals should also grant automatic fee relief to:

- parties represented by a state or territory legal aid commission or represented by a private practitioner under a grant of legal aid
- clients of approved community legal centres, Aboriginal and Torres Strait Islander legal services and pro bono schemes that adopt financial hardship criteria commensurate with those used to grant fee relief
- parties in possession of a Commonwealth concession card or health care card, with the exception of a Commonwealth Seniors Health Card.

For other individuals and small businesses, maximum fee contributions should be set for litigants based on their income and assets, similar to arrangements in England and Wales. The appropriate combination of income, asset and partial fee levels will depend on the level of cost recovery adopted.

Courts should also be provided with discretion to grant fee waivers for matters that seek to clarify an untested or uncertain area of law — or are otherwise of significant public benefit — where the court considers that charging court fees would unduly suppress the litigation.

Chapter 17 Courts — technology, specialisation and governance

RECOMMENDATION 17.1

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

RECOMMENDATION 17.2

The Australian, State and Territory Governments should ensure that the court system is funded to provide technologies needed for the courts to operate efficiently and effectively and to provide services to the public comparable to those provided by the other branches of government and private businesses.

To facilitate this the Australian, State and Territory Governments and courts should:

- examine opportunities to use technology to facilitate more efficient and effective interactions between courts and users, provide greater assistance to self-represented litigants, reduce court administration costs and support improved data collection and performance measurement
- consider, and reach agreement on, the most effective mechanism to increase coordination and leveraging of technology solutions across and within jurisdictions, including the compatibility of the systems used nationally.

RECOMMENDATION 17.3

The Australian, State and Territory Governments, other than Victoria and South Australia, should undertake a public study as to the funding and costs and benefits of establishing a single courts agency under the collective governance of the relevant presiding judicial officers. Such a review should consider:

- current and future levels of demand for court services
- given the extent of judicial remuneration, whether such agencies should be exempt from efficiency dividends, at least to the extent of that cost item
- the needs of court users, especially self-represented litigants and others experiencing disadvantage
- the need to address technology issues (recommendation 17.2)
- the potential to increase revenues from court users (recommendation 16.2)
- the desirability of such an agency being funded on a multi-year basis
- the possible inclusion of some or all of the jurisdiction's tribunals
- the extent to which access to justice and judicial independence would be enhanced.

Irrespective of the governance model chosen, the Australian, State and Territory Governments should undertake and publish periodic reviews of the adequacy of court funding every three years. Such reviews should be undertaken concurrently with those contained in recommendations 13.2 and 16.1 to minimise consultation burdens on interested parties.

Chapter 18 Private funding for litigation

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).

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.

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.

Chapter 19 Bridging the gap

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.

Chapter 21 Reforming legal assistance services

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.

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.

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.

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.

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.

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 State 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.

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.

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.

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.

Chapter 22 Assistance for Aboriginal and Torres Strait Islanders

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.

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.

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.

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.

Chapter 23 Pro bono services

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.

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*.

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.

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.

Chapter 24 Family Law

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.

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.

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.

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.

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.

Chapter 25 Data and evaluation

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.

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 by 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.

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.

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.

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